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SJC-13527

COMMONWEALTH vs. SCOTT MORRISON.

Norfolk. March 4, 2024. - October 8, 2024.

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

Kidnapping. Practice, Criminal, Required finding, Instructions to jury. Statute, Construction. Evidence, Joint venturer, Intent. Joint Enterprise. Intent. Words, "Thereby."

Indictments found and returned in the Superior Court Department on July 31, 2014, and April 29, 2016.

The cases were tried before Robert C. Cosgrove, J.

After review by the Appeals Court, 103 Mass. App. Ct. 263 (2023), the Supreme Judicial Court granted leave to obtain further appellate review.

Timothy J. Bradl for the defendant.  
Pamela Alford, Assistant District Attorney, for the Commonwealth.

GEORGES, J. This appeal concerns whether aggravated kidnapping under G. L. c. 265, § 26, third par., requires a defendant to inflict serious bodily injury using the dangerous

weapon with which he is armed, or whether serious bodily injury may be inflicted through other means. Pursuant to the rule of lenity, we conclude the dangerous weapon with which a defendant is armed must be used to inflict serious bodily injury to sustain a conviction of aggravated kidnapping. The jury in this case were instructed to the contrary, resulting in prejudice to the defendant. Accordingly, the defendant's conviction of aggravated kidnapping cannot stand.

1. Background. a. Facts. The jury could have found the following facts.

i. The kidnapping. The defendant's involvement in the kidnapping can be traced back to a jealousy-fueled scheme devised by James Feeney. Feeney and the victim, James Robertson, were romantically involved with the same woman, who ultimately "chose" the victim over Feeney. As a result, Feeney plotted revenge against Robertson.

To aid him in his plot, Feeney enlisted the help of two confederates, his cousin Alfred Ricci and the defendant, who was Feeney's car mechanic.<sup>1</sup> Feeney was aware that the victim had been ordered to undergo random drug testing. Using this knowledge to his advantage, Feeney hatched a plan to kidnap the victim. The plan called for the defendant and Ricci, while

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<sup>1</sup> Ricci testified for the prosecution as part of a cooperation and plea agreement.

masquerading as probation officers, to go to the victim's home, tell the victim they were taking him in for a random drug test, but then bring him to Ricci's garage where Feeney would be waiting to "question" and "scare" the victim. In preparation for the kidnapping, Feeney obtained police records concerning the victim, the victim's photograph, a gun, a police badge, and a pair of handcuffs.<sup>2</sup> Additionally, at Feeney's direction, Ricci and the defendant bolted a metal chair to the floor of Ricci's garage "so it would look real."

At around 10:30 A.M. on January 1, 2014, the defendant picked up Ricci in the defendant's car. As planned, Ricci and the defendant were dressed with the intention of impersonating probation officers; the defendant wore a dark coat, a police badge on his belt, and a black gun in a holster on his waist. In the front passenger seat was a black duffel bag, with Ricci taking the back seat.

After driving to the victim's home, where the victim lived with his parents, the defendant parked across the street from the house and grabbed the victim's police records that Feeney had obtained. The defendant then got out of the vehicle and

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<sup>2</sup> Feeney obtained these materials from Michael Schoener, a Dedham police officer to whom Feeney supplied drugs. See Commonwealth v. Schoener, 491 Mass. 706, 709 (2023). Schoener was charged and convicted of being an accessory before the fact to kidnapping, G. L. c. 265, § 26; we affirmed his conviction. See id. at 707, 729.

went to the victim's door. Once the victim came outside, the defendant indicated he was there to take the victim to a site for random drug testing and displayed the police paperwork. The victim briefly went back into the house and told his parents that he had to go with the "constables" to take a random drug test. When the victim's father asked how the victim knew that the men were constables, the victim said they "had guns and badges and paperwork."

