SJC-12047

COMMONWEALTH vs. ASHAWNEE DUKE.

Hampden. January 10, 2022. - May 11, 2022.

Present: Budd, C.J., Gaziano, Lowy, Wendlandt, & Georges, JJ.

Homicide. Felony-Murder Rule. Robbery. Evidence, Accomplice, Intent, Scientific test. Intent. Practice, Criminal, Instructions to jury, Indictment, Assistance of counsel, Capital case. Witness, Corroboration.

Indictments found and returned in the Superior Court Department on February 4, 2013.

The cases were tried before C. Jeffrey Kinder, J., and a motion for a new trial, filed on March 2, 2020, was heard by Mark D. Mason, J.

Angela G. Lehman for the defendant.
David L. Sheppard-Brick, Assistant District Attorney, for the Commonwealth.

GAZIANO, J. On December 2, 2012, the defendant and two accomplices attempted to rob Keshawn Dancy at gunpoint. Dancy fought back and got into a physical struggle with one of the robbers, Keogh Collins. Gunfire erupted, and Collins was

fatally shot in the head; Dancy suffered a serious wound to the leg. At the defendant's trial in August of 2015 on charges of murder in the first degree and related offenses, the Commonwealth proceeded on the theory that the defendant had fired the rounds that struck Collins and Dancy. This contention was based, in large part, on the testimony of a third accomplice, getaway driver Julien Holly, who testified for the Commonwealth after entering into a cooperation agreement.

A Superior Court jury convicted the defendant of felony-murder in the first degree for the shooting death of Collins.[1] The defendant thereafter filed a motion for postconviction discovery, followed by a motion for a new trial, based on the results of deoxyribonucleic acid (DNA) testing. The motion for a new trial was denied. In this consolidated appeal from his convictions and from the denial of his motion for a new trial, the defendant argues, among other things, that the conviction of felony-murder cannot stand because Collins, the defendant's accomplice, was killed during a struggle with the intended robbery victim, and the theory of felony-murder thus is inapplicable. See Commonwealth v. Tejeda, 473 Mass. 269, 279

[1] The defendant also was convicted of armed assault with intent to rob and assault and battery by means of a dangerous weapon causing serious bodily injury, with respect to the wounding of Dancy, as well as unlawful possession of a firearm and unlawful possession of ammunition.

(2015); Commonwealth v. Balliro, 349 Mass. 505, 515 (1965), S.C., 370 Mass. 585 (1976).

Having carefully examined the record and considered the defendant's arguments, we conclude that the felony-murder rule was applicable, the evidence was sufficient to support the convictions, and there was no error that would necessitate a new trial. Nor do we discern any reason to exercise our authority under G. L. c. 278, § 33E, to order a new trial or to reduce the conviction of murder to a lesser degree of guilt.

1. Facts. We summarize the facts that the jury could have found, viewed in the light most favorable to the Commonwealth, see Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), and drawing all reasonable inferences therefrom, see Commonwealth v. Lao, 443 Mass. 770, 779 (2005), S.C., 450 Mass. 215 (2007) and 460 Mass. 12 (2011).

a. Day of the shooting. On the afternoon of December 2, 2012, "best friends" Holly and Collins were driving around Chicopee and Springfield in Collins's 1999 green Nissan Altima. They, along with other individuals (not including the defendant), decided to rob a drug dealer known as "Biz." Collins was armed with a silver .380 caliber semiautomatic weapon. Due to defects in the feeding mechanism, the handgun had to be manually reloaded after each shot. Holly was armed with a .357 caliber revolver.

Holly lured Biz to the scene of the robbery under the guise of making a purchase of phencyclidine (PCP). When Biz got into the Altima, Holly pointed a gun at him, demanded he turn over drugs and a jacket, and then ordered him to get out of the vehicle. Intending to head back to Chicopee, Holly left his weapon at his house in Springfield because there was no longer any "need for [the] gun." Holly and Collins then drove around in the Altima, drinking alcohol and smoking marijuana mixed with the pilfered PCP.

A few hours after robbing Biz, Holly received a telephone call from the defendant. Holly knew the defendant from the neighborhood where they both lived and had seen him nearly every day during the preceding six months. The defendant generally called Holly using one of three different telephones: a landline, a cellular telephone registered to the defendant's mother, and the defendant's own cellular telephone.[2] The defendant asked Holly about the robbery of Biz. He also asked Holly to find out whether Collins would be willing to drive to another robbery in exchange for money to buy gasoline and marijuana. Collins agreed to give the defendant a ride.

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[2] The contacts list in Holly's cellular telephone included entries for "Ashawni" and "Ashawnee mom." According to Holly's telephone records, Holly and "Ashawni" exchanged a series of ten brief calls on December 2, 2012, between 11:30 A.M. and 5:34 P.M.

Collins picked up the defendant in his Altima and drove to a fast food restaurant. There, the defendant got out of the vehicle and placed a telephone call to the target of the robbery.[3] The defendant also loaded a bullet into the chamber of a gun, which resembled a larger version of Collins's .380 caliber firearm. The defendant then got back into the Altima and instructed Collins to drive to a housing development in Springfield.

