

NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCRreporter@sjc.state.ma.us

SJC-13583
SJC-13584
SJC-13585

COMMONWEALTH vs. LUIS COTTO
(and eight companion cases¹).

Hampden. April 10, 2026. - September 29, 2026.

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

Homicide. Firearms. Evidence, Intent, Inference, Joint
venturer, Presumptions and burden of proof. Intent. Joint
Enterprise. Practice, Criminal, Instructions to jury,
Presumptions and burden of proof, Capital case.

Indictments found and returned in the Superior Court
Department on February 20, 2020.

The cases were tried before Mark D. Mason, J.

Dana Alan Curhan for Isaiah Fraticelli.
Suzanne Renaud for Keith Cotto.
Joseph M. Kenneally for Luis Cotto.
Joseph G. A. Coliflores, Special Assistant District
Attorney (Katharine Johnston, Assistant District Attorney, also
present) for the Commonwealth.

¹ Two against Luis Cotto, three against Isaiah Fraticelli,
and three against Keith Cotto.

KAFKER, J. A jury convicted the defendants, Luis Cotto, Isaiah Fraticelli, and Keith Cotto, of murder in the first degree for the drive-by shooting of the victim, Gabriel Irizarry.^{2,3} The primary issues on appeal are (1) whether the Commonwealth's evidence was sufficient to convict the defendants of murder in the first degree; (2) whether the jury instructions impermissibly lowered the Commonwealth's burden to prove intent by using the phrase "knowingly participate" to describe that element; and (3) whether the trial judge erred in not instructing the jury on involuntary manslaughter as to Keith. The defendants also seek relief pursuant to our power under G. L. c. 278, § 33E.

We conclude the evidence was sufficient to prove beyond a reasonable doubt that each of the defendants knowingly participated in the murder and shared the requisite lethal intent and that the murder was committed with deliberate premeditation as to all defendants as well as with extreme atrocity or cruelty as to Luis and Fraticelli. We also conclude the judge erred in instructing the jury on intent because the instruction conflated the defendants' knowing participation in

² A fourth codefendant, Victor Espinosa, was tried and convicted of the same charges at the same trial. However, he is not part of the present appeal.

³ Because Keith and Luis share a last name, we refer to them by their first names.

the joint venture with the defendants' intent to kill. We conclude, however, that this error did not create a substantial likelihood of a miscarriage of justice in light of the judge's repeated clarifications with correct statements of law and all the evidence of the defendants' lethal intent. Next, we conclude that the judge did not err in denying Keith's request to instruct the jury on involuntary manslaughter. Finally, having carefully reviewed the entire record, we find no reason to reduce or set aside the verdicts. We therefore affirm.

1. Background. a. Facts. Because the defendants challenge the sufficiency of the Commonwealth's proof, "we recite the evidence, together with the reasonable inferences to be drawn from it, in the light most favorable to the Commonwealth." Commonwealth v. Carleton, 497 Mass. 11, 13 (2026), citing Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979). We reserve certain facts for our discussion of the legal issues.

i. The shooting. At approximately 8 P.M. on November 2, 2019, Keith Cotto; Keith's brother, Luis Cotto; and Keith and Luis's cousin, Isaiah Fraticelli, joined the Cottos' father at a restaurant in Chicopee to watch boxing matches on television. The group learned that the matches they planned to see, however, were not going to be shown at the restaurant, so Keith, Luis, and Fraticelli left the restaurant in a blue Honda Accord sedan

registered to Keith at around 9:30 P.M.. The group then met a friend, Victor Espinosa, at Espinosa's uncle's house. At approximately 12:30 A.M., Keith, Fraticelli, Espinosa, and Luis got into the Honda, and Keith drove the group to downtown Springfield. Fraticelli sat in the front passenger seat, Luis sat directly behind him in the rear passenger's side seat, and Espinosa sat in the rear driver's side seat.

That evening, the victim drove to Holyoke and picked up his sister-in-law, Sandra Rivera, in his white Ford F-150 pickup truck. The two did not have specific plans for the evening, but they eventually drove to downtown Springfield and decided to go to a casino there. After parking on Main Street, they walked around the outside of the casino in search of its entrance. After finding the entrance, however, Rivera was denied entry because she did not have the required identification. Both the victim and Rivera thereafter returned to the Ford.

At approximately 1 A.M., as the victim and Rivera were getting ready to reenter the vehicle to leave the area, the defendants in the Honda drove past them on the opposite side of the road. The Honda subsequently took three right turns onto side streets and then turned left to arrive behind the victim and Rivera, as the victim pulled the Ford out of its parking space. Both vehicles stopped behind a third vehicle at a red light on Union Street, where they waited for approximately

forty-five seconds. When the light changed, both the Honda and the Ford took the on-ramp to Interstate Highway 91 North (I-91). The ramp starts out with two lanes, but the lanes eventually merge into a single lane that becomes the right travel lane of I-91.