After the victim changed clothes -- putting on jeans, a sweatshirt, and sneakers -- he went back outside, followed by his mother. The victim asked if the testing was "for court," and the defendant answered affirmatively. When the victim asked where they were going, the defendant responded "Dedham."<sup>3</sup> After the victim's mother asked if the defendant would bring the victim home, the defendant "kinda smirked" and assured her: "Yeah. We'll bring him home." The defendant then seated the victim in the rear of the car, where Ricci placed him in handcuffs, and drove off.

Instead of driving to Dedham, the defendant drove to Ricci's house in Canton as Feeney instructed, where Feeney was waiting for them in a car parked in the driveway. The defendant grabbed the black duffel bag from his own car and handed it to

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<sup>3</sup> The defendant had previously served jail time in Dedham.

Feeney. At Feeney's instruction, the defendant and Ricci removed the victim from the car, brought him into the garage, and sat him down on the metal chair they had fastened to the floor.

Feeney then entered the garage wearing a black ski mask and carrying the black duffel bag. He placed the duffel bag down near the metal chair and proceeded to shackle the victim's ankles to the chair. Ricci saw a black police baton on top of the duffel bag; at trial, he could not recall whether the baton was in Feeney's hand before Feeney dropped the bag. Feeney told Ricci and the defendant to leave and that no one was to come into the garage.

Upon leaving the garage, Ricci and the defendant smoked cigarettes in front of Ricci's house and did not hear any sounds coming from the garage. They then went to a hardware store a short distance away. When the pair returned from the store, Feeney's car was still parked in the driveway. The two men worked on another car that was also parked at Ricci's house for about twenty minutes. Ricci then walked by the garage and heard an "oomph" sound coming from within.

At trial, Ricci recalled that, after completing work on the car, the defendant left to repair another car elsewhere. Once the defendant left, Feeney emerged from the garage and again told Ricci that no one was to enter the garage. At some point,

Ricci saw Feeney get in his car and leave. Ricci went inside the house to join his family members, who were celebrating the new year. While inside the house, Ricci received two or three phone calls from Feeney. During one of the calls, Feeney told Ricci he wanted to question the victim more, "rough him up a little bit," and then "drop him off at the end of the street."

Later in the evening, at around 11:10 P.M., Feeney called again and asked Ricci to "give him a hand." Ricci responded that he could not help because he was spending time with his cousin, who was going to Florida the next day, and suggested that Feeney call the defendant instead.

After Ricci's cousin left at around 12:25 A.M., Ricci came out of the house, saw Feeney's car in the driveway, and entered the garage. There, he observed Feeney standing over the victim's dead body, which was partially wrapped in a tarp, along with the defendant standing to the right of the body. Feeney removed the victim's claddagh<sup>4</sup> ring and put it in a pocket of the victim's jeans.

After Feeney indicated they needed to dispose of the victim's body, Ricci and the defendant carried the body to Feeney's car and loaded it in the trunk. With the defendant and

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<sup>4</sup> A claddagh is "an Irish design (as on a ring) of two hands holding a crowned heart that symbolizes friendship, loyalty, and love." Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/claddagh> [<https://perma.cc/E5YW-QZ3L>].

Ricci as passengers, Feeney drove the car toward the towns of Walpole and Norfolk. Eventually, Feeney stopped the car in a wooded area and directed Ricci and the defendant to dump the body there. The defendant and Ricci exited the car, dragged the body into the woods using the tarp, and covered it with branches and leaves. After the defendant and Ricci returned to the car, Feeney drove them back to Ricci's home. During the drive, Feeney told Ricci and the defendant: "Keep your mouth shut if you know what's good for you."

ii. The investigation. On the day of the kidnapping, after waiting to hear from the victim, members of his family began "calling his cell phone constantly" but did not get an answer. The victim's father then began calling jails, hospitals, and police stations. The next day, the victim's father reported the victim as missing to the police. Two days after the kidnapping, on January 3, State police became involved in the investigation.