Collins parked the Altima near the entrance to the housing development, out of sight of the apartment where the intended robbery victim was visiting a relative. The defendant twice asked Holly to get out of the vehicle and join him in the robbery. Holly refused; he testified that he thought the extent of his role was to bring the others to the scene. The defendant then asked Collins for help in conducting the robbery. After some hesitation, Collins agreed. As instructed, Holly got into the driver's seat of the Altima to wait for the defendant and Collins, who walked away.

The two reappeared within ten to fifteen minutes. They told Holly to drive around the block and to back into a parking space with a view of one of the apartments. That apartment had

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[3] On December 2, between 11:20 A.M. and 5:48 P.M., Dancy exchanged telephone calls with the number listed as "Ashawani." Dancy's telephone number did not call any of Holly's or Collins's numbers.

been rented by Dancy's sister, and Dancy generally stopped by to check on it while his sister was away. While waiting for the defendant and Collins to "do whatever they [were] going to do," Holly smoked another cigarette and flicked the butt out the window. Holly testified that he smoked Newport cigarettes, which have a green stripe around the filter.[4]

At around 5:40 P.M., Collins approached Dancy, who was on the front porch. Collins and the defendant spoke to Dancy, and Dancy passed an object to Collins, who smelled it. The defendant also smelled the object, and then handed it back to Dancy. At that point, Collins pulled out a firearm and pointed it at Dancy. Dancy struck Collins, grabbing his gun hand and, as Dancy described it, "hit[ting] him with everything I had." The two engaged in a "tussle," continuing to "fight" on the porch so intensely that they both fell down. Dancy heard shots and could not tell from where they were coming, but he assumed that the man he was fighting was the one who was shooting. Holly heard a loud pop. He did not see a muzzle flash and could not tell whether Collins had fired the shot. The defendant

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[4] Police recovered a discarded Newport cigarette butt near the scene. Although it was suitable for DNA testing, the Commonwealth choose not to test the cigarette butt to determine whether it contained DNA matching Holly's DNA profile. Postconviction forensic testing later revealed that DNA on the cigarette matched a profile from a third party and did not match Holly's DNA profile. See discussion, infra.

stepped back and pulled out his gun. Holly saw the defendant fire, and then saw Collins fall down the porch stairs.

Dancy testified that, during the fight, he focused on Collins -- his immediate threat, with whom he was fighting. The defendant moved around and, at one point, urged Collins, "[L]et's go, let's leave." Dancy then heard gunshots and felt Collins go limp; Dancy fell off the porch, tried to get up, and discovered that he had been shot in the leg. Dancy did not see the defendant produce a gun. He did see a muzzle flash, leading him to believe that the defendant had fired at him. Collins suffered a fatal gunshot wound to the head. There was no stippling or residue gun powder on the wound, indicating that the shot had been fired from a distance of more than eighteen inches. The shot to Dancy's leg resulted in a compound fracture.

Upon hearing the first gunshot, Holly started the Altima and pulled out into the road to wait for Collins and the defendant. The defendant got into the rear seat, and told Holly that Collins was dead. Holly drove away. A neighbor called 911; police and emergency medical technicians arrived on scene at 5:55 P.M.

Before police arrived, a witness who was inside a nearby apartment heard a loud crash, looked out the window, and saw a man collapse to the ground, try to get up, and fall again;

initially she thought he was drunk. When the man started calling for help, the witness went outside and saw another man lying on the ground gasping for air; there was a small caliber, silver handgun on the ground next to him. The witness kicked the gun across the street, and later pointed it out to one of the investigating officers. When the officer secured the weapon, it had a live round in the chamber.

b. Investigation. A spent projectile was located on the front porch of the apartment building where Collins had fallen, and two discharged nine millimeter cartridge casings were found on the street and in the lawn in front of the building. A projectile also was recovered from Collins's head.

A State police ballistician testified that Collins's .380 pistol was found with a live round in the chamber. The bullet bore impressions from the firing pin that could have been caused by the weapon having been dropped or kicked without discharging the round. The projectile found on the front porch was consistent with .380 caliber ammunition. The projectile, however, was too damaged to compare its tool markings to try to determine which gun had fired it. The two nine millimeter cartridge casings found on the street and in the lawn had been fired from the same unknown weapon. The projectile recovered from Collins's body was consistent with a nine millimeter

bullet. It was too large to have been fired from a .380 caliber gun.

Police questioned Holly on December 4, 2012, two days after the shootings. He told the detectives "some things" that had happened. To protect himself, he said that it was Collins's idea to commit the robbery, that he never saw the defendant with a firearm, and that he had been in the car waiting for Collins and the defendant, and he did not see the shootings. Two days later, on December 6, 2012, Holly was arrested. He then gave the officers a different version of events, this time saying that the defendant had set up the robbery; Holly continued to assert that he had not seen the actual shooting. In April of 2015, in conjunction with a cooperation agreement, Holly provided a third statement to police. He gave a detailed account of the events and the defendant's role in planning the robbery. At trial, however, Holly conceded that he had provided police this information only after having reviewed police reports and witness statements.

