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25-P-257

Appeals Court

COMMONWEALTH vs. DRAVON ROBINSON.

No. 25-P-257.

Suffolk. April 15, 2026. - October 19, 2026.

Present: Massing, Ditkoff, & Hand, JJ.

Homicide. Joint Enterprise. Practice, Criminal, Instructions to jury, Lesser included offense. Evidence, Joint venturer, Intent.

Indictment found and returned in the Superior Court Department on November 30, 2021.

The case was tried before Robert L. Ullmann, J.

Philip Weber for the defendant.
Molly Paris, Assistant District Attorney (Nathan McGregor, Assistant District Attorney, also present) for the Commonwealth.

DITKOFF, J. The defendant, Dravon Robinson, appeals from a conviction, after a jury trial in the Superior Court, of involuntary manslaughter, G. L. c. 265, § 13, as a lesser included offense of murder in the first degree, G. L. c. 265, § 1. He challenges the trial judge's decision to instruct the

jury, over his objection, on involuntary manslaughter, and argues that the evidence was insufficient to sustain his conviction. Because the evidence was uncertain when, if ever, the defendant knew that his coventurers were using knives or intended to use knives against the victim, the jury could rationally have found that the evidence failed to show beyond a reasonable doubt that the defendant shared an intent to kill the victim, and an instruction on manslaughter was appropriate. Accordingly, we affirm.

1. Background. On the morning of August 8, 2021, the police responded to reports of a stabbing incident in the Roxbury section of Boston. The incident was captured by a nearby security camera. The video footage from this security camera shows a silver sport utility vehicle (SUV) driving up the street before reversing alongside a woman walking on the sidewalk. The woman was later identified as the victim's girlfriend. The video footage has no audio, but the woman appears to be speaking to someone in the SUV. The rear passenger door of the SUV opened, and a man (not the defendant) alighted.¹ He approached the woman, who stepped away from him into the street.

¹ The rear passenger was convicted of murder in the first degree in a separate trial. His appeal is pending before the Supreme Judicial Court.

Seconds later, the victim entered the view of the camera. He walked up to the SUV, tossed his bags on the street, and ran toward the rear passenger. The driver, who was later identified as the defendant, and the front passenger² immediately got out of the SUV. A fight ensued. The victim fell to the ground, and the rear passenger can be seen striking him over and over. While the victim was on the ground, the defendant kicked him at least three times. The three assailants and the victim left the view of the camera for a few seconds before the defendant walked back toward the SUV, followed by the front passenger. The defendant waited by the SUV, looking toward where the victim and rear passenger continued interacting off camera. Seconds later, the defendant ran back to the driver's side door and, once the rear passenger reentered the car, the SUV drove off. At no point in the video footage can any weapon be seen on any of the participants.

An eyewitness testified that he saw "a silver car pull over" and "one kid [was] out of the car." Then, "three kids got out of the car," and "[i]t didn't look good," so the eyewitness went "around the corner to get help" from a nearby police officer. He "didn't see any knives." When he got back to the

² The trial began with the defendant and the front passenger as codefendants. During jury selection, the front passenger pleaded guilty to voluntary manslaughter.

location of the incident with the police officer, the three assailants had left, and he saw the victim "laying there . . . already gone."

The victim's girlfriend also testified. That morning she and the victim "had a weird argument," so she "left him on a couple of streets over." She was "just walking around like that part of the neighborhood" when she saw "this silver -- it was a SUV" that "kept following [her]." "[A]ll of a sudden[, the SUV] started backwards," and the rear passenger asked her to come with him, but she refused. He then said, "I'm going to go punch this white girl in the face," and got out of the SUV. "[H]e gets closer to [her] And he's . . . yelling in [her] face": "You're coming in the car, and that's it, whether you like it or not." She responded that she would "absolutely not." She had never seen the three men before. She started screaming, and the victim "came around the corner," and "all of a sudden the physical altercation happened between all three."

The victim's girlfriend described in more detail that "the guy in the back seat started fighting with [the victim]," and "then the other two got out and . . . proceeded to fight with him as well." "[A]ll [she] could see was blood and [the victim] saying stop the whole time." She said that she "didn't see any" weapons during the fight, but "the guy in the back seat" was "doing stabbing motions." When "they were all going back to the

car," though, the rear passenger "went back to pick up the knife." Once the police arrived, she "went over to [the victim]" and "[h]is eyes were in the back of his head and that was it." The paramedic who arrived on scene minutes later testified that the victim was not breathing and had no pulse. The medical examiner testified that the victim had "17 sharp force injuries," some of which alone could have been fatal. She ultimately opined that the victim died from "[m]ultiple sharp force injuries."