During the investigation, the police interviewed people close to the victim, including his parents and his romantic partner. From these interviews, the police learned of Feeney's connection to the defendant, and on January 9, police interviewed Feeney. During his interview, Feeney told police he was at his apartment on the day of the kidnapping and then

traveled later that day to his mother's house in Dedham. Feeney also told police the defendant was his mechanic.

On February 27, 2014, Dedham and State police officers searched Feeney's apartment pursuant to a warrant. Of note, the officers seized a black duffel bag containing a black police baton, handcuffs, leg irons, zip ties, packaging from the zip ties, and a pink rag. Later, the police baton, the inside and outside of the black duffel bag, and a red-brown stain on the outside of the zip tie packaging all tested positive for the presence of blood. Additionally, swabs taken from the police baton and the red-brown stain on the zip tie packaging subsequently yielded deoxyribonucleic acid (DNA) profiles that matched the victim's DNA profile.

In addition to interviewing Feeney, the police also conducted several interviews with Ricci and the defendant. The defendant admitted to the police that he was friends with Feeney but denied having been with him on the day of the kidnapping. Ricci also initially denied being with Feeney on the day of the kidnapping. However, during a subsequent interview, Ricci told police portions of what occurred the day of the kidnapping, though he did not disclose details about disposing of the victim's body. After this interview, Ricci, Feeney, and the defendant were arrested. Despite these arrests, however, the



victim's whereabouts remained unknown for nearly two years after his disappearance.

On December 26, 2015, hunters discovered a human skull in a wooded area and called the police. Responding officers searched the area where the skull was found. Nearby, they discovered a pelvic bone, a sneaker, and a disintegrated pair of jeans with a claddagh ring in one of the pockets. Additional searches of the area were conducted into 2016. During these searches, investigators discovered other bones, such as a lower jawbone, multiple ribs, numerous vertebrae, three long bones, a scapula, and a clavicle. Investigators also found other clothing, including a sweatshirt, a pair of tattered boxer shorts, and socks. Lastly, investigators located various items, including a casino rewards card in the victim's name, a bank card in the victim's name, a piece of duct tape, and three cigarette butts near where the remains were found.

Comparing the skull and jawbone to the victim's dental records, a forensic odontologist identified the remains as those of the victim. The victim's cause of death could not be determined due to the decomposition of the remains. As only bones were recovered, the medical examiner had "difficult[y] . . . evaluat[ing] any kind of injury to the soft tissues." There were some "defects" around the nasal bone area that could

have been a fracture; however, the medical examiner could not determine whether the damage occurred before or after death.

b. Procedural history. The defendant was indicted for kidnapping, G. L. c. 265, § 26,<sup>5</sup> and conspiracy, G. L. c. 274, § 7. After the victim's body was discovered, additional indictments were issued charging the defendant with murder, G. L. c. 265, § 1, and aggravated kidnapping, G. L. c. 265, § 26, third par.

At trial, after the Commonwealth rested its case, the defendant moved for a required finding of not guilty on the aggravated kidnapping charge, arguing that the dangerous weapon with which a defendant is armed must also be used to inflict the serious bodily injury required under G. L. c. 265, § 26, third par. The trial judge denied the motion, reasoning the natural reading of the statute does not require the actor to use the same weapon to kidnap and to inflict serious bodily injury.

The defendant also objected to the jury instructions on the same ground. The judge overruled his objection and instructed the jury that, to support a conviction of aggravated kidnapping, the Commonwealth must prove "the defendant committed the kidnapping while armed with a dangerous weapon" and "inflicted serious bodily injury upon [the victim]" but "[t]he Commonwealth

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<sup>5</sup> The kidnapping charge was ultimately dismissed as a lesser included offense of aggravated kidnapping.

is not required to prove that the defendant used the dangerous weapon to inflict the serious bodily injury -- the two elements are independent of each other."

