SJC-12733

COMMONWEALTH vs. JOEL QUILES.

Plymouth. March 1, 2021. - August 30, 2021.

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

Homicide. Felony-Murder Rule. Armed Home Invasion. Armed Assault with Intent to Rob. Attempt. Constitutional Law, Double jeopardy. Jury and Jurors. Practice, Criminal, Double jeopardy, Instructions to jury, Jury and jurors, Conduct of juror, Deliberation of jury, Duplicative convictions, Capital case.

Indictments found and returned in the Superior Court Department on June 7, 2013.

The cases were tried before Richard J. Chin, J.

James L. Sultan for the defendant.
Johanna Black, Assistant District Attorney, for the Commonwealth.

CYPHER, J. A jury convicted the defendant, Joel Quiles, of murder in the first degree on the theory of felony-murder, with the predicate offense of armed robbery for stabbing to death the victim, Jonathan Semedo. The jury also convicted the defendant

of armed assault with intent to rob the victim and armed home invasion.[1]

However, the jury did not reach their verdict of murder in the first degree based on the predicate felony of armed robbery on their first return of the verdict slips. When the jury returned the initial verdict slips, the judge noticed that the jury had checked the box on the verdict slip for felony-murder with the predicate offense of armed home invasion, but had answered "no" in response to the special question whether the defendant had assaulted a person other than the victim. After identifying this issue, in accordance with our recommendation in Commonwealth v. Zekirias, 443 Mass. 27, 32 (2004), discussed infra, the judge reinstructed the jury. He first reinstructed the jury to deliberate on murder in the second degree, but the next day reinstructed the jury to deliberate on murder in the first degree based on deliberate premeditation, extreme atrocity or cruelty, and felony-murder with the predicate felony of armed robbery, and murder in the second degree (third instruction). The jury returned the verdict on murder in the first degree based on the predicate felony of armed robbery after the judge's third instruction.

---

[1] The jury found the defendant not guilty of armed robbery against Jonathan Alves and Alexander Gomes, who were with the victim at the time of the stabbing, and of assault and battery by means of a dangerous weapon against Alves.

In his direct appeal, the defendant argues that (1) his right to a jury determination of guilt upon sufficient evidence was violated; (2) the judge violated his constitutional protection against double jeopardy by ordering the jury to continue deliberating on felony-murder with the underlying felony of armed robbery; (3) the judge's third instruction was unconstitutionally coercive; and (4) his conviction of murder in the first degree is not consonant with justice. For the reasons that follow, we affirm the defendant's convictions of murder in the first degree and armed home invasion. We vacate his conviction of armed assault with intent to rob as duplicative of his felony-murder conviction. After a thorough review of the record, we decline to exercise our authority under G. L. c. 278, § 33E, to grant a new trial or reduce or set aside the verdict of murder in the first degree.

Background. We summarize the evidence at trial, reserving certain details for our analysis of the issues.

1. Events leading to murder. On the night of May 3, 2013, the victim, Kiara Arias,[2] Jonathan Alves, Alexander Gomes, Kristina, and Haley[3] went to a nightclub in Providence, Rhode

[2] Arias and the defendant had an intermittent dating relationship for two or three years.

[3] Kristina and Haley were minors at the time, so we refer to them by their first names.

Island. On the way to Providence from Brockton, Arias received a call from the defendant, during which the defendant learned that Arias was with the victim.[4]

Also on the night of May 3, the defendant invited Talis Francisco to a party. Francisco's friend, Jordan Shockley, drove them in a minivan along with the defendant's two friends, Eric Claudio and Vladimir Verdieu.

The victim's group left the nightclub and stopped at a house party in Brockton. Arias had continued communicating with the defendant before arriving at the house party. The victim, Arias, Haley, and Alves went into the house, but all except Arias left after about fifteen minutes and went to Haley's apartment, also in Brockton. A short time after the victim's group left, the defendant's group arrived at the house party. Before arriving at the house party, Claudio showed a gun to Francisco and the defendant's group stopped at a different

[4] The judge allowed the following evidence to be admitted and provided a limiting instruction that this evidence was offered for the limited purpose of showing the defendant's state of mind. Talis Francisco testified that, in February 2013, he and the defendant were together when the defendant told Francisco that he "wanted to go rob this kid -- I guess he was a drug dealer and he had a lot of money -- to buy a car." Arias was driving with the victim at the time and was communicating by text message with the defendant about robbing the victim. Arias's role was to let the defendant know of the victim's location. However, Arias told the victim to leave the area when the defendant arrived, and the defendant was not successful in robbing the victim.

house, where the defendant and his friends went inside and came out with trash bags containing clothes and shoes. The defendant, Verdieu, and Claudio went into the house party. They stayed for around ten minutes, during which time the defendant appeared "aggravated." The defendant's group then left with Arias to go to Haley's apartment.

Before Arias provided the address of Haley's apartment, the defendant, Claudio, Verdieu, and Francisco spoke outside the minivan for from ten to thirty minutes. The defendant, Verdieu, Claudio, and Arias whispered in the back seat during the drive, and Arias testified that they were going to Haley's house "[t]o rob [the victim]."

