SJC-12721

COMMONWEALTH vs. OMAR BONNER.

Suffolk. October 8, 2021. - March 7, 2022.

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

Homicide. Joint Enterprise. Evidence, Joint venturer, Accomplice, Intent, Firearm. Intent. Firearms. Estoppel. Practice, Criminal, Instructions to jury, Capital case.

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

The cases were tried before Janet L. Sanders, J., and following a mistrial on the indictment charging murder in the first degree, the case was tried before Linda E. Giles, J.

Robert F. Shaw, Jr., for the defendant.
Darcy A. Jordan, Assistant District Attorney (Ian Polumbaum, Assistant District Attorney, also present) for the Commonwealth.

GAZIANO, J. On December 14, 2013, Romeo McCubbin was shot and killed after attending a music performance at a Boston nightclub. The shooting, which occurred on a nearby side street, was captured by surveillance cameras attached to a local

residence. The video footage revealed that two individuals separately shot the victim less than one minute apart, one shooting while the victim was sitting in a parked vehicle and the second while the victim was lying on the sidewalk mortally wounded. A grand jury returned indictments charging four men thought to have been accomplices with murder in the first degree. The grand jury also indicted the defendant on one count of unlawful possession of a firearm and one count of resisting arrest. At trial against the four codefendants, the Commonwealth proceeded on a theory that the defendant was liable for the victim's death as an accomplice to the second shooter. In June of 2016, at the first trial, the jury were unable to reach a verdict on the charge of murder against the defendant, but convicted him of the firearm offense and of resisting arrest. At a subsequent joint trial with the other three codefendants in May of 2017, a second jury convicted the defendant of murder in the first degree on theories of deliberate premeditation and extreme atrocity or cruelty.[1]

In this direct appeal, the defendant contends that the evidence was insufficient to sustain his murder conviction. He

[1] The jury also convicted codefendants Andrew Robertson, Javaine Watson, and Omar Denton of murder in the first degree. We affirmed Robertson's and Watson's convictions, see Commonwealth v. Robertson, 489 Mass. 226, 227 (2022); Commonwealth v. Watson, 487 Mass. 156, 157 (2021). Denton's appeal is pending before this court.

argues also that a new trial is warranted because of erroneous accomplice liability instructions. The defendant next challenges the sufficiency of evidence introduced in the first trial that he unlawfully possessed a firearm, and the judge's decision, in the second trial, to preclude the defendant from contesting that point on estoppel grounds. Finally, the defendant asks this court to exercise its extraordinary authority pursuant to G. L. c. 278, § 33E, and to grant him a new trial or to reduce the conviction to a lesser degree of guilt. Having carefully examined the record and considered the defendant's arguments, we conclude that there is no reversible error and find no reason to disturb the verdict.

1. Facts. We summarize the facts that the jury could have found, viewing them in the light most favorable to the Commonwealth. See Commonwealth v. Latimore, 378 Mass. 671, 677-678 (1979).

a. Evening of the shooting. On the evening of December 13, 2013, the victim attended a music performance at a nightclub on Blue Hill Avenue. The victim drove his brother and his girlfriend, among others, to the event in a Ford Explorer, and he parked around the corner from the venue.

The defendant, Denton, Robertson, and Watson attended the same performance. The defendant had borrowed his sister's silver Toyota RAV4 to drive to the event. Watson drove a red

Lincoln MKX that had been rented by his girlfriend the evening before, and that had been given to Watson that day.

There was no dispute that the four codefendants knew each other, and multiple pieces of evidence were introduced to support their close ties. An event photograph depicted three of the men -- the defendant, Denton, and Robertson -- standing near one another. The defendant is depicted in the photographs wearing a bright red shirt, matching bright red pants, a red hat with a pom-pom on top, and a plaid scarf. Denton is seen wearing a black wool hat and a maroon V-neck sweater over a white shirt. Robertson appears to be wearing a hat and, in some photographs, to be concealing his face with a dark scarf.

The Commonwealth also introduced cellular telephone records showing the defendant, Denton, Robertson, and Watson sending text messages to each other, as well as placing calls, in the month leading up to the shooting and within minutes of the shooting. Indeed, the defendant's mother and sister both characterized Denton as a close family friend. In addition, crime scene investigators found fingerprints that were matched to all four men inside and outside the recently rented (and cleaned) MKX.

After the show, the victim went outside, presumably to retrieve his vehicle, but he did not return to the club to pick up his brother and his girlfriend.[2]

The shooting was captured by surveillance cameras mounted to the exterior of a residence on a residential street that intersected Blue Hill Avenue near the nightclub. The video footage depicts two sport utility vehicles (SUVs), consistent with a Lincoln MKX and a Toyota RAV4, being driven down the street together, with the MKX in the lead. The street is a one-way residential street; traffic flows west to east from Morton Street to Blue Hill Avenue. The drivers and the occupants (if any) of the SUVs are not visible in the video footage. Approximately three minutes later, the victim's vehicle is seen being driven down the street and parallel parking into a space in front of the residence.

As the victim is finishing parking, an individual alleged to be Robertson runs into view from the direction of Morton Street.[3] The individual approaches the driver's side of the Explorer and fires multiple rounds through the front window on the driver's side. The SUV lurches forward, striking a pickup

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[2] None of the witnesses observed an altercation inside the club, nor were they aware of any existing problems between the victim and the codefendants.

[3] The footage is not sufficiently clear to be able to see any of the individuals' faces.

truck. Another vehicle, alleged to be the Lincoln MKX driven by Watson, immediately pulls up alongside the Explorer, the shooter gets in, and the vehicle speeds away. The victim somehow manages to move across the seat, open the front passenger's side door, fall to the curb, and move a few feet along the sidewalk on his stomach, toward the rear of the vehicle. The MKX continues to Blue Hill Avenue and turns right. According to the Boston police department's ShotSpotter system,[4] the volley was fired at precisely 1:45:00 A.M. The next shooting, as detected by the ShotSpotter system, occurred forty seconds later, at 1:45:40 A.M. Video footage taken from the home security system depicts the following events.[5]

After the MKX speeds off, the victim lies wounded on the sidewalk near the passenger's side of the Explorer, with his feet moving. At 1:53:57 A.M., an individual alleged to be Denton runs down the sidewalk from the direction of Blue Hill Avenue (and the nightclub) toward the victim. The individual hurriedly crosses the street at a diagonal, glancing over his

[4] A Boston police officer explained that ShotSpotter is a network of acoustic gunshot detection sensors.

