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SJC-12616

COMMONWEALTH vs. JAVAINE WATSON.

Suffolk. October 9, 2020. - April 6, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, & Kafker, JJ.

Homicide. Joint Enterprise. Intent. Accessory and Principal. Evidence, Joint venturer, Intent. Practice, Criminal, Instructions to jury, Duplicative convictions, Trial of defendants together, Question by jury, Capital case.

Indictments found and returned in the Superior Court Department on March 14, 2014.

The cases were tried before Linda E. Giles, J.

Neil L. Fishman for the defendant.
Darcy A. Jordan, Assistant District Attorney, for the Commonwealth.

CYPHER, J. A jury convicted the defendant, Javaine Watson, of murder in the first degree on the theories of deliberate premeditation and extreme atrocity or cruelty and of accessory

after the fact for the shooting death of Romeo McCubbin.[1] The defendant seeks reversal of his convictions, arguing that (1) his conviction of murder in the first degree must be vacated because the Commonwealth did not present legally sufficient proof regarding deliberate premeditation or extreme atrocity or cruelty; (2) the jury instruction on joint venture liability created a substantial likelihood of a miscarriage of justice; (3) this court must reverse the accessory after the fact conviction for various reasons; (4) the trial judge should have ordered the defendant's trial to be severed from that of the codefendants; and (5) the trial judge's answer to a question from the jury during deliberations was wrong as a matter of law and prejudiced the verdicts. He also urges this court to exercise its authority under G. L. c. 278, § 33E, to set aside the convictions or, alternatively, to reduce his murder conviction to murder in the second degree. For the reasons stated infra, we affirm the defendant's conviction of joint venture murder in the first degree and vacate his conviction of accessory after the fact. After a thorough review of the record, we decline to exercise our authority under G. L. c. 278,

[1] The defendant's three coventurers, Omar Bonner, Omar Denton, and Andrew Robertson, were convicted of murder in the first degree based on deliberate premeditation and extreme atrocity or cruelty. The coventurers' appeals are pending.

§ 33E, to grant a new trial or reduce or set aside the verdict of murder in the first degree.

Background. At around 1:45 A.M. on December 14, 2013, the victim was shot multiple times, resulting in his death at the scene on Havelock Street. The victim had attended an event earlier that night at a nightclub located at the corner of Havelock Street and Blue Hill Avenue in the Mattapan section of Boston. A person called 911 to report the shooting, the shots could be heard from a local police station, and ShotSpotter[2] reported shots fired.

1. Nightclub. An investigation revealed that Omar Bonner, Andrew Robertson, and Omar Denton were at the same event at the nightclub on the night the victim was shot. Nadira Amoroso[3] testified that she did not see the defendant at the nightclub that night, but during her grand jury testimony, which was admitted substantively under Commonwealth v. Daye, 393 Mass. 55, 73-75 (1984), she testified that she had seen him there that

[2] ShotSpotter uses sensors to detect a possible gunshot and approximates its location. There were two ShotSpotter activations on December 14, 2013, at around 1:45 A.M., both in the vicinity of where the victim was found.

[3] Nadira Amoroso testified that she had a relationship with the defendant, which consisted of his visiting her at her house during the night a few times each week. The defendant's parents testified that a different woman was the defendant's only girlfriend and that they did not know Amoroso. The defendant argued at trial that Amoroso lied about the relationship.

night. Photographs taken that night show that Bonner was dressed all in red, including a hat and a plaid scarf; Denton was dressed in a black hat and a maroon sweater over a white shirt; and Robertson was dressed in a hat and a dark scarf that covered his face.

2. Surveillance video recording. A home surveillance camera mounted on a home on Havelock Street captured a recording of the shooting. The Commonwealth combined the surveillance video footage with audio recordings from ShotSpotter and the police radio transmissions, and the compilation was played for the jury and admitted as an exhibit. The video footage showed two sport utility vehicles (SUVs), whose appearances were consistent with the red Lincoln MKX driven by the defendant and the silver Toyota RAV4 driven by Bonner and Denton, going down Havelock Street at the same time. Shortly thereafter, a Ford Explorer, later determined to be driven by the victim, went down Havelock Street and parked. A person, with a scarf trailing from his neck, ran toward the Ford Explorer and shot ten times into the driver's side door and window. An SUV, which the video recording showed to be consistent with the Lincoln, was driven up next to the Ford Explorer and stopped to let the shooter get into the front passenger's seat, and then was driven away. The victim then rolled out of the passenger's side door onto the sidewalk.