2. Events at Haley's apartment. When the defendant's group and Arias arrived at Haley's apartment, the defendant instructed Arias to enter the apartment, to leave the door open, and to tell him where people were located inside. Haley's apartment had two staircases leading to her third-floor apartment; one was an interior staircase that opened in the living room, and the other was an exterior staircase that opened in the bathroom. Arias used the exterior staircase and entered the bathroom, where she saw the victim, who was vomiting, and Haley. Arias told Haley that she took a taxicab to Haley's house. Haley invited Arias into the living room, but Arias replied that she needed to charge her cell phone and remained in

the bathroom. Within a few minutes of Arias's entering the apartment, the defendant, Verdieu, Claudio, and Francisco used the interior staircase to access Haley's apartment. The defendant borrowed Francisco's knife to open the locked door to the apartment, and he ordered the others to "get the money." Verdieu covered his face with a bandana, took out a gun, and led the group into the apartment.

Gomes, Alves, and Kristina were sitting on the couch in the living room when the defendant's group entered. The defendant, Verdieu, and Claudio approached the individuals on the couch, and Francisco remained in the apartment's hallway, despite the defendant putting his hand on Francisco's neck and asking him to get the money. Verdieu pointed his gun at the individuals on the couch and told them to empty their pockets. The defendant was holding a knife in the open position at his side and told the individuals on the couch that it was not a joke. Gomes and Alves handed over some items.

The victim was not with the others in the living room for the initial encounter, and when he entered the living room, the defendant, Verdieu, and Claudio told him to empty his pockets[5]

[5] The defendant disputes that the evidence supports that he gave any command to the victim. Contrary to his argument, the evidence does support that the defendant instructed the victim to empty his pockets. Gomes testified that three men approached the victim, "trying to rob him," and "[t]hey were just saying run everything," which he previously testified meant to empty

and Verdieu held a gun to his head. The victim refused and pushed the gun away, at which point a fight broke out.

During the fight, the defendant stabbed the victim. When Verdieu's gun went off into the ceiling, Francisco, Claudio, Verdieu, and the defendant left the apartment, got into Shockley's minivan, and told him to "go, go, go, drive." The victim's group also left the apartment and gathered outside the home. The victim was bleeding, had labored breathing, became unconscious, and later died.

While driving the defendant's group, Shockley did not see a knife, but he heard the defendant say, "Give me the knife." Francisco testified that the defendant was holding Francisco's knife when the defendant left Shockley's minivan. The victim's deoxyribonucleic acid was found in Shockley's minivan near where the defendant was sitting.

---

his pockets. As the defendant points out, Gomes did not identify the defendant as one of these three men, but when looking at the testimony from the other witnesses, it is clear that the defendant was one of the three men confronting the victim. Although the other witnesses did not testify that the defendant commanded the victim to empty his pockets, the jury could infer such a statement from the defendant's presence in the group of three men confronting the victim, combined with Gomes's testimony. See Commonwealth v. Garcia, 470 Mass. 24, 30 (2014) (in reviewing claim of insufficient evidence, we ask whether, "viewing the evidence in the light most favorable to the Commonwealth, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" [quotation and citation omitted]).

3. Cause of death. The medical examiner testified that the victim died from his stab wounds. The victim had stab wounds on his front and back and incised wounds on his arm. The medical examiner noted that the stab wounds on the victim's back were a different shape from the ones on his front and opined that it was possible that the wounds were caused by two different weapons.[6]

4. Jury deliberations. The jury returned their initial verdict on the second day of deliberations. However, the jury had checked the box on the verdict slip for felony-murder with the predicate offense of armed home invasion, but answered "no" in response to the special question whether the defendant had assaulted a person other than the victim. The judge reinstructed the jury to return to the jury room to consider whether the defendant was guilty of murder in the second degree, and after the jury deliberated for about an hour, he excused them for the day.[7] The next morning, after discussion with the

---

[6] Across the street from Haley's house, police recovered a knife that had bloodstains on it matching the victim's blood. Francisco testified that this was not the knife he lent to the defendant.

[7] When the jury returned the initial verdict slips, the judge mistakenly believed that there was a merger issue because the jury had checked the box on the verdict slip for felony-murder with the predicate offense of armed home invasion, but had answered "no" in response to the special question whether the defendant had assaulted a person other than the victim. "A conviction of felony-murder requires that the predicate felony

Commonwealth and the defendant, the judge reinstructed the jury on deliberate premeditation, extreme atrocity or cruelty, felony-murder with the predicate felony of armed robbery, murder in the second degree, and attempt.

The jury convicted the defendant of murder in the first degree, based on the theory of felony-murder with armed robbery as the predicate felony. The jury also convicted the defendant of armed home invasion and armed assault with intent to rob the victim.

Discussion. 1. Sufficiency of evidence. The defendant argues that there was insufficient evidence to support his conviction of murder in the first degree based on the theory of felony-murder with armed robbery as the predicate felony. He contends that the sequence of events from the initial jury verdict to the final jury verdict violated his right to a jury determination of guilt upon sufficient evidence of every element

---

be based on conduct that is independent of the act necessary for the killing." Commonwealth v. Holley, 478 Mass. 508, 519 (2017). "If an assault that is an element of an underlying felony is not separate and distinct from the assault that results in the death, then the assault is said to merge with the killing, in which case the underlying felony cannot serve as a predicate felony for purposes of the felony-murder doctrine." Commonwealth v. Scott, 472 Mass. 815, 819 (2015). The merger doctrine, however, is inapplicable to the defendant's conviction of felony-murder with the predicate offense of armed robbery where the purpose of the predicate felony, to steal, is distinct from the intent to cause injury or death. See Holley, supra at 520.

of the crime charged. The Commonwealth argues that the defendant's conviction of murder in the first degree must be affirmed because the defendant's attempted armed robbery of the victim was supported by sufficient evidence at trial, and attempted armed robbery is a lesser included offense of the predicate felony of armed robbery upon which the jury based their felony-murder verdict. We conclude that there was sufficient evidence for the jury to convict the defendant of murder in the first degree on the theory of felony-murder with the underlying felony of armed robbery.

