393

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

BRCR2013-00983

COMMONWEALTH

vs.

AARON HERNANDEZ

COMMONWEALTH'S OPPOSITION TO DEFENDANT'S RENEWED MOTION FOR A REQUIRED FINDING OF NOT GUILTY

Introduction. On April 15, 2015, a superior court jury found the defendant, Aaron Hernandez, guilty of first-degree murder, unlawful possession of a firearm, and unlawful possession of ammunition. By way of post-verdict motion filed on May 12, 2015, the defendant renewed his intra-trial motion for a required finding of not guilty and, in the alternative, requested reduction of the verdict relating to the murder charge pursuant to Mass. R. Crim. P. 25(b)(2). His motion is completely meritless. In a memorandum of law submitted by the defendant in support of his submission, he misstates or omits key evidence, misstates the governing legal standards, draws impermissible inferences about the factual bases of the jury's verdicts and otherwise fails to assert any legally

supportable claims that might justify revision of the verdicts here.

Trial Evidence. The following evidence was admitted at the defendant's trial: The defendant had known the victim, Odin Lloyd, for a period of several months before he murdered him. Apart from occasionally socializing with the defendant, the victim had begun supplying the defendant with marihuana. On Sunday night, June 16th, Ernest Wallace and Carlos Ortiz, arrived at the defendant's house in North Attleboro, Massachusetts in response to various calls and text messages sent to them by the defendant. Earlier in the evening, the defendant had also contacted the victim and asked him if wanted to "step" - i.e. go out to a club - as the two men had done on the preceding Friday, June 14th when they visited "Rumor," a Boston nightclub, together.[1] The victim had agreed to the defendant's proposal.

At approximately 1 AM on June 17th, the defendant met with Wallace and Ortiz at his home. At that time, the defendant was observed to be armed with a firearm consistent with a Glock pistol. After approximately twenty minutes of preparation, the three left drove to the

---

[1] The defendant texted the victim as follows: "I'm coming to grab that tonight u gon b around I need dat and we could step for a little again." This was just three minutes after the defendant had texted Wallace, asking him to come to the defendant's house that night.

victim's house in Dorchester. They made the journey in a silver Nissan Altima that the defendant had rented several days earlier. Along the way, video evidence from a gas station showed the defendant was driving his rented Altima. This was again confirmed when the three picked up the victim in front of his home at 2:33 AM. As the defendant met with the victim after all the clubs had closed, the four did not "step". Instead, the defendant immediately drove to North Attleboro, ultimately stopping at an isolated area within an industrial park located near the defendant's home. Video surveillance showed the Nissan Altima enter this area at 3:24 AM. The Nissan Altima was observed leaving this area approximately three minutes later and continuing in the direction of the defendant's home.

During that three minute period, the Nissan Altima drove deep into the middle of the property where the victim was shot six times and left to die. Ballistic evidence indicated that the first shot was fired from inside the car. That shell casing was later recovered under the defendant's seat. The next three shots were then fired outside the car and in quick succession while the victim was crouching near the vehicle. The final two shots were fired while the victim lay wounded and helpless on the

ground. The last two rounds penetrated the victim's body completely and were later recovered from the ground directly underneath his body.

The crime scene revealed evidence connecting the defendant to the murder. Near the victim's body, a marihuana cigarette was found that contained both the defendant's and the victim's DNA. A footprint, consistent with the shoes that the defendant was wearing that night, was located a short distance from the victim's body. This footprint pointed in the direction of where the other shell casings were found. Also near the body were tire tracks which were later matched/individualized to the tires recovered from the defendant's rented Altima.

After murdering the victim, video evidence established that the defendant, Ortiz and Wallace returned to Hernandez's nearby house to rest and relax.[2] Upon arriving home, the defendant was observed leading the others from the car and into his house where he gestured for the others to be quiet. Within minutes of the murder, the defendant was again observed with the same firearm, consistent with a Glock, that he possessed prior to the murder. The defendant then led the others to his basement where the video

[2] There was videotape evidence depicting the defendant's demeanor immediately before and after the killing. At all times he and the others appear relaxed and happy.

surveillance was disconnected. Later that day, the defendant returned the rented Altima and obtained a new rental car. A rental company employee found the shell casing underneath the defendant's seat which was determined to have been fired from a Glock .45 caliber firearm. This shell casing and the five others recovered from the scene were all determined to have been fired from the same Glock firearm. The projectiles recovered from the ground and the victim's body confirmed these findings.