About forty seconds after the first shooting, as the victim lay on the ground, a second person walked toward the victim. The second person was wearing a dark hat and a dark shirt with a white triangle at the collar. The second person was followed by a third person, who was wearing monotone clothing. The second person aimed a handgun at the victim and shot him four times. The third person then kicked the victim, and the two ran away.[4]

3. Arrest of Bonner and Denton. As officers responded to the shooting, Boston police Detective Brian Smigielski[5] saw a silver Toyota RAV4 being driven away from the location where shots were reported. Smigielski followed the RAV4 to the driveway of a home on Wood Avenue where Bonner's family lived. Bonner and Denton got out of the RAV4 and ran away. Police caught both men; they found a black hat, later determined to

[4] Two eyewitnesses also testified. One of the occupants of the home with the surveillance camera was awoken by the gunshots. He said he looked out of his window and saw the victim roll out of the vehicle onto the ground, at which point a man walked to the victim and shot him two or three times. A different man kicked the victim, and one of the two men then said "dirty motherfucker." The two men then ran toward Blue Hill Avenue. Another eyewitness was at home when he heard four or five gunshots and from his window saw four or five flashes. He next saw a person in a red hooded sweatshirt and a person in a black jacket run toward Blue Hill Avenue. He also saw a black Honda Civic and a red Lincoln MKX being driven from Havelock Street to Blue Hill Avenue to Baird Street, and then speed past his house on Baird Street.

[5] Brian Smigielski resigned from the Boston police department in 2016 after having been charged with conspiracy to defraud the United States, of which he was convicted.

contain deoxyribonucleic acid that matched Denton, and near Bonner they found his cellular telephone (cell phone) and a red hat on the ground, as well as a .380 caliber firearm in a yard near where he ran.

When the police arrested them, Bonner was wearing a plaid scarf and a red shirt and Denton was wearing a maroon sweater over a white shirt and had left a black jacket in the RAV4.

While at the police station, police recovered a cell phone from Denton's crotch area and overheard him tell Bonner that he told Bonner's sister to call "S.P." and that he had called "S.P." when he was in the wagon. Bonner's sister and Robertson's friends knew Robertson as "Spoilers."

4. Lincoln MKX. On December 12, 2013, Amoroso had rented a red Lincoln MKX. She testified that the defendant borrowed the Lincoln from her at around 10 P.M. on the night of December 13, 2013.

At around 2:30 to 2:45 A.M. on December 14, 2013, police officers discovered an unoccupied red Lincoln MKX blocking a driveway in the vicinity of where they arrested Bonner and Denton. The vehicle was running, the gear was in reverse, the driver's side window was open, and the back of the vehicle was against a fence post. Police found a cell phone, with the number ending in 6426, on the driver's seat and a set of keys in the center console, both of which were later identified as

belonging to the defendant. Further investigation revealed fingerprints, located inside and outside the Lincoln, that were consistent with fingerprints of the defendant and each of his codefendants.[6] The defendant's fingerprints were located on the gear shift, the inside driver's side door handle, the outside driver's side door handle and surrounding area, and the outside of the front and rear passenger's side doors. Robertson's fingerprints were located on the outside front passenger's side door and handle, the inside front passenger's side door handle, and the driver's side door. Denton's fingerprints were found on both the inside and outside rear driver's side door handles, and Bonner's were found on both the outside rear passenger's side door and the inside rear passenger's side door handle.

5. Cell phone records. The cell phone recovered by the police from the Lincoln with the number ending in 6426 (6426 number) was registered to the defendant's stepmother, but the defendant used it as his cell phone. The cell phone had contact information for "Big O," "Lil O," and "Sick." Bonner's nickname was "Big O," and Denton's nickname was "Lil O." The number associated with "Sick" was registered to an account opened for Robertson by Robertson's former girlfriend.

[6] An employee of the rental agency testified that the interior and exterior of their vehicles are generally cleaned before a new customer receives one.

