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SJC-13190

DARIO BAXTER vs. COMMONWEALTH.

Suffolk. February 2, 2022. - April 12, 2022.

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

Homicide. Firearms. Accessory and Principal. Constitutional Law, Double jeopardy. Practice, Criminal, Double jeopardy, Mistrial. Evidence, Identification, Intent. Intent.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on June 21, 2021.

The case was reported by Wendlandt, J.

Jillise McDonough for the petitioner.  
Andrew S. Doherty, Assistant District Attorney (Tara B. Burdman, Assistant District Attorney) for the Commonwealth.

WENDLANDT, J. The defendant, Dario Baxter, was tried on charges of murder in the first degree on theories of deliberate premeditation and extreme atrocity or cruelty, accessory after the fact to murder, carrying a firearm without a license, and carrying a loaded firearm without a license in connection with

the killing of Michael Ross, who was shot multiple times on the morning of March 30, 2018. The Commonwealth alleged that the defendant drove the shooter and another coventurer to and from the scene of the fatal shooting. After four days of deliberations, the Superior Court jury were unable to reach a verdict, and the trial judge declared a mistrial. The defendant filed a motion to dismiss on double jeopardy grounds. The motion judge, who was not the trial judge, denied the motion. The defendant filed a petition pursuant to G. L. c. 211, § 3, which was reserved and reported to the court by the single justice.

On appeal, the defendant maintains that a retrial would violate his right against double jeopardy. Because we agree that there was insufficient evidence that the defendant shared the lethal intent of the shooter required to support a conviction of murder in the first degree on a joint venture theory, we reverse the denial of his motion to dismiss insofar as it concerns this charge. We remand for further proceedings as to the remaining charges.

1. Background. a. Facts. We review the evidence in the light most favorable to the Commonwealth. See Pinney v. Commonwealth, 479 Mass. 1001, 1001-1002 (2018), S.C., 484 Mass. 1003 (2020) and 487 Mass. 1029 (2021); Commonwealth v. Latimore, 378 Mass. 671, 677 (1979).

The defendant and his two friends, codefendant Dawon Wright and Dakarai Pittman, were training to become personal trainers. On the morning of the shooting, Wright and Pittman attended a training session in an office building in downtown Boston along with their supervisor. Afterward, Wright and Pittman asked to be dropped off in the Orchard Park neighborhood of the Roxbury section of Boston -- a location the supervisor "associate[d] with" the defendant. The supervisor dropped off Wright and Pittman on Zeigler Street in that neighborhood at around 8:40 A.M. Wright was wearing a red-colored Red Sox jacket with a black hooded sweatshirt underneath, and Pittman was wearing a blue jacket over a grey hooded sweatshirt.

The defendant's girlfriend lived on Zeigler Street. She was the registered owner of a gold Honda Accord, which was parked in her driveway that morning. The car had heavily tinted side windows, a scratch on the front driver's side door, and damage to the front bumper. The defendant had permission to drive the car.

Video footage showed a person matching Pittman's description walking toward the car that morning, and the car leaving the driveway at 9:01:20 A.M.<sup>1</sup> Video footage showed the

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<sup>1</sup> The jury could infer that the defendant's girlfriend was not driving the car because she had clocked into work at 8:10 A.M. and did not clock out until 12:32 P.M.

car passing the intersection of Zeigler and Dearborn Streets at 9:01:30 A.M.. The front driver's side window was partially open, and a person who appeared to be the defendant was driving the car. A person wearing a red article of clothing was visible beside him in the front passenger's seat. At 9:06 A.M., video footage showed the car at the intersection of Wayland Street and Howard Avenue.

Additional video footage showed the victim leaving an apartment building on Howard Avenue at 9:06 A.M., crossing the street, and walking down Wayland Street. The Accord followed him down Wayland Street, and then went past him and stopped along the curb on the side of the street where he was walking. The car waited about eighteen seconds while the victim walked toward it on the sidewalk. As the victim approached the car, it pulled away from the curb and traveled a short distance on Wayland Street before taking a right turn onto Balfour Street.

About forty-five seconds later, as the victim walked past Balfour Street, a man in a red jacket came from Balfour Street on foot and quickly approached the victim from behind, extending his arms in front of him. The victim did not appear to be aware that the man was behind him until the man was just a few feet away. The man fired at least six shots at the victim, striking him in the back on the right side of his torso, his left arm, and his right wrist. The shooter fled to Balfour Street, and

the victim began to run but collapsed on the sidewalk. He later succumbed to his wounds.