[5] The times indicated refer to the time stamp on the security video footage, and not the actual time. The homeowner acknowledged that the system was not set to "the right time." We refer to the time stamp imprinted on the security video recordings, which were introduced in evidence and played to the jury.

shoulder toward the intersection with Blue Hill Avenue. At 1:54:03 to 1:54:04 A.M., the individual, brandishing a handgun, approaches the victim from the driver's side rear of the Explorer. At 1:54:05 A.M., the individual stands above the victim. At that moment, another individual, alleged to be the defendant, walks down the street and into the camera's view from the direction of Blue Hill Avenue. A second later, the man standing over the victim takes a few steps backward, squares his body into a shooting stance, and levels the gun at the victim, but the gun does not fire. At that point, the individual alleged to be the defendant is standing on the opposite sidewalk, looking at the shooter and moving in the shooter's direction.

Between 1:54:07 and 1:54:10 A.M., the shooter appears to "rack" the slide of the gun. He once again aims it at the victim as the other individual walks across the street to join him. At 1:54:11 to 1:54:12 A.M., the shooter fires four rounds at the victim in rapid succession. As the gunfire erupts, the individual alleged to be the defendant is in the middle of the street moving toward the shooter. The second shooter continues to point the gun at the victim for two more seconds, but no further shots are fired. By that time, the other individual, assertedly the defendant, is standing next to the shooter at the rear of the Explorer. From 1:54:14 to 1:54:15 A.M., the shooter

steps away from the victim; the other man exchanges places with him and kicks the victim in the head. During the next three seconds, the two men, with the shooter in the lead, cross the street and run toward Blue Hill Avenue. Police arrive at 1:55:34 A.M.

A resident of the house with the security camera was awoken at around 1:45 A.M. by four or five gunshots. He then heard what he thought was the sound of something bumping into his parked pickup truck. He looked out the second-floor window and saw the victim roll out of the passenger's side of the Explorer and collapse to the ground. The witness then observed "two guys coming down the street" from the direction of Blue Hill Avenue. One of the men, by inference Denton, "did a motion with a handgun . . . like a reset," and pointed the gun at the victim on the ground. The witness heard more gunfire. He also saw the second individual, by inference the defendant, kick the victim. The defendant exclaimed, in a voice loud enough for the witness to hear, "dirty mother fucker." On cross-examination, the witness explained that he believed the defendant had kicked an unresponsive, and presumably lifeless, body. He saw the shooter and the other man turn around and run down the street toward Blue Hill Avenue.

b. Police investigation and forensic evidence. Another neighbor called 911 to report the shooting. By that time,

police had received ShotSpotter alerts of two separate shootings in the vicinity. Police responded to the scene and found the victim lying face up on the sidewalk next to the bullet-ridden Explorer. Police found ten nine millimeter shell casings on the ground near the Explorer and four discharged projectiles inside the vehicle. These had been fired from the same weapon used to shoot the victim. The nine millimeter weapon itself was never found. Police also recovered four .380 shell casings and three live rounds of .380 caliber ammunition from the street.[6] The shell casings and projectiles were fired from a .380 pistol that was recovered a short time after the shooting. See discussion, infra.

The autopsy revealed that the victim had been shot nine times by a nine millimeter handgun, and twice in the head by a .380 caliber handgun. He died from multiple gunshot wounds to the head, torso, and lower extremities. The medical examiner opined that either .380 caliber gunshot wound to the head could have caused immediate death.

At 1:45 A.M. on December 14, 2013, Boston police Detective Brian Smigielski was inside the area B-3 police station when he

[6] A Boston police department ballistician testified that live rounds already chambered in a semiautomatic pistol can be ejected from the firearm if the operator pulls (or "racks") the slide mechanism backwards.

heard gunshots fired from two different weapons.[7] Smigielski drove toward the scene in an unmarked vehicle. En route, he observed a RAV4 turn recklessly from Baird Street onto Morton Street.[8] Smigielski followed the RAV4 through several residential streets, while it reached speeds of up to sixty miles per hour and went through a red light. The unmarked vehicle was not equipped with blue lights or a siren, and Smigielski did not attempt to stop the RAV4. The RAV4 eventually slowed down to the speed limit and traveled into the Hyde Park section of Boston. It then turned into the driveway of a house that later was learned to be the defendant's family home. Smigielski parked behind the RAV4. The defendant opened the front passenger's side door and stepped out. With his firearm held by his side, Smigielski ordered the defendant to get back into the vehicle. The defendant instead ran toward the

[7] Smigielski, who had been assigned to the youth violence strike force, resigned from the Boston police department in January 2016, after being charged in Federal court with conspiracy to defraud the United States. In pleading guilty, he admitted that he had impeded a Federal investigation into gang activity by supplying gang members with confidential information.

[8] Smigielski's characterization of the RAV4 as fleeing the crime scene was hotly contested. In a radio broadcast, he informed fellow officers that he was trying to catch up with the car "fleeing that scene." Defense counsel pointed out that Smigielski did not observe the RAV4 being driven away from the scene. Smigielski explained that he meant to say that the vehicle was "fleeing the area" of the shooting.

rear of the house. Smigielski saw something in the defendant's hand, but Smigielski could not tell what it was. He yelled to the driver, Denton, to stay put, and chased after the defendant.

Smigielski followed the defendant's path down the driveway to a detached garage. He lost sight of the defendant but heard something heavy hit the ground in the yard where the defendant had run. The defendant then emerged from behind the garage with his hands in his pockets. Smigielski ordered the defendant to the ground; the defendant complied but then attempted to get up, and a struggle ensued. At the same time, other police officers arrived at the house and encountered Denton in the driveway. Denton fled, but he eventually was found hiding underneath a pickup truck parked in the driveway of a house on a nearby street.[9]

After the defendant's arrest, police backtracked along the path that the defendant had traveled while running from Smigielski. They located the defendant's red hat toward the back of the driveway, near the garage doors. Officers also found a .380 handgun in the back yard of the house behind the garage. The firearm was on the ground on the other side of a fence that separated the two properties. Although there was

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[9] Police recovered a .25 caliber handgun on a walkway on the other side of a fence from the RAV4. It contained Denton's fingerprint. As discussed, this evidence was excluded from the second trial.

snow on the ground, there was no snow on the .380 caliber handgun. Testing established that the firearm had fired the shell casings found on the street where the victim had been shot, as well as the projectiles found in the victim's head.