The defendant also was arrested on December 6, 2012. He denied having participated in the robbery and having killed Collins. According to the defendant, he had stayed home all day on December 2, 2012, had been with his family, and only left the house to go to a nearby convenience store, once in the morning and once sometime around 7 or 8 P.M. Police obtained

surveillance video footage from the convenience store from 12 P.M. to 8 P.M. on December 2, 2012, and learned that the defendant did not appear on the surveillance footage at any point during that time.

2. Prior proceedings. On February 4, 2013, a grand jury returned indictments charging the defendant with murder in the first degree; armed assault with intent to rob Dancy; assault and battery by means of a dangerous weapon causing serious bodily injury to Dancy; unlawful possession of a firearm; and unlawful possession of ammunition. Beginning on August 19, 2015, the defendant was tried before a Superior Court jury. The Commonwealth proceeded at trial on theories of deliberate premeditation and felony-murder, with armed robbery as the predicate felony. At the close of the Commonwealth's case, and again at the close of all the evidence, the defendant moved for a required finding on so much of the indictment as charged felony-murder. Both motions were denied. On August 28, 2015, the jury convicted the defendant of all indictments. Prior to sentencing, the defendant filed a renewed motion for a required finding; he argued that he could not be found liable for the death of an alleged accomplice. The motion was denied.

After the appeal entered in this court, the proceedings were stayed to enable the defendant to seek forensic testing pursuant to G. L. c. 278A. The defendant subsequently filed a

motion for a new trial based on DNA results from the testing of the cigarette butt found in the parking lot where the getaway driver had waited. A different Superior Court judge (the trial judge having been appointed to the Appeals Court) held a nonevidentiary hearing on the defendant's motion and then denied the defendant's motion for a new trial. We consolidated the appeal from the denial of the motion for a new trial and the defendant's direct appeal.

3. Discussion. The defendant argues that the trial judge erred in denying his motion for a required finding of not guilty on the charge of felony-murder. The defendant maintains, first, that the doctrine of felony-murder is inapplicable here because Collins was killed "during the course of a struggle from an individual resisting a felony." Even if the theory of felony-murder is applicable, the defendant argues, the evidence was insufficient to allow a rational jury to have concluded, beyond a reasonable doubt, that he committed the predicate offense of armed robbery. The defendant also contends that the trial judge erred by not, sua sponte, instructing the jury on felony-murder in the second degree. In addition, the defendant argues that the motion judge abused his discretion in denying the motion for a new trial based on DNA evidence recovered from the cigarette butt during postconviction scientific testing. Finally, the defendant asks us to exercise our extraordinary authority under

G. L. c. 278, § 33E, to order a new trial or to reduce the degree of guilt, due to the Commonwealth's use of uncorroborated accomplice testimony, the failure to secure an indictment for the predicate felony, and the asserted ineffective assistance of trial counsel. We address each issue in turn.

a. Sufficiency of evidence of felony-murder.

i. Liability for felony-murder. The defendant's argument that his conviction of felony-murder in the first degree was unlawful is premised on limitations in the theory of felony-murder concerning liability for the deaths of individuals killed by someone who is resisting the predicate felony. The defendant contends that, viewed in the light most favorable to the Commonwealth, the evidence as to who fired the fatal shot was unclear. Relying on this court's holdings in Commonwealth v. Campbell, 7 Allen 541, 547 (1863), Balliro, 349 Mass. at 515, and Tejeda, 473 Mass. at 279, the defendant argues that he was entitled to a required finding because his accomplice, Collins, was fatally shot "as the underlying felony occurred and while the intended target of the felony -- [Dancy] -- resisted."

To evaluate the defendant's argument, a review of our long-standing jurisprudence on the scope of liability for felony-murder, where the fatal act was committed by someone seeking to thwart or resist the predicate offense, is in order. In 1863, we considered whether a participant in a riot against the Civil

War draft could be held liable for the death of a bystander, where it was unclear whether the victim was shot and killed by one of the rioters "with whom the [defendant] was acting in concert," or by a soldier inside an armory who was attempting to fend off the attack. See Campbell, 7 Allen at 543-544. The Commonwealth requested the jury be instructed that the defendant could be found guilty regardless of who fired the fatal shot. Id. at 543. We rejected the Commonwealth's attempt to expand our "reasonable limitation" on vicarious liability. Id. at 544. We held that "[n]o person can be held guilty of homicide unless the act is either actually or constructively his, and it cannot be his act in either sense unless committed by his own hand or by someone acting in concert with him or in furtherance of a common object or purpose." Id. at 544.