On the night of December 13, 2013, at 10:52 P.M., the 6426 number cell phone was used to place a call to Lil O for thirty-four seconds; at 11:24 P.M., the same cell phone was used to place a call to Sick for twenty seconds; and at 11:39 P.M., the same cell phone received a call from Big O for almost four minutes. On December 14, 2013, a call was missed on the 6426 number from Big O at 1:44 A.M., and then the 6426 number was used to make three calls to Big O: two at 1:47 A.M., and one at 1:48 A.M. The cell phone was not used to make or answer any calls after the third call to Big O. One of the cell phone's missed calls was from Amoroso at 10:02 A.M. on December 14.

In addition, less than three minutes before the shooting, Bonner's cell phone was used to call Denton's cell phone. The cell phone that police recovered from Denton's crotch area had been used to call Sick at around 2 A.M. on December 14, 2013.

In September 2013, Robertson's former girlfriend, Judith Nelson, opened a cell phone account for Robertson, with the number ending in 8764 (8764 number). This number was listed in the defendant's cell phone as the contact for Sick. Nelson testified that Robertson had only one cell phone, but before the grand jury she had testified that he had two cell phones. Amoroso testified that the defendant had two cell phones and that she spoke with him daily on the 8764 number. Nelson

cancelled Robertson's cell phone service on December 15, 2013, at his request.

An analysis of the codefendants' cell phone calling patterns between November 15 and December 14, 2013, revealed frequent contacts between the various cell phones. These included 203 contacts between the 8764 number and the 6426 number.

6. Ballistics. The police recovered four .380 caliber shell casings and three live rounds of .380 caliber ammunition near the victim's body. The victim was shot two times in the head and nine times in the rest of his body. The medical examiner testified that the shots to the head were fatal and that the other shots were likely fatal. She further testified that these wounds would have resulted in the victim's death within seconds to minutes.

The .380 caliber bullets recovered from the victim's head were matched to the .380 handgun found in Bonner's flight path. Police recovered ten nine millimeter shell casings from the scene and four spent nine millimeter bullets from inside the Ford Explorer, and the medical examiner recovered five spent nine millimeter bullets during the autopsy; all were fired from the same nine millimeter firearm used to shoot the victim.

7. Defendant's case. The defendant argued that Amoroso lied about having had a relationship with him. He also

contended that Amoroso lied during her grand jury testimony by saying that she saw the defendant in the nightclub on the night of the murder. He further argued that Amoroso claimed to contact the defendant on the 8764 number, which was associated with Robertson and Nelson, with over one hundred calls between her number and 8764, but that there was only one call between Amoroso's cell phone and the defendant's cell phone, number 6426.

The defendant called his stepmother as a witness. She testified that she did not know Bonner, Denton, or Robertson and that she had set up and paid for the defendant's cell phone. On December 14, 2013, she temporarily suspended the defendant's cell phone service after he asked her to do so.

The defendant moved for a required finding of not guilty at the close of the Commonwealth's case, which was denied. During closing argument, the defendant argued, among other things, that he was in a relationship with another woman, not Amoroso; someone else was the user of the 8764 number; and he had his own car and therefore did not need the rented Lincoln.

After the jury convicted the defendant, he moved for judgment of acquittal notwithstanding the verdict, which was denied.

Discussion. 1. Sufficiency of evidence for murder in first degree. The defendant first argues that there was

insufficient evidence to prove murder in the first degree under either the theory of deliberate premeditation or the theory of extreme atrocity or cruelty. Therefore, he argues that his conviction of murder in the first degree must be vacated. We conclude that the evidence sufficed to prove that the defendant committed murder in the first degree.

In reviewing the sufficiency of the evidence, "[w]e consider whether, after viewing the evidence in the light most favorable to the Commonwealth, any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt." Commonwealth v. Ayala, 481 Mass. 46, 51 (2018), citing Commonwealth v. Latimore, 378 Mass. 671, 677-678 (1979). "The evidence may be direct or circumstantial, and we draw all reasonable inferences in favor of the Commonwealth." Ayala, supra, citing Commonwealth v. Rakes, 478 Mass. 22, 32 (2017).

For murder in the first degree both under the theory of deliberate premeditation and under the theory of extreme atrocity or cruelty, to prove the defendant guilty as a joint venturer, the Commonwealth had to "prove beyond a reasonable doubt that 'the defendant knowingly participated in the commission of the crime charged, and that the defendant had or shared the required criminal intent.'" See Commonwealth v.