Two witnesses, both of whom were residents of Balfour Street, heard the gunshots and looked out their windows. Both observed two men running from the direction of Wayland Street to a gold car parked on Balfour Street: a tall Black man wearing a red-colored Red Sox sweatshirt, who got into the passenger's seat and appeared to have a gun at his side; and a shorter Black man wearing black jeans and a gray sweatshirt, who entered the back seat. Once the men were in the car, it sped away on Balfour Street toward Dalkeith Street.

A witness, who was driving on Howard Avenue at the time of the shooting, turned onto Dalkeith Street when he heard the shots, and subsequently turned onto Balfour Street. He observed a man running from Wayland Street onto Balfour Street and getting into a light brown Accord that was stopped on Balfour Street. The car went past him toward Dalkeith Street, and he observed three Black men inside the car, two in the front seat and one in the back. The Commonwealth's theory at trial was that the defendant was the driver of the vehicle, codefendant Wright was the shooter who entered the front passenger's seat of the vehicle, and Pittman acted as the lookout and entered the back seat of the vehicle after the shooting.

After reviewing surveillance video recordings from the area, Boston police issued a "be on the lookout" (BOLO) alert for a gold Honda with damage to the front bumper and tinted side windows. Later that night, officers stopped a car matching the BOLO description. The defendant was driving the car, and Wright was in the front passenger's seat. The men and the car were photographed and released.

The following day, the defendant's girlfriend removed the dark tinting from the car's windows. Later that same day, Boston police seized and searched the car pursuant to a warrant. They recovered a security pass receipt for Pittman from the building where the personal training session had been held the morning of the shooting. In addition, the defendant's fingerprints were found on the driver's door and interior handle.

b. Procedural history. The defendant was indicted for murder in the first degree, in violation of G. L. c. 265, § 1; accessory after the fact to murder, in violation of G. L. c. 274, § 4; carrying a firearm without a license, in violation of G. L. c. 269, § 10 (a); and carrying a loaded firearm without a license, in violation of G. L. c. 269, § 10 (n). At a jury

trial in the Superior Court,<sup>2</sup> the jury indicated that they were unable to reach a verdict after four days of deliberations, and the judge declared a mistrial. The defendant filed a motion to dismiss on double jeopardy grounds, which was denied by a judge who was not the trial judge.

The defendant filed a petition pursuant to G. L. c. 211, § 3. The single justice reserved and reported the matter to a full panel of the court.

2. Discussion. a. Standard of review. Following a mistrial, double jeopardy precludes the Commonwealth from retrying a defendant for the same offense where the evidence presented at the first trial was legally insufficient to warrant a conviction. See Pinney, 479 Mass. at 1001-1002, quoting Brangan v. Commonwealth, 478 Mass. 361, 363 (2017) ("After a mistrial, the Commonwealth may retry a defendant [only] if it has presented evidence at the first trial that, if viewed in the light most favorable to the Commonwealth, would be sufficient for a rational trier of fact to find the defendant guilty of the crime charged beyond a reasonable doubt" [alteration in original]). To determine whether the evidence was legally sufficient to permit a retrial, "[w]e consider whether, after

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<sup>2</sup> The defendant moved for a required finding of not guilty at the close of the Commonwealth's case-in-chief and at the close of all the evidence. Both motions were denied.

viewing the evidence in the light most favorable to the Commonwealth, any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt." Commonwealth v. Watson, 487 Mass. 156, 162 (2021), quoting Commonwealth v. Ayala, 481 Mass. 46, 51 (2018). "The evidence may be direct or circumstantial, and we draw all reasonable inferences in favor of the Commonwealth." Watson, supra, quoting Ayala, supra.

b. Murder in the first degree. "For murder in the first degree both under the theory of deliberate premeditation and under the theory of extreme atrocity or cruelty, to prove the defendant guilty as a joint venturer, the Commonwealth had to 'prove . . . that "the defendant knowingly participated in the commission of the crime charged, and that the defendant had or shared the required criminal intent."' " Watson, 487 Mass. at 162, quoting Commonwealth v. Britt, 465 Mass. 87, 100-101 (2013). "Because the Commonwealth did not contend that the defendant [him]self carried out the killing, but only that [he] aided the coventurers, . . . it was the Commonwealth's burden to show that the defendant (a) 'participated in the commission of the crime charged,' (b) did so 'knowingly,' and (c) 'shared the required criminal intent.'" Commonwealth v. Gonzalez, 475 Mass. 396, 406 (2016), quoting Britt, supra. "In the circumstances here, this required a showing that the defendant was the driver

of the suspect vehicle, that [he] knew [his] passenger[] intended to kill the victim, and that [he] shared this intent." Gonzalez, supra at 406-407. On appeal, the defendant challenges the sufficiency of the evidence that he was the driver of the vehicle and that he knew of and shared the shooter's intent to kill the victim.

i. Identification. Our decision in Watson is instructive as to the defendant's challenge to the sufficiency of the evidence that he was the driver of the Accord. In Watson, we concluded that the evidence was sufficient to identify the defendant as the driver of the suspect vehicle where the defendant borrowed the vehicle from his girlfriend the day before the murder occurred, the defendant's cell phone and car keys were found in the vehicle, and the defendant's fingerprints were found on the outside and inside of the vehicle, and specifically on the gear shift. Watson, 487 Mass. at 162-163.