In reviewing a claim of insufficient evidence, we ask whether, "viewing the evidence in the light most favorable to the Commonwealth, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (quotation omitted). Commonwealth v. Garcia, 470 Mass. 24, 30 (2014). The purpose of the felony-murder rule is to "impose[] criminal liability for homicide on all participants in a certain common criminal enterprise if a death occurred in the course of that enterprise."[8] Commonwealth v. Morin, 478 Mass. 415, 421 (2017), quoting Commonwealth v. Hanright, 466 Mass. 303, 307

[8] The trial in this case took place before our decision in Commonwealth v. Brown, 477 Mass. 805 (2017), in which we prospectively narrowed the scope of felony-murder liability. In Brown, supra at 807, we held that in trials that commence after September 20, 2017, a defendant may not be convicted of murder without proof of one of the three prongs of malice.

(2013), overruled on another ground by Commonwealth v. Brown, 477 Mass. 805 (2017), cert. denied, 139 S. Ct. 54 (2018). "Once a defendant participates in the underlying felony, with the intent or shared intent to commit that felony, he or she becomes liable for a death that 'followed naturally and probably from the carrying out of the joint enterprise.'" Morin, supra, quoting Hanright, supra.

To prove that a defendant committed an armed robbery during a joint venture, "the Commonwealth must prove that the defendant or a coventurer, or both, (1) was or were armed with a dangerous weapon; (2) either applied actual force or violence to the body of the person identified in the indictment, or by words or gestures put [that person] in fear; (3) took the money or the property of another; and (4) did so with the intent (or sharing the intent) to steal it" (quotation and citation omitted). Commonwealth v. Chesko, 486 Mass. 314, 320 (2020).

a. Predicate felony of attempted armed robbery. The defendant contends that because there was insufficient evidence that he committed an armed robbery of the victim and because the jury's negative response on the initial verdict slip to the question whether the defendant assaulted anyone other than the victim foreclosed establishing armed robbery against the others, it was not permissible for the jury to consider attempted armed robbery as a predicate for felony-murder and attempted armed

robbery was not even an option for the jury to select on the verdict slip. As the Commonwealth concedes, the evidence was insufficient to prove that the defendant committed an armed robbery of the victim because there was no evidence that the defendant or his coventurers took anything from the victim. We conclude that there was sufficient evidence to support a finding that the defendant attempted to commit an armed robbery against the victim and that it was proper for the jury to have such an option.

For felony-murder, it is sufficient for a defendant to have killed the victim while attempting to commit the underlying felony. See Commonwealth v. Cannon, 449 Mass. 462, 471 (2007). See also Commonwealth v. Tillis, 486 Mass. 497, 502 (2020) ("To prove felony-murder, the Commonwealth was required to prove that the act that caused the victim's death occurred during the commission or the attempted commission of the predicate felony"); Commonwealth v. Morgan, 422 Mass. 373, 378-379 (1996) (jury properly instructed on felony-murder where defendant stabbed victim during course of attempted robbery); Commonwealth v. Evans, 390 Mass. 144, 151 (1983) (defendant guilty of murder by application of felony-murder rule where victim killed in attempted commission of robbery); Commonwealth v. Wojcik, 65 Mass. App. Ct. 758, 762 (2006), quoting Jenkins v. State, 240 A.2d 146, 149 (Del. 1968), aff'd, 395 U.S. 213 (1969) ("It is

the felonious design imputed from the felony to the homicide that constitutes murder under the [felony-murder] rule; and that felonious intention is deemed to have existed, and is thus imputed, whether the felony was actually perpetrated, or was interrupted at the 'attempt' stage"). "The law in this regard is clear: murder in the attempted commission of an armed robbery is adequate to support a conviction of murder in the first degree under a theory of felony-murder." Cannon, supra. See G. L. c. 265, § 1 (murder in first degree includes murder "committed . . . in the commission or attempted commission of a crime punishable with death or imprisonment for life"); G. L. c. 265, § 17 (punishment for armed robbery is "imprisonment in the state prison for life or for any term of years"). Therefore, even though there was insufficient evidence to support a conviction of armed robbery of the victim, the defendant could still be convicted of felony-murder based on the attempted commission of an armed robbery of the victim. See Cannon, supra at 463 & n.1 (sufficient evidence to support defendant's conviction of felony-murder in first degree based on attempted armed robbery, even though judge had allowed defendant's motion for required finding of not guilty on indictment charging armed robbery because there had been no evidence that any items were taken).