As the Ford and the Honda merged onto I-91, State police Trooper Patrick Dolan was driving on I-91 in the center lane. His cruiser had a push bar bumper in front and emergency lights mounted inside the vehicle, but no other overt markers. Dolan testified that he saw a white Ford F-150 pickup truck and a blue Honda Accord sedan merge onto the highway. He further testified that he saw the Honda cut over into the center travel lane; accelerate ahead of the Ford, which was traveling in the right lane; and then decelerate so that it was even with the Ford. Dolan was approximately three or four car lengths behind both vehicles when he observed a firearm protruding from the passenger side of the Honda, pointed at the Ford. He heard gunshots and observed multiple muzzle flashes consistent with gunfire. The rate of fire and the differing heights of the muzzle flashes indicated to Dolan that multiple firearms were discharging.

Rivera testified that as she and the victim traveled on I-91, she heard what sounded like stones or pebbles hitting the Ford. The victim then looked over at Rivera in the passenger

seat, appearing confused, and the noises got louder. The Ford's windows shattered, and the victim let go of the steering wheel as his head fell over to the side. Rivera then climbed onto the victim's lap and used his legs to reach the Ford's accelerator pedal and maneuver the vehicle off the highway. She took the next exit, drove to a bus terminal, and sought help. The victim was transported to a hospital, where he died a few days later.

Meanwhile, Dolan reported the incident to the Springfield State police barracks and to the duty officer in Northampton, a senior officer with the ability to authorize a motor vehicle pursuit. He activated his lights and siren to stop the Honda, but it did not do so. Dolan pursued the Honda at speeds of over one hundred miles per hour, and the Honda eventually crashed off of Interstate Highway 391 North. As Dolan approached the vehicle, he saw three individuals running toward a wooded area nearby. Two men then came out of the woods and ran along a sidewalk, and Dolan and another officer eventually were able to arrest them. These two men were identified as Fraticelli and Luis. Keith was subsequently arrested when he was treated for injuries at a hospital.⁴

⁴ Police used a helicopter with infrared camera technology to locate Espinosa after the crash, who was on an island in the middle of a nearby river. Due to the weather conditions, the police were unable to send a unit to investigate. Espinosa was apprehended twelve days later.

ii. Physical and forensic evidence. Police recovered a nine millimeter Glock firearm with an inserted magazine from the front passenger seat of the Honda. In the woods near where the Honda crashed, they also located a nine millimeter Taurus semiautomatic pistol with an inserted magazine. A baseball cap, five beverage containers, and a wallet belonging to Keith were also recovered from the Honda. The interior of the Honda tested positive for gunshot residue, and a spent .40 caliber shell was found in the vehicle's rear seat. Ballistic analysis of the victim's Ford revealed that it had twenty bullet holes, and eleven discharged shell casings were recovered from the scene of the shooting.^{5,6} Of those recovered casings, six of the nine millimeter casings were determined to have been discharged from the Glock, and a seventh was discharged from the Taurus. Four .40 caliber shell casings were also recovered from the scene and were determined to have been ejected from a single unrecovered firearm.⁷ The parties stipulated that none of the defendants or

⁵ A bullet jacket fragment was also recovered in this area.

⁶ The Commonwealth presented testimony from a ballisticsian who explained that some casings were likely missing due to vehicular traffic and the fact that multiple firearms were discharged from a moving vehicle; casings could have become caught in tire treads or gone over the edge of the highway.

⁷ A "ShotSpotter" report from a nearby system identified between six and thirteen shots fired over six seconds. However, surveillance video footage of the final two seconds of the shooting, an audio recording of the incident, and the forensic

Espinosa had licenses to carry or firearm identification cards in Massachusetts.

An autopsy revealed that the victim was shot at least four times and sustained multiple gunshot wounds: a wound to his forehead, a wound to his left cheek, a wound to his left knee, and both an entrance wound and an exit wound to his lower left leg.⁸ The wounds to his forehead and left leg were listed as the cause of death.

The Glock and the Taurus were both tested for fingerprints, but no usable prints were detected on either weapon. However, deoxyribonucleic acid (DNA) testing revealed that a sample recovered from the Glock was consistent with Espinosa's DNA profile and a sample recovered from the Taurus was consistent with Keith's DNA profile. DNA samples collected from the Honda's front passenger's side airbag, as well as two of the beverage containers and the baseball cap recovered from the vehicle, were consistent with Fraticelli's DNA profile. Luis's fingerprints were found on the Honda's rear passenger's side window.

examination of the Ford indicate there were at least twenty shots fired.

⁸ The medical examiner noted an abrasion on the victim's abdomen but could not determine with confidence whether it was caused by a bullet because the injury had no penetrating defect from a projectile or projectile fragment.

