SJC-12701

COMMONWEALTH vs. WESSON COLAS.

Suffolk. September 14, 2020. - February 22, 2021.

Present: Lenk, Gaziano, Cypher, & Kafker, JJ.[1]

Homicide. Assault and Battery by Means of a Dangerous Weapon. Practice, Criminal, Instructions to jury, Capital case.

Indictments found and returned in the Superior Court Department on March 13, 2015.

The cases were tried before Christine M. Roach, J.

Esther J. Horwich for the defendant.
Cailin M. Campbell, Assistant District Attorney (Mark T. Lee, Assistant District Attorney, also present) for the Commonwealth.

GAZIANO, J. The defendant was convicted of murder in the first degree on a theory of deliberate premeditation in the shooting death of Dawn Jaffier, as well as armed assault with intent to murder and assault and battery by means of a dangerous

[1] Justice Lenk participated in the deliberation on this case prior to her retirement.

weapon in connection with the nonfatal shooting of Lealah Fulton. At trial, the Commonwealth alleged that the defendant and a companion had been involved in an altercation with a group of young men inside a convenience store. The dispute continued outside the store, where the defendant's companion argued with the others, while the defendant left to retrieve a handgun. According to the Commonwealth, the defendant then pointed the handgun at the rival group, and one of them, codefendant Keith Williams, fired multiple rounds at the defendant. Williams missed the defendant, but two of the bullets struck Jaffier and Fulton. Although the defendant himself did not fire a shot, the Commonwealth proceeded on a theory that the defendant had initiated a gunfight with Williams with the intent to kill and therefore was liable for the harm to the innocent bystanders. See Commonwealth v. Santiago, 425 Mass. 491, 503-504 (1997), S.C., 427 Mass. 298 and 428 Mass. 39, cert. denied, 525 U.S. 1003 (1998).[2]

In this direct appeal, the defendant raises a number of asserted errors at trial. He argues that the Commonwealth failed to introduce sufficient evidence to support his

[2] Keith Williams and the defendant were tried jointly. The jury convicted Williams of murder in the first degree, armed assault with intent to murder, assault and battery by means of a dangerous weapon, and unlawful possession of a firearm. Williams's appeal is pending before this court.

convictions of murder in the first degree, armed assault with intent to murder, and assault and battery by means of a dangerous weapon.[3] In addition, he challenges certain of the jury instructions, arguing in particular that the jury should not have been informed that they could draw an inference of an intent to kill from the use of a dangerous weapon. The defendant also contends that he is entitled to a new trial because of impermissible statements in the prosecutor's closing argument, and that trial counsel was ineffective for failing to object to portions of that argument, failing to object to certain testimony, and failing adequately to contest the sufficiency of the evidence. Finally, the defendant asks us to exercise our extraordinary authority under G. L. c. 278, § 33E, and to grant him a new trial or to reduce the conviction of murder to a lesser degree of guilt.

For the reasons that follow, we conclude that the verdicts of murder in the first degree and armed assault with the intent to murder cannot stand, but we affirm the conviction of assault and battery by means of a dangerous weapon. The matter shall be remanded to the Superior Court for a new trial on the charge of murder in the second degree.

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[3] The Commonwealth does not contest the defendant's claim that there was insufficient evidence to support a conviction of armed assault with intent to murder.

1. Background. We recite the facts the jury could have found, in the light most favorable to the Commonwealth, see Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), reserving some details for later discussion.

In the morning of August 23, 2014, a crowd gathered on Blue Hill Avenue in the Dorchester section of Boston to watch a parade. The defendant and a companion, Tevan Williams, were among the crowd.[4] The defendant was wearing a dark hooded sweatshirt and a visible gold chain. Tevan was dressed in a blue sweatshirt with the words "Blue Hill" printed on the front. Williams also was present, along with others, including Jordan Reed and Brian Joyce. Williams was wearing a distinctive blue "Ninja Turtles" T-shirt and blue shorts. All of the men were hanging out near a Blue Hill Avenue convenience store.[5]

The defendant and Tevan entered the store at approximately 8:20 A.M., followed a few minutes later by Reed and Joyce.[6] The defendant and Tevan exchanged "looks" and "stares" with Reed,

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[4] To avoid confusion with Keith Williams, the codefendant, we refer to Tevan Williams by his first name.