The jury found the defendant guilty of involuntary manslaughter, as a lesser included offense to the charge of murder in the first degree, as well as conspiracy to kidnap and aggravated kidnapping.<sup>6</sup> The defendant was sentenced to from twenty-five to thirty years in State prison on the aggravated kidnapping conviction, and concurrent sentences of from six to eight years and from four to five years on the manslaughter and conspiracy convictions, respectively.

After the defendant appealed, a divided Appeals Court panel affirmed his aggravated kidnapping conviction, reasoning the language of the kidnapping statute did not require serious bodily injury to be inflicted by means of the dangerous weapon to support a conviction of aggravated kidnapping. See Commonwealth v. Morrison, 103 Mass. App. Ct. 263, 264, 267-269 (2023). The dissent, however, concluded that, because the plain language and legislative history of the statute is ambiguous on

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<sup>6</sup> Feeney was tried jointly with the defendant and found guilty of murder in the first degree, aggravated kidnapping, and conspiracy to kidnap. Feeney appealed and subsequently filed a motion for a new trial, which we remitted to the Superior Court. Feeney's appeal is stayed pending a decision on the motion for a new trial. See Commonwealth vs. Feeney, SJC-13163.

this issue, the rule of lenity should apply. Id. at 273-280 (Sacks, J., dissenting in part).

We allowed the defendant's application for further appellate review, limited to the issue of the construction of G. L. c. 265, § 26, third par.

2. Discussion. The defendant raises two interrelated claims regarding his aggravated kidnapping conviction. He argues his motion for a required finding of not guilty should have been allowed on the aggravated kidnapping charge, and that the trial judge erred by instructing the jury that "[t]he Commonwealth is not required to prove that the defendant used the dangerous weapon to inflict the serious bodily injury," rather than charging that the Commonwealth is required to prove as much.

Both arguments hinge on the proper construction of G. L. c. 265, § 26, third par.

a. The kidnapping statute. We review questions of statutory interpretation de novo. See Commonwealth v. James, 493 Mass. 828, 834 (2024). In doing so, we begin our analysis by looking to the statute's language and endeavor to give effect to the plain and ordinary meaning of each word, not rendering any word superfluous. See Commonwealth v. Vigiani, 488 Mass. 34, 36 (2021). "[W]e derive the words' usual and accepted meaning from sources presumably known to the statute's enactors,

such as their use in other legal contexts and dictionary definitions" (citation omitted). Id.

Here, G. L. c. 265, § 26, third par., provides, in relevant part, that a person who "commits [kidnapping] while armed with a dangerous weapon and inflicts serious bodily injury thereby upon another person" shall be punished (emphasis added).<sup>7</sup> To resolve this case, we must discern the meaning of the word "thereby." Specifically, we must determine whether "thereby" refers to the entire phrase "[kidnapping] while armed with a dangerous weapon" or instead refers only to the "dangerous weapon."

We turn first to dictionary definitions and other sources presumably known by the Legislature. See Vigiani, 488 Mass. at 36. The word "thereby" is an adverb, defined as "by that" or "by means of that." Random House College Dictionary 1363 (rev. ed. 1984). See Morrison, 103 Mass. App. Ct. at 268. Therefore, if we were to replace "thereby" with either "by that" or "by means of that," the third paragraph of the kidnapping statute could be read as: "Whoever commits [kidnapping] while armed with a dangerous weapon and inflicts serious bodily injury [by that or by means of that] . . . shall be punished . . . ."

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<sup>7</sup> General Laws c. 265, § 26, third par., also prohibits kidnapping aggravated by sexual assault. See Commonwealth v. Rodriguez, 83 Mass. App. Ct. 267, 270 (2013). The Commonwealth did not proceed under this theory.

G. L. c. 265, § 26, third par. The question then becomes which antecedent<sup>8</sup> "that" is referring to: the entire phrase "[kidnapping] while armed with a dangerous weapon" or just "dangerous weapon."