The Commonwealth developed a timeline of the Honda's movements on the night of the shooting based on video surveillance footage, a ShotSpotter report, and cell site location information. Although the defendants' and Espinosa's cell phone records were analyzed, no relationship between the occupants of the Honda and the Ford was discovered, and the Commonwealth did not present a theory about the motive for the killing at trial.

b. Procedural history. On February 20, 2020, the defendants and Espinosa were each indicted on charges of murder in the first degree, G. L. c. 265, § 1 (count one); unlawful possession of a firearm, G. L. c. 269, § 10 (a) (count two); unlawful possession of a loaded firearm, G. L. c. 269, § 10 (n) (count three); and resisting arrest, G. L. c. 268, § 32B (count four).

Beginning on May 1, 2023, the defendants and Espinosa were jointly tried before a jury in the Superior Court in Hampden County. Each filed motions for required findings of not guilty at the close of the Commonwealth's case and again at the close of all the evidence. See Mass. R. Crim. P. 25, as amended, 420 Mass. 1502 (1995). With respect to Luis and Fraticelli, the motions were denied as to counts one, two, and three, and allowed as to count four. Keith and Espinosa's motions were denied as to all counts.

The jury convicted each of the defendants and Espinosa of murder in the first degree, unlawful possession of a firearm, and unlawful possession of a loaded firearm. Luis, Fraticelli, and Espinosa were convicted of murder in the first degree on theories of both deliberate premeditation and extreme atrocity or cruelty. Keith was convicted of murder in the first degree on a theory of deliberate premeditation only. The jury acquitted Keith and Espinosa of resisting arrest.

Each of the defendants and Espinosa appealed, and Luis, Fraticelli, and Keith's convictions are now before us on direct appellate review under G. L. c. 278, § 33E.⁹

2. Discussion. The defendants raise three primary arguments on appeal. First, each of the defendants contends that the evidence was insufficient to support his conviction of murder in the first degree. Next, each of the defendants asserts that he was prejudiced by the trial judge's instruction on intent, which they contend was erroneous, and Keith asserts that the trial judge erred in declining to give an involuntary manslaughter instruction. Finally, each of the defendants asks this court to exercise its extraordinary authority pursuant to G. L. c. 278E, § 33E, and to grant him a new trial or to reduce

⁹ Espinosa's appellate counsel filed a motion to withdraw on August 28, 2025, before filing any brief. To date, no successor counsel has entered an appearance or filed a brief on Espinosa's behalf.

his conviction of murder in the first degree to a lesser degree of guilt. We address each argument in turn.

a. Sufficiency of the evidence. In reviewing the defendants' claims of insufficient evidence for their convictions of murder in the first degree, "we assess the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found each element of the crime beyond a reasonable doubt." Commonwealth v. Robinson, 493 Mass. 303, 307 (2024), citing Latimore, 378 Mass. at 677-678. "The evidence may be direct or circumstantial, and we draw all reasonable inferences in favor of the Commonwealth." Commonwealth v. Baez, 494 Mass. 396, 400 (2024), quoting Commonwealth v. Watson, 487 Mass. 156, 162 (2021), S.C., 497 Mass. 764 (2026). "Inferences 'need only be reasonable and possible and need not be necessary or inescapable.'" Commonwealth v. Bonner, 489 Mass. 268, 275 (2022), quoting 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.'" Bonner, supra at 275-276, quoting Commonwealth v. Mandile, 403 Mass. 93, 94 (1988).

To prove the defendants guilty of "murder in the first degree both under the theory of deliberate premeditation and under the theory of extreme atrocity or cruelty, . . . the

Commonwealth had to prove beyond a reasonable doubt that the defendant[s] knowingly participated in the commission of the crime charged, and that the defendant[s] had or shared the required criminal intent" (quotation and citation omitted). Watson, 487 Mass. at 162. "Intent may be inferred from the defendant's knowledge of the circumstances and subsequent participation in the offense" (quotations and citation omitted). Carleton, 497 Mass. at 17. "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. [W]hat matters is only that there be proof of . . . the defendant's knowing participation in some manner in the commission of the offense" with the shared requisite intent. (Quotation and citations omitted.) Bonner, 489 Mass. at 277.

We begin by discussing the passengers, Luis and Fraticelli, followed by the driver, Keith. In sum, there was ample evidence that the shooting was an intentional killing committed with deliberate premeditation, as to all defendants, and with extreme atrocity or cruelty, as to Luis and Fraticelli.

i. Luis and Fraticelli. Both Luis and Fraticelli argue the Commonwealth failed to prove beyond a reasonable doubt that either of them participated in the shooting. We disagree.