Similarly, in the present case, a rational trier of fact reasonably could have found that the defendant was the driver of the Accord on the morning of the shooting. The car belonged to the defendant's girlfriend, and he had her permission to drive it. The morning of the shooting, Wright and Pittman, known compatriots of the defendant, asked to be dropped off in a neighborhood affiliated with the defendant and near the defendant's girlfriend's home. Pittman approached the Accord

shortly before it pulled away from the girlfriend's driveway, and his security tag from the office that he and Wright visited earlier that morning was found in the Accord. Video footage captured the car's movements shortly thereafter as it traveled from the girlfriend's home to the scene of the shooting; specifically, the car is shown leaving the girlfriend's driveway at about 9:01 A.M. and traveling over the next six minutes to the scene of the shooting, including maneuvering near the victim just prior to the shooting. Significantly, the defendant's girlfriend was at work, so she could not have been the driver herself, and video footage showed a person resembling the defendant driving the Accord about six minutes before the shooting occurred, just shortly after the car left the girlfriend's driveway. The jury could infer from the footage that Wright, who was wearing a red jacket, was in the front passenger's seat. The defendant's fingerprints were found on the interior and exterior of the driver's door. Several witnesses identified the Accord as leaving the scene of the shooting after the shooter, who was wearing a red jacket, and a coventurer ran away from the victim's body. The defendant and Wright were found traveling in the Accord, hours after the shooting. In sum, the evidence of identification was sufficient to support a reasonable inference that the defendant was the driver. See Pinney, 479 Mass. at 1001-1002.

ii. Knowledge and intent. The defendant's challenge to the sufficiency of the evidence that he knew of and shared the shooter's intent to kill the victim stands on different footing. See Gonzalez, 475 Mass. at 414, citing Commonwealth v. Nolin, 448 Mass. 207, 217 & n.11 (2007) (to support conviction of murder in first degree on theory of joint venture, "the Commonwealth was required to prove, beyond a reasonable doubt, not only that the defendant drove the suspect vehicle, but that [he] knew [his] passenger[] intended to kill the victim and that [he] shared [that] intent"). "While such '[m]atters . . . are rarely proved by direct evidence and are most often proved circumstantially,' . . . the circumstantial evidence may not consist solely of a 'show[ing] that the defendant . . . was present when the crime was committed,' even if that showing is supplemented by evidence that the defendant 'knew about [the crime] in advance'" (alterations in original). Gonzalez, supra, quoting Commonwealth v. Rosario, 83 Mass. App. Ct. 640, 643 (2013), and Commonwealth v. Zanetti, 454 Mass. 449, 470 (2009) (Appendix). The Commonwealth asserts that the manner by which the defendant maneuvered the vehicle before and after the shooting is sufficient evidence to prove that the driver knew of and shared the lethal intent of the shooter. Because such an inference rests on speculation and conjecture, see Commonwealth v. Mandile, 403 Mass. 93, 94 (1988), we disagree.

In particular, while the evidence of the defendant's maneuvering of the vehicle may have allowed the jury to infer that the defendant knew of and shared the passenger's intent to assault the victim, it fails to sustain a reasonable inference, beyond a reasonable doubt, that he shared the passenger's intent that the attack be deadly, as required for a conviction under a joint venture theory. See, e.g., Gonzalez, 475 Mass. at 415 (evidence of shared lethal intent legally insufficient despite evidence that defendant had motive, had planned alibi, had engaged in multiple cell phone calls with perpetrators in hours before shooting, had driven shooter to scene of killing, and maneuvered vehicle after dropping off shooter, suggesting she "had the purpose of 'buy[ing] some time' until the killing could be completed, so that the driver could retrieve the perpetrators"); Mandile, 403 Mass. at 95, 100-101 (evidence of shared lethal intent insufficient where defendant participated in stealing guns, was present at scene of murder but remained in getaway vehicle, knew coventurer was armed, was driver of getaway vehicle, and attempted to conceal crime by disposing of murder weapon).