The defendant relies on Commonwealth v. Scott, 472 Mass. 815, 826 (2015), for the proposition that if the Commonwealth proceeds on a theory of felony-murder with the underlying felony of armed robbery, it must adduce sufficient evidence of an armed robbery to reach the jury; otherwise, the jury may not consider that armed robbery as the predicate felony. In the present case, the defendant contends that because there was no evidence of any taking from the victim, there was insufficient evidence to submit the theory of felony-murder based on armed robbery to the jury. In Scott, this court addressed the argument that because there was insufficient evidence of larceny from the decedent, the defendant could be convicted only of attempted armed robbery, which could not support his conviction of felony-murder in the first degree. Id. at 825. This court stated:

> "[A] prosecution for murder in the first degree on a theory of felony-murder can be premised on a killing that occurs 'in the commission or attempted commission of a crime punishable with . . . imprisonment for life' [(emphasis added). G. L. c. 265, § 1.] The predicate felony asserted by the Commonwealth in this case was armed robbery, not attempted armed robbery. If, at the retrial, the Commonwealth adduces sufficient evidence to warrant a finding of armed robbery (a life felony pursuant to G. L. c. 265, § 17), then the jury may return a verdict of felony-murder in the first degree based on a killing that occurred in the attempted commission of that crime, even if they find that the robbery was not completed. If the Commonwealth does not adduce sufficient evidence to warrant a finding of armed robbery, a felony-murder charge obviously could not be put to the jury on the basis of armed robbery as the predicate felony."

Id. at 825-826. The judge in Scott did instruct the jury on murder in the first degree based on the theory of felony-murder with the predicate felony of armed robbery, and he included in those instructions that the defendant had to commit or attempt to commit a felony with a maximum sentence of imprisonment for life and an instruction on attempt. As discussed supra, "murder in the attempted commission of an armed robbery is adequate to support a conviction of murder in the first degree under a theory of felony-murder." Cannon, 449 Mass. at 471.

Moreover, although the defendant was not charged with armed robbery of the victim or with attempted armed robbery, this does not preclude his conviction of felony-murder with the predicate felony of attempted armed robbery of the victim. See Commonwealth v. Smiley, 431 Mass. 477, 490-491 (2000) ("Armed robbery or attempted armed robbery are proper underlying felonies to support a conviction of murder in the first degree based on a theory of felony-murder even though a defendant is not indicted for either crime"). See also Commonwealth v. Neves, 474 Mass. 355, 358 n.3 (2016); Cannon, 449 Mass. at 463 & n.1.

At trial, the Commonwealth asserted that the defendant killed the victim while attempting to rob him. The prosecutor also told the jury, "[W]e're here because [the defendant] killed [the victim] in the course of a robbery," and that the defendant

and his group were at Haley's apartment to rob the victim. In regard to felony-murder, the prosecutor suggested the felony was "the breaking in armed and holding people up at gunpoint." The prosecutor further argued that the defendant "killed [the victim] after attempting to rob him."

In addition to the Commonwealth's presentation of the case, the jury instructions also made it clear that the defendant could be convicted of felony-murder based on the attempted commission of an armed robbery. The judge instructed the jury that "[w]here a defendant is charged with felony[-]murder, the Commonwealth must prove beyond a reasonable doubt that the defendant knowingly participated in the commission of the underlying crime, in this case, armed robbery and armed home invasion." The judge provided more detail on felony-murder, instructing that the Commonwealth must prove that the defendant "committed or attempted to commit" a felony with a maximum sentence of life imprisonment, that death was caused by the act of a person participating "in the commission or attempted commission of the underlying felony," and that the act that caused death occurred during "the commission or attempted commission" of the underlying felony. In addition, after the jury returned their first verdict on felony-murder, the judge instructed on attempt, stating, in part, that "[t]he essence of the crime of attempt is that the person has a specific intent to

commit a crime and takes a specific step toward committing that crime." Taken as a whole, Commonwealth v. Stewart, 460 Mass. 817, 824 (2011), the jury instructions informed the jury that one of the underlying felonies was armed robbery and that the defendant could be convicted of felony-murder based on an attempt to commit the underlying felony, see Commonwealth v. Silva, 482 Mass. 275, 290 (2019) (jury presumed to follow instructions).

Therefore, although here there was insufficient evidence that the defendant committed an armed robbery of the victim, the defendant could be convicted of felony-murder based on the attempted commission of an armed robbery of the victim, and the jury instructions informed the jury of that possibility.

We further conclude that there was sufficient evidence to convict the defendant of felony-murder based on the attempted armed robbery of the victim. "An attempt is defined as (1) an intent to commit the underlying crime and (2) an overt act towards its commission." Brown, 477 Mass. at 812 n.5. Although the evidence was limited to show the defendant's state of mind, the jury heard that months before the murder, the defendant tried to rob the victim by coordinating with Arias. The defendant again coordinated with Arias on the night of the murder, and instructed her on what to do once inside Haley's apartment. Before entering the apartment, the defendant told

the others that they were to rob the people inside, and once inside, the defendant and at least one of his companions was armed. When the victim entered the living room, Verdieu held a gun to his head, and the defendant, Verdieu, and Claudio told the victim to empty his pockets. The victim fought back and refused to comply, and the defendant therefore did not recover anything from him. Viewed in the light most favorable to the Commonwealth, Garcia, 470 Mass. at 30, a rational trier of fact could have found that the defendant had the intent to commit an armed robbery of the victim and that the defendant, either as a principal or as part of a joint venture,[9] performed an overt act toward committing an armed robbery of the victim. Therefore, the Commonwealth presented sufficient evidence to convict the defendant of felony-murder based on the attempted armed robbery of the victim.

b. Basis of jury's verdict. The defendant further argues that the jury could have based their guilty verdict on the insufficient ground of armed robbery and therefore it cannot stand. We conclude that the jury necessarily and unavoidably based their conviction of felony-murder on the attempted commission of an armed robbery.