Later that morning, police found the Lincoln MKX abandoned on and blocking a driveway on a street approximately one block from the defendant's home. The MKX was pinned against a fence post; it was still running, and its reverse lights were on.

2. Prior proceedings. Beginning on May 25, 2016, the defendant and his three codefendants were tried before a Superior Court jury. On June 24, 2016, the jury found the defendant guilty of unlawful possession of a firearm and resisting arrest, but they could not reach a verdict on the murder charge for any of the defendants. The jury also convicted Denton of unlawful possession of a firearm. The judge declared a mistrial as to the murder indictments.

The defendant was not sentenced on his two convictions at that point. A second trial of all four codefendants, before a different judge, was conducted from May 3 to May 24, 2017. The defendant moved for a required finding of not guilty at the close of the Commonwealth's case. The motion was denied. The jury found the defendant guilty of murder in the first degree on theories of deliberate premeditation and extreme atrocity or cruelty.

3. Discussion. The defendant argued at trial that this was a case of mistaken identity and that, even if he was present at the scene of the shooting, he was an innocent bystander. In this appeal, the defendant argues that the evidence was insufficient to allow a rational jury to have concluded, beyond a reasonable doubt, that he was guilty of murder in the first degree. He also contends that the judge's instructions on accomplice liability[10] improperly lessened the Commonwealth's burden of proof. In addition, the defendant challenges the sufficiency of the evidence, introduced at the first trial, that he possessed a firearm, and the judge's decision, at this trial, to preclude him from contesting that point. The defendant also 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.

a. Sufficiency of the evidence supporting the conviction of murder. In determining whether the evidence was sufficient

[10] In Commonwealth v. Zanetti, 454 Mass. 449, 467 (2009), we adopted the use of the term "accomplice liability" for individuals who did not actually kill the victim, but who participated in some way in the killing, with the shared intent that it be accomplished. We recognize that, since our decision in that case, we have at times returned to the language of "joint venture," and at times used the phrase "accomplice liability." Given the simultaneous use of both terms in our subsequent decisions, with the language in Zanetti becoming less and less prevalent, although its reasoning remains controlling, we use both terms as well, consistent with the language of the particular case being discussed.

to sustain the conviction, we consider the evidence in the light most favorable to the Commonwealth, see Latimore, 378 Mass. at 677-678, including issues of credibility, see Commonwealth v. James, 424 Mass. 770, 785 (1997). "A conviction may rest exclusively on circumstantial evidence, and, in evaluating that evidence, we draw all reasonable inferences in favor of the Commonwealth." Commonwealth v. Javier, 481 Mass. 268, 279 (2019), quoting Commonwealth v. Jones, 477 Mass. 307, 316 (2017). Inferences "need only be reasonable and possible and need not be necessary or inescapable." Commonwealth v. Longo, 402 Mass. 482, 487 (1988). A conviction, however, may not "rest upon the piling of inference upon inference or conjecture and speculation." Commonwealth v. Mandile, 403 Mass. 93, 94 (1988).

In this case, there was overwhelming evidence that the shootings were acts of an intentional killing committed with either deliberate premeditation or extreme atrocity or cruelty, and the defendant does not contest that the shooting was a crime of murder in the first degree. In brief, the victim was stalked by two gunmen, shot while he was seated in his vehicle, and shot a second time while he was lying mortally wounded on a sidewalk. See Commonwealth v. Castillo, 485 Mass. 852, 867-868 (2020) (conviction of murder in first degree on theory of extreme atrocity or cruelty requires evidence that defendant caused victim's death by method that surpassed cruelty inherent in

taking life); Commonwealth v. Chipman, 418 Mass. 262, 269 (1994) (murder in first degree on theory of deliberate premeditation requires evidence of resolution to kill after period of reflection).

The essence of the defendant's argument that the evidence was insufficient to convict him of murder in the first degree is the asserted lack of evidence that he was liable for the victim's death as one who aided and abetted a crime. See G. L. c. 274, § 2 (aiding and abetting is punished to same extent as act of "principal felon"); Commonwealth v. Zanetti, 454 Mass. 449, 467 (2009) ("spirit behind the common law as now reflected in the aiding and abetting statute, G. L. c. 274, § 2, which declares the aider and abettor to be as culpable as the chief perpetrator of the offense . . . is to hold the criminal actor who participates in a felony liable as a principle without regard to whether the felony is completed or committed by another" [quotation and citation omitted]). Under the theory of accomplice liability, it was the Commonwealth's burden to prove beyond a reasonable doubt that the defendant knowingly participated with another in the commission of the crime, with the intent required to commit that offense. See Commonwealth v. Rakes, 478 Mass. 22, 32 (2017); Commonwealth v. Britt, 465 Mass. 87, 100-101 (2013).

At the outset, it is important to bear in mind a fundamental limitation on joint venture liability: it does not sweep so broadly as to establish a form of guilt by association. See Commonwealth v. Montalvo, 76 Mass. App. Ct. 319, 330 (2010) ("evidence that a defendant associated with persons who committed the crime does not lead to an inference that he [or she] also participated in the crime"). See, e.g., Commonwealth v. Sherry, 386 Mass. 682, 695 (1982); Commonwealth v. Fancy, 349 Mass. 196, 200 (1965). "[M]ere presence coupled with the failure to take affirmative steps to prevent the crime is insufficient, as is simple knowledge that a crime will be committed, even if evidence of such knowledge is supplemented by evidence of subsequent concealment of a completed crime." Commonwealth v. Ortiz, 424 Mass. 853, 859 (1997). See Commonwealth v. Gonzalez, 475 Mass. 396, 409-410, 416-418 (2016) (insufficient evidence defendant, who was associated with alleged gunmen and had had dispute with victim, participated in crime by driving suspect vehicle, or that she shared lethal intent required for conviction); Commonwealth v. Sephus, 468 Mass. 160, 167 (2014) (conviction may not rest on evidence that merely places defendant at crime scene and shows defendant to be associated with principals).

