

## **AIDING OR ABETTING**

(formerly JOINT VENTURE)

*The Supreme Judicial Court recommends that judges incorporate instructions regarding aiding and abetting into the elements of the crime. "For instance, in cases charging murder in the first degree where two or more persons may have participated in the killing, the first element, 'that the defendant committed an unlawful killing,' should be changed to 'that the defendant knowingly participated in the commission of an unlawful killing.'" Commonwealth v. Zanetti, 454 Mass. 449 (2009). The following instruction may be given following the judge's explanation of the elements of the specific offense.*

**Where there is evidence that more than one person may have participated in the commission of a crime, the Commonwealth must prove two things beyond a reasonable doubt:**

***First:* that the defendant knowingly and intentionally participated in some meaningful way in the commission of the alleged offense, alone or with (another) (others),**

**and *Second:* that he (she) did so with the intent required for that offense.**

**The Commonwealth must prove that the defendant intentionally participated in the commission of a crime as something he (she) wished to bring about, and sought by his (her) actions to make succeed. Such participation may take the form of**

**(personally committing the acts that constitute the crime) or**

**(aiding or assisting another person in those acts) or**

**(asking or encouraging another person to commit the crime) or**

**(helping to plan the commission of the crime) or**  
**(agreeing to stand by, or near, the scene of the crime to act as**  
**lookout) or**  
**(agreeing to provide aid or assistance in committing the crime) or**  
**(agreeing to help in escaping if such help becomes necessary).**

**An 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 to act consciously together before or during the crime with the intent of making the crime succeed.**

**The Commonwealth must also prove beyond a reasonable doubt that, at the time the defendant knowingly participated in the commission of the crime charged, [identify the crime charged if needed to avoid confusion], he (she) had or shared the intent required for that crime. You are permitted, but not required, to infer the defendant's mental state or intent from his (her) knowledge of the circumstances or any subsequent participation in the crime. The inferences that you draw must be reasonable, and you may rely on your experience and common sense in determining from the evidence the defendant's knowledge and intent.**

SUPPLEMENTAL INSTRUCTIONS

1. *Mere presence.*

**Our law does not allow for guilt by association. Mere presence at the scene of the crime is not enough to find a defendant guilty. Presence alone does not establish a defendant's knowing participation in the crime, even if a person knew about the intended crime in advance and took no steps to prevent it. To find a defendant guilty, there must be proof that the defendant intentionally participated in some fashion in committing that particular crime and had or shared the intent required to commit the crime. It is not enough to show that the defendant simply was present when the crime was committed or that he (she) knew about it in advance. There must be proof that the defendant intentionally participated in committing the particular crime, not just that he (she) was there or knew about it.**

2. *Mere knowledge.*

**Mere knowledge that the crime was to be committed is not sufficient to convict the defendant. The Commonwealth must prove more than mere association with a**

**perpetrator of the crime, either before or after its commission.**

**(Even evidence that the defendant agreed with another person**

**to commit the crime would be insufficient to support a**

**conviction if the defendant did nothing more.) The**

**Commonwealth must prove more than a failure to take**

**appropriate steps to prevent the commission of the crime.**

**Some active participation in, or furtherance of, the criminal**

**enterprise is required in order to prove the defendant guilty.**

**3. *Withdrawal from joint venture.***

**The defendant is not guilty of a**

**crime if he (she) withdrew from or abandoned it in a timely and**

**effective manner. A withdrawal is effective only if it is**

**communicated to the other persons involved, and only if it is**

**communicated to them early enough so that they have a**

**reasonable opportunity to abandon the crime as well. If the**

**withdrawal comes so late that the crime cannot be stopped, it is**

**too late and is ineffective.**

**If the evidence raises a question whether the defendant**

**withdrew from participation, then the Commonwealth has the**

**burden of proving to you beyond a reasonable doubt that the defendant did not withdraw it. If the Commonwealth does not do so, then you must find the defendant not guilty.**