One hundred and two years later, in Balliro, 349 Mass. at 511, we considered whether an accomplice to a burglary was vicariously liable for the death of two of the occupants of an apartment, who were killed during a shootout between the burglars and police, after the burglars had broken into the apartment building. During the gunfight, a mother and her son were caught in the crossfire and shot to death. Id. at 508-510. The judge denied each of the defendants' requests for an instruction that he could not be found guilty of felony-murder unless the jury found beyond a reasonable doubt that the bullet

that caused the death came from a gun that had been fired by one of the defendants. Id. at 511. Instead, the judge erroneously instructed the jury that the victims' deaths were "imputable to the[] defendants," even if the fatal shots had been fired by one of the police officers, so long as the "defendants entered and shot first." Id. Reaffirming its decision in Campbell, 7 Allen at 543-544, this court concluded that a felon cannot be held criminally liable for the death of an individual killed by someone who was resisting the commission of the felony. Balliro, supra at 515.

Fifty years after that decision, we considered whether the limitations on felony-murder set forth in Campbell and Balliro extended to the death of an accomplice who was killed by the victim of an intended robbery. See Tejeda, 473 Mass. at 269. The defendant in Tejeda, supra at 279-281, was a getaway driver who parked outside a residence while his accomplices, one of whom was armed, attempted to rob a drug dealer. Id. at 270. The dealer pulled out his own weapon, shots were exchanged, and one of the robbers was fatally shot in the chest. Id. The Commonwealth asked this court to expand the scope of vicarious liability for felony-murder to include "every act that results in death that is proximately caused by the underlying felony." Id. at 274-275. We rejected this proposal, which would have expanded "vicarious accomplice liability to acts that were not

committed by accomplices, and that were committed not to further the joint venture but to thwart it." Id. at 277. Once again, we held that a felon cannot be criminally liable for the death of a person who is killed by someone resisting the commission of a felony. Id.

In the present case, we agree with the trial judge's conclusion that there was sufficient evidence that the defendant shot and killed his accomplice. See Commonwealth v. James, 424 Mass. 770, 785 (1997) (evidence, including determinations of credibility, is viewed in light most favorable to Commonwealth). The jury heard sufficient evidence to have found that Collins was armed with a .380 caliber pistol and that the defendant had a slightly larger nine millimeter weapon. The jury also could have found, based on the evidence before them, that Collins approached Dancy, and then pulled out a gun, and Collins and Dancy engaged in a fist fight. Other evidence before the jury would have allowed them to find that the second robber, by inference the defendant, fired at Dancy. The jury heard that police found two spent nine millimeter shell casings at the scene, which were not filed from Collins's .380, but which had been fired from the same gun. There also was evidence that the shot that killed Collins was fired from more than eighteen inches away, and the projectile that was found imbedded in

Collins's head was consistent with having been fired by a nine millimeter firearm.

Thus, the defendant's reliance on Campbell, Balliro, and Tejeda is inapposite. Unlike the circumstances in those cases, here the Commonwealth did not seek to hold the defendant vicariously liable for a fatal blow delivered by someone -- whether the victim of a robbery, a soldier, or a police officer -- who was resisting the crime. The premise of the felony-murder indictment against the defendant was that, during the robbery, the defendant shot at Dancy and ended up hitting both Dancy and Collins. Accordingly, there was no error in the judge's determination that the limitations on the scope of felony-murder set forth in Campbell, 7 Allen at 547, Balliro, 349 Mass. at 515, and Tejeda, 473 Mass. at 279, were inapplicable.

ii. Evidence of intent required to establish armed robbery. "The effect of the felony-murder rule is to substitute the intent to commit the underlying felony for the malice aforethought required for murder. Thus, the rule is one of constructive malice"[5] (quotation omitted). Commonwealth v.

[5] The defendant was convicted prior to this court's decision in Commonwealth v. Brown, 477 Mass. 805, 807 (2017), cert. denied, 139 S. Ct. 54 (2018), where the court prospectively abolished the concept of constructive malice and the crime of felony-murder in the second degree.

Gunter, 427 Mass. 259, 271 (1998), S.C., 456 Mass. 1017 (2010) and 459 Mass. 480, cert. denied, 565 U.S. 868 (2011), quoting Commonwealth v. Matchett, 386 Mass. 492, 502 (1982). The element of the intent to steal is substituted for malice aforethought. See Commonwealth v. Morin, 478 Mass. 415, 431 (2017) ("It is the intent to do that conduct [here stealing from (the victim)] that serves as the substitute for the malice requirement of murder" [alterations in original; citation omitted]). See also Commonwealth v. Holley, 478 Mass. 508, 520 (2017).

The defendant contends that there was insufficient evidence that he had had the "appropriate mental state" necessary to support the predicate felony of armed robbery. The defendant points out that, before the shots were fired, Dancy heard the second robber (inferentially the defendant), tell Collins, "[L]et's go, let's leave." Moreover, after Dancy was shot, the second robber "had a look of shock on his face," and did not seize the opportunity to steal Dancy's drugs or money.

In order to establish that a defendant is guilty of armed robbery, the Commonwealth most prove that the defendant (or a coventurer) (1) was "armed with a dangerous weapon; (2) either applied actual force or violence to the body of the person identified in the indictment, or by words or gestures put [that person] in fear; (3) took the money or the property of another;

and (4) did so with the intent (or sharing the intent) to steal it." See Commonwealth v. Chesko, 486 Mass. 314, 320 (2020), quoting Commonwealth v. Benitez, 464 Mass. 686, 690 (2013).