There was also significant evidence presented to the jury of the defendant's knowledge and possession of firearms. In addition to evidence that he kept firearms in his home, there was also evidence that a .22 caliber pistol associated with the defendant had been found on the ground a short distance from the site of the murder.

After the murder, the defendant then engaged in a series of acts evidencing his consciousness of guilt. These acts included but are not limited to attempting to avoid police contact, lying to the police and other witnesses, destroying and attempting to destroy evidence, providing a false alibi and assisting his confederates in evading apprehension. Other relevant evidence is included in the legal analysis below as necessary.

Required Finding Standard. The defendant's burden here is considerable. Specifically, in order to prevail on a motion for a required finding of not guilty, the defendant must demonstrate that, even when the trial evidence is viewed in the light most favorable to the Commonwealth, no rational jury could have found the essential elements of the crimes charged beyond a reasonable doubt. See Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). Moreover, in considering the sufficiency of the government's proof, "[c]ircumstantial evidence [standing alone] is competent to establish guilt beyond a reasonable doubt." Commonwealth v. Murphy, 70 Mass. App. Ct. 774, 777 (2007), quoting Commonwealth v. Merola, 405 Mass. 529, 533 (1989). Finally, any inferences made by the jury based on the evidence need only be "reasonable and possible," not "necessary or inescapable," Commonwealth v. Casale, 381 Mass. 167, 173 (1980), citing Commonwealth v. Beckett, 373 Mass. 329, 341 (1977), and "[t]o the extent that conflicting inferences are possible from the evidence, 'it is for the jury to determine where the truth lies.'" Cramer v. Commonwealth, 419 Mass. 106, 110 (1994), quoting Commonwealth v. Wilborne, 382 Mass. 241, 245 (1981). Tested against these standards, the defendant does not even come close to meeting the burden required to obtain relief.

First-Degree Murder. Where, as here, the government's theory of liability was joint venture, the Commonwealth was obliged to present evidence that "the defendant knowingly participated in the commission of the crime charged, alone or with others, with the intent required for that offense." Commonwealth v. Zanetti, 454 Mass. 449, 468, (2009). To prove the requisite intent, the Commonwealth was required to show that the defendant harbored malice - i.e. that he "intended [the victim]'s death, grievous bodily harm to him, or any act which a reasonable person would know created a plain and strong likelihood of death," Commonwealth v. Hanright, 466 Mass. 303, 314 (2013) - or otherwise to adduce evidence from which malice could be inferred as a matter of law. See Commonwealth v. Earle, 458 Mass. 341, 346 (2010); Commonwealth v. Zanetti, 454 Mass. at 467-468 (intent required for conviction of murder in any form is malice). Finally, in order to support a conviction for first-degree murder on the theory relied upon by the jury here, it was necessary to present legally sufficient evidence that the murder was accomplished by means of conduct that objectively embodied extreme atrocity or cruelty. However, no proof that the defendant himself was armed was required to obtain a conviction. Commonwealth v. Britt, 465 Mass. 87, 99 (2013). Moreover,

"the Commonwealth [wa]s not required to prove exactly how a[ny particular] joint venturer participated in the murder[]," Commonwealth v. Phillips, 452 Mass. 617, 633, 634 (2008), or which of [multiple joint venturers] did the actual killing." Commonwealth v. Deane, 458 Mass. 43, 51 (2010).