The answer to this question is not immediately clear. As the dissent in the Appeals Court explained:

"If we substitute [the entire phrase] . . . the provision would read, 'whoever commits kidnapping while armed with a dangerous weapon and inflicts [serious bodily injury] by kidnapping [while armed with a dangerous weapon] upon another person . . . shall be punished.' . . . [This interpretation] does not require that the [serious bodily injury] be inflicted by the dangerous weapon, and it is plausible.

"But if instead we substitute [only] 'dangerous weapon' . . . the provision would read, 'whoever commits kidnapping while armed with a dangerous weapon and inflicts [serious bodily injury] by [means of that] dangerous weapon upon another person . . . shall be punished.' This is the defendant's interpretation. It does require that the [serious bodily injury] be inflicted by the dangerous weapon, and it, too, is plausible." (Footnote omitted.)

Morrison, 103 Mass. App. Ct. at 274 (Sacks, J., dissenting in part). Because both interpretations are plausible, the provision is ambiguous.

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<sup>8</sup> An antecedent is "a substantive word, phrase, or clause whose denotation is referred to by a pronoun that typically follows the substantive (such as John in 'Mary saw John and called to him')" (emphasis in original). Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/antecedent> [<https://perma.cc/K2PQ-LBLK>]. In the example, the pronoun "him" refers back to "John," which is the antecedent basis.

Generally, where a statute is unclear, we may then "turn to the history of the statute" for clarity. Commonwealth v. Hamilton, 459 Mass. 422, 433 (2011). We have conducted a comprehensive review of the kidnapping statute's legislative history and find the Legislature's intent behind the inclusion of the word "thereby" in the third paragraph insufficiently clear.<sup>9</sup>

When, as here, we cannot discern the legislative intent behind ambiguous language in a criminal statute, the rule of lenity requires that we give the defendant "the benefit of any rational doubt" and resolve any ambiguity in favor of the defendant (citation omitted). Commonwealth v. Rossetti, 489 Mass. 589, 599 (2022). Accordingly, we hold that G. L. c. 265, § 26, third par., requires the Commonwealth to prove that the dangerous weapon with which a defendant was armed was used to inflict serious bodily injury. In other words, we read the relevant portion of the statute to mean: "[w]hoever commits

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<sup>9</sup> What little can be gleaned from the legislative history is far from conclusive. For example, as explained by the Appeals Court dissent, a floor amendment in the House of Representatives contained proposed statutory language different from the final law. See Morrison, 103 Mass. App. Ct. at 278-279 (Sacks, J., dissenting in part). Among the differences, the floor amendment omitted the word "thereby" in the provision prohibiting aggravated kidnapping. Id. Although this history is arguably consistent with the defendant's preferred interpretation, it is not necessarily more consistent. See id. at 279.

[kidnapping] while armed with a dangerous weapon and inflicts serious bodily injury [by means of that dangerous weapon] . . . shall be punished." G. L. c. 265, § 26, third par.<sup>10</sup>

We turn now to the defendant's arguments that there was insufficient evidence that serious bodily injury was inflicted by means of the dangerous weapon and that the jury instructions were erroneous.

b. Sufficiency of the evidence. Turning first to the denial of the defendant's motion for a required finding of not guilty, we consider whether, when viewed "in the light most favorable to the Commonwealth . . . [the] evidence is sufficient to satisfy a rational trier of fact that each element of the crime charged could be found beyond a reasonable doubt." Commonwealth v. Lopez, 484 Mass. 211, 215 (2020). Considering our construction of the kidnapping statute, we must determine whether there was sufficient evidence that either the defendant or one of his coventurers -- given the Commonwealth proceeded on a theory of joint venture liability -- was armed with a dangerous weapon during the course of the kidnapping and used that weapon to inflict serious bodily injury on the victim.

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<sup>10</sup> A model jury instruction for aggravated kidnapping by infliction of serious bodily injury is set forth in an Appendix to this opinion.