The Commonwealth need not establish a defendant's precise role in the crime, i.e., whether the defendant acted as a

principal or as an accomplice. Commonwealth v. Lee, 483 Mass. 531, 547 (2019). "[W]hat matters is only that there be proof of . . . the defendant's knowing participation in some manner in the commission of the offense." Commonwealth v. Silva, 471 Mass. 610, 621 (2015). See Commonwealth v. Akara, 465 Mass. 245, 254-256 (2013) (reviewing evidence of defendant's active participation in events leading to victim's death). As we explained in Zanetti, 454 Mass. at 470 (Appendix), a defendant's knowing participation in the commission of the offense

> "may take the form of agreeing to stand by at, or near, the scene of the crime to act as a lookout, or to provide aid or assistance in committing the crime, or in escaping, if such help becomes necessary. The agreement to help if needed does not need to be made through a formal or explicit written or oral advance plan or agreement; it is enough consciously to act together before or during the crime with the intent of making the crime succeed."

See Model Jury Instructions on Homicide 13-14 (2018).

Here, viewed in the light most favorable to the Commonwealth, we conclude that the evidence was sufficient to allow a rational jury to find, beyond a reasonable doubt, that the defendant participated in the shooting with the shared intent to kill the victim. This was established by evidence that (1) the victim was attacked by a group of individuals acting in concert; (2) the defendant was present at the scene of the second shooting, in a position to render aid if necessary, and demonstrated active hostility to the victim through verbal

insults and kicking the mortally wounded victim in the head; (3) the defendant facilitated the second shooter's escape from the scene by supplying the getaway vehicle and an intended place of safety to which to flee; and (4) the defendant attempted to hide the murder weapon.

First, the jury reasonably could have inferred that the victim was set upon by individuals acting in concert, and that the defendant's actions before and after the second shooting indicated that he was part of that group effort. The timeline begins with the defendant's three minute and fifty-five second telephone call to Watson's telephone at 11:39 P.M.[11] Then, at 1:42 A.M., less than three minutes before the shooting, the defendant's telephone placed an unanswered call to Denton's telephone. At 1:44 A.M., a minute before the shooting, the defendant's telephone attempted to call Watson's telephone, but there was no answer. Approximately two and three minutes after the shooting, at 1:47 and 1:48 A.M., Watson placed two unanswered telephone calls to the defendant.[12]

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[11] The times of the calls noted are based on records maintained by the cellular service provider, which are accurate, in contrast to the incorrect time stamps on the surveillance video footage.

[12] The defendant argues that the evidence concerning the calls undermines the Commonwealth's claim that he participated in the shooting. He contends that the telephone calls established that he was not with Watson or Denton in the minutes before the shooting, "the approximate time the government

In Watson, 487 Mass. at 162, we concluded that it was reasonable for the jury to infer that the last two telephone calls, at 1:47 and 1:48 A.M., suggested the defendant's involvement in the shooting. See Commonwealth v. Barbosa, 477 Mass. 658, 667 (2017) (inference of joint participation in crime based on telephone calls with suspected accomplices immediately before and within thirty minutes of shooting). The record does not reveal the content of the defendant's nearly four-minute conversation with Watson at 11:39 P.M., or explain why the defendant called Denton and Watson minutes before the shooting, at 1:45 A.M., or Watson's reason for returning the defendant's calls at 1:47 and 1:48 A.M. Nonetheless, it was reasonable for the jury to have inferred, on the basis of the surveillance video recording and the telephone records, that the codefendants searched for the victim after the show and eventually located him sitting in his parked vehicle around the corner from the nightclub. See Watson, supra at 163. The surveillance video

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suggests some sort of 'reconnaissance' was occurring from the RAV4 Denton was driving that night, and the Lincoln MKX allegedly driven by Watson." It is more reasonable, the defendant suggests, to view this evidence as indicating that he remained at the nightclub while the others drove away without him. We agree with the defendant that it is possible to interpret the evidence in this manner. Our duty, however, is to view the evidence in the light most favorable to the Commonwealth. See Watson, 487 Mass. at 162 (reasonable for jury to infer communications made in crucial minutes concerned shooting).

footage shows two SUVs, consistent with the rented Lincoln MKX and the defendant's sister's Toyota RAV4, going slowly down the street in tandem. Id. at 164. Shortly thereafter, the victim parked his vehicle and, within three minutes, was confronted by the first shooter, who approached on foot. After firing numerous shots, that shooter ran from the victim he had just shot, got into the passenger's side of a vehicle with characteristics matching those of the MKX, which was waiting in the middle of the street, and the vehicle sped away. Id. at 163-164.

Forty seconds later, another individual, presumptively Denton, approached the victim from the opposite direction. A man who was presumably the defendant trailed behind Denton, walking the same path from Blue Hill Avenue and the location of the nightclub, along the sidewalk across the street from where the victim's vehicle was parked, and then crossing the street at an angle toward the victim as Denton fired at the prone victim. The acts of approaching the shooter as he was shooting, then standing beside him as he continued to point the gun at the victim, yelling insults, and kicking the prone victim in the head would have allowed a reasonable juror to decide that the defendant was present to render aid to the shooter if necessary and shared the intent to kill. See Longo, 402 Mass. at 488 (evidence was sufficient for jury to infer participation where

defendant knew of attack from armed principal and was present to lend assistance if necessary).