[5] The Commonwealth introduced video recordings from surveillance cameras mounted inside the convenience store, which included a view of the sidewalk in front of the store.

[6] As he walked into the store, the defendant appeared to be carrying a cellular telephone. At trial, counsel argued that the silver and black object later seen in the defendant's hand was a cellular telephone, and not a handgun.

Joyce, and another customer. While no words were spoken, this behavior created "a lot of tension in the store" during the brief encounter.

At 8:22 A.M., the defendant and Tevan left the store, followed by Reed and Joyce. The defendant walked away for a moment, while Tevan remained outside the store, drinking a soda. Joyce and Reed paused, turned toward Tevan, glared, and exchanged "aggressive" words with him. Williams and his group then headed towards McLellan Street. The defendant rejoined Tevan on Blue Hill Avenue, and the two began walking in the direction of Williams and his group.

Three witnesses observed the defendant during the ensuing altercation, and saw him produce a handgun from his waistband. The first witness, an off-duty Boston police detective, Arthur Hall-Brewster, had been waiting for the barbershop next to the convenience store to open. He stood on the sidewalk, against a wall, and intently watched the group of young men gathered nearby. The defendant passed by on the sidewalk within a few inches of Hall-Brewster. Hall-Brewster noticed that the defendant kept his fingertips flat against his stomach inside his belt. Watching the defendant from behind, Hall-Brewster observed him pull an object from his waist while continuing towards McLellan Street. At first, the detective thought that the shiny object the defendant had pulled from his waistband

might be a knife. As the defendant turned, Hall-Brewster saw that the defendant was holding a silver handgun with a five-inch long barrel. The defendant kept the weapon by his side as he faced a group of four to five men who had gathered on the sidewalk and the street. Hall-Brewster did not see him raise or aim the firearm.

The second witness, Troy Souto, who lived nearby, was outside with his teenaged son to watch the parade. After Souto noticed a group of men, who had been inside the convenience store, arguing on the street near the corner of the barbershop, he ordered his son to return home. Souto then saw the defendant produce a handgun from the back of his pants. Souto was unable to describe the weapon, but was certain that the defendant did not point or fire it.

The third witness, Michael Turner, entered the convenience store at the same time as Reed and Joyce. While purchasing a drink, Tevan twice bumped into Turner and "stared him down." Although no words were exchanged, Turner felt that there was "a lot of tension in the store." To avoid any involvement in a potentially escalating situation, Turner waited for the men to go before he left the store. The hostilities between the two groups of men continued on Blue Hill Avenue. In particular, Turner saw Tevan arguing with Reed and others in that group.

Turner then noticed the defendant and Tevan walking down the street behind him. Turner overheard Tevan tell the defendant, "Just keep calm, this will all be over in a second." Turner turned around when he heard a commotion, and ended up facing the defendant. He saw the defendant, who was holding a "pistol" by his side, raise it and point it in the direction of McLellan Street (which was also in the direction toward where Turner was standing). Turner described the weapon as "long" and "dark." He froze for a moment, before he turned and ran to the middle of the street, and then continued running home; he heard shots fired from a distance.

After the initial altercation, Williams, Reed, and Joyce left the area in front of the convenience store and gathered near the corner of Blue Hill Avenue and McLellan Street. The largest man in the group (by inference, Williams) was holding a firearm. One of the men in Williams's group yelled "blast them, blast them," or words to that effect. Williams then fired four or five shots at the defendant, who was farther along Blue Hill Avenue.

The defendant was not hit, but one of the bullets struck and killed a bystander, Jaffier. Jaffier had been walking across the intersection of Blue Hill Avenue and Charlotte Street with two friends when gunfire erupted and she fell to the ground. She had been shot in the head. Another bullet struck

Fulton, who had been watching the parade from a median strip near American Legion Highway, in the leg.