---

[9] The Commonwealth proceeded on a theory of joint venture, and the judge instructed the jury on joint venture.

"[T]he general rule in the Commonwealth is that there must be a new trial if . . . a jury, given two theories of guilt, returned a general verdict, and the evidence supported a guilty verdict on only one of those theories." Commonwealth v. Plunkett, 422 Mass. 634, 638 (1996). There is an exception to the general rule where it is apparent that the jury reached their general verdict "necessarily and unavoidably" on the theory for which there was evidentiary support. See id., citing Commonwealth v. Blackwell, 422 Mass. 294, 300 (1996).

The judge here gave a proper jury instruction on felony-murder, which included that the killing could have occurred during the attempted commission of the underlying armed robbery; the jury found that the defendant committed an armed assault with intent to rob the victim, which is closely related to attempted armed robbery, see Commonwealth v. Ladetto, 349 Mass. 237, 248-249 (1965); and the jury necessarily found that the victim was killed and that the defendant was responsible for his death. The circumstances of this case are similar to those in Blackwell, 422 Mass. at 299-300, where this court concluded that although a jury returned a general verdict of murder in the first degree, they necessarily and unavoidably found the defendant guilty of felony-murder based on armed robbery. The court reasoned that the jury were properly instructed on felony-murder with armed robbery as the underlying felony; that the

jury found the defendant guilty of assaulting the victim, while masked and armed, with the intent to rob him; and that the jury necessarily found that the victim had been killed and that the defendant was responsible for his death under a joint venture theory. See id. at 300. Because the jury returned a guilty verdict on felony-murder, they necessarily found that the victim was killed during the commission or attempted commission of the underlying felony of armed robbery. Contrast Plunkett, 422 Mass. at 639 (vacating conviction of felony-murder in part because jury's finding that defendant committed underlying felony did not necessarily mean jury also found that victim's death occurred during commission of felony because jury returned only general verdict).

Also, because on the initial verdict slip, the jury found that the defendant did not assault anyone other than the victim, the final verdict was necessarily based on the attempted robbery of the victim, and not on another ground, such as armed robbery of one of the other occupants of the apartment. For the foregoing reasons, we conclude that the jury necessarily and unavoidably found the defendant guilty of felony-murder based on his attempted armed robbery of the victim.

2. Double jeopardy. The defendant next argues that the judge violated his constitutional protection against double jeopardy by ordering the jury to continue deliberating on

felony-murder with the underlying felony of armed robbery. The Commonwealth counters that because the jury were silent on the other theories of murder, including felony-murder predicated on armed robbery, there was not a valid verdict and the defendant remained in continuing jeopardy. We conclude that the judge's instructions did not violate the principles of double jeopardy.

The initial verdict slip provided the jury with options to check "not guilty," "guilty of murder in the first degree," and "guilty of murder in the second degree." Under the murder in the first degree option, the jury could select "by deliberate premeditation," "by extreme cruelty and atrocity," and "felony[-]murder." Under the felony-murder option, the verdict slip stated, "identify the felony which is the basis of felony[-]murder," and listed "armed robbery" and "armed home invasion." The jury first returned the verdict slip with the boxes checked for "guilty of murder in the first degree," "felony[-]murder," and "armed home invasion." However, the jury answered "no" with respect to the question accompanying armed home invasion that asked whether the defendant had assaulted anyone other than the victim. The jury left the other theories of murder unchecked on the initial verdict slip. When the judge viewed the verdict slip, he mistakenly believed that the jury's answers presented a merger issue because the jury determined that the defendant did not assault anyone other than the victim.

After a discussion with the defendant and the Commonwealth, the judge instructed the jury to deliberate on murder in the second degree for the remainder of that day's deliberations. The following morning, the judge held another conference with the defendant and the Commonwealth and explained that his instruction to the jury only to deliberate on murder in the second degree was tantamount to granting a directed verdict on the other theories of murder, which was a mistake. The judge heard arguments from both sides and then reinstructed the jury. The judge told the jury that he had made a mistake and instructed them to deliberate on murder in the first degree based upon deliberate premeditation, extreme atrocity or cruelty, and felony-murder with the predicate offense of armed robbery. He also instructed the jury on murder in the second degree and on attempt. The judge relied on Zekirias, 443 Mass. at 32, in which this court stated that when "[f]aced with ambiguity on a matter of ultimate significance, the correct procedure [for the judge] is to decline to record the verdict . . . , call the jury's attention to their apparent misunderstanding of his [or her] instructions, and, after reinstruction, send the jury out for further deliberations."

The Fifth Amendment to the United States Constitution "mandates that a person cannot twice be put in jeopardy for the same offence" (quotation and citation omitted). Commonwealth v.