Britt, 465 Mass. 87, 100-101 (2013), quoting Commonwealth v. Zanetti, 454 Mass. 449, 467 (2009).

a. Knowing participation. The Commonwealth presented ample evidence that the defendant knowingly participated in the murder. The jury could have inferred from Amoroso's testimony that the defendant was at the event at the nightclub attended by his coventurers, and the cell phone records and testimony demonstrated that he and his coventurers were associates. The cell phone records among the four coventurers in the month leading up to the murder demonstrated their association, which continued right up until the time of the murder. The cell phone records show, in part, that around the time of the murder, the defendant first missed a call from Bonner at 1:44 A.M. and then called him shortly thereafter. The jury could have made the reasonable inference that the defendant was calling Bonner to let him know that he and Robertson had completed their part of the plan.

The jury also could have made reasonable inferences that the Lincoln rented by Amoroso was used in the murder and that the defendant was the driver of the Lincoln. Regarding the defendant being the driver, the jury could look to the testimony and evidence that he borrowed the Lincoln from Amoroso on December 13, 2013; that police recovered the defendant's cell phone and car keys in the abandoned Lincoln; and that his

fingerprints were found on the inside and outside of the Lincoln, including on the gear shift. Regarding the Lincoln being the vehicle used in the murder, the jury could look to the evidence that the SUV the defendant borrowed was the same make, model, and color as the one used in the murder, and that fingerprints from all of the defendants were found in the abandoned Lincoln. In addition, an SUV with characteristics matching those of the Lincoln was seen with Bonner's RAV4 on Havelock Street before the murder, demonstrating an association between the two. And the jury could infer that an SUV with characteristics matching those of the Lincoln was waiting for the first shooter, Robertson, to shoot the victim, before speeding away with him.

b. Shared intent. There was also sufficient evidence for the jury to find that the defendant shared the mental state of malice aforethought for murder in the first degree under the theories of deliberate premeditation and extreme atrocity or cruelty.[7] See Commonwealth v. Gonzalez, 475 Mass. 396, 414 (2016); Commonwealth v. Sokphann Chhim, 447 Mass. 370, 377 (2006).

[7] In a letter submitted pursuant to Mass. R. A. P. 16 (l), as amended, 386 Mass. 1247 (1982), the defendant directed our attention to Commonwealth v. Colas, 486 Mass. 831, 839-841 (2021), and Commonwealth v. Johnson, 486 Mass. 51, 61 (2020). We have reviewed those cases, and they do not alter our analysis.

i. Deliberate premeditation. Under the theory of deliberate premeditation, the Commonwealth was required to prove, beyond a reasonable doubt, that the defendant knew his coventurers intended to kill the victim and that he shared that intent. See Gonzalez, 475 Mass. at 414. There must be some proof "that the defendant 'consciously . . . act[ed] together [with the coventurers] before or during the crime with the intent of making the crime succeed.'" Id., quoting Zanetti, 454 Mass. at 470 (Appendix). The Commonwealth met this standard. First, an SUV consistent with the Lincoln, which Amoroso testified she lent to the defendant on the night of the murder and which the jury reasonably could have inferred was driven by the defendant, went down Havelock Street following an SUV matching Bonner's RAV4, shortly before the murder. The jury could infer that they were conducting reconnaissance before the victim's arrival. It also was reasonable for the jury to infer that the defendant's role was not just to be the getaway driver, but also to bring Robertson to Havelock Street, allow him to approach the victim's vehicle from behind, and block the street so that other vehicles could not interfere.

Moreover, the jury could infer that, immediately after Robertson shot the victim, it was the defendant who drove the Lincoln next to him, Robertson got in, and they drove away. The jury could infer from this chain of events that Robertson and

the defendant had a plan for the defendant to pick him up after the defendant knew the shooting was completed.