The defendant was tried on a charge of murder in the first degree. Initially, the defendant requested an instruction on involuntary manslaughter; however, he objected to any instruction on involuntary manslaughter as a joint venturer. The judge instructed the jury on both voluntary and involuntary manslaughter as a joint venturer, and allowed the parties to preserve their objections at the charge conference. The jury convicted the defendant of involuntary manslaughter, on a theory of wanton or reckless conduct. This appeal followed.

2. Sufficiency of the evidence of involuntary manslaughter. a. Standard of review. When reviewing the sufficiency of the evidence, "[w]e consider the evidence introduced at trial in the light most favorable to the Commonwealth, and determine whether a rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt." Commonwealth v. Lopez, 105 Mass. App. Ct. 674, 676 (2025), quoting Commonwealth v. Oberle, 476 Mass. 539, 547 (2017). "The inferences that support a conviction 'need only be reasonable and possible; [they] need not be necessary or inescapable.'" Commonwealth v. Erler, 106 Mass. App. Ct. 149, 157 (2025), quoting Commonwealth v. Quinones, 95 Mass. App. Ct. 156, 162 (2019).

b. Application. The gist of the defendant's argument is that an involuntary manslaughter conviction is unsupportable, as the facts of this case required either a conviction for murder or an acquittal. Specifically, the defendant argues that "it is quite clear that the defendant was aware that dangerous weapons, the knives, were going to be used on the victim" and that "[t]here is no conceivable way that the defendant thought the incident would be just a simple assault and battery, he saw the knives, he knew it was a stabbing."

The defendant frames his argument primarily as a challenge to the sufficiency of the evidence supporting the involuntary manslaughter conviction, but this claim need not detain us long. The defendant agreed at oral argument that there was sufficient evidence of murder in the first degree. We agree that a jury could have found that the defendant saw the knife used by his coventurer to stab the victim and continued to kick him, although (as we will explain) the evidence did not compel that

conclusion. "Where a defendant continues to act in furtherance of the joint venture even after learning of a coventurer's weapon, we have allowed an inference that the coventurer had the requisite intent for the joint venture." Commonwealth v. Buth, 480 Mass. 113, 117, cert. denied, 586 U.S. 1041 (2018).

Involuntary manslaughter is a lesser included offense of murder. See Commonwealth v. Earle, 458 Mass. 341, 349 (2010). A "lesser included offense is one which is necessarily accomplished on commission of the greater crime." Commonwealth v. Porro, 458 Mass. 526, 531 (2010), quoting Commonwealth v. D'Amour, 428 Mass. 725, 748 (1999). Accord Commonwealth v. Brule, 98 Mass. App. Ct. 89, 94 (2020). Accordingly, because there was sufficient evidence to convict the defendant of murder, there was sufficient evidence to convict him of the lesser included offense of involuntary manslaughter.

3. Instruction on involuntary manslaughter. a. Standard of review. The defendant also raises an instructional challenge -- that is, whether the trial judge properly instructed on the lesser included offense. In determining whether to instruct on a lesser included offense, "the test is 'whether the evidence at trial presents a rational basis for acquitting the defendant of the crime charged and convicting him of the lesser included offense.'" Commonwealth v. Taylor, 486 Mass. 469, 485 (2020), quoting Commonwealth v. Russell, 470 Mass. 464, 480 (2015).

Accord Commonwealth v. Scott, 98 Mass. App. Ct. 843, 854-855 (2020).

It is worth pausing to acknowledge that, when a judge improperly instructs on a lesser included offense, and the jury convict on that lesser included offense, the remedy is unclear. Our precedent suggests as many as four different answers:

(1) retrial on the greater offense only; (2) retrial on the lesser included offense only; (3) acquittal; or (4) no remedy at all. Unfortunately, our case law supports each possibility, and each has arguments in its favor.