We first consider the gun in the defendant's holster as the dangerous weapon. Multiple witnesses testified the defendant was in possession of this gun when he removed the victim from his home. Thus, there was sufficient evidence to support a finding that the defendant was "armed" with the gun.

No evidence was presented, however, that the gun was used to harm the victim. Investigators were unable to determine the victim's cause of death or if any injuries were inflicted on the soft tissues of the victim's body, as only the victim's bones were recovered. Additionally, Ricci did not testify that he saw or heard the victim being shot, nor did any other witness. Thus, there was insufficient evidence to prove the gun was used to inflict serious bodily injury on the victim.

We next consider the police baton Ricci observed in the garage. There was sufficient evidence the defendant's coventurer, Feeney, was armed with the police baton during the kidnapping. According to Ricci's testimony, Feeney entered the garage carrying a black bag, which he set on the ground before shackling the victim's ankles. Around this time, Ricci observed the baton "right there with the bag," which "could have been in [Feeney's] hand" when Ricci left the garage. This evidence supports a finding that Feeney was armed with the baton during the kidnapping. See Commonwealth v. Powell, 433 Mass. 399, 403

(2001) (armed robbery requires "the defendant had to have [a dangerous weapon] in his possession").

The evidence further supported a finding that Feeney used the police baton to inflict serious bodily injury on the victim. As Ricci testified, after Feeney was left alone in the garage with the victim, Ricci heard an "oomph" sound coming from the garage. The baton was later found by the police in Feeney's apartment with the victim's blood on it, suggesting that -- regardless of whether the baton was the ultimate cause of death -- Feeney severely beat the victim with the baton.

Further, there was sufficient evidence to find the defendant knew Feeney was armed with the police baton. See Commonwealth v. Britt, 465 Mass. 87, 100 (2013) (when offense "has use or possession of a weapon as an element," Commonwealth must show "that a joint venturer had knowledge that a member of the joint venture had a weapon"). Ricci testified that the black duffel bag was sitting in the front passenger seat of the defendant's car when they removed the victim from his home. Ricci then saw the defendant give Feeney the bag when they arrived at Ricci's garage. From this testimony, a rational fact finder could infer the police baton, along with the other kidnapping tools later recovered from Feeney when investigators searched his home, was inside the bag when the defendant provided it to Feeney. See Commonwealth v. Latimore, 378 Mass.

671, 676-677 (1979). Further, the defendant was present in the garage when Feeney was restraining the victim, at which time the baton was in view.

Finally, there was sufficient evidence the defendant, as a joint venturer, "had or shared the required criminal intent." Commonwealth v. Zanetti, 454 Mass. 449, 466-467 (2009).

Kidnapping requires "the intent to confine or imprison another person against his will." Commonwealth v. Schoener, 491 Mass. 706, 725 (2023). As discussed previously, evidence was presented that Feeney explained his kidnapping plan to the defendant, which the defendant then took steps to effectuate. Significantly, the defendant removed the victim from his home under false pretenses and, with the help of Ricci, restrained the victim in the back seat of a car using handcuffs.

The defendant then brought the victim into Ricci's garage, sat him in the metal chair that he had fastened to the floor, and stood by while Feeney shackled the victim's ankles to the chair. The defendant's intent to secretly confine or imprison the victim against the victim's will can be inferred from these actions. See Commonwealth v. Gorassi, 432 Mass. 244, 250 (2000) (fact finder could "reasonably . . . infer[] that the defendant intended to kidnap the [victim]" from "evidence that the defendant falsely enticed the [victim] into the crafts room"). See also Commonwealth v. Pucillo, 427 Mass. 108, 112 (1998)

("jury may infer the requisite mental state from the defendant's knowledge of the circumstances and subsequent participation in the offense" [citation omitted]).