In addition, we are not persuaded by the defendant's argument that Gonzalez, 475 Mass. 396, compels a different result. In Gonzalez, where the defendant was convicted of murder in the first degree as a joint venturer under the theory of deliberate premeditation, we determined that the evidence was insufficient to allow a rational juror to find, beyond a reasonable doubt, that the defendant participated in the crime or that she shared the requisite mental state for deliberately premeditated murder. Id. at 397, 407. However, there are multiple distinguishing factors between the facts underlying Gonzalez and the present case. Unlike in Gonzalez, here there was evidence from which the jury could infer that the coventurers hatched the plan during the hundreds of telephone calls between them in the month prior to the killing. Further, the four were together at the club shortly before the murder. The evidence also allowed for an inference that the defendant conducted reconnaissance prior to the shooting, remained at the scene during the shooting, and picked Robertson up once the shooting was completed. Finally, police found the abandoned Lincoln with the defendant's cell phone and keys, tying him to the Lincoln.

ii. Extreme atrocity or cruelty. Under the theory of extreme atrocity or cruelty, malice is defined "as an intent to cause death, to cause grievous bodily harm, or to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would follow." Sokphann Chhim, 447 Mass. at 377. The Commonwealth demonstrated that the defendant shared this intent. The surveillance video footage shows that after the SUV consistent with the Lincoln dropped Robertson off, the SUV was driven slowly behind him, with Robertson illuminated in the Lincoln's headlights. As discussed supra, it was reasonable for the jury to infer that the defendant was the driver of the Lincoln, and it therefore also was reasonable for the jury to infer that the defendant saw Robertson shoot at the victim ten times while the victim sat in his vehicle, and therefore that he knew that Robertson's actions had a "plain and strong likelihood" of resulting in death. Robertson's shooting the victim ten times from close range was disproportionate to the means necessary to kill the victim and, therefore, constituted extreme atrocity or cruelty. See Commonwealth v. Cunneen, 389 Mass. 216, 227 (1983). The defendant was responsible for Robertson's actions because he shared the requisite malice aforethought and he knowingly participated in the murder. See Sokphann Chhim, supra at 379-380 ("If the [coventurer's] actions

warrant a finding of extreme atrocity or cruelty, the [defendant] is responsible for those actions").

In addition, we decline the defendant's invitation to change our current law regarding joint venture murder in the first degree under the theory of extreme atrocity or cruelty. The defendant contends that it is "substantially unfair and unjust" that a defendant does not need to share his or her coventurer's intent to commit the murder in an extremely atrocious or cruel way. We recently declined to impose a requirement that the jury find that a defendant intended to commit an extremely atrocious or cruel murder, and we decline to do so again. See Commonwealth v. Castillo, 485 Mass. 852, 864-865 (2020), and cases cited.

2. Joint venture instruction. The defendant argues that the jury instruction on joint venture liability erroneously left the jury with the impression that they could convict the defendant of murder even if his role was just to be an accessory after the fact. The Commonwealth counters that the judge provided the jury with correct and complete instructions that joint venture murder and accessory after the fact were distinct crimes with varying elements. We conclude that the instruction was a correct statement of the law, and therefore there was no error.

"We evaluate jury instructions as a whole and interpret them as would a reasonable juror" (citation omitted). Commonwealth v. Kelly, 470 Mass. 682, 697 (2015). To prove a joint venture, the Commonwealth must prove beyond a reasonable doubt that the defendant knowingly participated in the commission of the crime charged with the required intent. Zanetti, 454 Mass. at 467-468. There are multiple ways for a defendant to participate in a crime, including by "providing aid or assistance . . . in escaping." Model Jury Instructions on Homicide 14 (2018). To prove accessory after the fact, the Commonwealth must prove that after the commission of a felony, the defendant harbored, concealed, maintained, or assisted another person, with knowledge that the other person committed a felony and with the intent that the other person avoid or escape detention, arrest, trial, or punishment. G. L. c. 274, § 4. Although joint venture and accessory after the fact both include assisting an offender with escaping, the two are distinct crimes, with joint venture occurring before or during the commission of the crime and accessory after the fact occurring after the commission of the crime. Compare Model Jury Instructions on Homicide, supra (for joint venture, sufficient for agreement to help "if the defendant and at least one other person consciously acted together before or during the crime with the intent of making the crime succeed" [emphasis added]),

with G. L. c. 274, § 4 (for accessory after fact, "[w]hoever, after the commission of a felony," among other things, assists felon with intent that he or she will avoid or escape detention [emphasis added]).

The judge here instructed the jury on joint venture, in relevant part, that "the Commonwealth must prove that the defendant knowingly participated in the commission of the crime of murder" and "that he did so with the intent required to commit the crime." The judge also included that the jury needed to find that the defendant knowingly participated in the murder with the intent required "before or during the crime," and that he had to be involved in the murder in some way, such as by "act[ing] as a lookout" or "provid[ing] aid or assistance in committing the crime or in escaping, if such help becomes necessary."