In Commonwealth v. Nardone, 406 Mass. 123, 124, 132 (1989), the defendant was convicted of assault with the intent to kill as a lesser included offense of assault with the intent to murder, but the Supreme Judicial Court determined that there was "no evidence from which a rational juror could conclude that the defendant had shot his wife in reaction to a sudden attack by her or because of passion induced by reasonable provocation," and thus there was no basis for instructing on the lesser included offense.³ The court remanded for retrial on the greater

³ The Supreme Judicial Court decided Nardone long before it rejected "oral revelations of infidelity as a basis for reasonable provocation," Commonwealth v. Ronchi, 491 Mass. 284, 294 (2023), but there was no suggestion of such revelations (or any basis for provocation) in Nardone, 406 Mass. at 123-125, 132.

offense of assault with the intent to murder, stating, "Where a defendant attacks the very error that resulted in his conviction on the lesser offense rather than the main offense, we hold that retrial on the main offense is not barred." Id. at 133.

Next, in Commonwealth v. Thayer, 35 Mass. App. Ct. 599, 600, 607 (1993), S.C., 418 Mass. 130 (1994), the defendants were convicted of rape of a child (or, as we called it, "statutory rape") as a lesser included offense of forcible rape of a child, and we concluded that there was no "genuine dispute as to force," and thus the instruction should not have been given.⁴ We then stated:

"It is to be noted that the jury's verdict on the lesser offense, statutory rape, is an implied finding of not guilty on the greater offense, forcible rape under G. L. c. 265, § 22A. There may, however, be a retrial of so much of the forcible rape indictment as charges statutory rape." (Citations omitted.)

Id. at 607-608. Although we cited Nardone, see Thayer, supra at 604, we did not distinguish it.

Then, in Commonwealth v. Ortiz, 47 Mass. App. Ct. 777, 778-779 (1999), the defendant was convicted of indecent assault and battery as a lesser included offense of rape, but we concluded

⁴ The Supreme Judicial Court granted further appellate review and determined that the instruction on the lesser included offense was warranted. See Commonwealth v. Thayer, 418 Mass. 130, 133 (1994). Accordingly, the court did not address the remedy question.

that "the jury could find rape had occurred but the evidence did not permit a finding that something less had occurred," and thus the instruction on the lesser included offense should not have been given. We then held that the defendant was entitled to an outright acquittal:

"The jury's verdict convicting the defendant of indecent assault and battery is an implied acquittal of the anal rape charge. The defendant may not be retried for that offense. Double jeopardy principles also bar a retrial on the lesser included offense of indecent assault and battery because, as explicated above, the government did not adduce evidence that could take that offense before the jury. Failure of evidence, such as would entitle a defendant to a required finding of not guilty as to a particular charge, bars retrial of that charge." (Citations omitted.)

Id. at 779-780.⁵ We ignored Thayer, and declined to follow Nardone by concluding that it involved "unique circumstances." Ortiz, supra at 780.

Finally, in Commonwealth v. Roderiques, 462 Mass. 415, 416, 425 (2012), the defendant was convicted of reckless endangerment of a child as a lesser included offense of recklessly permitting an assault and battery on a child causing substantial bodily injury, but "no view of the evidence" permitted the jury to

⁵ The meager Federal circuit precedent we could find supports this approach. See United States v. Harary, 457 F.2d 471, 479-480 (2d Cir. 1972); United States v. Waldron, 11 M.J. 36, 37 (C.M.A. 1981), adopting 9 M.J. 811, 818 (N.C.M.R. 1980). But see United States v. Miergrimado, 66 M.J. 34, 36 n.1 (C.A.A.F. 2008) (stating opinion in Waldron was plurality opinion).

doubt the aggravating elements. Because the defendant requested the lesser included offense instruction,⁶ and "the evidence amply supported a guilty verdict on the" greater offense, the Supreme Judicial Court found no substantial risk of a miscarriage of justice and thus affirmed the conviction of the lesser included offense. Id. at 427-428.

Each of these approaches has some force to it. There is something unseemly about a defendant convicted of manslaughter arguing that he is plainly guilty of murder and therefore should obtain relief from the manslaughter conviction. One could argue that he should merely welcome the jury's error in his favor and accept his sentence.

On the other hand, if the jury indeed chose a verdict that has no rational basis in fact, that is powerful evidence that the trial process was flawed, and a retrial with a rational jury (or correcting whatever trial error led the jury astray) would be a sensible remedy for that problem. Considering that "the [double jeopardy] bar will attach to a[n] . . . acquittal that is patently wrong in law," Smith v. Massachusetts, 543 U.S. 462, 473 (2005), it makes sense that this retrial would be only on

⁶ By contrast, as here, the defendant objected to instructing on the lesser included offense in Nardone, 406 Mass. at 130; Thayer, 35 Mass. App. Ct. at 600; and Ortiz, 47 Mass. App. Ct. at 778.

the lesser included offense. See Price v. Georgia, 398 U.S. 323, 324, 329 (1970) (defendant convicted of voluntary manslaughter could not be retried on greater offense of murder, even though "[t]he jury's verdict made no reference to the charge of murder").