Luis and Fraticelli both admit they were in the Honda when the shooting occurred; Luis sat in the rear passenger's side

seat and Fraticelli sat in the front passenger seat. Luis's fingerprints were found on the rear passenger's side window, and Fraticelli's DNA was found on the front passenger's side airbag, two beverage containers, and a baseball hat.

Given their uncontroverted presence in the Honda during the shooting, viewing all the evidence in the light most favorable to the Commonwealth, the jury reasonably could have inferred that Luis and Fraticelli knowingly participated in the shooting with the intent to kill. Specifically, the jury could infer that Keith drove the Honda while Luis and Fraticelli each shot at the victim from their respective passenger's side seats. See Commonwealth v. Phillips, 495 Mass. 491, 497 (2025); Commonwealth v. Zanetti, 454 Mass. 449, 455-456 (2009).

There were three passengers in the Honda, and three types of ammunition were recovered from the scene. Police recovered the Glock with an inserted magazine on the front passenger seat, where Fraticelli was sitting, and a spent .40 caliber shell casing from the rear of the Honda, where Luis and Espinosa were sitting. Of the recovered discharged shell casings, six were discharged from the Glock, a seventh was discharged from the Taurus that was found in the woods, and four .40 caliber shell casings were discharged from the unrecovered third firearm. From these three firearms, shots were fired from the passenger's

side of the car, which was closest to the victim's Ford and where Luis and Fraticelli were sitting.

Additionally, Dolan testified, and the surveillance footage corroborates, that the rate of fire and muzzle flashes from different heights from the Honda led him to believe shots were fired from multiple firearms simultaneously. The ShotSpotter report and surveillance footage also show that the shooting itself lasted only a few seconds, during which time twenty bullets struck the victim's Ford. The jury therefore could have reasonably inferred from all of this evidence -- the number of passengers, Luis and Fraticelli's presence on the passenger's side of the Honda closest to the victim's Ford during the shooting, the three types of ammunition recovered, and the speed of simultaneous gunfire from three different firearms -- that Luis and Fraticelli shot at the victim with the intent to kill while Keith drove the car. See Phillips, 495 Mass. at 497 (sufficient evidence that defendant passenger shot victim through lowered passenger's side window, where defendant's DNA was located on water bottle in car and defendant's fingerprints were found on passenger's side door); Commonwealth v. Reaves, 434 Mass. 383, 390 (2001) (defendant passenger in drive-by shooting acted with intent to kill, where shots were fired at reasonably close range at group defendant had confronted earlier that day).

Moreover, both Luis and Fraticelli fled into the woods after the Honda crashed, which suggests consciousness of guilt. "While consciousness of guilt alone is insufficient to support a guilty verdict, such evidence may be sufficient when combined with other probable inferences." Commonwealth v. Woods, 466 Mass. 707, 715, cert. denied, 573 U.S. 937 (2014), S.C., 480 Mass. 231 (2018). See Bonner, 489 Mass. at 281 (defendant's joint flight after killing and efforts to dispose of murder weapon, among other conduct, sufficient evidence that defendant participated in shooting with intent to kill).

Finally, there was also sufficient evidence for the jury to convict Luis and Fraticelli of murder in the first degree on theories of both deliberate premeditation and extreme atrocity or cruelty. "In order to prove deliberate premeditation, the Commonwealth must show that 'the plan to kill was formed after deliberation and reflection.'" Commonwealth v. Shakespeare, 493 Mass. 67, 85 (2023), quoting Commonwealth v. Fernandez, 480 Mass. 334, 344 (2018). "[N]o particular period of reflection is required, and . . . a plan to murder may be formed in seconds." Shakespeare, supra at 86, quoting Commonwealth v. Gambora, 457 Mass. 715, 733 (2010). In the instant cases, the jury reasonably could infer that this was a deliberately premeditated attack because the defendants followed the victim's Ford for several minutes, positioned the Honda parallel to the victim's

Ford on the highway, and simultaneously fired twenty shots at the victim from three firearms within seconds. See, e.g., Bonner, 489 Mass. at 276 ("overwhelming evidence" that shootings were committed with deliberate premeditation where "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"); Commonwealth v. Williams, 422 Mass. 111, 123 (1996) ("The use of a firearm in the killing is sufficient to support a verdict of murder in the first degree based on deliberately premeditated malice aforethought"); Commonwealth v. Stewart, 398 Mass. 535, 541 (1986) ("evidence that the defendant brought a gun with him to the scene of a planned crime is evidence of planning, which included preparation for using the gun").

