

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

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1093

COMMONWEALTH

vs.

LUIS FONSECA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury trial in the Superior Court, the defendant, Luis Fonseca, charged with murder in the first degree, was convicted of murder in the second degree, in violation of G. L. c. 265, § 1; armed assault with intent to murder, in violation of G. L. c. 265, § 18 (b); unlawful possession of a firearm, in violation of 269, § 10 (a); and unlawful possession of a loaded firearm, in violation of G. L. c. 269, § 10 (n).¹ On appeal, the defendant contends that the evidence was insufficient and that errors and omissions in the jury instructions created a substantial risk of a miscarriage of justice. We affirm.

Discussion. 1. Sufficiency of evidence. a. Identity of the gunman. The defendant contends that the judge erred in

¹ The defendant's conviction of unlawful possession of ammunition, in violation of G. L. c. 269, § 10 (h), was dismissed as duplicative at the Commonwealth's request.

denying his motion for a required finding of not guilty because the evidence was insufficient to establish his identity as the person who shot the victims. On appeal, we review to determine "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." Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), quoting Jackson v. Virginia, 443 U.S. 307, 318-319 (1979). "A conviction may rest exclusively on circumstantial evidence, and, in evaluating that evidence, we draw all reasonable inferences in favor of the Commonwealth." Commonwealth v. Jones, 477 Mass. 307, 316 (2017). "A conviction may not, however, be based on conjecture or on inference piled upon inference." Id.

In the light most favorable to the Commonwealth, the jury could have found the following. On the night of July 11, 2015, and into the early morning hours of July 12, Jessica Fernandes, Ornella Clement, and the defendant attended a house party at 66 Green Street in Brockton. The three drove to the party in Fernandes's black Mercedes and parked in a parking lot at 81 Green Street, directly across the street from 66 Green Street. The three left and returned to the party twice, but parked in the same spot each time they returned. The defendant wore a white T-shirt, black shorts, and a baseball cap. Many people

attended the party, with one witness estimating that over fifty people were present.

At approximately 3:25 A.M., multiple fights broke out inside the party and spilled outside into the driveway. People ran out of the house through the front and side doors. Fernandes, Clement, and the defendant left through the front door. Once outside, Fernandes saw that Ozair Gomes Perreira, who was her cousin and the defendant's friend, had been stabbed in the back. At 3:29 A.M. Fernandes, Clement, the defendant, Fernandes's sister, Tracy, and Tracy's boyfriend, Nilton DePina, helped get Perreira into DePina's car so that he could be taken to the hospital. After seeing that Perreira had been stabbed, the defendant appeared angry and started pacing. Fernandes and Clement then ran towards Fernandes's car; the defendant trailed behind them. As Clement reached the car, from behind her she heard the defendant yell, "[W]hat the fuck. Somebody fuckin' hurt my boy." Fernandes and Clement heard gunshots fired from nearby, coming from the same direction as the defendant's voice. Fernandes's car was the only car parked in the lot at 81 Green Street; no other people were in the parking lot. As Clement reached Fernandes's car she saw the defendant, backing towards the car in "a skipping motion," facing away from the car and towards 66 Green Street.

Lisito Fernandez left the party to escort a friend to her car, then walked to the driveway of 66 Green Street to get back into the house. He saw a lot of people in the driveway as he approached the door, and he was shot in the knee as he was trying to enter. Immediately after he was shot, he heard rapid gunfire. Another party attendee, Mansuro Jalo, heard gunfire and saw flashes of light coming from the parking lot across the street. He ran into the driveway alongside his friend, Gilson "Patrick" Monteiro, who fell to the ground, fatally shot.

Ten shell casings were recovered from the 81 Green Street parking lot; no casings were recovered outside of the lot. All of the recovered casings were fired from the same weapon. A projectile recovered from the driveway and a projectile recovered from a car parked near the entrance of the driveway were also fired from the same weapon. The building at 66 Green Street was outfitted with thirteen surveillance cameras, monitoring activities inside and outside. Footage from one of the cameras showed an individual in a white T-shirt moving from left to right across the 81 Green Street parking lot at the time of the shooting.

Considering the evidence as a whole, a rational juror could readily conclude, beyond a reasonable doubt, that the defendant was the man who fired the gun into the driveway. The evidence

was sufficient, and the judge did not err in denying the defendant's motions for a required finding of not guilty.

b. Armed assault with intent to murder. The defendant also contends that the Commonwealth presented insufficient evidence that he specifically intended to kill Fernandez. "The elements of armed assault with intent to murder are that the defendant committed an assault, that he was armed with a dangerous weapon, and that he had the specific intent of murdering the victim in assaulting him" (quotation and citation omitted). Commonwealth v. Buttimer, 482 Mass. 754, 771 (2019). In considering the evidence in the light most favorable to the Commonwealth, the jury could have found that the defendant intentionally fired a gun multiple times towards 66 Green Street with the intent to kill the people in the driveway. "The jury were free to infer from the burst of shooting that whoever was firing intended mortal harm." Commonwealth v. Sylvester, 35 Mass. App. Ct. 906, 906 (1993). See Commonwealth v. Gonzalez, 68 Mass. App. Ct. 620, 628-629 (2007) (evidence sufficient to prove assault with intent to murder where defendant fired shots at group of people in driveway).

A transferred intent instruction was not necessary for the jury to find that the defendant intended to kill Fernandez; "there was no requirement that the Commonwealth prove that [Fernandez] was the specific target of the shots fired."

Commonwealth v. Gomes, 475 Mass. 775, 791 (2016). See Commonwealth v. Taylor, 463 Mass. 857, 864 (2012) (defendant who intended to kill someone in group may be guilty of deliberately premeditated murder even if he did not specifically intend to kill particular victim); Commonwealth v. Melton, 436 Mass. 291, 299 n.11 (2002) ("the absence of an instruction on transferred intent can only help a defendant, as the jury may then mistakenly assume that the Commonwealth has to prove intent specifically directed at [the] actual victim").