There was no direct evidence that the defendant intended that the victim be killed. Compare Commonwealth v. Woods, 466 Mass. 707, 709, 711, cert. denied, 573 U.S. 937 (2014), S.C., 480 Mass. 231, cert. denied, 139 S. Ct. 649 (2018) (defendant,

who was not shooter, had made threats to shoot or kill victim); Commonwealth v. Marrero, 459 Mass. 235, 247-248 (2011) (defendant threatened to kill victim). Nor did the defendant's actions by their nature demonstrate a shared lethal intent. Compare Commonwealth v. Tavares, 471 Mass. 430, 432-433 (2015) (defendant brought firearm to scene of killing, chambered bullet, and pointed gun at victim); Commonwealth v. Rosa, 468 Mass. 231, 233-234 (2014) (defendant held and fired gun along with two others); Commonwealth v. Keo, 467 Mass. 25, 27, 29-30 (2014) (defendant supplied firearm). In addition, there was no evidence that the defendant heard the passenger express lethal intent or that he saw the passenger do anything to demonstrate lethal intent, such as displaying a firearm before the shooting. Compare Commonwealth v. Newson, 471 Mass. 222, 226-228 (2015) (defendant knew coventurer had just used gun and subsequently drove coventurer to site of fatal shooting); Commonwealth v. Reaves, 434 Mass. 383, 386-387, 392-393 (2001) (defendant was present during planning of drive-by shooting, saw guns, rode in vehicle with shooters, and assisted in disposing of weapons after shooting). And there was no evidence that the defendant saw or joined the shooter during the commission of the shooting. Compare Commonwealth v. Bonner, 489 Mass. 268, 283-284 (2022) (evidence sufficient that defendant shared shooter's lethal intent where defendant observed shooter wield firearm,

manipulate slide, and aim at victim, and defendant then moved to shooter's side to lend encouragement, kicked victim in head and called him an expletive, facilitated shooter's escape, and disposed of murder weapon).

The evidence as a whole did not support a reasonable inference, beyond a reasonable doubt, that the defendant arrived at the scene with the knowledge and sharing the purpose of the passenger to kill the victim. Therefore, the denial of the defendant's motion to dismiss the charge of murder in the first degree must be reversed.

c. Postshooting charges. Unlike the charge of murder in the first degree, which requires an assessment of the defendant's knowledge and intent prior to and during the commission of the killing, the remaining charges involve an assessment of his knowledge and intent after the shooting. See Bonner, 489 Mass. at 281 (noting that shared lethal intent element occurs before or during commission of crime, and accessory after the fact occurs after commission of crime).

i. Accessory after the fact. The defendant's challenge to the charge of accessory after the fact, see G. L. c. 274, § 4, apparently relies on his challenge to the identification evidence. Because the evidence of identification was sufficient, his challenge to this charge is without basis. As relevant here, to support a conviction of accessory after the

fact, the Commonwealth was required to present evidence that the defendant knew the identity of the perpetrator, was aware of the substantial facts of the crime committed, and assisted the principal in his escape. See Commonwealth v. Perez, 437 Mass. 186, 190 (2002). See also Commonwealth v. Rivera, 482 Mass. 145, 150 (2019). From the evidence, the jury could reasonably conclude that the defendant knew the identity of the shooter, inferably Wright. The jury could also infer from the witnesses who were on Balfour Street and heard the shots fired that the defendant, who was in approximately the same location, also knew that a shooting had occurred. Finally, the defendant helped the shooter escape by driving him away from the scene of the killing.

ii. Firearm charges. With regard to the sufficiency of the evidence as to the firearm charges, the defendant contends only that no evidence suggests that he knew anyone was armed as required to convict him of the charges on a theory of joint venture. See Commonwealth v. Humphries, 465 Mass. 762, 768 (2013), quoting Commonwealth v. Brown, 50 Mass. App. Ct. 253, 256 (2000) (to establish liability for firearm possession under theory of joint venture, Commonwealth must prove "only that [the] defendant 'was accessory to another identified defendant in possessing a firearm'"). As discussed supra, two Balfour Street residents heard the shots from inside their homes,

suggesting that the defendant also heard the shots from where he was parked. Moreover, one witness saw the shooter holding a firearm as he ran back to the car, supporting a reasonable inference that the defendant also saw the gun before driving away. We agree with the Commonwealth that this evidence was sufficient to support a reasonable inference, beyond a reasonable doubt, that the defendant knew his passenger was armed when the passenger returned to the car after the shooting.

3. Conclusion. Because the Commonwealth did not present sufficient evidence for a reasonable jury to conclude beyond a reasonable doubt that the defendant shared the lethal intent of the shooter, a retrial of the defendant on the charge of murder in the first degree is prohibited by the principles of double jeopardy. Therefore, so much of the order denying the defendant's motion to dismiss the charge of murder in the first degree is reversed. The matter is remanded to the Superior Court, where the indictment charging murder in the first degree shall be dismissed, and for further proceedings on the remaining charges.

So ordered.