Although "sufficient evidence for [deliberate premeditation] would suffice to affirm the verdict," the evidence here was also sufficient to support the jury's finding of extreme atrocity or cruelty with respect to Luis and Fraticelli. Shakespeare, 493 Mass. at 86, quoting Commonwealth v. Whitaker, 460 Mass. 409, 416-417 (2011).¹⁰ Again, the defendants used three firearms to shoot the victim while driving on the highway. Twenty bullets struck the victim's Ford within

¹⁰ As Fraticelli was eighteen years old at the time of the killing, his conviction under both deliberate premeditation and extreme atrocity or cruelty affects the time at which he is eligible for parole. See note 15, infra.

a few seconds, and the victim suffered at least four gunshot wounds, including fatal wounds to the forehead and left leg. This conduct is "excessive and out of proportion to what would be needed to kill a person." Commonwealth v. Castillo, 485 Mass. 852, 866 (2020). See id. (third factor juries may consider in determining whether death was caused with extreme atrocity or cruelty includes "the extent of the injuries to the deceased; the number of blows delivered; the manner, degree, and severity of the force used; and the nature of the weapon, instrument, or method used"). See, e.g., Shakespeare, supra at 87 (evidence sufficient to support finding of extreme atrocity or cruelty where defendant shot victim six times); Commonwealth v. Alicea, 464 Mass. 837, 853 (2013) (evidence sufficient for extreme atrocity or cruelty where defendant fired five shots at victim, inflicting multiple gunshot wounds and fatal wound to victim's head).¹¹

ii. Keith. We next consider whether the evidence was sufficient to convict Keith of murder in the first degree on a theory of deliberate premeditation. At trial, the Commonwealth

¹¹ We also reject the defendants' argument that the killing was not committed with extreme atrocity or cruelty because most of the shots fired hit the victim's Ford, and only four shots struck the victim. That some shots missed their intended target "does not detract from the apparently intentional close-range shooting" of the victim in the instant cases. Reaves, 434 Mass. at 471.

posited that Keith drove and maneuvered the Honda to allow his passengers to carry out the killing but did not shoot a firearm himself. In these circumstances, the Commonwealth was required to prove beyond a reasonable doubt "that [Keith] was the driver of the suspect vehicle, that [he] knew [his] passenger[s] intended to kill the victim, and that [he] shared this intent." Baez, 494 Mass. at 400, quoting Baxter v. Commonwealth, 489 Mass. 504, 508 (2022). We conclude that the Commonwealth met this standard.

Keith admits that he was the driver of the Honda, but he contends that the evidence of his knowledge and shared intent to kill the victim was lacking. There was, however, evidence that the Honda, going in the opposite direction, passed the victim's parked Ford, then turned off onto side streets, and ultimately pulled up behind the Ford as the victim left his parking space in downtown Springfield, and began to follow the Ford. "It was for the jury to assess the reason why" Keith maneuvered the Honda in this manner to arrive behind the victim, and from these facts, viewed in the light most favorable to the Commonwealth, "the jury could reasonably infer that the victim was the intended target of [the defendants'] activity." Carleton, 497 Mass. at 17-18. Keith subsequently drove the Honda behind the victim's Ford for several minutes, waited at a traffic light behind the Ford, shifted to the lane adjacent to the Ford, and

allowed the vehicles to come parallel to each other immediately before the shooting began. These facts likewise permitted the jury to find that Keith intended to position the Honda in a way that would facilitate "the shooting he knew was to come." Id. at 18. "Although, as [Keith] argues, there are many innocuous reasons why a driver may" change lanes as he did, the jury were not required to make the favorable inference that such reasons motivated Keith's driving on this occasion. Id. See Commonwealth v. Sanders, 101 Mass. App. Ct. 503, 509 (2022) ("reasonable and strong inference from the evidence [viewed in the light most favorable to the Commonwealth] was that [the defendant] positioned the Honda so that the occupants could attack the occupants of the Audi from inside the Honda").

Moreover, the instant cases are "distinguishable from those [Keith cites] in which we have concluded that there was insufficient evidence of shared lethal intent where a defendant merely acted as a driver of a car in which a passenger -- outside the presence of the defendant -- committed a shooting." Carleton, 497 Mass. at 19, citing Commonwealth v. Tse, 495 Mass. 74, 81-84 (2024), Baez, 494 Mass. at 402-405, Baxter, 489 Mass. at 509-511, and Mandile, 403 Mass. at 100-102. Here, by contrast, Keith "drove a car while a shooting took place in his presence from within the car itself." Carleton, supra. Contrast, e.g., Baxter, supra at 510 (where defendant dropped

off passenger at scene of shooting, "evidence of the defendant's maneuvering of the vehicle" supported reasonable inference that "defendant knew of and shared the passenger's intent to assault the victim," but not "that he shared the passenger's intent that the attack be deadly"). The proof of Keith's knowledge is also strengthened by ballistics evidence demonstrating that three different firearms were used in the attack, as well as surveillance footage of the latter portion of the shooting indicating that Keith did not swerve -- from which the jury permissibly could infer that the simultaneous discharging of three firearms from inside his vehicle did not surprise him.¹² See Carleton, supra (driver's operation of car supports inference that shooting "did not catch the defendant by surprise"); Sanders, 101 Mass. App. Ct. at 510 ("the number and variety of weapons used in the attack supports a reasonable inference . . . of a coordinated, deadly attack that required that the driver of the Honda shared the intent to carry it out"). Finally, there was evidence -- including the presence of Keith's DNA on the Taurus located in the woods -- that Keith