In assessing whether the Commonwealth has met its burden of proof, a jury may consider evidence of the defendant's consciousness of guilt. See Commonwealth v. Rojas, 388 Mass. 626, 629 (1983) ("[i]n conjunction with other evidence . . . actions and statements of a defendant that show a consciousness of guilt" may be used to meet the government's burden of proof). "While proof of . . . consciousness of guilt alone may be insufficient to convict [a defendant] of [a] crime, see Commonwealth v. Montecalvo 367 Mass. 46, 52 (1975), evidence of such a state of mind when coupled with other probable inferences, may be sufficient to amass the quantum of proof necessary to prove guilt." Commonwealth v. Porter, 384 Mass. 647, 653 (1981) citing Commonwealth v. Best, 381 Mass. 472, 483 (1980). In particular, evidence of flight, destruction of evidence or the purveying of false or inconsistent statements to police is highly suggestive of a defendant's consciousness of

guilt. See Commonwealth v. Basch, 386 Mass. 620, 624-625 (1982); Commonwealth v. Connors, 345 Mass. 102, 105 (1962).

Applying the foregoing principles to the evidence presented to the jury here, there can be no question that the Commonwealth met its burden of proof. The fact that the defendant and his co-venturers gathered at the defendant's house immediately before the killing, armed themselves with guns, then drove as a group an hour away to Boston to collect the victim at a time and place arranged by the defendant, then brought the victim back (another hour's drive) to a spot 1000 yards from the defendant's house where the victim was shot repeatedly, then left the industrial park immediately suggesting that they had driven there for the sole purpose of killing the victim, then drove as a group to the defendant's house after the killing all strongly support the inference that "the defendant knowingly participated in the commission of the crime charged, alone or with others, with the intent required for that offense."

Indeed, it is hard to imagine what exculpatory inference a reasonable juror might draw from the foregoing facts. That the defendant, in the aftermath of the killing, gave misleading statements to police (he dissembled about when he had last seen the victim, provided

a false alibi to other witnesses and ordered a confederate (his fiancée) to meet and provide money to Wallace as well as to remove, conceal and destroy evidence in his home provides strong evidence of consciousness of guilt, further bolstering the basis for the verdict. See Commonwealth v. Kennedy, 426 Mass. 703, 705-708 (1998) quoting Commonwealth v. Merola, 405 Mass. 529, 533 (1989) ("[a]n inference [supporting probable cause] 'need only be reasonable and possible; it need not be necessary or inescapable'").

While the defendant's conduct provides a ready basis for inferring the necessary mental state, if there were any room for doubt about the issue, the choice of weapon provides a sufficient independent basis for inferring malice in this case. It is well established that a "jury are permitted to infer malice from the use of a dangerous weapon." Commonwealth v. Guy, 441 Mass. 96, 107 (2004). See also Commonwealth v. Reaves, 434 Mass. 383, 393 n.16 (2001) (instruction that malice may be inferred from intentional use of dangerous weapon correct supplemental instruction); Commonwealth v. Albert, 391 Mass. 853, 860-861 (1984). To the extent that the victim was killed by means of the intentional use of .45 caliber handgun here, there can be no doubt as to the legal sufficiency of the

evidence relating to malice. See Commonwealth v. Perez, 444 Mass. 143, 153 (2005).

Further, in view of the manner of death, it is similarly plain that the government met its burden in establishing that the killing here was accomplished by means of extreme atrocity or cruelty. To convict a defendant of murder in the first degree on a theory of extreme atrocity or cruelty, the jury must consider the factors set out in Commonealth v. Cunneen, 389 Mass. 217, 227 (1983), and conclude that the manner of death involved atrocity or cruelty by reference to at least one of them. See Commonwealth v. Evans, 469 Mass. 834, 845 (2014) (conviction under theory of extreme atrocity or cruelty supported by evidence on just one of the Cuneen factors). The relevant factors are as follows: "(1) whether the defendant was indifferent to or took pleasure in the victim's suffering; (2) the consciousness and degree of suffering of the victim; (3) the extent of the victim's physical injuries; (4) the number of blows inflicted on the victim; (5) the manner and force with which the blows were delivered; (6) the nature of the weapon, instrument, or method used in the killing; and (7) the disproportion between the means needed to cause death and those

employed." See Commonwealth v. Linton, 456 Mass. 534, 546 & n.10 (2010).