*Commonwealth v. Hogan*, 426 Mass. 424, 434 n.12, 688 N.E.2d 977, 984 n.12 (1998); *Commonwealth v. Cook*, 419 Mass. 192, 201-202, 644 N.E.2d 203, 209-210 (1994) (instruction required only where supported by evidence, viewed in light most favorable to defendant); *Commonwealth v. Galford*, 413 Mass. 364, 372, 597 N.E.2d 410, 415 (1992) (where raised by evidence, Commonwealth must prove beyond a reasonable doubt the absence of abandonment); *Commonwealth v. Fickett*, 403 Mass. 194, 201 n.7, 526 N.E.2d 1064, 1069 n.7 (1988) (same); *Commonwealth v. Graves*, 363 Mass. 863, 866-868, 299 N.E.2d 711, 713-714 (1973); *Commonwealth v. Green*, 302 Mass. 547, 555, 20 N.E.2d 417, 421-422 (1939); *Commonwealth v. Joyce*, 18 Mass. App. Ct. 417, 428, 467 N.E.2d 214, 221 (1984); *Commonwealth v. Farnkoff*, 16 Mass. App. Ct. 433, 447, 452 N.E.2d 249, 258 (1983); *Commonwealth v. Mangula*, 2 Mass. App. Ct. 785, 792 n.6, 322 N.E.2d 177, 182 n.6 (1975). See *Hogan*, 426 Mass. at 434, 688 N.E.2d at 984 (“In the case of multiple crimes committed by joint venturers and the issue of withdrawal, an instruction about withdrawal should point out, when the evidence warrants, that a defendant can be found guilty as a joint venturer of an initial crime but then can effectively withdraw so as to avoid culpability for a subsequent crime.”); *Commonwealth v. Fickett*, 403 Mass. 194, 201, 526 N.E.2d 1064, 1069 (1988) (defendant may argue to jury, alternately, that he never entered a joint venture and that if he did he also timely withdrew).

4. *Joint participant hearsay exception.*

**You may consider against an individual defendant any statements made by another (defendant) (alleged participant in a joint venture) only if three things have been proved to you about that statement: *First*, that other evidence apart from that statement shows that the speaker and this defendant were participating with each other in the commission of the crime; *Second*, that the statement was made during the commission or in furtherance of the crime, and *Third*,**

**that the statement was made in order to further or help along the goal of committing the crime. Only if those three things have been proved are you allowed to consider the statement of another (defendant) (alleged participant) when you are considering the charges against (a defendant other than the speaker) (the defendant).**

The statement of one participant during and in furtherance of the crime is admissible against other participants. Such cases are normally tried by admitting such evidence only as to the speaker. When the judge determines, based on evidence other than the statement, that there is a fair inference that there was joint participation, the limitation is removed and the statement becomes subject to "humane practice." The jury should be instructed that they may consider the evidence against a defendant other than the speaker only if they find sufficient evidence apart from the statement to support a fair inference that there was more than one participant, that the defendant was a participant, and that the statement was uttered in the course of, and in furtherance of the commission of the crime. *Commonwealth v. Brown*, 394 Mass. 510, 516, 476 N.E.2d 580, 584 (1985); *Commonwealth v. Bongarzone*, 390 Mass. 326, 340, 455 N.E.2d 1183, 1192 (1983); *Commonwealth v. Beckett*, 373 Mass. 329, 338-340, 366 N.E.2d 1252, 1257-1259 (1977); *Commonwealth v. Flynn*, 362 Mass. 455, 476-477, 287 N.E.2d 420, 435-436 (1972), denial of habeas corpus aff'd sub nom. *Velleca v. Superintendent, M.C.I. Walpole*, 523 F.2d 1040 (1st Cir. 1975); *Commonwealth v. Cartagena*, 32 Mass. App. Ct. 141, 144-145, 586 N.E.2d 43, 45-46 (1992).

The rule applies even in severed trials. *Commonwealth v. Florentino*, 381 Mass. 193, 194, 408 N.E.2d 847, 849 (1980).

The judge should not inform the jury of his or her preliminary ruling admitting such evidence against the defendant. *Commonwealth v. Beckett*, 373 Mass. 329, 337 n.3, 366 N.E.2d 1252, 1257 n.3 (1977); *Commonwealth v. Lima*, 29 Mass. App. Ct. 490, 492 & n.3, 562 N.E.2d 100, 102 & n.3 (1990).

NOTES:

1. **No distinction between a principal and a joint venturer.** In *Commonwealth v. Zanetti*, 454 Mass. 449 (2009), the Supreme Judicial Court renounced "the false distinction between a principal and an accomplice," holding, "We, therefore, now adopt the language of aiding and abetting rather than joint venture for use in trials that commence after the issuance of the rescript in this case. When there is evidence that more than one person may have participated in the commission of the crime, judges are to instruct the jury that the defendant is guilty if the

Commonwealth has proved beyond a reasonable doubt that the defendant knowingly participated in the commission of the crime charged, alone or with others, with the intent required for that offense.”