In addition, the evidence was sufficient for the jury reasonably to have inferred that the defendant facilitated Denton's escape from the crime scene. An individual who acts as a getaway driver or otherwise helps the principal to escape may be convicted as an accomplice to the crime. See Zanetti, 454 Mass. at 467-468, 470 (Appendix). For example, in Commonwealth v. Gomes, 475 Mass. 775, 781-782 (2016), we noted that the jury reasonably could have inferred the defendant's knowing participation in a shooting based, in part, on evidence that "when the shooting ceased, the defendant sped off, quickly removing the shooters from the scene." See Akara, 465 Mass. at 255 (evidence of joint flight supports finding that each confederate was willing and available to assist another if necessary); Commonwealth v. Sokphann Chhim, 447 Mass. 370, 378 (2006) (defendant was "present and available to assist his friends in a continuing assault on the victim or in their getaway"); Commonwealth v. Williams, 422 Mass. 111, 121 (1996) ("joint venture may be proved by circumstantial evidence, including evidence of flight together"); Commonwealth v. Chay Giang, 402 Mass. 604, 608 (1988) (it was "undisputed that the defendant rendered aid to the principals"; "[h]e drove the getaway vehicle").

Here, the surveillance footage showed the shooter and the kicker running together toward Blue Hill Avenue and the nightclub, with the shooter in the lead. The silver Toyota RAV4 that the defendant had driven to the nightclub was parked somewhere out of range of the surveillance camera. Within minutes of the two men running from the scene toward Blue Hill Avenue, however, a RAV4 later learned to have been driven by Denton, with the defendant in the front passenger's seat, was seen being driven away at speeds of up to sixty miles per hour. The vehicle, followed by an investigating officer, was driven to the defendant's family home, where it turned into the driveway. The defendant got out and attempted to run from police.

In addition to inferring that the defendant assisted Denton to escape, the jury were entitled reasonably to infer that the defendant continued to participate in the joint venture by disposing of the weapon Denton had used to shoot the victim. Immediately after the defendant got out of the RAV4, with Smigielski parked in the driveway behind the RAV4, the defendant took off running toward the garage, with Smigielski in pursuit. Although the defendant was able to pull ahead out of Smigielski's view, Smigielski heard the sound of an object falling, and shortly thereafter, officers found a .380 handgun lying on the snow on the other side of a fence behind the garage. Ballistics testing established that the firearm had

shot the projectiles found in the victim's head. See Commonwealth v. Reaves, 434 Mass. 383, 391 (2001) (evidence of defendant's participation in drive-by shooting included "attempt to dispose of both guns used in the attack").

We agree, as the defendant asserts, that "[c]onduct such as flight, or disposing of a weapon, or acting as an accessory through conduct after the fact . . . fail[s] the threshold for sufficiency." Such conduct, occurring after the shooting, itself is insufficient to establish joint venture liability. See Commonwealth v. Simpkins, 470 Mass. 458, 461-462 (2015) (evidence was insufficient to establish accomplice liability where defendant hid murder weapon but Commonwealth could not prove implicit agreement to assist shooter at time of commission of offense). The Commonwealth is required to prove knowing participation with another in the commission of the crime, with the intent required to commit the offense, beyond a reasonable doubt. See Rakes, 478 Mass. at 32.

Here, the evidence of the joint venture between the four codefendants -- the organized search for the victim, using the defendant's vehicle in conjunction with Watson's vehicle, the defendant's actions standing next to Denton at the scene, their joint flight in the defendant's RAV4, and the defendant's efforts to dispose of the murder weapon that he himself had not used -- was sufficient to allow a reasonable juror to infer,

beyond a reasonable doubt, that the defendant participated in the shooting and shared the intent to kill the victim.

The defendant contends that his mere presence at the scene, and his flight with Denton after the shooting, indicated participation after the fact, rather than a shared intent to kill the victim. The crime of being an accessory after the fact requires proof 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 (emphasis added). G. L. c. 274, § 4. In Watson, 487 Mass. at 165-166, we observed, "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." See United States v. Dinkane, 17 F.3d 1192, 1196 (9th Cir. 1994) ("if assistance is rendered while the felony is in progress, individual is guilty as a principal; if felony is no longer in progress, then individual can only be guilty as an accessory after the fact"); 2 W.R. LaFave, Substantive Criminal Law § 13.1 (3d. ed. 2021) ("[an] accessory after the fact, by virtue of his involvement only after the felony was completed . . . [is] not truly an

accomplice in the felony . . . but rather one who has obstructed justice").

The cases upon which the defendant relies in support of his argument that he acted, at most, as an accessory after the fact involve facts that are materially different from the facts in this case. For example, in Commonwealth v. Lopez, 484 Mass. 211, 215-216 (2020), four men, including the defendant, chased the victim into a driveway, where they assaulted him with their fists. The victim was able to escape and scaled a fence to a back yard, where he was fatally stabbed by two assailants, not including the defendant. Id. at 213-214. The two men climbed back over the fence and fled with the defendant. Id. There, the Commonwealth failed to establish that the defendant knowingly participated in the fatal stabbing because "there was insufficient evidence to demonstrate beyond a reasonable doubt that the defendant stabbed the victim or was present at the time of the fatal stabbing [in the back yard]." Id. at 220-221. In Simpkins, 470 Mass. at 460-462, another case the defendant cites, the evidence supported a charge of being an accessory after the fact where the defendant was not present during the shooting but hid the murder weapon after the commission of the crime. Similarly, in Mandile, 403 Mass. at 95, 100, the evidence suggested that the defendant "(1) participated in stealing guns to aid in the commission of some future offense,

(2) was present during the commission of the murder [but did not enter the victim's house], (3) knew the passenger was armed, (4) was the driver of a getaway car, and (5) attempted to conceal the crime through the disposal of the murder weapon and inconsistent statements to the police." The evidence nonetheless was insufficient to demonstrate shared intent to kill because the defendant, who had remained in the getaway vehicle, was unaware of the conduct of his accomplice, and there was no evidence of hostility between the accomplice or the defendant and the victim. Id. at 101.

The defendant argues that the shooting was "a spontaneous event that [he] became aware of after it was well under way, coming upon the event as it unfolded, but never putting himself in a position to facilitate or contribute to the victim's death." After Denton shot the victim in the head, the defendant maintains, he merely "jog[ged] around the back of [the victim's] vehicle to look, and then appear[ed] to lightly kick the victim, who is dead, on the ground." Although "distasteful," the kick to the head was not evidence of a shared lethal intent.