In view of the relevant factors, the defendant has simply misstated the law when he claims that there is no evidence to support a finding that the victim's death was procured here by means of extreme atrocity or cruelty. In support of his claim, the defendant states, *inter alia*, that the victim was merely shot and that "[n]o other injuries were noted" (Def.'s memo at 14). This, the defendant apparently contends, could not possibly constitute cruelty or atrocity within the legal meaning of those terms. As the SJC determined in Commonwealth v. Glass, 401 Mass. 799, 802-803 (1988), "[o]ur cases have generally upheld submission of the question of extreme atrocity or cruelty to the jury on the basis of even a single fatal blow." See also Commonwealth v. Golston, 373 Mass. 249, 259-260 (1977) (single blow with baseball bat amounted to extreme atrocity or cruelty). Indeed, the SJC held in Commonwealth v. Doherty, 353 Mass. 197, 213 (1967), that a single gunshot wound, in appropriate circumstances, might be sufficient for a conviction of murder by means of extreme atrocity or cruelty. Consistent with Doherty, the court in Commonwealth v. Blackwell, 422 Mass. 294, 299-300 (1996), explicitly declined to announce a rule of law that

a single gunshot could never be sufficient for submission on the theory of extreme atrocity or cruelty. Needless to say, the evidence in this case far exceeds these minimum requirements.

Here, the victim was taken to an isolated area in the middle of the night and shot six times at close range. He was shot repeatedly while standing or crouching and then shot twice more as he lay dying on the ground. There was evidence that more than one of the shots, standing alone, would have been fatal. The defendant then decamped to his house to socialize with his confederates. Thus, whether viewed in terms of the "number of blows," the "disproportionality" of the force used versus the force required to procure the victim's death, the quantum of fear and suffering endured by the victim (and evidenced by the crouching position at the time of the shooting), or the indifference to the victim's death evinced by the defendant on the videotape evidence, the government patently met its burden of proof. Indeed, rather than meeting merely one of the Cuneen factors - as noted, all that is required to support a conviction - the government has met most.

The fact that the defendant's conviction rested on a joint venture theory is immaterial to the foregoing analysis. As the SJC stated in Commonwealth v. Podalski,

377 Mass. 339, 346-347 (1979), "[w]e reject the defendant's contention that a person cannot be guilty of murder with extreme atrocity or cruelty by means of participation in a joint venture." The Court explained that "to be guilty on a joint venture theory, a defendant must share the intent of the principal, see Commonwealth v. Scanlon, 373 Mass. 11, 17 (1977), but as to this type of murder in the first degree, even the principal need not have an intention to use atrocious or cruel means or indeed know that the particular conduct constitutes atrocity or cruelty." Ibid. See also Commonwealth v. Golston, 373 Mass. 249, 259-260 (1977), cert. denied, 434 U.S. 1039 (1978); Commonwealth v. Satterfield, 362 Mass. 78, 81 (1972); Commonwealth v. Appleby, 358 Mass. 407, 415 (1970). Accordingly, in terms of mental state, a joint venturer, to be guilty of first-degree murder by means of extreme atrocity or cruelty, "need only intend that the victim be killed or know that there is a substantial likelihood of the victim's being killed . . . If the joint venturer has this intent [i.e. if malice is present] and participates in a killing accomplished by means of extreme atrocity or cruelty, he is guilty of murder in the first degree." Ibid. See Commonwealth v. Freiberg, 405 Mass. 282, 288, cert. denied, 493 U.S. 940 (1989) (no requirement of intent to inflict

extraordinary pain or suffering to convict of murder based on extreme atrocity or cruelty). Such was the case here.

In sum, the government met it burden of proof in this case. Beyond all question, there was adequate evidence that "the defendant knowingly participated in the commission of the crime charged, alone or with others, with the intent required for that offense." The government provided ample proof of the defendant's involvement in the killing. There was evidence that the defendant repeatedly communicated with the victim in the hours before the murder, provided the vehicle used to transport the victim to the site of the murder, personally drove his accomplices to pick up the victim in Boston and transport him to the site of the murder, was present at the moment of the victim's death, possessed a gun of the type used to kill the victim during the timeframe of the murder, drove the getaway car to facilitate the escape of his accomplices from the site of the murder, and provided a private staging area in the minutes after the murder (i.e. his house) potentially to conceal evidence and otherwise avoid detection. Consistent with his intent and actions in procuring the victim's murder, the video surveillance shows the defendant (and his accomplices) behaving perfectly normally upon his return to his home just minutes after the

killing. Despite the defendant's repeated claims to the contrary, the government was not required to prove that the defendant pulled the trigger of the gun that killed the victim. Indeed, as noted already, "the Commonwealth is not required to prove exactly how a joint venturer participated in the murder[]," Commonwealth v. Phillips, 452 Mass. at 617, or which of [multiple joint venturers] did the actual killing." Commonwealth v. Deane, 458 Mass. at 51.