Nonetheless, retrial on the lesser included offense alone could result in a final conviction on the lesser included offense, the very offense that the courts determined should not have been available to the jury in the first trial. Accordingly, there is some sense to simply barring retrial altogether.

Finally, the Nardone approach -- allowing a retrial on the greater offense -- also has logic behind it. The defendant, after all, argues that a rational jury had to convict him of the greater offense if they did not acquit him altogether, and we are a "soft transition" State where a jury need not acquit a defendant of an offense to convict of a lesser included offense. See Commonwealth v. Figueroa, 468 Mass. 204, 227-228 (2014). See also Cichos v. Indiana, 385 U.S. 76, 80 (1966) (where defendant was charged with reckless homicide and involuntary manslaughter and convicted only of reckless homicide, declining to "accept petitioner's assertions that the first jury acquitted him of the charge of involuntary manslaughter"). Fortunately, we need not resolve this conundrum, because we conclude that in

this case the evidence provided a factual basis for concluding that the defendant committed only involuntary manslaughter, and thus the judge properly instructed on the lesser included offense of involuntary manslaughter.

b. Factual basis for the instruction. As stated, "the test is 'whether the evidence at trial presents a rational basis for acquitting the defendant of the crime charged and convicting him of the lesser included offense.'" Taylor, 486 Mass. at 485, quoting Russell, 470 Mass. at 480. Preliminarily, the defendant contends that, "for a jury to find that [the defendant] had the mental state required for involuntary manslaughter, they would have, as a matter of law, needed to have found that his co-defendants committed involuntary manslaughter on the basis of wanton and reckless acts." Joint venturers, however, need not share the same mental state. See Commonwealth v. Tavares, 471 Mass. 430, 440 (2015) ("Two or more defendants may have knowingly participated together in a criminal act, such as an unlawful killing, but may have had different mental states or levels of culpability with respect to that act"). See also Commonwealth v. Sosa, 493 Mass. 104, 116 (2023), cert. denied, 145 S. Ct. 306 (2024) (codefendant's "intent is not imputed to the defendant"). Indeed, "each participating defendant may . . . be convicted as an aider and abettor (or joint venturer), so long as each participant had, at a minimum, the mental state

required for the particular offense or offenses of which he or she was convicted." Tavares, supra at 441. See Commonwealth v. Wood, 469 Mass. 266, 294 (2014) ("the jury could, in the exercise of their discretion, permissibly find the defendant and [the codefendant] guilty of a different degree of murder, even based on different theories"). Accordingly, the fact that the rear passenger had the intent to kill is no bar to the defendant's being convicted only of involuntary manslaughter if the jury concluded that his intent was lesser.

In this light, "[a] verdict of involuntary manslaughter is warranted 'only where the defendant caused an unintentional death (1) during the commission of an act amounting to wanton or reckless conduct, or (2) during the commission of a battery.'" Commonwealth v. Felix, 476 Mass. 750, 760 (2017), quoting Commonwealth v. Degro, 432 Mass. 319, 331 (2000). Here, the jury verdict was based on wanton or reckless conduct, not a battery. "The elements of involuntary manslaughter [on this theory] are (1) that the defendant caused the victim's death, (2) that the defendant intended the conduct that caused the victim's death, and (3) that the defendant's conduct was wanton or reckless." Commonwealth v. Guaman, 90 Mass. App. Ct. 36, 40 (2016). "Wanton or reckless conduct 'involves a high degree of likelihood that substantial harm will result to another,' and depends on whether the defendant realized the risk of harm or if

a reasonable person, who knew what the defendant knew, would have realized such risk." Commonwealth v. Hardy, 482 Mass. 416, 421 (2019), quoting Earle, 458 Mass. at 347 & n.9.