2. **Accessory after the fact.** Unlike a participant, an accessory after the fact to a felony is not involved in the planning or execution of the crime, and need not have advance knowledge of it. An accessory after the fact “need merely [1] know the identity of the principal perpetrator and [2] have knowledge of the substantial facts of the felonious crime that the principal committed and, possessed of such knowledge, [3] aid the principal in avoiding punishment,” *Commonwealth v. Hoshi H.*, 72 Mass. App. Ct. 18, 19-21, 887 N.E.2d 1104, 1105-1106 (2008), by “harboring, conceal[ing], maintain[ing], . . . assist[ing] . . . or giv[ing] such offender any other aid” (G.L. c. 274, § 7). A defendant who harbors a principal who has committed multiple felonies may be convicted of the same number of counts of being an accessory after the fact. *Commonwealth v. Perez*, 437 Mass. 186, 189-194, 770 N.E.2d 428, 433-434 (2002). A defendant cannot be convicted both of the substantive crime and as being an accessory after the fact to the same crime. *Commonwealth v. Gajka*, 425 Mass. 751, 754, 682 N.E.2d 1345, 1348 (1997); *Commonwealth v. Berryman*, 359 Mass. 127, 129, 268 N.E.2d 354, 356 (1971). General Laws c. 274, § 4 is a 7-year felony that is not within the final jurisdiction of the District Court.

3. **Accomplice Testimony.** The statement of one joint venturer during and in furtherance of the joint venture is admissible against other joint venturers. Such cases are normally tried by admitting such evidence only as to the speaker. The statement may be admitted if “(a) the statement was made during the course of and in furtherance of a common criminal enterprise and (b) there is sufficient nonhearsay evidence to establish an adequate probability that the declarant and defendant were engaged in a criminal enterprise.” *Commonwealth v. Nascimento*, 421 Mass. 677 (1996). A jury “may not consider the statement of one defendant against the other until and unless the Commonwealth proves the existence of a joint venture beyond a reasonable doubt”. *Commonwealth v. Clarke*, 418 Mass. 207, 635 N.E.2d 1197 (1994). The statement becomes subject to “humane practice.” In most cases, it lies within the judge’s discretion whether or not to instruct the jury that the testimony of accomplices should be examined with special care, although some appellate decisions seem to have encouraged such a charge. See the supplemental instructions to Instruction 2.260 (Credibility of Witnesses). The judge should not inform the jury of his or her preliminary ruling admitting such evidence against the defendant. *Commonwealth v. Beckett*, 373 Mass. 329, 366 N.E.2d 1252 (1977); *Commonwealth v. Lima*, 29 Mass. App. Ct. 490, 562 N.E.2d 100 (1990).

4. **Anticipatory compact not required.** Unlike a conspiracy charge, “there is no need to prove an anticipatory compact between the parties to establish a joint venture charge. It is enough to prove that at the “climactic moment’ the parties acted together to carry out their goal.” *Commonwealth v. Sexton*, 41 Mass. App. Ct. 676, 672 N.E.2d 991(1996), rev’d on other grounds, 425 Mass. 146, 680 N.E.2d 23. For that reason, the acquittal of all codefendants on a conspiracy charge does not collaterally estop the Commonwealth from later trying them on a joint venture charge. “The shared purpose of joint venturers in the commission of a substantial offense differs from the prior agreement to commit the offense that is the essence of a conspiracy...As a general rule,...the agreement that must be shown to prove a conspiracy is a meeting of the minds of the conspirators separate and distinct from and prior to the common intent that is implicit in the commission of the substantive crime.” Except in situations where concerted advance planning is necessarily implied in the substantive offense, a jury might acquit joint venturers of a conspiracy charge because there was insufficient proof on an antecedent, agreed-upon plan. *Commonwealth v. DeCillis*, 41 Mass. App. Ct. 312, 669 N.E.2d 1087 (1996).

5. **Conviction as principal.** “The jury are not required to conclude unanimously that the defendant was either the principal or the joint venturer, so long as sufficient evidence exists to support either role.” *Commonwealth v. Ellis*, 432 Mass. 746, 761, 739 N.E.2d 1107, 1119 (2000). “[I]t seems accepted, under G.L. c. 274, sec. 2...that a person [charged] as a principal may be convicted on a showing of accessory, or joint venture, involvement.” *Commonwealth v. James*, 30 Mass. App. Ct. 490, 570 N.E.2d 168 (1991).

6. **Co-venturers tried separately.** Joint venturers need not be tried together. *Commonwealth v. Cifizzari*, 397 Mass. 560, 492 N.E.2d 357 (1986). Where warranted by the evidence, a joint venture charge may be appropriate even where a single defendant is on trial, to indicate that the defendant need not have acted alone. *Commonwealth v. Dyer*, 389 Mass. 677, 451 N.E.2d 1161 (1983). A joint venture charge is permissible even if the alleged co-venturer was previously acquitted at a separate trial. *Commonwealth v. Jones*, 403 Mass. 279, 526 N.E.2d 1288 (1988). It is not necessary for the Commonwealth to prove the identity of the other joint venturer as long as the

evidence supports the finding that there existed some principal other than the defendant and that the defendant shared that other's intent and was available to help as needed. *Commonwealth v. Williams*, 450 Mass. 894, 824 N.E.2d 843 (2008); *Commonwealth v. Gonzalez*, 443 Mass. 799, 824 N.E.2d 843 (2005); *Commonwealth v. Netto*, 438 Mass. 686, 783 N.E.2d 439 (2003).