The evidence offered regarding the defendant's actions to conceal the crime in the aftermath of the murder also speak to his intent and active personal involvement in the murder. He ordered the destruction of evidence, including the surveillance video and, more likely than not, the murder weapon[3], made false or misleading statements to

---

[3] Although it is ultimately unknown what was in the box from the basement disposed of by Shayanna Jenkins the day after the murder, it was reasonable for the jury to infer that the box contained the firearm that the defendant was observed holding before and after the murder and other firearms that had been observed in the home prior to the murder. Within minutes of returning from the murder scene, the defendant was observed carrying the firearm to the basement. After going to the basement, the defendant disconnected the surveillance video. Although the video was reconnected several hours later, the defendant was not observed carrying the firearm out of the basement. As noted already, the morning after the murder, the defendant called Shayanna Jenkins from another number and told her it was important to immediately get rid of a box from the basement. Ms. Jenkins retrieved the box, which she described as heavy and weighing approximately twenty-five pounds and disposed of it.

police[4], and exchanged the vehicle used in the killing for another car immediately after the murder to avoid detection. All of these actions bespeak a high degree of consciousness of guilt, and so may be relied upon to support the jury's verdict. In short, the direct and circumstantial evidence of the defendant's guilt here was overwhelmingly powerful.

In order to escape the persuasive force of the Commonwealth's evidence supporting the jury's verdict, the defendant, in the memorandum submitted with his motion, engages in the most tortured legal gymnastics. Specifically, he states as follows: "Since the jury did not convict Hernandez of first degree murder by deliberate premeditation, it did not conclude that there was a plan. If there was no plan, Lloyd's killing was spontaneous. If it was spontaneous, there was absolutely no basis to conclude that Hernandez, rather than one or more other persons present at the scene, played any role in that spontaneous event or agreed to do so. Guesswork, speculation and imagination do not equate to guilt beyond a reasonable doubt" (Def.'s memo at 12). There are numerous

[4] As noted, the defendant misled police about when he had last seen the victim.

misstatements, both factual and legal, in the foregoing assertions; each is rebutted in turn.

In the first instance, the defendant cites absolutely no legal authority whatsoever for the proposition that a jury verdict premised on one theory of culpability with respect to a particular offense provides a legal basis for inferring an acquittal on an alternate theory. In fact, the law is precisely the opposite. As the SJC concluded in Commonwealth v. Carlino, 449 Mass. 71, 78 (2007), an acquittal will not be implied "unless a conviction of one crime logically excludes guilt of another crime." On this basis, in Carlino, the court held that a conviction expressly based on deliberate premeditation and extreme atrocity or cruelty did not operate as an acquittal on a theory of felony murder. As the SJC stated in Commonwealth v. Zanetti, 454 Mass. 449, 460 (2009), "[w]e will not infer acquittal from silence on a verdict slip." Accordingly, there is absolutely no merit to the defendant's argument that, absent a special verdict, it is possible to draw any inferences about possible fact-findings with respect to alternate theories (like deliberate premeditation) upon which the jury's verdict might have rested.

Moreover, and perhaps more fundamental, the defendant completely misstates the law when he argues that a murder

committed with malice aforethought, which the jury manifestly found occurred here, equates to a "spontaneous event." In fact, malice, as noted already, may take the form of either an intent to kill or an intent to cause grievous bodily harm[5], See Commonwealth v. Ennis, 398 Mass. 170, 180 (1986), both of which embody forward-looking states of mind. It is altogether possible, therefore, that the jury concluded here that the defendant's actions in advance of the murder evinced a specific intent to kill the victim, but that his intent was not the product of deliberate premeditation. As the SJC observed in Commonwealth v. Simpson, 434 Mass. 570, 588 (2001), deliberate premeditation requires proof of: "(1) a plan to murder; (2) a decision to kill after a period of deliberation; and (3) a 'resolution to kill . . . [that is] the product of cool reflection." See also Commonwealth v. Jiles, 428 Mass. 66, 72 (1998); Commonwealth v. Judge, 420 Mass. 433, 441 (1995). In view of that very high standard, and considering the fast-moving pace of events on the night of the murder, as well as the evidence of voluntary drug use, it is certainly possible that the jury, while finding