Regarding accessory after the fact, the judge instructed the jury that the Commonwealth must prove that the defendant "assisted [Robertson] following the commission of the crime" (emphasis added); "provided such assistance with the specific intent that [Robertson] avoid or escape arrest, detention, or prosecution"; and "rendered such assistance with knowledge of the identity of [Robertson] and of the substantial facts of that murder." She elaborated that to meet the first element, the Commonwealth must prove that the defendant assisted Robertson

"after the commission of the crime in question" (emphasis added).

The judge provided clear instructions regarding joint venture and accessory after the fact, including the relevant timing for each, and therefore her instructions were a correct statement of the law, and there was no error.[8]

3. Accessory after the fact conviction. The defendant argues that his accessory after the fact conviction must be reversed. We conclude that in these circumstances, the defendant could not be convicted of joint venture murder in the first degree and of accessory after the fact. Therefore, we vacate his conviction of accessory after the fact.

As stated supra, to prove accessory after the fact, the Commonwealth must prove that after the commission of a felony, the defendant harbored, concealed, maintained, or assisted another person, with knowledge that the other person committed a felony and with the intent that the other person avoid or escape detention, arrest, trial, or punishment. G. L. c. 274, § 4. To prove joint venture, the Commonwealth must prove beyond a reasonable doubt that the defendant knowingly participated in the commission of the crime charged with the required intent.

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[8] In a second letter pursuant to Mass. R. A. P. 16 (l), the defendant directed our attention to the joint venture argument in the appellate brief filed by Bonner. We have reviewed that argument, and it does not alter our analysis.

Zanetti, 454 Mass. at 467-468. Under the law of joint venture, there is not a distinction between a principal offender and an accomplice; all joint venturers are equal offenders. Id. at 464.

"A defendant may not properly be convicted of a crime and of being an accessory after the fact to the same crime." Commonwealth v. Gajka, 425 Mass. 751, 754 (1997), citing Commonwealth v. Berryman, 359 Mass. 127, 129 (1971). In Gajka, the jury returned verdicts of guilty on indictments charging murder, accessory after the fact to that murder, armed robbery, and accessory after the fact to that armed robbery, and when the judge considered the sentences to be imposed, he dismissed each accessory indictment without prejudice. Gajka, supra. In the present case, the jury returned verdicts of guilty of joint venture murder and accessory after the fact to that murder, and the judge imposed sentences for both. Here, the evidence was sufficient to convict the defendant as an accessory after the fact, but because one cannot "properly be convicted of a crime and of being an accessory after the fact to the same crime," id., citing Berryman, supra, we vacate the defendant's

conviction of and sentence for accessory after the fact to the murder.[9]

4. Joint trial. The defendant next contends that because he and Robertson had clearly antagonistic defenses, the judge abused her discretion by failing to order the trial severed. We agree with the Commonwealth that the trial judge correctly exercised her discretion to try the defendant in a joint trial.

It is presumed that "[w]hen criminal charges against two or more individuals 'arise out of the same criminal conduct,'" those individuals will be tried together. See Commonwealth v. Siny Van Tran, 460 Mass. 535, 542 (2011), quoting Mass. R. Crim. P. 9 (b), 378 Mass. 859 (1979). A judge may order severance "[i]f it appears that a joinder of . . . defendants is not in the best interests of justice." Mass. R. Crim. P. 9 (d). Severance generally is a matter within the trial judge's discretion, Commonwealth v. Moran, 387 Mass. 644, 658 (1982), but should be ordered when (1) "the prejudice resulting from a joint trial is so compelling that it prevents a defendant from obtaining a fair trial," id., or (2) the defenses are "antagonistic to the point of being mutually exclusive," Siny Van Tran, supra, quoting Commonwealth v. Bienvenu, 63 Mass. App.

[9] Because we determine that the accessory after the fact conviction cannot stand as a matter of law, we need not address the defendant's remaining arguments on this point.