A neighborhood resident heard the shots and looked out her third-floor window. Her house was approximately 500 feet from the intersection of Blue Hill Avenue and McLellan Street. She saw three men walking down the street acting "nervous." She described one of the men, who was wearing a blue shirt and shorts (by inference, Williams), as "fat, heavyset," and the other two as "skinny." One of the skinny men, dressed in a white shirt and black pants, said, "Get rid of it. They're coming." The fat man rummaged through bushes and dropped something near the corner of the house across the street. Upon hearing police sirens, the men ran from the area. Alerted by neighbors, the police searched the area and recovered a .357 revolver from under a porch. Tests later revealed that the revolver, which contained six empty shell casings, was the weapon that fired the shots that killed Jaffier and injured Fulton.

Police stopped and handcuffed three men -- Williams, Reed, and Joyce -- approximately one to two blocks away from the location where the firearm was found. Shortly thereafter, based on dispatches over the police radio describing the clothing worn by three suspects, they were brought to police headquarters.

2. Discussion. a. Sufficiency of the evidence of murder in the first degree. The defendant contends that there was insufficient evidence to convict him of murder in the first degree. His argument is premised on the Commonwealth's purported inability to establish that he either possessed an operable and loaded handgun, or pointed a handgun at Williams. In light of this argument, coupled with the undisputed fact that he never fired a round at Williams, the defendant maintains that the jury could not have found, beyond a reasonable doubt, that he acted with the requisite intent to prove murder in the first degree.[7]

In determining whether the Commonwealth met its burden to establish each element of the offense charged, we apply the

[7] The defendant argues that the Commonwealth failed to prove that he possessed a firearm based on discrepancies in the evidence. For instance, Hall-Brewster described the object as a shiny, silver handgun with a long barrel, while Turner testified that the defendant raised a "long and dark" pistol, that "definitely wasn't shiny silver." On cross-examination, Souto testified that he assumed the object had been a firearm, but it could have been a cellular telephone. Unlike Turner, Hall-Brewster and Souto testified that the defendant kept the object by his side the entire time. "If the evidence lends itself to several conflicting interpretations," however, "it is the province of the jury to resolve the discrepancy" (citation omitted). Commonwealth v. Lopez, 484 Mass. 211, 215 (2020). To the extent that the trial record contains conflicting versions of events, it is the function of the jury, and not an appellate court, to resolve those conflicts, "for the weight and credibility of the evidence is wholly within their province." See Commonwealth v. Lao, 443 Mass. 770, 779 (2005), S.C., 450 Mass. 215 (2007) and 460 Mass. 12 (2011).

familiar Latimore standard. See Latimore, 378 Mass. at 677-678. "[The] question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 677, quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979). Although a conviction may be based entirely on circumstantial evidence, and the inferences drawn need only be reasonable, not inescapable, see Commonwealth v. Rakes, 478 Mass. 22, 32, 45 (2017), a "conviction may not rest on the piling of inference upon inference or on conjecture and speculation," Commonwealth v. Lao, 443 Mass. 770, 779 (2005), S.C., 450 Mass. 215 (2007) and 460 Mass. 12 (2011), citing Commonwealth v. Swafford, 441 Mass. 329, 339–343 (2004).

i. Intent to kill. "In order to have committed murder in the first degree with deliberate premeditation, a defendant must have had or shared an intent to kill or cause death, which was the product of cool reflection" (quotations and citations omitted). Commonwealth v. Tavares, 471 Mass. 430, 434-435 (2015). See Commonwealth v. Tejada, 484 Mass. 1, 4-5, cert. denied, 141 S. Ct. 441 (2020). Establishing an intent to kill requires proof that the defendant "consciously and purposefully intended" to cause the victim's death (citation omitted). Id. at 5. Specific intent, in turn, requires that a defendant "not only . . . consciously intended to take certain actions,

but . . . also consciously intended certain consequences." See Commonwealth v. Gunter, 427 Mass. 259, 269 (1998). An individual's specific intent is "rarely susceptible of direct proof and must usually be inferred from all the facts and circumstances disclosed by the evidence." Commonwealth v. Eppich, 342 Mass. 487, 493 (1961).