---

[5] It may also, again as noted already, take the form of an "act which a reasonable person would know created a plain and strong likelihood of death." Commonwealth v. Hanright, 466 Mass. 303, 314 (2013)

that the defendant harbored a specific intent to kill the victim, deemed it was not the product of careful deliberation or cool reflection. In any event, as the SJC concluded in Carlino and Zanetti, it is not possible to infer that deliberate premeditation was definitively not present merely because the jury chose to convict on another theory.

Finally, apart from being at odds with the law, the defendant's argument is likewise at odds with the facts. As noted, he states that: "If [the killing] was spontaneous, there was absolutely no basis to conclude that Hernandez, rather than one or more other persons present at the scene, played any role in that spontaneous event or agreed to do so." In fact, as detailed already, there was an abundance of evidence that Hernandez played a central role in the killing even assuming, merely for the sake of argument, that it was, as the defendant says, "spontaneous." Specifically, there was evidence that: (1) immediately before and after the killing, the defendant possessed the very type of weapon used to murder the victim; (2) a marihuana cigarette bearing the defendant's DNA, his footprint and rental car's tire track were found on the ground near the victim's body; (3) the defendant displayed strong consciousness of guilt by destroying or

procuring or attempting to procure the destruction of evidence, by making false statements to the police, providing a false alibi to other witnesses and by swapping the Altima for another vehicle the day after the murder; (4) the defendant procured the car used in the murder; (5) the defendant drove the victim to the site of the murder, a place that was plainly selected expressly for that purpose[6]; and (6) the defendant, alone among the three co-venturers, had a relationship with and a possible motive to kill the victim. Thus, whether viewed from a factual or legal perspective, the defendant's argument is completely baseless.[7]

---

[6] As noted above, the defendant and his confederates left the industrial park immediately after they killed the victim providing a powerful basis for the inference that their sole purpose in going to the industrial park was to find a secluded spot to shoot the victim.

[7] Apparently cognizant of the weakness of his position, the defendant resorts in his memorandum to a tactic he has used before in this case; namely, asking this Court to change the law of the Commonwealth to provide him with a basis for an otherwise baseless position. Relying on dicta in two SJC decisions, Commonwealth v. Berry, 466 Mass. 763, 773-778 (2014) and Commonwealth v. Reilly, 467 Mass. 799, 828-829 (2014), the defendant urges this Court to overthrow more than one hundred years of precedent, see Commonwealth v. Gilbert, 165 Mass. 45, 59 (1895), and require a mental state requirement beyond malice to obtain a conviction for first-degree murder on a theory of extreme atrocity and cruelty. Specifically, the defendant argues that the Court should require the jury to find that a defendant intended to kill the victim by particularly cruel and atrocious means as a prerequisite for conviction. First and foremost, that is not the law. Second, the cases cited by

Unlawful Possession of a Firearm and Ammunition. The defendant was also convicted of unlawful possession of a firearm and unlawful possession of ammunition. As to these counts, the indictment alleged that the defendant actually and/or constructively possessed a loaded .45 caliber firearm (i.e. a gun and ammunition), alone and/or with others in the course of the joint venture by having it in his possession or under his control in a vehicle. The