Here, viewed in the light most favorable to the Commonwealth, the jury heard sufficient evidence of the defendant's intent to steal from Dancy. There was evidence before the jury that the defendant telephoned Holly, seeking a ride from Collins in order to rob a "big," "husky" "guy" with a "scruffy beard" and dreadlocks. The jury reasonably could have inferred that the defendant's telephone calls to Dancy, immediately prior to the robbery, were made to arrange the purported drug deal. There was testimony from which the jury could have found that the defendant and Collins, both of whom were armed, approached Dancy for the purpose of stealing drugs or money from him. That the robbery was unsuccessful is not relevant to a finding that the defendant had the intent to steal. See Commonwealth v. Quiles, 488 Mass. 298, 304 (2021), cert. denied, 142 S. Ct. 1237 (2022) (for felony-murder, it is sufficient for defendant to have killed victim while attempting to commit underlying felony).

b. Instruction on felony-murder in second degree. The defendant argues that the judge erred in not instructing the jury on felony-murder in the second degree because the evidence at trial did not support a conviction of the life felony of

armed robbery, but that "there were two indicted felonies upon which an allegation of second-degree felony-murder could have advanced": armed assault with intent to rob, G. L. c. 265, § 18 (b); and assault and battery by means of a dangerous weapon resulting in serious bodily injury, G. L. c. 265, § 15A (c) (i). The defendant also suggests here, as he develops further in his request for relief pursuant to G. L. c. 278, § 33E, that, regardless of the state of the evidence, he could not have been convicted of felony-murder in the first degree where he was not indicted for a life felony. See part 3.d.ii, infra.

The defendant did not request an instruction on felony-murder in the second degree, and the judge did not give one sua sponte. We review claims of unpreserved error in capital cases for a substantial likelihood of a miscarriage of justice. See Commonwealth v. Wright, 411 Mass. 678, 682 (1992), S.C., 469 Mass. 447 (2014).

A judge is required to instruct the jury on felony-murder in the second degree only where "there is a rational basis in the evidence to warrant the instruction." See Commonwealth v. Christian, 430 Mass. 552, 558 (2000), overruled on other grounds by Commonwealth v. Paulding, 438 Mass. 1 (2002). In determining whether an instruction on felony-murder in the second degree would be warranted, the judge looks to all the elements of murder in the second degree. Christian, supra. "A conviction

of felony-murder in the second degree requires the jury to find that (1) the defendant committed or attempted to commit a felony with a maximum sentence of less than imprisonment for life, (2) a killing occurred during the commission or attempted commission of that felony, and (3) the felony was inherently dangerous or the defendant acted with conscious disregard for the risk to human life." Id.

Here, the judge instructed the jury on murder in the first degree on theories of deliberate premeditation and felony-murder, with attempted armed robbery as the predicate offense. The judge explained that the essence of the crime of attempt "is that a person has a specific intent to commit a crime, in this case armed robbery, and takes a specific step toward committing the crime." The judge also instructed on murder in the second degree committed in the absence of deliberate premeditation, with malice, and involuntary manslaughter due to wanton and reckless conduct.

There was no error in the judge's instructions on felony-murder, and consequently no substantial likelihood of a miscarriage of justice. As the defendant recognizes, depending on the facts, the offense of armed assault with intent to rob may be equivalent to an "attempted commission of armed robbery." See Benitez, 464 Mass. at 694 n.12, quoting Commonwealth v. Ladetto, 349 Mass. 237, 248-249 (1965). "[I]n a theoretical

sense, armed assault to rob is a lesser included offense of every armed robbery. . . . [T]he theoretical existence of a lesser included predicate offense, [however,] with a maximum sentence of less than life imprisonment by itself does not require that an instruction on felony-murder in the second degree be given." Benitez, supra. In determining whether to give such an instruction, a judge must decide whether the facts "reasonably would support a jury finding that the lesser predicate felony had been proved, and not the greater." Id.

Here, no rational view of the evidence would have supported a finding that the defendant was an accomplice in the armed assault with intent to rob Dancy, but was not an accomplice in the attempted armed robbery of Dancy. See Chesko, 486 Mass. at 321 (if jury did not believe defendant committed predicate felony of armed robbery, they would have found her not guilty, and "they could not have rationally concluded that she was guilty only of armed assault with intent to rob").

As stated, the defendant maintains that the offense of assault and battery by means of a dangerous weapon resulting in serious bodily injury to Dancy "could have supported a conviction for second-degree felony-murder." Nonetheless, the judge had a reasonable basis upon which to forgo instructing the jury, sua sponte, on felony-murder in the second degree predicated on the defendant's nonfatal shooting of Dancy.