Taylor, 486 Mass. 469, 477 (2020). See Benton v. Maryland, 395 U.S. 784, 794 (1969) (Fifth Amendment applicable to States). "Under the double jeopardy doctrine, a defendant cannot be prosecuted a second time for the same offense after having been acquitted." Commonwealth v. Gonzalez, 437 Mass. 276, 281 (2002), cert. denied, 538 U.S. 962 (2003). See Commonwealth v. Hrycenko, 417 Mass. 309, 316 (1994). "An acquittal occurs where there is a ruling on 'the facts and merits' . . . ." Taylor, supra at 481, quoting Gonzalez, supra at 282.

This court has long recognized that silence on a verdict slip does not amount to an acquittal. See Commonwealth v. Niemic, 483 Mass. 571, 579 (2019), and cases cited; Scott, 472 Mass. at 816 n.2. Additionally, courts will not "imply an acquittal unless a conviction of one crime logically excludes guilt of another crime." Commonwealth v. Carlino, 449 Mass. 71, 76-80 (2007).

In the present case, the jury's initial verdict slip was silent on felony-murder predicated on armed robbery. That silence does not amount to an acquittal. See Niemic, 483 Mass. at 579. Silence by the jury on the verdict slip regarding deliberate premeditation, extreme cruelty or atrocity, and the armed robbery predicate to felony-murder demonstrated only that the jury did not convict the defendant on those theories; the silence did not shed light on whether the jury reached any

decisions regarding those theories. See Carlino, 449 Mass. at 78 (where jury left blank line next to felony-murder on verdict slip, "[w]e cannot determine from the verdict slip what decision the jury reached on the felony-murder theory, except that their verdict cannot be construed as a conviction on that basis"). "The jury might have intended an acquittal on [those theories]; they might have been unable to reach a unanimous verdict; or they might not have deliberated on [those theories] at all." Id. at 78 n.18.

The defendant, however, contends that "the general rule established by Carlino and its progeny should not apply where the jury [have] made other specific findings that enable a reviewing court to draw a conclusion about what their silence actually means." He distinguishes the facts at hand from jury silence on a matter by arguing that we should construe the combination of the jury (1) failing to initially check the box for felony-murder based on armed robbery, (2) finding that the defendant did not assault anyone other than the victim, and (3) acquitting the defendant of armed robbery of Alves and Gomes, which were the only two charges of armed robbery brought against him, as an acquittal of felony-murder based on armed robbery. He further contends that the combination of the above factors is, at the very least, ambiguous, and that we must resolve such ambiguity in his favor. See Hrycenko, 417 Mass. at 317.

The defendant is correct that the jury did more than simply leave one box unchecked, but their actions, and combination thereof, do not amount to an acquittal, nor do they enable us to draw a conclusion regarding the meaning of the jury's silence. The jury's selections that the defendant did not assault anyone other than the victim and did not commit armed robberies of Alves and Gomes did not exclude a finding of guilty of felony-murder predicated on armed robbery. See Carlino, 449 Mass. at 78. Based on the evidence presented at trial, the jury could have found that the defendant attempted to commit an armed robbery against the victim, which is a valid predicate to felony-murder. See Cannon, 449 Mass. at 471, citing G. L. c. 265, §§ 1, 17 ("murder in the attempted commission of an armed robbery is adequate to support a conviction of murder in the first degree under a theory of felony murder"). The factors cited by the defendant neither individually nor cumulatively amounted to an acquittal on felony-murder with the predicate of armed robbery because they did not demonstrate a unanimous decision by the jury on that theory. Therefore, the judge did not violate the principles of double jeopardy, as the defendant remained in jeopardy of a conviction based on felony-murder with the predicate offense of armed robbery.[10] Compare Commonwealth

[10] Collateral estoppel also did not prohibit the jury's deliberation on felony-murder with the predicate felony of armed

v. Smith, 473 Mass. 798, 814 n.26 (2016) (double jeopardy principles precluded Commonwealth from proceeding against defendant on theory of deliberate premeditation in any retrial where jury left line on verdict slip associated with deliberate premeditation blank but, when jurors were polled individually, each "stated that he or she found the defendant not guilty of murder in the first degree on a theory of deliberate premeditation").

3. Coercive instruction. The defendant next argues that the judge's third instruction was unconstitutionally coercive because the instruction placed undue pressure on the jury to convict him of felony-murder. We agree with the Commonwealth that the instruction was not unconstitutionally coercive.

As noted supra, the procedure followed by the judge was in accordance with our recommendation in Zekirias, 443 Mass. at 32.

---

robbery. "Collateral estoppel 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" Commonwealth v. Benson, 389 Mass. 473, 478, cert. denied, 464 U.S. 915 (1983), quoting Ashe v. Swenson, 397 U.S. 436, 443 (1970). "The doctrine of collateral estoppel will preclude either the subsequent prosecution or the introduction or argument of certain facts, only if the jury could not have based their verdict rationally on an issue other than the one the defendant seeks to foreclose." Benson, supra, citing Ashe, supra at 444. For substantially the same reasons as above, collateral estoppel did not preclude the jury from continuing deliberations after returning the initial verdict slip. See Commonwealth v. Carlino, 449 Mass. 71, 78 n.18 (2007).

See Pritchard v. Hennessey, 1 Gray 294, 296 (1854) ("The practice of sending out a jury [for further deliberations], when they return a finding that is absurd or defective, has existed more than four hundred years"). In reinstructing a jury, a judge's questions or instructions must be neutral and not suggest that the jury should decide one way or the other. See Zekirias, supra at 33-34.