---

the defendant are completely inapposite. Berry involved a situation in which the SJC reduced a first-degree murder conviction on the basis of a defendant's acute mental illness and Reilly involved a case in which malice was proved on the basis of the so-called "third prong," a mental state that, unlike the other two "prongs" of malice does not involve any specific intent; namely, committing an act that, in the circumstances known by the defendant, a reasonably prudent person would have recognized created a plain and strong likelihood of death or serious injury. See Commonwealth v. Sama, 411 Mass. 293, 298 (1991). Here, there is no issue of mental illness and, in view of the manner of the death, there can be no question that such malice as the jury found was present must have arisen out of some form of specific intent, either to kill or to cause grievous bodily harm. Absent the presence of such special factors, the argument in favor of any enhanced mental state requirement is significantly weakened. It is also worth noting that even if the Court were to adopt the defendant's view of the mental state required for conviction of first-degree murder on a theory of extreme atrocity and cruelty, the jury's verdict would have been permissible in any event. Deliberately shooting a defendant six times, twice while he is already lying on the ground, under the contextual circumstances present here, would necessarily provide a basis for inferring an intent to commit murder by means of extreme atrocity or cruelty. In any event, the defendant's view of what the law should be does not provide the basis for proper argument.

trial evidence provided an ample basis for conviction of that charge.

In the first instance, the aforementioned surveillance video images of the defendant holding a gun immediately before and after the murder supports the inference that the defendant possessed the murder weapon personally. He is the only one of the three co-venturers seen with a weapon on the night of the killing and the gun he is seen holding in the video is consistent with the type used to kill the victim.[8] In addition, a spent .45 caliber shell casing was found underneath the seat of the defendant's rental vehicle the day after the murder. This evidence, standing alone, is enough to support the jury's verdicts.

However, even if the there were no basis to conclude that the defendant personally possessed the loaded murder weapon, an individual may be charged with possession of a gun or ammunition under a joint venture theory if the elements of joint venture are met and there is sufficient evidence to support the inference that the defendant knew that a coventurer possessed the weapon. See Commonwealth v. Ortiz, 424 Mass. 853, 856 (1997); Commonwealth v.

---

[8] Ballistics evidence indicated that the ammunition used to kill the victim was fired from a .45 caliber Glock firearm and a firearms expert testified that a gun seen on the videotape in question appeared to be such a weapon.

Sadberry, 44 Mass. App. Ct. 934, 936 (1998). Here, in view of the coordinated activity that preceded the murder, the significant time the three accomplices spent together in the hours before the killing and the necessity for having a gun to achieve the objective of the joint enterprise, there was likewise an ample basis for the jury to conclude that the defendant knowingly possessed the loaded murder weapon jointly with Ortiz and Wallace. In short, there was legally sufficient evidence on which the jury could have premised a finding of guilt as to both of the firearms charges here.

Reduction of Verdict. Pursuant to Mass. R. Crim. P. 25(b)(2), a trial judge has the authority to reduce a verdict, despite the presence of evidence sufficient to support the jury's original verdict.[9] See Commonwealth v. Woodward, 427 Mass. 659, 666-667 (1998). That power is comparable to the power vested in the SJC pursuant to G. L. c. 278, § 33E, and a trial judge's decision on a rule 25(b)(2) motion "should be guided by the same considerations." Commonwealth v. Gaulden, 383 Mass. 543,

---

[9] Rule 25(b)(2) states in pertinent part that, if a guilty verdict is returned by the jury, a defendant may file a motion requesting the judge to set aside the verdict and (1) order a new trial, (2) order the entry of a finding of not guilty, or (3) order the entry of a finding of guilty of any lesser offense included within the scope of the indictment or complaint.

555 (1981). The purpose behind the grant of such power to a judge is "to ensure that the result in every criminal case is consonant with justice." Commonwealth v. Woodward, supra at 666. See Commonwealth v. Ghee, 414 Mass. 313, 321 (1993); Commonwealth v. Keough, 385 Mass. 314, 320 (1982). However, the SJC has state that "a judge should use this power sparingly," Commonwealth v. [821] Woodward, supra at 667, and not sit as a "second jury." Commonwealth v. Keough, supra at 321.

A judge's discretion to reduce a verdict pursuant to rule 25(b)(2) is appropriately exercised where the weight of the evidence in the case, although technically sufficient to support the jury's verdict, points to a lesser crime. Thus, for example, where evidence of premeditation was "slim," a judge was deemed not to have abused his discretion in reducing a verdict of murder in the first degree to murder in the second degree. See Commonwealth v. Ghee, 414 Mass. at 322. Similarly, where the weight of the evidence suggested that the defendant had not acted with malice, a murder verdict was appropriately reduced to manslaughter. See Commonwealth v. Woodward, supra at 669-671 & n.14; Commonwealth v. Greaves, 27 Mass. App. Ct. 590, 594 (1989). Further, where weaknesses in the evidence supporting a jury's verdict is coupled with errors

by the trial judge that may have influenced the jury's deliberations, relief has been deemed appropriate.