Certainly, "not every assault that results in a death will serve as a basis for murder in the first degree on the theory of felony-murder." Commonwealth v. Scott, 472 Mass. 815, 819 (2015). The merger doctrine requires the Commonwealth to prove that "the conduct which constitutes the felony be separate from the acts of personal violence which constitute a necessary part of the homicide itself" (quotation omitted). Morin, 478 Mass. at 430-431, quoting Gunter, 427 Mass. at 272. Nonetheless, assuming, for the sake of argument, that Collins was killed during the assault and battery by means of a dangerous weapon used against Dancy, this would do nothing to suggest that an instruction on felony-murder in the second degree was appropriate. The violence of the assault and battery -- the shooting of Dancy -- was inextricably intertwined with the fatal shooting of Collins. The merger doctrine, therefore, precluded the theory of felony-murder in the second degree.

c. Motion for a new trial. Following the jury verdicts, the defendant sought postconviction scientific testing of the cigarette butt found on the ground near the car where Holly allegedly had been sitting waiting for the defendant and Collins to conduct their planned robbery of the drug dealer. The defendant's motion, unopposed by the Commonwealth, was allowed. The testing revealed that the DNA profile on the cigarette butt did not match Holly's DNA profile, nor did it match the

defendant's or Collins's DNA profiles. The DNA profile later was matched, through a government database, to a third party who played no role in the events of this case. In his motion for a new trial, the defendant argued that the inadequate police investigation, including the failure to test the cigarette butt prior to trial, deprived him of a possible third-party culprit defense, and deprived both the Commonwealth and the defendant of a "potential eyewitness to the events." He also emphasized the importance that the Commonwealth placed on the cigarette butt as corroboration of Holly's testimony.

Pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001), a judge may allow a motion for a new trial "if it appears that justice may not have been done." Where an appeal from the denial of a motion for a new trial has been consolidated with a defendant's direct appeal from a conviction of murder in the first degree, we review the denial of the motion for a new trial under G. L. c. 278, § 33E. See Commonwealth v. Moore, 480 Mass. 799, 805 (2018). Thus, we examine the motion judge's decision to determine whether there was error and, if so, whether the error created a substantial likelihood of a miscarriage of justice. Commonwealth v. Vargas, 475 Mass. 338, 355 (2016).[6]

[6] The defendant does not argue that the DNA test results were newly discovered or newly available evidence. See

Here, the jury heard evidence that the neighbor was the one who initially brought the cigarette butt to the attention of one of the investigating officers. Earlier that evening, she had heard "some banging noise" and went to her kitchen window to see what was going on. She saw a dark vehicle with its lights off pull up behind her parked car and a "young man," moving at a "dead run," get into the front passenger seat. After the vehicle sped away, the neighbor went outside to her own vehicle and noticed a cigarette butt on the ground behind her rear tire. This caught her attention because it was raining and the cigarette butt did not appear to be wet.

On cross-examination, one of the Commonwealth's experts testified that the cigarette butt had been prepared for testing but had not been tested. The expert agreed that proper DNA testing and analysis might have provided the identity of the individual who had smoked the discarded cigarette. Both trial counsel and the prosecutor referenced the cigarette butt at some length in their closing arguments.

In his closing, the defendant emphasized that the Commonwealth had failed to test the cigarette butt, which might

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Commonwealth v. Grace, 397 Mass. 303, 305-306 (1986) (discussing two-pronged standard of review for newly discovered or newly available evidence). Indeed, he does not challenge the judge's finding that "the cigarette butt was available for testing at the time of trial had trial counsel elected to take the risk that the results would undermine [the] defense."

have revealed "who [was] in the vehicle." The defendant argued that police had "tied their wagon" to Holly, and thereafter had not conducted much of an investigation, as they simply chose to believe every word he said. Defense counsel pointed out that none of the forensic evidence connected the defendant to the scene. Counsel emphasized the other items that the Commonwealth had tested for DNA and argued that the failure to test the cigarette butt was because the cigarette butt that Holly threw out the car window was not the same one police collected behind the tire of the neighbor's car. Defense counsel discussed the relative positions of the vehicles, pointing out that Holly's car had been parked in a parking space where he waited, and had not been parked in the open behind the neighbor's vehicle. Counsel maintained that the cigarette butt had belonged to "the person who ran into the [getaway] car," and not Holly. Counsel then again urged the jury to conclude that the absence of any investigation of the cigarette butt indicated how cursory the police investigation had been, because of the decision to rely largely upon the statements of the immunized witness.

The prosecutor argued at several points in his closing that the cigarette butt corroborated Holly's testimony; the prosecutor summarized Holly's testimony that he "threw a cigarette butt on the ground and mentioned what brand of cigarettes he smoked on December 6th before he even knew a

cigarette butt was recovered at that area." The prosecutor also pointed out that the defendant's argument that the cigarette might have been discarded by the man running back to the car was implausible, arguing, "If someone is running away from a shooting, are they going to light up a smoke after they shoot someone and before they run to a car and get in?" Later in his argument, the prosecutor again emphasized the evidence of the cigarette butt and how it corroborated Holly's testimony: "Holly mentioned his brand of cigarettes back on December 6th and they find a cigarette butt right where he happens to say he was sitting and smoking a menthol before he flicked it out the window and they find it right there. That's corroboration, ladies and gentlemen."

