

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-725

COMMONWEALTH

vs.

DOMINIC TASSY.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant, Dominic Tassy, appeals from his convictions after a Superior Court jury trial for second degree murder, G. L. c. 265, § 1, and witness intimidation, G. L. c. 268, § 13B. Concluding that there was no substantial risk of a miscarriage of justice in the trial judge's failure to instruct on a marginal theory of manslaughter and that there was no error in the closing argument, we affirm the judgment on the murder conviction. Concluding that there was insufficient evidence to support the conviction of witness intimidation, we reverse the judgment on that conviction.

1. Background. On August 10, 2012, the victim and his friend drove to Brockton to visit another friend and parked the vehicle in the driveway of a three-family home. The defendant

and Jerome Almonor<sup>1</sup> pulled up behind them in a vehicle and entered the house. Approximately two minutes later, the men came back outside and Almonor approached the victim's vehicle. Almonor pulled a shotgun from his pants and said, "[W]ho you here to see?" The victim's friend said that they were there to see someone on the third floor. Almonor said, "I remember you, I remember you." The victim said, "[Y]ou got the wrong person."

Almonor then instructed the victim and his friend to empty their pockets. The victim's friend understood this to denote a robbery. At this point, the defendant joined Almonor by the victim's vehicle and said, "[Y]ou're doing all this talking. . . . I would have been popped his ass."

At this point, the victim smirked, and Almonor said, "[O]h, you laughing?" The defendant walked away. Almonor then lifted his shotgun and shot the victim in the chest. After Almonor shot the victim, the defendant said, "[C]ome on let's go."

When the victim's friend reached for the door handle of his vehicle, "[t]he man with the gun [Almonor] said, '[Y]ou get your fat ass out of there, I'm going to pop your ass, too.'"<sup>2</sup> Almonor and the defendant then fled the scene in their vehicle.

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<sup>1</sup> Almonor was also charged with murder and is awaiting trial.

<sup>2</sup> An eyewitness testified that he heard Almonor say, "'If you get out of the car, I'll waste you, too.'" Or something in that manner."

The defendant returned to the scene of the shooting a few minutes later with food in his hands. The victim's friend identified the defendant, and the police detained him. After receiving his Miranda rights, the defendant told police that he was there only to bring food to his children when a black man with dreadlocks jumped into his car. The defendant said that he drove down the street and then the man in dreadlocks exited his vehicle.

2. Failure to instruct on manslaughter. a. Standard of review. "[W]here a defendant is charged with murder, an instruction on involuntary manslaughter is appropriate if any 'reasonable view of the evidence would [permit] the jury to find "wanton [or] reckless" conduct rather than actions from which a "plain and strong likelihood" of death would follow.'" Commonwealth v. Lugo, 482 Mass. 94, 103 (2019), quoting Commonwealth v. Tavares, 471 Mass. 430, 438 (2015). "In making this determination, we draw all reasonable inferences from the evidence in favor" of the defense. Commonwealth v. Dyous, 436 Mass. 719, 731 (2002). Nonetheless, "even when evidence is introduced that would justify conviction for a lesser included offense, the defendant is not entitled to an instruction thereupon unless the proof on the 'elements differentiating the two crimes is sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and

guilty of the lesser included offense.'" Commonwealth v. Donlan, 436 Mass. 329, 335 (2002), quoting Commonwealth v. Souza, 428 Mass. 478, 494 (1998).

Prior to trial, the defendant requested a jury instruction on manslaughter, and the trial judge stated that he would give the instruction. The next day, the judge pointed out that the Commonwealth was proceeding only on a theory of joint venture and, without a manslaughter instruction, the jury would have to acquit the defendant if they were not convinced of the joint venture. The judge mused whether the indictment covered principal liability for manslaughter and asked defense counsel whether the jury could convict the defendant for manslaughter as a principal under the indictment. The defendant immediately withdrew his request for a manslaughter instruction, and did not object to its absence in the instructions. Accordingly, the issue was not preserved, and we review "only for a substantial risk of a miscarriage of justice." Commonwealth v. Gupta, 84 Mass. App. Ct. 682, 688 (2014).

b. Discussion. In Commonwealth v. Watt, 484 Mass. 742, 745 (2020), the coventurer handed a gun to the shooter and told him he "needed to go handle that." The coventurer argued on appeal that "the jury could have concluded that he merely 'recklessly' gave a firearm to [the shooter] for self-protection, or to frighten the teen he encountered, but did not

share [the shooter's] intent to kill." Id. at 752. The Supreme Judicial Court determined that the coventurer "might have been entitled to receive an involuntary manslaughter instruction had he requested it, but . . . in view of the evidence presented, the absence of the instruction did not result in a substantial likelihood of a miscarriage of justice." Id.

In the absence of joint venture, the instant case is quite a bit weaker for any criminal liability than Watt, as the defendant here did not provide the shooter with a weapon but only made a statement. Nonetheless, we follow the example of the Supreme Judicial Court and pretermite the question whether, if the defendant was not engaged in a joint venture with the shooter, he could be convicted of manslaughter. As in Watt, we discern no substantial risk of a miscarriage of justice based on the evidence presented at trial. See Watt, 484 Mass. at 752.