The jury were not required to accept the defendant's explanation of how he came to kick the victim in the head. See Commonwealth v. Merola, 405 Mass. 529, 533-534 (1989) (prosecution was not required to "exclude every reasonable hypothesis of innocence, provided the record as a whole supports

a conclusion of guilt beyond a reasonable doubt"). Having been presented with sufficient evidence of the defendant's knowing participation in the crime to meet the Latimore standard, it was the province of the jury to determine whether the defendant crossed "the line that separates mere knowledge of unlawful conduct and participation in it." See Commonwealth v. Cerveny, 387 Mass. 280, 287 (1982).

Aside from evidence of his participation in the shooting, the key question here is whether the defendant shared the shooter's intent to kill the victim. An individual's intent is a matter of fact, which is often not susceptible of proof by direct evidence, so resort frequently is made to proof by inference from all of the facts and circumstances developed at trial. See Commonwealth v. Soares, 377 Mass. 461, 470, cert. denied, 444 U.S. 881 (1979) ("The jury may infer the requisite mental state from the defendant's knowledge of the circumstances and subsequent participation in the offense"). The critical inquiry is whether the jury properly could have inferred beyond a reasonable doubt that the defendant shared another's intent to kill "or whether, to the contrary, the Commonwealth only offered evidence of mere association, coupled with consciousness of guilt." See Mandile, 403 Mass. at 100.

In some cases, lethal intent may be inferred from a defendant's own conduct, such as bringing a gun to the scene of

a shooting but not firing the fatal shot. See Gonzalez, 475 Mass. at 416. In other cases, "intent has been inferred from evidence that a defendant (a) observed a coventurer demonstrate or express lethal intent (e.g., by producing a gun) and (b) thereafter took some step to help carry out that intent." Id. at 416-417. In reviewing the sufficiency of the evidence of intent, we consider "the whole transaction of which the crime was a part," because "[e]vidence of the attendant circumstances may aid the jury in reaching a verdict by giving them the complete picture." Longo, 402 Mass. at 489, quoting Commonwealth v. Durkin, 257 Mass. 426, 428 (1926).

The evidence here supported a reasonable inference, beyond a reasonable doubt, that Denton arrived at the scene for the purpose of killing the victim. It is clear from the surveillance footage that an individual -- later learned to be the defendant after his flight from the scene -- observed his accomplice "demonstrate or express lethal intent," Gonzalez, 475 Mass. at 416-417. While crossing the street, the defendant watched Denton (who also was identified after he got out of the getaway vehicle in front of Smigielski) wield a firearm, manipulate the slide, and aim at the fallen victim. Thereafter, the defendant took some steps to carry out that lethal intent by moving to Denton's side to lend encouragement, facilitating Denton's escape in the RAV4, and disposing of the murder weapon.

See Barbosa, 477 Mass. at 667 ("defendant's flight from the scene less than a minute after the shooting . . . , and telephone calls with his suspected coventurers immediately before the shooting and in the thirty minutes after, allow the reasonable inference of the defendant's participation in and shared intent to commit the murder").

The defendant argues that his act of kicking the victim in the head cannot serve as a basis to infer an intent to kill. We do not agree. A jury may consider the defendant's conduct, including any overt expression of hostility toward the victim, in assessing his state of mind. See Commonwealth v. Philbrook, 475 Mass. 20, 26 (2016). The case of Commonwealth v. Norris, 462 Mass. 131 (2012), is instructive. There, after the defendant and the victim fought over the victim's gold chain, the victim produced a handgun and warned the defendant and an accomplice to "get back." Id. at 133-134. The defendant complied. Id. at 134. The accomplice then fired his gun six times at the victim, striking him in the head. Id. The head wound would have caused death immediately or within seconds. Id. at 134-135. The defendant "walked over to [the victim] as he lay motionless on the ground and kicked him in the face." Id. at 135. We held that, considered as a whole, the evidence was sufficient for a rational jury to find a shared lethal intent beyond a reasonable doubt. Id. at 139. "Most tellingly,

after [the accomplice] shot [the victim] six times and [the victim] lay on the ground motionless and bleeding from the head, [the defendant] walked over and kicked [the victim in the face]." Id. at 140. "This kick, considered with the evidence just summarized, clearly permitted the inference that [the defendant] wanted [the victim] to die." Id.

Here, similarly, the jury were entitled to consider the evidence that the defendant kicked the victim in the head and called him a "dirty motherfucker" as probative of a shared intent to kill. In Commonwealth v. Casale, 381 Mass. 167, 173-174 (1980), for example, we held that the jury reasonably could have inferred the requisite shared mental state from the circumstances, including evidence that the defendant "harbored hostility towards [the victims]." See Mandile, 403 Mass. at 101 (in case of murder involving group melee, court examines evidence of hostility between defendant and victim); Longo, 402 Mass. at 487 (inference of requisite mental state was drawn from evidence of hostility between defendant and victim).

b. Instructions on joint venture liability. The defendant contends that the judge erred in instructing the jury that the Commonwealth was not required to establish "how" the defendant knowingly participated in the shooting. He also argues that the judge "unwisely" deviated from the instructions in Zanetti, 454 Mass. at 470 (Appendix), by requiring only that the jury find

the defendant had some level of "involvement" in the crime. These errors, the defendant contends, substantially diminished the Commonwealth's burden of proof. Because the defendant did not object at trial, we review under the standard of a substantial likelihood of a miscarriage of justice. Commonwealth v. Wright, 411 Mass. 678, 682 (1992), S.C., 469 Mass. 447 (2014).

As the defendant points out, the judge supplemented the instructions set forth in the Appendix in Zanetti, 454 Mass. at 470, and adopted by this court in its Model Jury Instructions on Homicide. She added the following:

> "The Commonwealth is not required to prove exactly how a joint venturer participated in the murder or which of the two or more did the actual killing. A jury may convict a defendant of murder without deciding whether he or she was the shooter or an accomplice, as long as the jury finds, beyond a reasonable doubt, that the defendant and another, either one of whom could have fired the fatal shot, were involved in a joint venture during which the alleged victim was killed."