If a defendant intends to kill one person, and mistakenly kills another, under the doctrine of transferred intent the defendant is treated as though he or she intended to kill the other individual. Commonwealth v. Taylor, 463 Mass. 857, 863 (2012). See Commonwealth v. Shea, 460 Mass. 163, 172-173 (2011). In this case, the shooting of the two bystanders raised the issue of transferred intent, and the judge instructed on transferred intent as follows:

> "If a defendant intends to kill or injure someone and in attempting to do so mistakenly kills or injures someone else instead . . . such as a bystander the defendant is treated under the law as is if he intended to kill or injure the actual victim. This is referred to as transferred intent under the law. For example if I aim and fire a gun at one person intending to kill him, but instead mistakenly kill another person, the law treats me as if I intended to kill the actual victim. My intent to kill the intended victim is transferred to the actual victim."

Thus, the jury were required to decide whether the Commonwealth proved, beyond a reasonable doubt, that the defendant consciously and purposefully intended to kill Williams.

The act of pointing a firearm at someone is not, standing alone, sufficient "use" of that firearm to infer an intent to kill. See Commonwealth v. Lewis, 465 Mass. 119, 126 (2013). In Lewis, for example, we considered whether the Commonwealth had established that the defendant, who twice pointed a loaded firearm at a police officer, had possessed a specific intent to kill. Id. We determined that, in the circumstances there, the evidence equally supported conflicting views, and could have indicated either "an intent to kill" or "an intent to frighten and deter." Id. The Commonwealth was unable to prove that the defendant intended to kill the officer the first time the defendant pointed a loaded firearm at him. Id. The question was different the second time, because, at that point the officer had shot the defendant, and "the jury reasonably could infer that the defendant's intentions changed after [the police officer] shot him. Having failed to deter [the police officer] in his pursuit, having failed to avoid apprehension by pointing a gun at [the police officer], and having been shot twice, the defendant's persistence in pointing a loaded gun at the man who just wounded him with lethal force" was circumstantial evidence of an intent to kill. Id.

In other cases, courts have concluded that there was sufficient evidence of an intent to kill because of facts leading to an inference beyond a reasonable doubt that, in the

circumstances of the particular case, a defendant actually pulled the trigger. See, e.g., Commonwealth v. Gordon, 41 Mass. App. Ct. 459, 463-464 (1996) (observation that defendant's hand recoiled upon firing handgun, in conjunction with other evidence, supported inference of intent to kill); Wright v. Bergeron, 769 F. Supp. 2d 3, 6 (D. Mass. 2011) (discharged shell casings inside revolver supported conclusion that defendant had fired it and thus had intended to kill).

The court's analysis in Tavares, 471 Mass. 430, is instructive with respect to the types of inferences that properly may be drawn from evidence that a defendant pointed a gun at a rival but did not pull the trigger. In Tavares, supra at 432-433, the defendant got into an argument with the victim that devolved into a barroom brawl. While the defendant's friend (the codefendant) and the victim were fighting inside, the defendant left the bar, and returned outside armed with a handgun. Id. He waited nearby until the victim, the codefendant, and others who had been involved in the altercation left the bar. Id. at 433. The defendant then pointed the gun at the victim, and attempted to chamber a round by "racking" the slide backward. Id. The codefendant grabbed the gun from him and shot at the victim. Id. The jury convicted the defendant as an aider and abettor to the killing. Id. at 434. The court concluded that the defendant's acts of going to get the gun,

"lying in wait" near the entrance to the bar, pointing the gun at the victim, attempting to chamber a round "so that the gun could be fired at any moment," allowing the codefendant to grab the gun, and then running behind the codefendant as he chased and shot the victim were sufficient to establish that the defendant participated in the killing by "obtaining the murder weapon" and "allow[ing] or encourag[ing the codefendant] to follow through with the murder." Id. at 435-436. The court affirmed the conviction because the defendant's knowledge of the circumstances, and his participation in the crime, supported an inference that he shared his codefendant's intent to kill. Id.