In his motion for a new trial, the defendant maintained that the only evidence that implicated him in the shooting was testimony by Holly, the immunized codefendant. The defendant emphasized that Holly also had been at the scene of the shooting and remarked that Holly had "every reason to give the Commonwealth whatever it wanted" in exchange for favorable treatment. At one point, the defendant remarked, "It is clear from how his story changed over time that [Holly] was willing to say anything to assist the Commonwealth." Indeed, at times in his closing argument, counsel explicitly described Holly's testimony as that of an "admitted liar" that could never be

worthy of belief. Relying on these and similar statements, the defendant argued in his motion for a new trial that "any evidence impugning Holly's credibility was paramount."

In ruling on the defendant's motion for a new trial, the motion judge, who was not the trial judge, considered "the strength of the Commonwealth's evidence, particularly as to . . . Holly's credibility (or lack thereof), in order to assess whether, taken as a whole, the case against [the defendant] is significantly weaker for lack of the cigarette butt's corroboration." The judge observed that "the Commonwealth's case against [the defendant] was not so overwhelming as to render the cigarette butt wholly unimportant." Nonetheless, the judge decided that it was "unlikely" that the cigarette butt would have been central to the jury's assessment of Holly's creditability. Considering the entirety of the record, the judge concluded that "the overall effects of the new DNA test do not render [the defendant's] trial fundamentally unfair."

After a careful review of the record, we agree. See Commonwealth v. Raymond, 450 Mass. 729, 733 (2008) (where motion judge was not trial judge, and ruling was based on documentary record and did not rest on credibility determinations, appellate court is in as good position as motion judge to assess trial record). The extent to which both attorneys focused on the

cigarette butt in their closing arguments indicates they did not view it as insubstantial and did consider the issue of corroboration of the Commonwealth's key witness's (Holly's) statements as significant. Nonetheless, contrary to the defendant's argument, the record clearly contains multiple other types of evidence, including testimony by the neighbor and the intended victim, as well as telephone records and ballistics evidence, that corroborate different portions of Holly's testimony. Thus, the evidence that Holly's DNA was not on the cigarette butt found in the parking lot of an apartment building where the getaway driver was to wait for the robbers likely would have made little difference in the jury's thinking about Holly's credibility.

In sum, the defendant has not shown that the results of the DNA testing cast doubt on the justice of the conviction, and accordingly he is not entitled to a new trial.

d. Review under G. L. c. 278, § 33E. The defendant maintains that, even if the evidence was sufficient to support a verdict of murder in the first degree, such a verdict was against the weight of the evidence, and "justice requires" that the court direct entry of a verdict of not guilty, reduce the degree of guilt, or order a new trial, pursuant to its authority under G. L. c. 278, § 33E. The defendant argues that relief under G. L. c. 278, § 33E, is warranted for three reasons:

(1) the Commonwealth's reliance on uncorroborated witness testimony; (2) the absence of an indictment for armed robbery or any other life felony that would have supported the theory of felony-murder in the first degree; and (3) the ineffective assistance of his trial counsel.

i. Uncorroborated accomplice testimony. The defendant urges this court, in the exercise of its extraordinary authority, to extend the corroboration requirement for immunized testimony, mandated by G. L. c. 233, § 20I, to cooperating witnesses. See G. L. c. 233, § 20I ("No defendant in any criminal proceeding shall be convicted solely on the testimony of, or the evidence produced by, a person granted immunity . . ."). The defendant acknowledges that we previously have rejected such a request on a number of occasions. See, e.g., Commonwealth v. Thomas, 439 Mass. 362, 372-373 (2003); Commonwealth v. Watkins, 377 Mass. 385, 389-390, cert. denied, 442 U.S. 932 (1979), citing Caminetti v. United States, 242 U.S. 470, 495 (1917) (no right to corroboration of testimony of accomplice). He argues, however, that the instructions we have mandated, urging the jury to "scrutinize the testimony of accomplices with great care," Thomas, supra at 372, when assessing the credibility of cooperating witnesses, regardless of whether the accomplices' statements are corroborated, are wholly inadequate to address the fundamental issue. Because

false informant testimony is "one of the leading factors in wrongful convictions," the defendant maintains, the court should further scrutinize its use, and should reconsider its prior determinations not to require corroborating evidence for witnesses who testify pursuant to a cooperation agreement.

We decline the defendant's request to extend the corroboration requirement to testimony by cooperating witnesses. In Thomas, 439 Mass. at 372-373, we explained that a defendant's rights were adequately protected by the instruction that juries must "scrutinize the testimony of accomplices with great care, regardless of the presence of corroborative evidence." We also concluded that juries must be informed that while the Commonwealth may enter into an agreement with a witness, it has no way of knowing whether the witness indeed is telling the truth when testifying. Id., citing Commonwealth v. Ciampa, 406 Mass. 257, 266 (1989). We concluded that these instructions adequately would protect a defendant's right to due process, given that a testifying witness is subject to "one of the most rigorous tests of scrutiny: cross-examination, which is beyond any doubt the greatest legal engine ever invented for the discovery of truth" (quotation and citation omitted). Thomas, supra at 372.