7. **Knowledge of coventurer's weapon.** To be convicted as a participant in a crime involving the use of a weapon, it must be proved that the defendant knew at the time of the offense that the other participant had the weapon. *Commonwealth v. Thompson*, 56 Mass. App. Ct. 710, 713, 780 N.E.2d 96, 98 (2002). See *Commonwealth v. Watkins*, 425 Mass. 830, 840, 683 N.E.2d 653, 660 (1997) (armed robbery); *Commonwealth v. Colon*, 52 Mass. App. Ct. 725, 730, 756 N.E.2d 615, 620 (2001) (armed robbery).

8. **Lookout liability.** Evidence of additional factors may permit an inference that a defendant contributed more than mere presence to a crime. See *Commonwealth v. DeJesus*, 48 Mass. App. Ct. 911, 911-912, 720 N.E.2d 28, 29 (1999) (finding additional factors where defendant hung out window of target apartment, looking up and down the street, and was later found there with four others, surrounded by drugs, cash, and packaging materials); *Commonwealth v. Velasquez*, 48 Mass. App. Ct. 147, 150, 718 N.E.2d 398, 401 (1999) (finding additional factors where defendant disposed of illegal drugs and made threatening remarks to police). See also *Commonwealth v. Serrano*, 74 Mass. App. Ct. 1, 4, 904 N.E.2d 247 (2009) (under "presence" branch of joint venture, "presence" is appropriately defined to mean "at or near the general vicinity of the crime . . . at some point during the joint venture"); *Commonwealth v. Frederico D. Centino*, 48 Mass. App. Ct. 1121, 724 N.E.2d 752 (No. 98-P-128, Feb. 22, 2000) (unpublished opinion under Appeals Court Rule 1:28) (finding no additional factors where defendant merely failed to open door for police and gave a false name).

9. **Mere presence.** If the defendant was present at the scene of the crime but denies participation, or knew that a crime was planned but denies aiding it, "the jury should be instructed that mere 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 . . . supplemented by evidence of subsequent concealment of the completed crime." *Ortiz*, 424 Mass. at 859, 679 N.E.2d at 1011.

10. **Post-crime assistance.** Post-crime aid is not itself sufficient to establish a joint venture. *Commonwealth v. Christian*, 430 Mass. 552, 722 N.E.2d 416 (2000). See G.L. c. 274, § 4 (accessory after the fact).

11. **Post-crime statements.** The mere fact that alleged co-participants were arrested together is insufficient to establish that, after the crime, there was a continuing joint venture to conceal it, so as to make the hearsay exception applicable to a statement of one participant made upon arrest. *Commonwealth v. Pringle*, 22 Mass. App. Ct. 746, 498 N.E.2d 131 (1986) (error to admit one co-defendant's use of false name upon arrest against other co-defendant.) However, such statements are admissible "where the participants are acting to conceal the crime that formed the basis of the enterprise." *Commonwealth v. Angiulo*, 415 Mass. 502, 615 N.E.2d 155 (1993). Whether there was such a continuing participation to conceal the crime may become a jury issue if there is additional evidence to support such an inference. *Commonwealth v. Andrews*, 403 Mass. 441, 530 N.E.2d 1222 (1988) (proper to admit one co-defendant's flight and use of false name against other co-defendant).

12. **Specific unanimity instruction not required; use of general verdict slip proper.** A specific unanimity instruction or bifurcated verdict slip should not be used. *Commonwealth v. Santos*, 440 Mass. 281, 797 N.E.2d 1191 (2003); *Commonwealth v. Ramos*, 31 Mass. App. Ct. 362, 367-368, 577 N.E.2d 1012, 1015 (1991). A general verdict slip should be. The Supreme Judicial Court held the trial judge may "furnish the jury with a general verdict even when there is differing evidence that the defendant committed the crime as a principal or as an accomplice; and (3) on conviction, examine whether the evidence is sufficient to permit a rational juror to conclude beyond a reasonable doubt that the defendant knowingly participated in the commission of the crime charged, with the intent required to commit the crime." *Commonwealth v. Zanetti*, 454 Mass. at 466-467. "We continue to permit the trial judge to furnish the jury with a general verdict slip even when there is differing evidence that the defendant committed the crime as a principal or as an accomplice. Now, however, on appeal after a conviction, we will examine whether the evidence is sufficient to permit a rational juror to conclude beyond a reasonable doubt that the defendant knowingly participated in the commission of the crime charged, with the intent required to commit the crime, rather



than examine the sufficiency of the evidence separately as to principal and joint venture liability. *Commonwealth v. Zanetti*, 454 Mass. at 468 (2009).