In discussing whether the facts in Tavares supported an instruction on involuntary manslaughter, the court emphasized that evidence that the defendant pointed the firearm at the victim was not sufficient, standing alone, to establish an intent to kill. Id. at 438. Had the defendant in Tavares acted as he did, but done nothing further after pointing the gun, the jury reasonably might have believed "that the defendant's actions of returning to the area outside the bar and pointing the gun at [the victim] were meant only to scare or intimidate him and not to kill him." Id.

ii. Defendant's intent toward Williams. In this case, the Commonwealth recognizes that "more was needed," see Lewis, 465 Mass. at 126, to prove the defendant's intent to kill beyond

evidence that he pointed a firearm at Williams. The Commonwealth argues, however, that the defendant's specific intent to kill Williams reasonably may be inferred from "the circumstances under which [the defendant] drew and aimed" the weapon. In support of its argument, the Commonwealth points to the following circumstances. The defendant had been involved in a "tense situation" inside the convenience store with Williams's companions, Reed and Joyce, and the dispute escalated when the men went outside, where Tevan exchanged "hostile words" with Reed and Joyce. The defendant then left the area to retrieve a firearm. He returned and, while armed, walked with Tevan towards the corner where Williams and his group stood; while they were walking, Tevan told the defendant, "Just keep calm, this will all be over in a second." The defendant "then raised his arm and pointed it in the direction of Williams's group, which was less than [one hundred] feet away."

We do not agree that the evidence here was sufficient for the jury to have concluded, beyond a reasonable doubt, that the defendant intended to kill Williams. In this case, unlike in Tavares, 471 Mass. at 435-436, there is no evidence that the defendant possessed a loaded firearm, did anything "so that the gun could be fired at any moment," id., or chased down the intended target to finish him off. There also is no evidence that the defendant fired the gun either before or after Williams

fired at him. The fact that, in the midst of an argument, the defendant pointed a firearm at an opponent is not enough to carry the Commonwealth's burden. See Lewis, 465 Mass. at 126.

The remaining potential evidence of intent consisted of Tevan's statement, "Just keep calm, this will all be over in a second." It is possible, as the Commonwealth suggests, that Tevan's remark implied killing Williams as a means of quickly settling the dispute. It also is possible, however, that the comment referred to publicly running the Williams group off the crowded street where the parade was to take place, or some other less sinister alternative. While we recognize that this is a close call, the Commonwealth did not meet its burden to prove that the defendant consciously and purposefully intended to kill Williams. See Commonwealth v. Gonzalez, 475 Mass. 396, 414 (2016).

Because the evidence of the defendant's intent to kill was insufficient, his conviction of murder in the first degree cannot stand. This conclusion, however, does not mean that the defendant is entitled to an acquittal. See Commonwealth v. Rodriguez, 457 Mass. 461, 481-482 (2010). A careful review of the entire record shows that, viewing the evidence in the light most favorable to the Commonwealth, a reasonable juror could have found the defendant had an intent to commit an act that, in the circumstances known to him, created a plain and strong

likelihood of death. Thus, in the light most favorable to the Commonwealth, the jury could have determined that there was sufficient evidence of third prong or "depraved heart" malice to convict the defendant of murder in the second degree. See Commonwealth v. Robidoux, 450 Mass. 144, 161 n.8 (2007); Commonwealth v. Semedo, 422 Mass. 716, 720 (1996).