"Malice is what distinguishes murder from manslaughter." Commonwealth v. Concepcion, 487 Mass. 77, 92, cert. denied, 142 S. Ct. 408 (2021), quoting Commonwealth v. Pagan, 471 Mass. 537, 546, cert. denied, 577 U.S. 1013 (2015). "Without malice, an unlawful killing can be no more than manslaughter." Commonwealth v. Lyons, 444 Mass. 289, 293 (2005), quoting Commonwealth v. Judge, 420 Mass. 433, 437 (1995). "To prove malice, the Commonwealth must prove one of three prongs: (1) an intent to kill the victim; (2) an intent to cause grievous bodily harm to the victim; or (3) commission of an act that, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood of death." Pagan, supra at 546-547, quoting Commonwealth v. Riley, 467 Mass. 799, 821-822 (2014). By contrast, under the wanton or reckless theory, the defendant's conduct need only "create[] a high degree of likelihood that substantial harm will result to another." Commonwealth v. Escobar, 490 Mass. 488, 499 (2022), quoting Commonwealth v. Lugo, 482 Mass. 94, 103 (2019). "A judge is not required to instruct on involuntary manslaughter when it is obvious that 'the risk of physical harm to the victim creates a "plain and strong likelihood that death would

follow."" Commonwealth v. Braley, 449 Mass. 316, 331 (2007), quoting Commonwealth v. Souza, 428 Mass. 478, 493 (1998).

Here, a rational jury could reasonably doubt that the defendant intended to kill the victim and that his actions created a plain and strong likelihood of death while still finding beyond a reasonable doubt that the defendant's actions were wanton or reckless. The video footage shows that, within seconds of the fight's beginning, the defendant joined in, kicking the victim multiple times. As the rear passenger attacked the victim, who was on the ground, the defendant remained close by, leaving the view of the camera for a few seconds before walking back toward the SUV, followed by the front passenger. Neither eyewitness saw any weapons during the incident, nor can any weapon be seen in the video footage. Accordingly, the evidence did not require that the jury find that the defendant was aware of his coventurer's knife at any point during the incident. See Commonwealth v. Chhim, 447 Mass. 370, 382-383 (2006). See also Commonwealth v. Desiderio, 491 Mass. 809, 821 (2023) ("persuasive" circumstantial evidence "did not . . . require the jury to find that the defendant knew that his coventurers were armed and masked during the commission of [the] crimes").

Because the jury could find that the defendant intended merely to be part of a severe but weaponless beating of the

victim, the jury were permitted to infer that the defendant knew only that his conduct created a "high degree of likelihood that substantial harm will result to another," or that a reasonable person knowing what the defendant knew would have understood his conduct to create no more than that degree of risk. Lyons, 444 Mass. at 293, quoting Commonwealth v. Sires, 413 Mass. 292, 304 n.14 (1992). See Hardy, 482 Mass. at 421, quoting Commonwealth v. Welansky, 316 Mass. 383, 398 (1944) ("the defendant . . . chose[] to run the risk rather than alter [her] conduct so as to avoid the act or omission which caused the harm"). The evidence showed that the defendant actively participated in the physical altercation leading up to the victim's death. The jury were not required to infer that the defendant knew that the rear passenger had a knife or that the rear passenger intended to kill the victim. The jury could also reasonably doubt whether a weaponless beating, even if three on one, created a plain and strong likelihood of death. Instead, a reasonable jury could conclude that a reasonable person in the defendant's position would think this was a "fistfight," Chhim, 447 Mass. at 382, and that the defendant's behavior was "consistent with a failure to regard the consequences of his action or an indifference to what the consequences of his action might have been, thus rising to wanton or reckless conduct." Commonwealth v. Tyler, 493 Mass.

752, 762 (2024), quoting Commonwealth v. Campbell, 352 Mass. 387, 397-398 (1967).

Additionally, the verdict was consistent with the defendant's argument at trial that he did not possess the intent to kill. In his closing, defense counsel argued, "Did [the defendant] have the intent to kill or murder [the victim]? Did [the defendant] in fact murder or kill [the victim]? And the simple answer is no." Counsel stated that the defendant did not "know [the rear passenger] ha[d] a knife" and, once the rear passenger stabbed the victim, the defendant "back[ed] away." The defendant "did not willingly engage or bring about [the rear passenger's] efforts to kill, to murder [the victim]." Indeed, a rational view of the evidence could lead the jury to conclude that "the defendant anticipated that only a simple assault and battery was to be committed by the participants and . . . he had no knowledge that it would escalate into the use of a dangerous weapon on the victim." Commonwealth v. Snow, 34 Mass. App. Ct. 27, 32 (1993). Accordingly, the trial judge properly instructed the jury on involuntary manslaughter.

Judgment affirmed.