What the SJC has emphatically declared is *not* permitted, however, is reduction to a lesser verdict that would be inconsistent with the weight of the evidence, or reduction based solely on factors irrelevant to the level of offense proved. See Commonwealth v. Sabetti, 411 Mass. 770, 780-781 (1992); Commonwealth v. Burr, 33 Mass. App. Ct. 637, 640-644 (1992). While each case depends on its particular facts and, while no single fact is conclusive, a most important consideration is whether the jury verdict is markedly inconsistent with verdicts returned in similar cases. Here, none of the permissible bases for reducing a verdict under Mass. R. Crim. P. 25(b)(2) is present.

The jury's verdict was, as thoroughly canvassed above, amply supported by the trial evidence. In particular, the evidence of malice was clear, both through evidence of the defendant's intent to kill the victim reflected in the high degree of coordinated activity that preceded the murder, as well as (independently) in the use of a deadly weapon. See Commonwealth v. Perez, 444 Mass. at 153. Further, the evidence that ran to the various Cuneen factors - i.e. the evidence that differentiated the offense from second-degree murder - was overwhelmingly powerful. As noted, while

evidence on one factor is sufficient to support a verdict for first-degree murder, there was ample evidence here on at least four of the factors. Finally, there can be no argument that the verdict here was dissimilar to verdicts obtained in similar cases. This was a brutal and senseless crime that was carried out with extreme violence. The defendant was pitiless, failing to show either mercy or remorse. The verdict was indisputably commensurate with verdicts in other similar cases. No reduction is indicated here under the governing legal standards.

WHEREFORE, the Commonwealth respectfully requests this Court to deny the defendant's motion for a required finding of not guilty or, in the alternative, and as to the murder conviction only, for reduction of the verdict pursuant to Mass. R. Crim. P. 25(b)(2).

Respectfully submitted,

William M. McCauley
Assistant District Attorney
Bristol District
BBO#562635
888 Purchase St.
New Bedford, MA 02740

Dated: June 11, 2015

CERTIFICATE OF SERVICE

I, William M. McCauley, certify that I have served a copy of the Commonwealth's Opposition to Defendant's Renewed Motion for a Required Finding of Not Guilty by first class postage prepaid mail to Counsel for the Defendant, as follows: Charles W. Rankin, Rankin & Sultan, 151 Merrimac Street, 2nd Floor, Boston, MA 02114; James L. Sultan, Rankin & Sultan, 151 Merrimac Street, 2nd Floor, Boston, MA 02114; and Michael K. Fee, Latham & Watkins, LLP, John Hancock Tower, 20th floor, 200 Clarendon St., Boston, MA 02116.

Signed under the pains and penalties of perjury this 11th day of June 2015.

COMMONWEALTH OF MASSACHUSETTS,

William M. McCauley/MB

William M. McCauley
Deputy District Attorney
For the Bristol District
888 Purchase Street
New Bedford, MA 02741-0973

The Commonwealth of Massachusetts
OFFICE OF THE
DISTRICT ATTORNEY
BRISTOL DISTRICT

THOMAS M. QUINN III
DISTRICT ATTORNEY

Fall River Justice Center
186 S. Main St.
Fall River, MA 02721
(774) 627-1600

June 11, 2015

Superior Court Clerk's Office
Fall River Justice Center
186 South Main Street
Fall River, MA 02720

Re: Commonwealth v. Aaron Hernandez
1373CR00983

To whom it may concern:

Enclosed for filing, please find the Commonwealth's Opposition to Defendant's Renewed Motion for a Required Finding of Not Guilty.

Respectfully submitted,

William M. McCauley /MB

William M. McCauley
Assistant District Attorney

cc: Charles W. Rankin, Esq.
James L. Sultan, Esq.
Michael K. Fee, Esq.