In particular, a reasonable juror could have concluded from the evidence introduced at trial that the act of pointing a firearm at a rival, on a crowded street, likely would provoke a deadly response, thereby demonstrating an indifference to human life. See Commonwealth v. Braley, 449 Mass. 316, 331-332 (2007), quoting Commonwealth v. Jenks, 426 Mass. 582, 585 (1998) (absent evidence that defendant's knowledge was impaired, act of shooting into crowd created plain and strong likelihood death would follow). See also Roy v. United States, 871 A.2d 498, 507 & n.10 (D.C. App. 2005), cert. denied, 547 U.S. 1162 (2006) (defendant's participation in "gun battle" represented depraved indifference to human life); State v. Spates, 779 N.W.2d 770, 777 & n.5 (Iowa 2010) (same). See generally State v. Young, 429 S.C. 155, 160-165 (2020) (discussing theories of liability for harm resulting from mutual combat, including depraved-indifference murder).

The same evidence also could have supported a conviction of involuntary manslaughter as an unintentional, unlawful killing

caused by wanton and reckless conduct. See Tavares, 471 Mass. at 437-438 (discussing "fine line" that distinguishes murder in second degree based on third prong malice from involuntary manslaughter).[8] "The difference between the elements of the third prong of malice and . . . involuntary manslaughter lies in the degree of risk of physical harm that a reasonable person would recognize was created by particular conduct, based on what the defendant knew. The risk for the purposes of third prong malice is that there was a plain and strong likelihood of death [whereas] [t]he risk that will satisfy the standard for . . . involuntary manslaughter 'involves a high degree of likelihood that substantial harm will result to another'" (citation omitted). Commonwealth v. Lyons, 444 Mass. 289, 293 (2005). See Braley, 449 Mass. at 331; Jenks, 426 Mass. at 585.

b. Sufficiency of the evidence of assault and battery by means of a dangerous weapon. The defendant argues that the Commonwealth failed to introduce sufficient evidence to support a conviction of assault and battery by means of a dangerous weapon. He contends that the jury heard no evidence that he intended to shoot anyone, or that he caused any injury to Fulton. The Commonwealth responds that the defendant's

[8] After discussing the matter "at length" with the defendant, the defendant's trial counsel declined the judge's offer to instruct the jury on the lesser included offense of involuntary manslaughter.

intentional actions caused Williams to fire, and thus "the defendant is liable for the injuries that the victims incurred at Williams'[s] hand."

"An assault and battery is the intentional and unjustified use of force upon the person of another, however slight . . ." (citation omitted). Commonwealth v. Appleby, 380 Mass. 296, 306 (1980). Assault and battery by means of a dangerous weapon is a general intent crime. See id. at 307, and cases cited. "Under [G. L. c. 265, § 15A], the battery must be accomplished by means of the dangerous weapon, and not merely while possessing the weapon." Id. at 306, citing Salemme v. Commonwealth, 370 Mass. 421, 424 (1976). The Commonwealth need not prove specific intent to injure; it is only required to prove a general intent to do the act causing the injury. Appleby, supra at 307. See Commonwealth v. McNulty, 458 Mass. 305, 325 (2010).

With respect to causation, the Commonwealth may establish that a defendant caused the touching "by proving beyond a reasonable doubt that the defendant either directly caused or directly and substantially set in motion a chain of events that produced the serious injury in a natural and continuous sequence" (quotation and citation omitted). Commonwealth v. Marinho, 464 Mass. 115, 119 (2013).

Here, the evidence was sufficient to establish the defendant's general intent to point the firearm at Williams, the

act that caused the battery to Fulton. Thus, viewed in the light most favorable to the Commonwealth, the evidence established that the defendant set in motion a chain of events that culminated in Fulton's injury. Accordingly, the evidence was sufficient to allow the jury to convict the defendant of the offense of assault and battery by means of a dangerous weapon.

c. Jury instructions. i. Inference to be drawn from use of dangerous weapon. The defendant contends that a new trial is necessary because the judge erred in instructing the jury on the inference they could draw from the use of a dangerous weapon. The defendant argues that the evidence concerning the manner of his alleged use of a dangerous weapon did not support the instruction. Because counsel did not object to any of the judge's instructions, we review this claim to determine whether there was a substantial likelihood of a miscarriage of justice. See Commonwealth v. Serino, 436 Mass. 408, 419 (2002).