Ct. 632, 637 (2005). "[D]efenses are mutually antagonistic and irreconcilable where the 'sole defense of each [is] the guilt of the other.'" Siny Van Tran, supra. See Moran, supra at 659, quoting United States v. Ziperstein, 601 F.2d 281, 285 (7th Cir. 1979), cert. denied, 444 U.S. 1031 (1980) ("'[M]utual antagonism' only exists where the acceptance of one party's defense will preclude the acquittal of the other"). "Severance is not required where the defendants merely assert inconsistent trial strategies." See Siny Van Tran, supra.

The judge did not abuse her discretion in trying the defendants together, because the defenses were not "antagonistic to the point of being mutually exclusive," nor did the joint trial result in prejudice that prevented the defendant from receiving a fair trial. See Siny Van Tran, 460 Mass. at 542; Moran, 387 Mass. at 658-659.

The defendant contends that his defense and Robertson's defense were mutually exclusive and that the resulting prejudice deprived him of obtaining a fair trial. As relevant to severance, the defendant notes that at trial he argued that he was not involved in the murder or its planning, he attacked Amoroso's credibility, and he argued that the more than one hundred cell phone calls between the 8764 number and Amoroso were between Amoroso and Robertson -- not between himself and Amoroso. He further notes that Robertson argued that Robertson

was misidentified as the first shooter and that Robertson did not have exclusive use of the 8764 number.

Contrary to the defendant's argument, his argument at trial that Amoroso's testimony was false and Robertson's argument that it was true regarding the 8764 number did not create a contradiction that resulted in each defendant trying to inculpate the other. Importantly, Robertson argued it was unclear who the user of the 8764 number was -- not that the defendant was the sole user. Moreover, the records relating to the 8764 number were not the only piece of evidence that connected the defendant to the murder, as his cell phone and car keys connected him to the Lincoln, which was used in the shooting. In addition, Robertson and the defendant both argued that they were misidentified and that they were not involved in the shooting. There was not "a danger that the jury [would] feel compelled to choose between defendants rather than to assess the proof against each defendant separately," Moran, 387 Mass. at 659, and for the foregoing reasons, the defendant and Robertson did not present defenses that were mutually exclusive.[10]

[10] We also find unpersuasive the defendant's argument that his trial counsel's failure to "bring the clearly unfair situation to the court's attention constituted ineffective assistance of counsel." As discussed supra, there was no error. See Commonwealth v. Silva, 482 Mass. 275, 288 & n.16 (2019).

5. Jury question. The defendant argues that reversible error resulted from the judge's erroneous affirmative response to the jury's question, "If two or more people are convicted of murder in the first degree through a joint venture, can they have different 'theories' applied to their verdict?" We agree with the Commonwealth that the judge's affirmative answer was a correct statement of the law.

"The proper response to a jury question must remain within the discretion of the trial judge, who has observed the evidence and the jury firsthand and can tailor supplemental instructions accordingly." See Commonwealth v. Monteagudo, 427 Mass. 484, 488 (1998), quoting Commonwealth v. Waite, 422 Mass. 792, 807 n.11 (1996). The mental state for murder based on deliberate premeditation or on extreme atrocity or cruelty is malice aforethought, which the defendant must share with the coventurers to be guilty on a joint venture theory. See Sokphann Chhim, 447 Mass. at 377, 379 (for purposes of extreme atrocity or cruelty, malice defined "as an intent to cause death, to cause grievous bodily harm, or to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would follow"); Commonwealth v. Serino, 436 Mass. 408, 411 (2002) ("Malice, as it applies to deliberately premeditated murder, means an intent to cause death"). See also Commonwealth

v. Spinucci, 472 Mass. 872, 881 (2015), and cases cited (to convict of murder based on extreme atrocity or cruelty, "malice alone defines the intent that the Commonwealth must prove"). "The jury may infer the requisite mental state from the defendant's knowledge of the circumstances and subsequent participation in the offense" (citation omitted). Sokphann Chhim, supra at 377-378.

Therefore, the Commonwealth must prove malice for each defendant, but the circumstances underlying that malice can differ between the defendants, leading to potentially different theories of murder being applied.

6. Review under G. L. c. 278, § 33E. After a thorough review of the record, we find no reason to exercise our authority under G. L. c. 278, § 33E, to set aside or reduce the murder verdict against the defendant.

Conclusion. For the foregoing reasons, the defendant's conviction of murder in the first degree is affirmed, and his conviction of accessory after the fact to murder is vacated.

So ordered.