¹² The evidence demonstrated that the shooting lasted approximately six seconds, see note 7, supra, but only approximately the final two seconds of the shooting were captured on the surveillance video footage. Nevertheless, there was no testimony or other evidence indicating that Keith swerved during the portion of the shooting that was not captured by the video recording.

fled from the Honda with the other defendants and either provided the weapon or attempted to hide it. See Bonner, 489 Mass. at 279-281, 283-284 (although conduct such as flight or disposing of murder weapon "itself is insufficient to establish joint venture liability," this evidence may nevertheless be considered alongside other evidence).

In sum, "[al]though there was no direct evidence presented during the Commonwealth's case that [Keith] knew his companions were armed," Sanders, 101 Mass. App. Ct. at 510, there was undisputed evidence that Keith drove the Honda past the victim's Ford and thereafter followed the Ford onto the highway; the shooting occurred just moments after Keith brought the Honda parallel to the Ford; at least twenty bullets were fired at the Ford in a few seconds, and Keith did not swerve during the portion of the shooting captured on surveillance footage; and three different firearms, including one with his DNA on it, were used in the attack, which was carried out in Keith's presence and from within the vehicle he was operating. Based on these facts, the jury reasonably could infer that Keith both knew his passengers intended to kill the victim and intended the same lethal result himself. See Bonner, 489 Mass. at 277-278 (sufficient evidence of defendant's knowing participation and shared intent to kill where victim was attacked by individuals acting in concert and defendant was present at shooting,

verbally insulted and kicked mortally wounded victim, supplied getaway vehicle and place of safety for shooter to flee, and attempted to hide murder weapon); Watson, 487 Mass. at 164-165 (sufficient evidence that driver shared shooter's intent to murder victim where driver dropped shooter off, drove slowly behind shooter and illuminated shooter in headlights, and picked up shooter after victim was shot ten times); Sanders, 101 Mass. App. Ct. at 510 ("Taken together, the evidence supports the inference of a coordinated, deadly attack that required that the driver of the Honda shared the intent to carry it out").

For similar reasons, the evidence was sufficient for the jury to find that Keith formed his intent to kill the victim after deliberate premeditation. Keith "had time to reflect on his decision" to kill when, after passing the victim in downtown Springfield, he proceeded to turn the Honda around, wait behind the victim's Ford at a stop light, follow the victim onto the highway, and bring the two vehicles parallel to each other such that the Honda's occupants could begin shooting. Shakespeare, 493 Mass. at 86. This evidence, as well as the multiple weapons and bullets used to carry out the attack shortly thereafter, "demonstrated the necessary sequence of thought to support a finding of deliberate premeditation." Commonwealth v. Rakes, 478 Mass. 22, 34-35 (2017).

b. Jury instructions. We next address the defendants' argument that they were each prejudiced by an erroneous jury instruction on the issue of the requisite intent for murder. We thereafter consider Keith's argument that the evidence, in the light most favorable to him, entitled him to an involuntary manslaughter instruction, which the trial judge erroneously declined to give.

i. Intent. "Where, as here, the defendant failed to object to the instructions at trial, we review the instructions to determine whether any error in those instructions creates a substantial likelihood of a miscarriage of justice."

Commonwealth v. Denis, 442 Mass. 617, 621 (2004). "In examining a claim of error in jury instructions, we do not look at individual phrases taken out of context; rather, we consider the instructions viewed as a whole," id., "looking for the interpretation a reasonable juror would place on the judge's words" (citation omitted), Commonwealth v. Vargas, 475 Mass. 338, 349 (2016).

The judge began his instructions by correctly instructing the jury in accordance with the then-current Model Jury Instructions on Homicide (2018): "First, the Commonwealth must prove that the defendant knowingly participated in the commission of the crime[.] Second, the Commonwealth must prove

that he did so with the intent required to commit the crime."

See Zanetti, 454 Mass. at 466-468.

The judge then instructed the jury on the elements of murder, including murder in the first degree on the theory of deliberate premeditation, murder in the first degree on the theory of extreme atrocity or cruelty, and murder in the second degree. As to each of these crimes, the judge departed from the Model Jury Instructions on Homicide when he instructed the jury on the intent element as follows: "the defendant intended to kill or to knowingly participate in killing Gabriel Irizarry; that is, the defendant consciously and purposely intended to cause Gabriel Irizarry's death" (emphasis added). The judge similarly departed from the model instructions when he instructed the jury with respect to deliberate premeditation that the Commonwealth must prove beyond a reasonable doubt that "the defendant committed or knowingly participated in the killing with deliberate premeditation; that is, he decided to kill after a period of reflection" (emphasis added).