The defendant argues that "[t]here may be no greater case [for imposing a corroboration requirement] than the one at bar

where even the Commonwealth admitted that the entire case rested on the shoulders of Julien Holly." The defendant maintains that the absence of a corroboration requirement creates a disincentive for police to pursue an adequate investigation, rather than simply accepting the immunized accomplice's version of events. This, in turn, disrupts the essential truth-seeking purpose and role of a trial, and "impermissibly shifts to the defendant" the burden "to prove not just that the accomplice is lying but that the defendant is innocent," in violation of the defendant's right to due process.

As the defendant points out, G. L. c. 233, § 20I, requires the Commonwealth to introduce "some evidence in support of the testimony of an immunized witness on at least one element of proof essential to convict the defendant." Commonwealth v. DeBrosky, 363 Mass. 718, 730 (1973). See Commonwealth v. Resende, 476 Mass. 141, 152 (2017); Commonwealth v. Fernandes, 425 Mass. 357, 359 (1997).

Here, as discussed, other evidence at trial, including Dancy's testimony, the cellular telephone records, and the ballistics evidence, corroborated Holly's testimony concerning felony-murder predicated on attempted armed robbery, and the defendant's role in perpetuating the armed robbery during which Collins was shot. Accordingly, the evidence before the jury provided the corroboration the defendant asserts was necessary

in order for Holly's testimony to be used to establish the defendant's guilt of felony-murder.

ii. Lack of indictment on charge of armed robbery or any other life felony. While recognizing that, to date, this court has not established such a requirement, the defendant urges this court to order a new trial because he was not indicted on the life felony of armed robbery that served as the predicate for felony-murder. The defendant contends that the language of G. L. c. 265, § 1, "seems" to require an indictment on a felony that serves as a predicate for felony-murder, "so that there is appropriate notice of the charges a defendant faces and sufficient evidence to establish probable cause to indict." The defendant also points to Mass. R. Crim. P. 3, as appearing in 442 Mass. 1502 (2004); arts. 1, 10, 11, 12, and 26 of the Massachusetts Declaration of Rights; and the Fourteenth Amendment to the United States Constitution as mandating that, in order to be convicted of felony-murder in the first degree, a defendant must be indicted on the life felony asserted to be the predicate offense.

The defendant's argument is unavailing. In Commonwealth v. Stokes, 460 Mass. 311, 315 (2011), this court held that "the felony on which a charge of felony-murder is premised may be uncharged, so long as the evidence supports it." See Commonwealth v. Phap Buth, 480 Mass. 113, 119, cert. denied, 139

S. Ct. 607 (2018); Gunter, 427 Mass. at 274. The defendant offers no compelling reason to change course on this consistently asserted position over the past approximately twenty-five years. Nothing in the record here suggests that the defendant was prejudiced by the lack of an indictment. Nor do we find compelling the defendant's strained interpretation of G. L. c. 265, § 1, as requiring a separate indictment for the predicate offense. See G. L. c. 265, § 1 ("Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree").

iii. Ineffective assistance of counsel. The defendant argues that his trial counsel was ineffective because counsel failed to "grasp the nuances in the murder charge" and failed to "act as a zealous advocate to the point of upsetting the adversarial process." See Kimmelman v. Morrison, 477 U.S. 365, 374-375 (1986). The defendant maintains that trial counsel provided ineffective assistance because he failed to "comprehend issues related to the charge of murder." The asserted failures of comprehension; "acquiescence" to the Commonwealth's theory of felony-murder in the first degree with armed robbery as the predicate felony; failure to argue that felony-murder did not apply because this case was on all fours with Balliro, 349 Mass.

at 515; and failure to argue that the assault was much more like an armed assault with intent to rob than an attempted armed robbery (thus rendering this a case of felony-murder in the second degree), all relate to the defendant's argument, see part 3.a.i, supra, that the theory of felony-murder in the first degree was inapplicable on these facts. For the reasons discussed in part 3.a.i, supra, we conclude that there was no substantial likelihood of a miscarriage of justice in trial counsel's asserted missteps. See Commonwealth v. Carroll, 439 Mass. 547, 557 (2003) (no ineffective assistance of counsel for failure to pursue claim that would have been futile).

4. Conclusion. The convictions of murder in the first degree, assault and battery by means of a dangerous weapon causing serious bodily injury, unlawful possession of a firearm, and unlawful possession of ammunition are affirmed. The denial of the defendant's motion for a new trial is also affirmed. The Commonwealth has agreed to the defendant's request that his conviction of armed assault with intent to rob be dismissed as a lesser included offense that is duplicative of the felony-murder conviction. See Commonwealth v. Rivera, 445 Mass. 119, 132 (2005). Accordingly, the conviction of armed assault with intent to rob is vacated and set aside, and the matter is remanded to the Superior Court for dismissal of that conviction.

So ordered.