Viewed in the light most favorable to the Commonwealth, there was sufficient evidence from which a rational fact finder could conclude that the defendant committed aggravated kidnapping pursuant to G. L. c. 265, § 26, third par., under a joint venture theory of liability. See Latimore, 378 Mass. at 676-677. Thus, the trial judge did not err in denying the defendant's motion for a required finding of not guilty.

c. Jury instructions. Turning next to the jury instructions, for the reasons previously stated, the trial judge erred by instructing the jury that "[t]he Commonwealth is not required to prove that the defendant used the dangerous weapon to inflict the serious bodily injury -- the two elements are independent of each other." Because the defendant objected at the time of trial, we review this error to determine whether it prejudiced the defendant. See Commonwealth v. Teixeira, 486 Mass. 617, 622 (2021).

We conclude this instruction was prejudicial. The Commonwealth proceeded at trial on two theories -- that either the gun or the baton could satisfy the "dangerous weapon" element. Yet, as discussed, the baton was the only viable implement under a proper construction of the statute. Based on

the erroneous instructions they received, the jury could have found either the gun or the baton to be the "dangerous weapon." Because we do not know on which theory the jury rendered their verdict, the defendant's conviction of aggravated kidnapping cannot stand. See Commonwealth v. Fickett, 403 Mass. 194, 197 (1988). See also Commonwealth v. Nadal-Ginard, 42 Mass. App. Ct. 1, 4 (1997).

3. Conclusion. For the reasons discussed above, we vacate the defendant's conviction of aggravated kidnapping and remand for further proceedings consistent with this opinion. Because the errors in this case were limited to the aggravating elements of the offense, "on remand the Commonwealth has the option of moving to have the defendant sentenced on the lesser included offense[]" of kidnapping, G. L. c. 265, § 26, first par.,<sup>11</sup> "or

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<sup>11</sup> On remand, the Commonwealth cannot move for sentencing on the lesser offense of kidnapping "while armed with a firearm" pursuant to G. L. c. 265, § 26, second par., because there was no evidence presented at trial showing that the holstered gun met the statutory definition of a firearm. See G. L. c. 140, § 121 (defining "firearm" for purposes of licensing and regulations as "a stun gun or a pistol, revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged and of which the length of the barrel or barrels is less than [sixteen] inches or [eighteen] inches in the case of a shotgun as originally manufactured"). See also Commonwealth v. Garrett, 473 Mass. 257, 260 (2015) ("[the] definition [in § 121] . . . is the foundation for the Legislature's gun control framework; indeed, the definition was incorporated virtually unchanged from the 1934 version of the statute when the Legislature rewrote the gun control act in 1998").

of retrying the defendant" on the charge of aggravated kidnapping.<sup>12</sup> Commonwealth v. Kastner, 76 Mass. App. Ct. 131, 141 (2010).

So ordered.

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<sup>12</sup> Insofar as there is a retrial, "the defendant may be retried only on [the] theory" for which there was sufficient evidence at the original trial -- i.e., the joint venture theory based on Feeney's use of the baton to inflict serious bodily injury on the victim. Commonwealth v. Berry, 431 Mass. 326, 336 (2000).

Appendix.

Model Jury Instruction -- Armed Kidnapping Aggravated by  
Infliction of Serious Bodily Injury.

The defendant is charged with kidnapping while armed with a dangerous weapon, thereby inflicting serious bodily injury, as an aggravated form of kidnapping defined by the State Legislature. The Massachusetts kidnapping statute includes all forms of unlawful restraint of the liberty of a person, including the forcible confinement of the person against his or her will. In order to prove the defendant guilty of this offense, the Commonwealth must establish the defendant's guilt on a charge of kidnapping and must prove the following two additional elements beyond a reasonable doubt:

First: That the defendant committed the kidnapping while armed with a dangerous weapon; and

Second: That the defendant used the dangerous weapon that he was armed with to inflict serious bodily injury on the victim.