The defendant's statement as reported by the victim's friend, if credited by the jury, was damning, and the focus of the defense was to discredit it. The defendant vigorously argued that the statement was an invention and that "it's clear what [the victim's friend] did, from the entire investigation of this case up through trial, he ad libbed, he added facts, he lied." The defendant pointed out that the victim's friend did not report this statement to the police and argued that, "[i]f you just heard someone telling someone to shoot your friend,

that, I submit to you, is what you are going to tell the police officer." As in Watt, any argument that the defendant made the statement but did not intend the victim's death "would have been inconsistent with the focus of this defense." Watt, 484 Mass. at 753.

Similarly, after the shooting, the defendant said, "[C]ome on, let's go" and then drove Almonor away. Upon returning to the scene, the defendant attempted to mislead the police by saying that he did not know the man who had jumped into his car. "Given [the defendant's] conduct before and after the shooting," it is unlikely that a reasonable jury would have found that the defendant merely acted recklessly. Watt, 484 Mass. at 752-753. As in Watt, we discern no substantial risk of a miscarriage of justice in the absence of an involuntary manslaughter instruction.

3. Witness intimidation. In reviewing the denial of a motion for a required finding of not guilty, "we 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. 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. Quinones, 95 Mass. App. Ct. 156,

162 (2019), quoting Commonwealth v. Waller, 90 Mass. App. Ct. 295, 303 (2016).

"Conviction of witness intimidation under G. L. c. 268, § 13B, requires the Commonwealth to prove beyond a reasonable doubt that '(1) the target of the alleged intimidation was a witness in a stage of a criminal proceeding, (2) the defendant wilfully endeavored or tried to influence the target, (3) the defendant did so by means of intimidation, force, or threats of force, and (4) the defendant did so with the purpose of influencing the complainant as a witness.'" Commonwealth v. Perez, 460 Mass. 683, 702 (2011), quoting Commonwealth v. Robinson, 444 Mass. 102, 109 (2005). After reviewing the evidence in the light most favorable to the Commonwealth, "we conclude that evidence sufficient for the jury to find intimidation beyond a reasonable doubt is lacking."  
Commonwealth v. Ruano, 87 Mass. App. Ct. 98, 102 (2015).

Almonor's postshooting statement to the victim's friend was a threat designed to keep him from interfering with the defendant and Almonor's escape, but there is no indication in the evidence that it was an attempt to influence the victim's friend as a witness. See Commonwealth v. Cathy C., 64 Mass. App. Ct. 471, 475 (2005) ("[T]o constitute a violation under G. L. c. 268, § 13B, there must be a close nexus between a defendant's conduct

and the discharge of a victim's responsibilities as witness or juror").

Furthermore, there was no evidence presented by the Commonwealth that Almonor's statement was a part of the joint venture. See Commonwealth v. Hanright, 466 Mass. 303, 307-308 (2013) ("Outside the narrow context of joint venture felony-murder, we have held that joint venture liability should not extend to unintended crimes, even if such unintended crimes are the 'natural and probable' consequences of a crime in which a defendant participated as a joint venturer"). Accordingly, judgment must enter for the defendant on the charge of witness intimidation.

4. Closing argument. The judge denied the defendant's motion to suppress his first statement to police but granted his motion to suppress his later statements at the police station. The officer testified that the defendant stated on the scene that "a black male with dreadlocks jumped into his car" and then he "drove down the street for some distance, where the unidentified black male exited the car." During the suppressed interview at the police station, the defendant stated that "he had known [Almonor], that he knew him. He had spoken with him earlier that day by phone."

During closing argument, the prosecutor argued, "He's put in the cruiser and he starts to lie. He lied about why he was



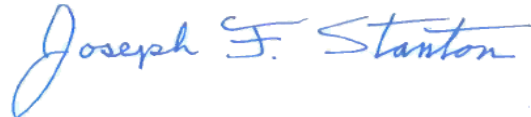
there. He lied about his involvement. He even lies about knowing Mr. Almonor, the man he has been hanging out on the second floor apartment with almost daily all summer. He says some guy with dreads got in my car. He's lying." See Commonwealth v. Martinez, 476 Mass. 186, 197 (2017) ("Evidence that a defendant provided false information also may be admissible to show consciousness of guilt").

"A prosecutor is barred from referring in closing argument to matter that has been excluded from evidence, Commonwealth v. Burke, 373 Mass. 569, 575 (1977), and a prosecutor should also refrain from inviting an inference from the jury about the same excluded subject matter." Commonwealth v. Carroll, 439 Mass. 547, 554 (2003), quoting Commonwealth v. Grimshaw, 412 Mass. 505, 508 (1992). That is not what happened here. The prosecutor argued, based on the evidence admitted at trial, that the defendant lied about not knowing the identity of Almonor in his vehicle. The fact that the defendant admitted in a later statement that he knew Almonor does not alter the fact that his first statement was false. There was no error.

5. Conclusion. On the indictment for witness intimidation, the judgment is reversed, the verdict is set aside, and judgment shall enter for the defendant. On the indictment for second degree murder, the judgment is affirmed.

So ordered.

By the Court (Massing, Shin & Ditekoff, JJ.<sup>3</sup>),



Clerk

Entered: August 5, 2020.

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<sup>3</sup> The panelists are listed in order of seniority.