In reviewing the adequacy of a judge's final charge, we consider the totality of the instructions and interpret the instructions "as would a reasonable juror." Commonwealth v. Kelley, 470 Mass. 682, 697 (2015). "Trial judges have considerable discretion in framing jury instructions, both in determining the precise phraseology used and the appropriate degree of elaboration" (quotation and citation omitted). Commonwealth v. Ortiz, 487 Mass. 602, 612 (2021). Although we

have urged trial judges to adhere to the Model Jury Instructions on Homicide, and to "proceed with caution" when not doing so, "judges are not required to deliver their instructions in any particular form of words" (citation omitted). Commonwealth v. Howard, 479 Mass. 52, 61 (2018).

We discern no substantial likelihood of a miscarriage of justice in the judge's instruction that "[t]he Commonwealth is not required to prove exactly how a joint venturer participated in the murder or which of the two or more did the actual killing." That was an accurate statement of the law apparently drawn from Commonwealth v. Deane, 458 Mass. 43, 50 (2010). See Barbosa, 477 Mass. at 671; Commonwealth v. Williams, 475 Mass. 705, 712 (2016). Such language is meant to inform the jury that joint venture liability is premised on knowing participation in a crime "even when there is differing evidence that the defendant committed the crime as a principal or as an accomplice." See Zanetti, 454 Mass. at 466-467. Although the first part of the sentence indeed does have the potential to diminish the Commonwealth's burden of establishing that the defendant knowingly participated in the crime, we do not evaluate "bits and pieces" of instructions "removed from their context" (citation omitted). Commonwealth v. Perez, 390 Mass. 308, 313 (1983). The judge explained that it is the

Commonwealth's burden to prove knowing participation beyond a reasonable doubt, and that

> "knowing participation by the defendant may take many forms. It may take the form of personally committing the acts that constitute the crime or of aiding or assisting another in those acts. It may take the form of the defendant asking or encouraging another person to commit the crime or of helping to plan the commission of the crime. Alternatively, it may take the form of the defendant agreeing to stand by, at, or near the scene of the crime, to act as a lookout or to provide aid or assistance in committing the crime or in escaping, if such help becomes necessary."

Considered in the context of the over-all instruction, the phrase did not diminish the Commonwealth's burden of proof.

Nor do we discern a substantial likelihood of a miscarriage of justice in the judge's use of the word "involved." The defendant argues that this language provided the jury with a watered down alternative to the key phrase "knowing participation." This view takes the phrase out of context. The judge used the word "involved" as a way to describe a cooperative effort between two individuals, i.e., that the defendant and an alleged accomplice were "involved" in a joint effort. We used the same language of being "involved" with another to describe a joint venture in Akara, 465 Mass. at 258. There, we said that "[a] jury may convict a defendant of murder without deciding whether he was the shooter or an accomplice, as long as the jury finds beyond a reasonable doubt that the defendant and another (either one of whom could have fired the

fatal shot) were involved in a joint venture during which the victim was killed" (quotation and citation omitted). Id. See Commonwealth v. Williams, 450 Mass. 645, 653 (2008) (evidence was sufficient to believe others were involved in victim's shooting); Newman v. Commonwealth, 437 Mass. 599, 601 (2002) (discussing evidence of defendant's involvement in robbery).

In sum, the judge's instructions, considered as a whole, adequately described the Commonwealth's burden to prove that the defendant knowingly participated in the shooting.

c. Sufficiency of evidence to support conviction of unlawful possession of a firearm. The defendant argues that the evidence introduced at his first trial was insufficient to sustain the conviction of possession of a firearm without a license.

To convict an individual of unlawful possession of a firearm, the Commonwealth must prove, beyond a reasonable doubt, that the defendant knowingly possessed an object, and that the object met the legal requirements of being a firearm as defined in G. L. c. 140, § 121. See Commonwealth v. Young, 453 Mass. 707, 713 n.9 (2009); G. L. c. 269, § 10 (a). Possession may be either actual or constructive. See Commonwealth v. Romero, 464 Mass. 648, 652 (2013). In this case, the Commonwealth alleged that the defendant actually had possessed the firearm and had thrown it away as he was being chased by Smigielski.

The defendant contends that "[t]he notion that [he] grabbed the .380 from the RAV4, possessed it when he stepped out (despite Smigielski not seeing it), is unsupported." Rather, the defendant argues, the evidence implicated Denton because police "found the firearm not far from the location of [Denton's] arrest." The defendant points out that the only evidence to support the suggestion that he tossed the .380 is the word of a "dishonest detective."

In considering the evidence in the light most favorable to the Commonwealth, "we do not weigh the supporting evidence against conflicting evidence, nor consider the credibility of the witnesses." Commonwealth v. Bacigalupo, 455 Mass. 485, 489 (2009). Here, the evidence established that the victim was shot with a .380 caliber firearm. The shooter and the man who kicked the downed victim ran from the scene on foot, and they were next spotted "leaving the area" in a small SUV. Having been alerted to the shooting, and while heading to the scene, Smigielski encountered and followed the fleeing vehicle until it turned into the driveway of what was learned to be the defendant's house. The defendant got out of the RAV4 from the front passenger's seat and ran into the back yard. Smigielski chased him and then lost sight of him, Smigielski but heard "an object hit the ground." Minutes later, another police officer retraced the defendant's path and located a .380 caliber handgun lying on

top of the snow. Ballistics testing established that this firearm was the same weapon that had fired the fatal rounds.

Although the defendant argues that the evidence was insufficient to show that he, and not someone else, had thrown the weapon on top of the snow, the evidence permitted a reasonable inference that the defendant ran into the back yard behind the garage, carrying the murder weapon, and then threw it in the snow while he was being chased by police. "Proof of possession and knowledge may be established by circumstantial evidence and the inferences that can be drawn therefrom." Commonwealth v. Gouse, 461 Mass. 787, 795 (2012). See, e.g., Commonwealth v. Jefferson, 461 Mass. 821, 824-825, 826 (2012) (reasonable inference from location of firearm in middle of walkway that it only recently had landed there); Commonwealth v. Ralph R., 100 Mass. App. Ct. 150, 163 (2021) (police recovered firearm in area within juvenile's path of flight); Commonwealth v. Grayson, 96 Mass. App. Ct. 748, 751 (2019) (firearm was found next to fence along defendant's flight path); Commonwealth v. Duncan, 71 Mass. App. Ct. 150, 153-154 (2008) (defendants were only persons in immediate vicinity of firearm).

d. Limitations on defendant's ability to challenge firearm evidence. The defendant argues that the judge erred in ruling that the defendant was estopped from arguing at the second trial that he had not possessed the .380 caliber firearm.