Taking the judge's instruction that "the Commonwealth must prove beyond a reasonable doubt . . . that the defendant possessed a specific or actual intent to kill the person assaulted" as the law of the case, the evidence was sufficient. The jury could have found that the defendant shot into the driveway with the intent to kill those in range; he did not need to have Fernandez specifically in mind to harbor the intent to kill him. See Commonwealth v. Waters, 27 Mass. App. Ct. 64, 68 (1989) (where defendant set off bomb in house when numerous people were sleeping, evidence sufficient to show that he intended to kill each person, even if he did not have in mind or visualize each particular victim).

2. Jury instructions. At trial, the theory of the defense was misidentification. Given this strategy, defense counsel did not focus on the state of mind of the defendant at the time of

the shooting. For the first time on appeal, the defendant claims error in the jury instructions that, he contends, might have affected the verdict. As the defendant did not request the jury instructions he now claims were warranted and did not object to the instructions provided at trial, we review to determine if any error created a substantial risk of a miscarriage of justice. See Commonwealth v. Pagan, 471 Mass. 537, 546 (2015).

a. Intoxication instruction. The judge, unprompted, instructed the jury on voluntary intoxication with respect to murder in the first degree.² The defendant asserts that the judge erred in failing to instruct the jury that the defendant's alcohol consumption may have affected his ability to form the specific intent required for murder in the second degree and for armed assault with intent to murder.

We discern no error. Where specific intent is required, and the "evidence 'tend[s] to show' that the accused may have been intoxicated at the time of the offense, the judge, if requested, must instruct the jury to consider the defendant's

² The judge instructed, "In deciding whether the defendant intended to kill the victim and whether he formed that intent with deliberate premeditation, you may consider any credible evidence that the defendant . . . was affected by his consumption of alcohol or drugs. A defendant may form the required intent and act with deliberate premeditation even if he . . . had consumed alcohol or drugs but you may consider such evidence in determining whether the Commonwealth proved these elements."

intoxication in determining whether the Commonwealth has proved that specific intent beyond a reasonable doubt." Commonwealth v. Anderson, 58 Mass. App. Ct. 117, 120 (2003), quoting Commonwealth v. Traylor, 43 Mass. App. Ct. 239, 243-244 (1997). "However, 'voluntary intoxication instructions are not required where the evidence does not suggest a condition of "debilitating intoxication" that could support a reasonable doubt as to whether a defendant was capable of forming the requisite criminal intent.'" Anderson, supra at 120-121, quoting Commonwealth v. James, 424 Mass. 770, 789 (1997). Evidence of "debilitating intoxication" generally requires a showing that the defendant's intoxication effected his mental state such as "difficulty walking, running, speaking, or understanding." Commonwealth v. Lennon, 463 Mass. 520, 523 (2012).

The evidence did not require a voluntary intoxication instruction. To be sure, the evidence showed that the defendant had been consuming hard liquor throughout the evening and was drunk at the party, but it did not show that he was debilitated from drinking. The video surveillance footage showed the defendant walking and interacting with others at the party without stumbling or falling. The defendant was alert when he reacted to Perreira's stabbing and helped get Perreira into DePina's car. Because the evidence did not show that the defendant was "debilitated" by his alcohol consumption, an

instruction was not warranted. See Anderson, 58 Mass. App. Ct. at 121 (no intoxication instruction required where "there was countervailing evidence that the defendant was alert, had his faculties about him, and demonstrated clear cognitive processing of information").

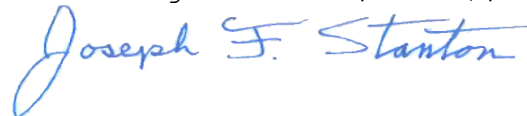
b. Involuntary manslaughter instruction. The defendant also contends that the judge erred in failing to provide the jury with an instruction on involuntary manslaughter. "A manslaughter instruction is required if the evidence, considered in the light most favorable to a defendant, would permit a verdict of manslaughter and not murder." Commonwealth v. Pina, 481 Mass. 413, 422 (2019). To determine whether an instruction on involuntary manslaughter is required, the court considers "if any 'reasonable view of the evidence would [permit] the jury to find 'wanton and reckless' conduct rather than actions from which a 'plain and strong likelihood' of death would follow'" (citations omitted). Commonwealth v. Tavares, 471 Mass. 430, 438 (2015).

No view of the evidence would support a finding that the defendant's conduct was wanton and reckless, and not intentional. Just minutes before the shooting occurred, multiple fights at the party triggered groups of people to leave out of the side door into the driveway and out of the front door into the street, and then to mill about in front of the house

and in the driveway. After the first shot was fired, a group of people ran into the driveway, attempting to reenter the house and escape the gunfire. Fernandez was near the side door, and Monteiro was running into the driveway, when they were shot. Shooting into the group of people congregating in the driveway of 66 Green Street does not warrant an involuntary manslaughter instruction. See Pina, 481 Mass. at 424 (no manslaughter instruction required where defendant fired gun in front of crowded bar); Commonwealth v. Dyous, 436 Mass. 719, 731 (2002) (no manslaughter instruction required where defendant fired into occupied car); Commonwealth v. Jenks, 426 Mass. 582, 586 (1998) ("Firing a pistol seven times in a crowded room is more than wanton and reckless conduct . . . it is malicious conduct in the plainest sense").

Judgments affirmed.

By the Court (Green, C.J.,
Massing & Lemire, JJ.³),



Clerk

Entered: April 3, 2020.

³ The panelists are listed in order of seniority.