This language seemingly came about because the judge added the word "participate" throughout his preliminary jury instructions, and during the charge conference, Keith's trial counsel moved to add the word "knowing" before "participation"

in each instance.¹³ We have repeatedly emphasized the importance of adhering to our Model Jury Instructions on Homicide. See Bonner, 489 Mass. at 285 ("we have urged trial judges to adhere to the Model Jury Instructions on Homicide"); Commonwealth v. Howard, 479 Mass. 52, 61 (2018) ("judges should proceed with caution when deviating from our model jury instructions on homicide").

As explained supra, "the Commonwealth had to 'prove beyond a reasonable doubt that the defendant knowingly participated in the commission of the crime charged, and that the defendant had or shared the required criminal intent'" (quotation omitted). Watson, 487 Mass. at 162, quoting Commonwealth v. Britt, 465 Mass. 87, 100-101 (2013). Knowing participation in the joint venture and the requisite criminal intent for murder are two distinct, "essential elements." Zanetti, 454 Mass. at 455, 467. Adding variations of the phrase "or knowingly participate" to the instructions on intent and deliberate premeditation introduced some confusion into the Commonwealth's burden of

¹³ Specifically, during the charge conference, Keith's trial counsel stated: "Your Honor, it's just that throughout the murder elements [the preliminary instructions] just say[] participate, and I think there's a danger here especially with Keith Cotto that participation could be looked at as driving where you participated. But that's not enough under the actual joint venture theory [I]t's knowing participation. I think that's a very important distinction for him throughout all of the murder counts." The judge thereafter allowed this motion without objection.

proof by suggesting that the jury could find the necessary intent if the defendants knowingly participated in the killing. See id. at 455 ("mental state or intent for deliberately premediated murder . . . is malice, and, in particular, an intent to kill").

Nevertheless, we discern no substantial likelihood of a miscarriage of justice in the judge's instruction. Immediately after the confusing "knowingly participate in killing" language with respect to intent, the judge clarified, "that is, the defendant consciously and purposely intended to cause Gabriel Irizarry's death." Similarly, with respect to deliberate premeditation, the judge clarified, "that is, he decided to kill after a period of reflection."¹⁴ These are correct statements of the law. See Commonwealth v. Brown, 496 Mass. 287, 299 (2025) ("The Commonwealth must also prove that the defendant acted with

¹⁴ The judge did not clarify the "knowingly participate in killing" language with a correct statement of the law in the instructions for murder committed with extreme atrocity or cruelty. Nevertheless, we discern no substantial likelihood of a miscarriage of justice. The jury convicted each defendant of murder in the first degree on a theory of deliberate premeditation with the clarified, correct instructions, indicating the jury found each defendant had the intent to kill. Additionally, the jury did not convict Keith of murder with extreme atrocity or cruelty. Finally, the evidence indicates Luis and Fraticelli, who were convicted on the theory of extreme atrocity or cruelty, fired numerous gunshots into the victim's Ford, hitting the victim at least four times. Any error in these circumstances clearly did not create a substantial likelihood of a miscarriage of justice.

deliberate premeditation: that the defendant resolved to kill after a period of reflection" [quotation and citation omitted]); Commonwealth v. Andrade, 488 Mass. 522, 539 (2021) ("Establishing an intent to kill requires proof that the defendant consciously and purposefully intended to cause the victim's death" [quotation and citation omitted]).

Moreover, as explained supra, there is significant evidence of the defendants' lethal intent. The evidence indicates the defendants used three firearms to fire twenty bullets at the victim in a drive-by shooting on the highway, and the jury convicted all the defendants of deliberately premeditated murder. There can be no reasonable doubt that the jury found the defendants had the intent to kill. See Commonwealth v. Evans, 439 Mass. 184, 205, cert. denied, 540 U.S. 923 and 540 U.S. 973 (2003) (error in jury instructions "did not create a substantial likelihood of a miscarriage of justice because the instruction on deliberate premeditation was correct, and the evidence support[ed] a verdict of deliberate premeditation"); Commonwealth v. Moure, 428 Mass. 313, 317 n.5 (1998) ("The instructions created no substantial likelihood of a miscarriage of justice in light of the evidence that warranted the jury's finding that the defendant had planned and ordered the murder").