As discussed supra, after the jury returned the initial verdict, the judge first instructed them to deliberate on murder in the second degree, and the next morning reinstructed them to deliberate on the remaining grounds of murder in the first degree and on murder in the second degree and provided an instruction on attempt.

The judge's actions did not improperly coerce or influence the jury. As discussed supra, the judge was correct to tell the jury that they did not convict the defendant of felony-murder with the underlying felony of armed home invasion. He also was correct to instruct the jury to continue their deliberations. See Zekirias, 443 Mass. at 32. The defendant, however, also takes issue with the series of events in which the judge first told the jury that their answer to the special question did "not support a conviction for first degree murder," then instructed the jury to continue deliberating just on murder in the second degree, and the next morning instructed them to deliberate on

murder in the second degree and on the remaining theories of murder. He asserts that this sequence of words and actions was inherently coercive and that the judge was conveying an implicit, improper message: "You made a mistake by failing to properly convict [the defendant] of first degree murder yesterday; do not make that same mistake today."

Although the judge did reinstruct the jury to first resume deliberations on murder in the second degree and then the following morning -- after the jury had spent over an hour deliberating on murder in the second degree -- told the jury he made a "mistake" and that they should deliberate on murder in the first degree as well, this reinstruction called attention to the judge's error; it did not state or imply that the jury made a mistake. In addition, reinstructing the jury on the other theories of murder in the first degree was proper, as limiting deliberations to murder in the second degree would have been akin to directing a verdict of murder in the first degree. See Zekirias, 443 Mass. at 31.

The defendant also contends that the judge's instruction on attempt, for the first time during the third instruction and at the Commonwealth's request, was improperly coercive and "provided the jury with a clear roadmap of how to convict [the defendant] of first degree murder." The judge's instruction on attempt during the third instruction was consistent with the

original felony-murder instructions. During the original felony-murder instructions, the judge instructed the jury that the defendant could be found guilty of felony-murder if the killing occurred during the commission or attempted commission of the underlying felony. Viewed as a whole, the instructions were not unconstitutionally coercive. See Stewart, 460 Mass. at 824.

4. Juror misconduct. The defendant further argues that his trial was tainted by racist comments made during jury deliberations. When the jury returned to court on the morning of the second day of deliberations, the judge conducted voir dire based on a report by juror no. 6 of "racist comments" by juror no. 10. Juror no. 6 testified that juror no. 10 said, "[O]h, these are Brazilians, Hispanics, and Cape Verdeans we're talking about. They're gangsters," and that when she then asked juror no. 10, "[W]ell, I'm Brazilian. Do I look like I'm a gangster to you?" he responded, "Yeah, you do. Ha, ha, ha." Juror no. 6 said that she then responded, "[I]t's not a joke to me," and that the matter was dropped, but that juror no. 10 did not apologize. She said that the other jurors were respectful and "in shock."

During the voir dire, juror no. 10 denied making the comments, but based on the voir dire of the other deliberating jurors, the judge found that juror no. 10 made "comments

regarding the witness being Brazilian and made some ethnic comments." The judge dismissed juror no. 10 and found that juror no. 6 and the other remaining members of the deliberating jury were indifferent.

The judge denied the defendant's motion for a mistrial. The judge seated an alternate juror and instructed the jury that deliberations should not involve race and that the subject of gangs should not be discussed, as there was no evidence of gang activity in the trial. The jury were given new verdict slips and instructed to begin deliberations anew.

The defendant concedes that the judge followed existing precedent for preverdict allegations of racist comments by a juror, see Commonwealth v. Tavares, 385 Mass. 140, 154-157, cert. denied, 457 U.S. 1137 (1982), but urges this court to "reconsider whether that precedent adequately protects the fundamental right to trial by impartial jury, or whether it should be replaced by the standard for reviewing such claims raised in the post-verdict context," see Commonwealth v. McCowen, 458 Mass. 461, 495-497 (2010). We agree with the Commonwealth that we should decline to extend the McCowen test to preverdict issues of juror bias.

A criminal defendant has a constitutional guarantee to be tried by an impartial jury. See McCowen, 458 Mass. at 494. See also Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017).

Tavares, 385 Mass. at 154, sets forth the procedure for the judge to follow when there is a preverdict allegation of jury misconduct. In Tavares, the judge was informed by an alternate juror that a juror made a racist comment about the defendant and that another juror used a racist term when describing a witness. Id. at 153. The judge conducted voir dire of each juror and learned that none of the deliberating jurors heard the racist comment, but five heard the racist term. Id. at 154. The five jurors who heard the racist term said that the "term was understood as a joke, and that it did not affect their ability to render an impartial verdict." Id. The judge did not dismiss any of the jurors, and this court reasoned that a judge has "broad discretion to make such order as he deems appropriate for the administration of justice," and that the trial judge was in the "best position to judge the weight and credibility of the evidence" (quotation and citations omitted). Id. at 155-156. As such, this court concluded that it was sufficient for the judge to interrogate the jurors and conclude that they could fairly and impartially render a verdict. Id. at 156.