In instructing the jurors on the elements of murder in the first degree, the judge said, "As a general rule you are permitted, but not required, to infer that a person who intentionally uses a dangerous weapon on another person, intends to kill that person." Similarly, the instructions on murder in the second degree informed the jury that, "As a general rule you are permitted but not required to infer that a person who intentionally uses a dangerous weapon on another person intends

to kill that person or cause him grievous bodily harm or intends to do an act which in the circumstances known to him a reasonable person would know creates a plain and strong likelihood that death would result."

These instructions were erroneous. As a general rule, the jury are permitted to infer an intent to kill from the use of a dangerous weapon. See Commonwealth v. Tu Trinh, 458 Mass. 776, 784 nn.12, 13 (2011). The reasonableness of this inference depends, as set forth in the model jury instructions on homicide, upon "the nature of the dangerous weapon and the manner of its use." Model Jury Instructions on Homicide 105 (2018). See, e.g., Commonwealth v. Smith, 456 Mass. 476, 487-488 (2010) (jury were permitted to infer intent to kill from evidence that defendant shot victim); Commonwealth v. Oliveira, 445 Mass. 837, 845 (2006) (jury were permitted to infer intent to kill from evidence that defendant stabbed victim with knife).

This was not, however, a typical case involving someone alleged to have shot, stabbed, or clubbed a victim. The phrase "the manner of its use" logically implies that a defendant used the dangerous weapon to attack another person, i.e., fired a gun, stabbed with a knife, or clubbed someone with a baseball bat. In Commonwealth v. Keown, 478 Mass. 232, 250 (2017), cert. denied, 138 S. Ct. 1038 (2018), we relied upon a reasonable inference that "one who attacks another with an item that is

capable of causing serious injury intends to kill that person." Notably, in applying the inference to be drawn from the use of a dangerous weapon, courts in other jurisdictions have required evidence that a defendant used the weapon "in a manner reasonably likely to cause death," see State v. Rokus, 240 Neb. 613, 622 (1992), and cases cited, or "serious bodily injury," see Chapman v. State, 719 N.E.2d 1232, 1234 (Ind. 1999). See generally 2 W.R. LaFave, Substantive Criminal Law § 14.2(b) (3d ed. 2017) (under deadly weapon doctrine, "one who intentionally uses a deadly weapon on another human being and thereby kills him [with the deadly weapon] presumably intends to kill him").

Here, the manner of the defendant's use of the firearm did not support instructing the jury on the inference to be drawn from the use of a deadly weapon. Contrary to the Commonwealth's argument, it is not enough that the defendant's use of the firearm -- by pointing it at Williams -- ultimately led to the harm to the victims. As discussed, the instruction contradicts our holding in Lewis, 465 Mass. at 126. Thus, it was error to instruct the jury that they were permitted to infer malice from the defendant's use of the deadly weapon.

We turn to whether the error in the jury instructions created a substantial likelihood of a miscarriage of justice. "In deciding, under G. L. c. 278, § 33E, whether an error in a jury instruction created a substantial likelihood of a

miscarriage of justice, a new trial is called for unless we are substantially confident that, if the error had not been made, the jury verdict would have been the same." Commonwealth v. Ruddock, 428 Mass. 288, 292 n.3 (1998). One significant factor in this assessment is the strength of the evidence against the defendant. See Commonwealth v. Fowler, 431 Mass. 30, 42 (2000). As discussed, here the jury were required to resolve a difficult question -- the defendant's state of mind at the moment he pointed the firearm at Williams. Based on the disputed and highly critical nature of this evidence, we cannot be confident that the verdict would have been the same absent the erroneous instruction. Accordingly, a new trial would be required on that basis alone.

ii. Instructions on causation. The defendant also argues that the instructions on causation, based on Santiago, 425 Mass. at 503-504, was erroneous. With respect to the cause of Jaffier's death, the judge instructed as follows:

> "The first element is that the defendant caused the death of [the victim]. The defendant's act is the cause of the victim's death where the act in a natural and continuous sequence results in death and without which death would not have occurred. The Commonwealth alleges that . . . Williams shot the bullets from the gun that killed [the victim]. The Commonwealth alleges that [the defendant] removed a gun [and] raised it as if to fire which caused the gunfire from . . . Williams which then caused the death of [the victim]. In other words the Commonwealth alleges here . . . that [the defendant] chose to engage in a gun battle with another with the intent to kill and that [the victim] died as a proximate result.

> "The Commonwealth is not required by law to prove that [the defendant] fired the fatal shot. Rather the Commonwealth is required to prove beyond a reasonable doubt that each defendant took [an] act or acts, which were a proximate cause of [the victim]'s death. To be proximate a cause cannot be too remote in the chain of events leading to a victim[']s death. But a proximate cause need not be the sole or exclusive cause of that death.
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> "Proximate cause is a cause, which in a natural and continuous sequence produces a death and without which the death would not have occurred. Our law recognizes that the death of a bystander is a natural result of a shootout and that a shootout cannot occur without participation from more than one side. Here the Commonwealth is required to prove beyond a reasonable doubt that . . . Williams and [the defendant] each took acts on August 23, 2014, which proximately [caused the victim]'s death."

The flaw in these instructions, the defendant argues, is that the jury were permitted to convict on insufficient evidence. More specifically, the defendant maintains that the judge should have defined the words "acts" and "participation" to clarify that the defendant had to have engaged in mutual combat in order for his conduct to be encompassed in these terms. The defendant contends that, relying on these instructions, the jury could have convicted him based on evidence that he pointed "something" in the direction of Williams, the actual shooter.

We discern no error in the judge's instructions. The instructions adequately convey the concept of proximate causation set forth in Santiago, 425 Mass. at 503-504. See Commonwealth v. Sinnott, 399 Mass. 863, 878 (1987) ("judges are not required to deliver their instructions in any particular

form of words, so long as all necessary instructions are given in adequate words"). In Santiago, we considered the scope of criminal liability for combatants in a shootout that results in the death of an innocent bystander. In such circumstances, the Commonwealth is not required to prove that the defendant actually fired the fatal shot. Santiago, supra at 503. The defendant's conduct is the proximate cause of a shooting "by either side because the death of a bystander is a natural result of a shootout, and the shootout could not occur without participation from both sides." Id. at 504.

Here, the judge explained that the defendant was liable for the Jaffier's death based on the theory that he "chose to engage in a gun battle with another . . . and that [the victim] died as a proximate result." The judge instructed that the Commonwealth was required to prove beyond a reasonable doubt that the defendant's actions were the proximate cause of Jaffier's death. She then provided a detailed instruction on proximate cause, which informed the jury that "[t]he defendant's act must be a cause, which, in the natural and continuous sequence, produces the death, and without which death would not have occurred" (quotation and citation omitted). See Santiago, 425 Mass. at 503-504. The judge concluded by instructing, consistent with our holding in Santiago, that a shootout, and the death of a

bystander, can happen only by participation from "more than one side." See id. at 504.

We do not agree with the defendant that the jury were left with the impression that he could be convicted if he pointed "something" in Williams's direction. Properly viewed in its entirety, the judge instructed the jury that the defendant's liability rested on a finding that he participated in a shootout with Williams. See Commonwealth v. Sellon, 380 Mass. 220, 232-233 (1980). Accordingly, there was no error.[9]

3. Conclusion. The defendant's convictions of murder in the first degree and armed assault with intent to murder are vacated and set aside. The conviction of assault and battery by means of a dangerous weapon is affirmed. The case is remanded to the Superior Court for a new trial on so much of the indictment as alleges murder in the second degree.

So ordered.

[9] Our disposition of the case renders it unnecessary to address the remaining issues raised by the defendant.