Some discussion of the proceedings at the first trial is necessary to understanding the defendant's argument. As stated, the first jury convicted the defendant of unlawful possession of a firearm and could not reach a verdict on the murder indictment. The jury also convicted Denton of unlawful possession of a firearm. It was the Commonwealth's theory at the first trial that the defendant had possessed the .380 caliber handgun found behind the garage, and that Denton had possessed the .25 caliber handgun found near the driveway. The Commonwealth did not move for sentencing following the codefendants' convictions of the firearms offenses, and the defendant did not seek interlocutory review to challenge the sufficiency of the evidence. See Neverson v. Commonwealth, 406 Mass. 174, 175-176 (1989).

Prior to the second trial, Denton filed a motion in limine to exclude evidence that he had possessed the .25 caliber handgun. Denton maintained that he would be unfairly prejudiced by the introduction of evidence that he had possessed a firearm that was not the murder weapon. See Commonwealth v. Barbosa, 463 Mass. 116, 122 (2012). The Commonwealth then moved to introduce that evidence. The Commonwealth argued that evidence of a second firearm would support its theory that Denton and the defendant shared an intent to kill, in that both men likely arrived at the scene armed. The Commonwealth maintained that,

after the vehicle that was fleeing the area stopped in the driveway, one codefendant disposed of one of the guns (not necessarily the weapon he had possessed at the time of the shooting), and the other defendant threw away the other gun.

The judge held that evidence of a second firearm would invite unfair speculation as to the defendant's intent. She noted that Denton had been charged with unlawful possession of the .25 caliber handgun and convicted of that offense. The judge observed, "There's no evidence that [the defendant] had any possession or any knowledge of that gun in this case." Given the speculative nature of the Commonwealth's theory of two men and two guns, the judge allowed Denton's motion to exclude the .25 caliber gun.

In opening statements, Denton's counsel argued that the police rushed to judgment and arrested her client without legitimate grounds. She also said that the jury should not credit Smigielski's anticipated testimony that the defendant threw the .380 caliber firearm in the snow. Defense counsel urged the jury to scrutinize carefully the evidence that the defendant had disposed of the murder weapon. The Commonwealth then argued that defense counsel had opened the door to the introduction of evidence that police had had probable cause to arrest both defendants for unlawful possession of a firearm. The judge denied the Commonwealth's motion. She nonetheless

admonished counsel to "avoid an insinuation that these guys . . . didn't get near the gun . . . because . . . they were convicted of these charges." Later, the judge ruled that the defendant was "estopped from denying that he possessed the .380."

On appeal, the defendant argues that the doctrine of estoppel was not applicable because the Commonwealth did not move for sentencing following the first trial, and the defendant therefore did not have an opportunity to seek appellate review. As such, the conviction was not final, and the doctrine of estoppel was inapplicable. See Commonwealth v. Stephens, 451 Mass. 370, 375 (2008) ("doctrine of collateral estoppel provides that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties"). See also Commonwealth v. Williams, 431 Mass. 71, 74 (2000); Commonwealth v. Lopez, 383 Mass. 497, 499 (1981). The Commonwealth maintains that the defendant waived his right to prompt sentencing by agreeing to defer sentencing on the firearm charge. The Commonwealth argues that this resulted in a delay of the right to appeal and that, "[b]y doing this, [the defendant] forwent the final judgment of his firearm conviction." See Commonwealth v. Dascalakis, 246 Mass. 12, 19 (1923) (in criminal case, sentencing is final judgment).

At trial, the defendant objected to the judge's ruling on the ground that the prior firearm conviction was tainted by the ineffective assistance of trial counsel. He did not challenge the finality of the conviction. See Commonwealth v. McDonagh, 480 Mass. 131, 137 (2018) (only timely and precise objection to admission of evidence, or judge's ruling, will preserve asserted error for appellate review). Accordingly, we review to determine whether there was a substantial likelihood of a miscarriage of justice. See Wright, 411 Mass. at 682.

Notwithstanding the judge's admonition about avoiding any suggestion that the defendant had not had a gun, the defendant was able to contest the evidence that he had been in possession of the .380 firearm. On cross-examination, Smigielski testified that he had not seen a firearm in the defendant's hand and did not observe the defendant throw an object. Defense counsel also pointed out that Smigielski did not inform the responding police officers that he had heard an object thrown to the ground and that it landed with an audible thud. One of the crime scene technicians testified that he had not observed any tracks in the snow indicating that the firearm had been tossed, had tumbled, or had rolled.

Moreover, in his closing argument, defense counsel argued that the defendant had not discarded the firearm in the snow:

> "Smigielski should be indicted. Smigielski says he heard a thump or something, heard a heavy object hit the ground. It's funny because the officer that found this .380 in Lewiston in some yard, he says he never told him he heard any sound. He says to Smigielski he's the one that found the gun. Smigielski never told him he heard any sound. 'I heard a thump.' Snow? Look it, you've been at the scene, right? You saw the garage, you saw the place -- If my client drew that, he's gone over the garage or across by [thirty] feet. The gun's going to roll. Look at the picture. I asked the person that found it. You know, I asked the lab person, 'Did you see any marks on the snow to indicate this weapon rolled?' He said, 'No.' Because my client never threw the gun."

Defense counsel suggested that the object in the defendant's hand had been a cellular telephone, not a handgun: "We know [the defendant's] got a phone because Smigielski said that's the only thing he saw. He never saw him with a gun, never saw him throw a gun."

Because the defendant was able to challenge the Commonwealth's theory that he had possessed the murder weapon, even if the judge erred in concluding that the defendant was estopped from making such a challenge, there was no substantial likelihood of a miscarriage of justice, as the defendant was able to accomplish essentially all that he would have accomplished had the judge not ruled on the issue of estoppel.

e. Relief pursuant to G. L. c. 278, § 33E. Having carefully reviewed the entire record, pursuant to our duty under G. L. c. 278, § 33E, we discern no reason to order a new trial or to reduce the degree of guilt.

Judgments affirmed.