Accordingly, given the judge's repeated correct statements of the law and all the evidence of the defendants' lethal

intent, the addition of the words "knowingly participate in killing," while adding some confusion in the instructions on intent, did not cause a substantial likelihood of a miscarriage of justice. See Commonwealth v. Roman, 495 Mass. 412, 429 (2025) (no substantial likelihood of miscarriage of justice where "judge's misstatement of law was sandwiched between multiple correct statements of the law and was de minimis in the context of the broader instructions"); Commonwealth v. Lynch, 439 Mass. 532, 542-544, cert. denied, 540 U.S. 1059 (2003) (no substantial likelihood of miscarriage of justice despite two incorrect and two correct instructions where judge repeatedly emphasized correct burden of proof).

ii. Involuntary manslaughter with respect to Keith. Keith also asserts that the trial judge erred in declining to instruct the jury on involuntary manslaughter. Because Keith requested this instruction at trial, we review the judge's decision for prejudicial error. Commonwealth v. Moscaritolo, 497 Mass. 220, 229 (2026). "An involuntary manslaughter instruction is required where any view of the evidence will permit a finding of manslaughter and not murder" (quotation omitted). Id., quoting Commonwealth v. Tyler, 493 Mass. 752, 760 (2024). In conducting this inquiry, "the evidence must be viewed in the light most favorable to the defendant." Moscaritolo, supra, quoting Commonwealth v. Escobar, 493 Mass. 694, 708 (2024). Here, we

conclude there was no error because no reasonable view of the evidence supported an instruction on manslaughter.

"[I]nvoluntary manslaughter is 'the unintentional result of an act committed with such disregard of its probable harm to another as to amount to wanton or reckless conduct.'"

Commonwealth v. Pagan, 471 Mass. 537, 547, cert. denied, 577 U.S. 1013 (2015), quoting Commonwealth v. Souza, 428 Mass. 478, 492-493 (1998). "In the context of involuntary manslaughter, wanton [or] reckless conduct is 'intentional conduct that create[s] a high degree of likelihood that substantial harm will result to another person." Pagan, supra, quoting Commonwealth v. Chambers, 465 Mass. 520, 536 n.15 (2013).

Keith contends that "[u]nder a view of the evidence that [he] knew that the passengers were armed -- even though he did not know they had any intent to use guns -- his decision to drive to a position where they were capable of shooting might have created a high degree of likelihood that substantial harm [would] result to another" (quotation omitted).

But even in the light most favorable to Keith, the evidence establishes that he maneuvered the Honda into position while three armed passengers prepared to shoot out of the passenger's side windows, and he did not swerve during the portion of the shooting captured by surveillance video footage. A drive-by shooting with multiple guns and bullets firing at another car in

close range presents at least a "plain and strong likelihood of death," not just a "high degree of likelihood that substantial harm will result." Commonwealth v. Horne, 466 Mass. 440, 443-444 (2013), quoting Commonwealth v. Lyons, 444 Mass. 289, 293 (2005). "A judge need not provide an involuntary manslaughter charge if it is clear that the risk to the victim was nothing less than a plain and strong likelihood that death would follow" (quotation omitted). Commonwealth v. Concepcion, 487 Mass. 77, 92, cert. denied, 142 S. Ct. 408 (2021), quoting Commonwealth v. Diaz, 431 Mass. 822, 831 (2000).

Moreover, the jury here "'rejected the option of murder in the second degree, the malice element of which comes closest to involuntary manslaughter,' namely 'an intent to do an act that in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death will result.'" Pagan, 471 Mass. at 548-549, quoting Commonwealth v. Tolan, 453 Mass. 634, 650 (2009). "In finding the defendant guilty of murder in the first degree [based on deliberate premeditation only], the jury necessarily found that the defendant had both a specific intent to kill and that the shooting was premeditated." Pagan, supra at 549, quoting Tolan, supra.

In sum, no instruction on involuntary manslaughter was required, nor would it have made any difference had it been given.

c. Review under G. L. c. 278, § 33E. Finally, after a thorough review of the entire record, we find no reason to exercise our authority under G. L. c. 278, § 33E, to set aside or reduce the murder verdicts against the defendants.¹⁵ There was extensive evidence supporting the jury's finding that all of the defendants acted with deliberate premeditation, and that the defendants other than Keith, who fired the weapons, acted with extreme atrocity or cruelty. See Carleton, 497 Mass. at 12-13, and Phillips, 495 Mass. at 506 (declining to reduce verdicts in drive-by shooting where defendants circled around block, allowed other cars to pass, slowed car, and fired multiple shots at victim through passenger's side window).

3. Conclusion. For the foregoing reasons, the defendants' convictions are affirmed.

So ordered.

¹⁵ In Commonwealth v. Mattis, 493 Mass. 216, 217-218 (2024), we concluded that it is unconstitutional to sentence individuals who were eighteen through twenty years of age when they committed the crime to life without the possibility of parole. Because Fraticelli was eighteen years old at the time of the murder, and because he was convicted of murder in the first degree committed with extreme atrocity or cruelty, he is entitled to parole eligibility after serving thirty years in prison. Id. at 237.