The court in McCowen, 458 Mass. at 496-497, set forth a two-step test for when there is a postverdict allegation of juror misconduct, to determine whether a new trial is necessary. The defendant "bears the initial burden of proving, by a preponderance of the evidence, that the jury were exposed to

statements that infected the deliberative process with racially or ethnically charged language or stereotypes," and "[i]f the defendant meets this burden, the burden then shifts to the Commonwealth to show beyond a reasonable doubt that the defendant was not prejudiced by the jury's exposure to these statements." Id. at 497. In making this determination, "the judge must focus on the probable effect of the statements on a hypothetical average jury" (quotation and citation omitted). Id.

The defendant relies, in part, on Commonwealth v. Hart, 93 Mass. App. Ct. 565, 569 (2018), in which the Appeals Court questioned whether "Tavares provides adequate guidance to trial judges seeking to assess the potential effects of racial prejudice expressed in the jury room in all circumstances" and noted that McCowen provides "a more rigorous procedure judges should follow when they are informed, after the verdict has been returned, of racially charged statements made by jurors." See id. at 170 ("we believe it would be appropriate for the Supreme Judicial Court to consider furnishing additional guidance to trial judges seeking to assess the potential for juror taint resulting from discriminatory statements made during deliberations").

We first conclude that the judge here did not err in conducting an individual voir dire of the deliberating jurors,

investigating the comments without prying into the jury's deliberations, dismissing juror no. 10 for good cause based on his comments, asking each juror whether he or she could continue impartially, and finding that they could. See Tavares, 385 Mass. at 154-156. As the defendant concedes, the judge followed the accepted procedure for preverdict allegations of juror misconduct. See id. See also Commonwealth v. Colon, 482 Mass. 162, 168 (2019) ("reviewing court will not disturb a judge's findings of impartiality, or a judge's finding that a juror is unbiased, absent a clear showing of an abuse of discretion or that the finding was clearly erroneous" [quotations and citation omitted]). In addition, none of the other jurors assented to the racial comments, and juror no. 6 confronted juror no. 10 about his comments. Compare McCowen, 458 Mass. at 498 (judge "concluded that the black female juror's appropriate response to the [racial] statement served the beneficial purpose of exposing and 'blunting the effect' of the racial stereotype, and of warning the jury of the risk of racial stereotypes infecting their deliberations").

Moreover, we decline to replace the procedure in Tavares with the test in McCowen. The preverdict procedure in Tavares affords a trial judge necessary flexibility in determining what steps need to be taken to ensure the defendant is tried by an impartial jury. We further note that a strict application of

McCowen to preverdict allegations of juror misconduct would be unworkable because the second prong, requiring the "Commonwealth to show beyond a reasonable doubt that the defendant was not prejudiced by the jury's exposure to [the] statements," McCowen, 458 Mass. at 497, would be nearly impossible to demonstrate when a verdict has not yet been reached.

5. Review under G. L. c. 278, § 33E. The defendant argues that his conviction of murder in the first degree based on felony-murder is not consonant with justice. He contends that the only substantive crime of which he was convicted that could support a felony-murder conviction was armed assault with intent to rob. After a thorough review of the record, we find no reason to exercise our authority under G. L. c. 278, § 33E, to grant a new trial or to reduce or set aside the verdict of murder in the first degree. As discussed supra, attempted armed robbery can support a felony-murder conviction in the first degree, and the defendant was not required to have been separately indicted on the predicate offense.

We also conclude that the defendant's conviction of armed assault with intent to rob must be vacated as duplicative of his felony-murder conviction. See Commonwealth v. Rivera, 445 Mass. 119, 131-132 (2005). "When the jury return a guilty verdict on a theory of felony-murder, the predicate felony merges into the felony-murder conviction as a lesser included offense." Id. at

132. See Commonwealth v. Mello, 420 Mass. 375, 398 (1995) ("appropriate remedy for the imposition of duplicative convictions is to vacate both the conviction and sentence on the lesser included offense, and to affirm the conviction on the more serious offense").

"The elements of armed assault with intent to rob are that the defendant, armed with a dangerous weapon, assaults a person with a specific or actual intent to rob the person assaulted." Rivera, 445 Mass. at 130 n.15. "[T]he elements of armed robbery are that the defendant takes money or other property from the victim with the intent to steal it, while armed with a dangerous weapon and by applying actual force to the victim or putting the victim in fear through the use of threatening words or gestures." Commonwealth v. Benitez, 464 Mass. 686, 694 n.12 (2013). Depending on the facts, armed assault with intent to rob "is equivalent to an 'attempted commission' of armed robbery." See Ladetto, 349 Mass. at 248-249.

The evidence here supporting the conclusion that the defendant attempted to commit an armed robbery is the same as the evidence that established that he committed an armed assault with intent to rob. See Rivera, 445 Mass. at 132. Contrast Commonwealth v. Wooden, 70 Mass. App. Ct. 185, 192-193 (2007). Therefore, the armed assault with intent to rob conviction is duplicative of the predicate felony of armed robbery. See

Commonwealth v. Wilson, 381 Mass. 90, 124 (1980) (felony-murder conviction bars additional punishment based on "same evidence" [citation omitted]).

Conclusion. We affirm the defendant's conviction of murder in the first degree based on the predicate felony of armed robbery and his conviction of armed home invasion. We vacate his conviction of armed assault with intent to rob.

So ordered.