STATE OF CONNECTICUT *v.* CALVIN BENNETT
(SC 18606)

Rogers, C. J., and Norcott, Palmer, Zarella, Harper and Vertefeuille, Js.*

Argued September 27, 2012—officially released February 5, 2013

Heather M. Wood, assistant public defender, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *John Davenport*, senior assistant state's attorney, for the appellee (state).

Opinion

HARPER, J. The defendant, Calvin Bennett, was charged with aiding and abetting murder in violation of General Statutes §§ 53a-8 and 53a-54a, felony murder in violation of General Statutes § 53a-54c, home invasion in violation of General Statutes § 53a-100aa (a) (1), and burglary in the first degree in violation of General Statutes § 53a-101 (a) (3). The defendant elected a trial to a three judge court (panel). See General Statutes § 54-82. The panel, consisting of *Cremins*, *Crawford* and *Schuman*, *Js.*, rendered a unanimous verdict of guilty on all of the charges except aiding and abetting murder, on which a majority of the panel found the defendant guilty, and thereafter rendered judgment in accordance with the verdict and imposed a total effective sentence of sixty years imprisonment. Pursuant to General Statutes § 51-199 (b) (3), the defendant directly appealed from the judgment of conviction to this court. On appeal, the defendant contends: (1) that there was insufficient evidence to convict him of aiding and abetting murder; and (2) that he did not knowingly waive his right to a jury trial. We agree with the defendant's first claim but reject his second claim. Therefore, we reverse the judgment in part with respect to the defendant's murder conviction.

In its memorandum of decision, the panel unanimously found the following facts, none of which the defendant challenges on appeal. "[The victim] James Caffrey lived in the second floor apartment of 323 Hill Street in Waterbury with his girlfriend Samantha Bright and one other roommate. James' mother, Emilia Caffrey, lived in the first floor apartment. In the late afternoon of Saturday, October 26, 2008, James Caffrey and Bright had five visitors, including Tamarius Maner, in their living room. Maner had a clear view of the bedroom from where he was seated in the living room. Maner purchased a small amount of marijuana from James Caffrey and paid him some money, which Caffrey put in the bedroom. Caffrey kept the marijuana in the bedroom. Caffrey remarked that he had saved $500 for a child that he was expecting with Bright.

"At about that time, Maner and the defendant lived next door to each other in Bridgeport and had done drug business together. Maner contacted the defendant by cell phone during the evening of Saturday, October 26. Shortly after midnight on Sunday, October 27, Maner and the defendant drove from Bridgeport to Waterbury to go to James Caffrey's apartment. They were carrying loaded handguns.

"Just after 1 a.m., the doorbell to the second floor apartment at 323 Hill Street rang and Caffrey answered the door. A conversation of a few seconds with . . . Caffrey ensued. Maner then shot Caffrey in the face from a distance of one to three feet with a .45 caliber

handgun. Caffrey fell in the hallway in a pool of blood and died from the gunshot wound to the head.

"Maner and the defendant walked past Caffrey and into a bedroom. There the defendant put a gun to Bright's head and asked: 'Where is everything?' Bright understood the question to inquire about money and drugs. Bright referred them to the top dresser drawer. Maner opened it and threw its contents on the bedroom floor.

"At about that time, they heard the screams of Emilia Caffrey, who had heard the shot and discovered her son lying in the second floor hallway. The defendant told Bright to keep her head down and face toward the wall. Maner and the defendant then ran into the kitchen, which Emilia Caffrey had also entered in order to call 911. Maner, who was standing at the stove, fired one shot at [Emilia] Caffrey and missed. The defendant was standing at the window.

"Maner and the defendant then ran out of the kitchen, pushing [Emilia] Caffrey to the floor as they left. They returned to their car and arrived back in Bridgeport around 2 a.m.

"Police interviews of some of the Waterbury visitors to James Caffrey's apartment on the afternoon of October 26 led to the identity of Maner, who was also known in Bridgeport as 'T' or 'Trigger.' Further police investigation, including analysis of Maner's cell phone calls, brought police to an apartment in Bridgeport where they found the defendant. The defendant voluntarily returned to Waterbury with the police and told them that he had not left Bridgeport on the night in question. When confronted with the fact that his cell phone records showed him in Waterbury during the time of the crimes, the defendant put his head down for a minute and then indicated that he had nothing more to say. A search, pursuant to a warrant, of his apartment in Bridgeport revealed a suitcase containing the defendant's clothes, a loaded .45 caliber pistol, and a sock containing sixty-one rounds of ammunition."

I

We begin with the defendant's claim that there was insufficient evidence to convict him of aiding and abetting murder. Specifically, the defendant claims that the state presented no evidence to establish that he intended to kill James Caffrey, as required under the state's accessory theory of liability. The defendant contends that the evidence established only that he intended to steal money from Caffrey and Bright and that he accompanied Maner on the night of the homicide.

In considering the defendant's challenge, we undertake the same limited review of the panel's verdict, as the trier of fact, as we would with a jury verdict. See *State* v. *Crespo*, 246 Conn. 665, 676, 718 A.2d 925 (1998),

cert. denied, 525 U.S. 1125, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999); *State* v. *D'Antuono*, 186 Conn. 414, 421, 441 A.2d 846 (1982). In reviewing a sufficiency of the evidence claim, we construe the evidence in the light most favorable to sustaining the verdict, and then determine whether from the facts so construed and the inferences reasonably drawn therefrom, the trier of fact reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. *State* v. *Robertson*, 254 Conn. 739, 783, 760 A.2d 82 (2000). "On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [trier's] verdict of guilty." (Internal quotation marks omitted.) Id. In the present case, we conclude that, despite this deferential standard, there was insufficient evidence to convict the defendant of murder under the accessory theory advanced by the state.

Because the present case involves sufficiency of proof to assign criminal responsibility to the defendant for a fatal injury inflicted by another, it is useful to be mindful of the substantive differences between the three theories under which such vicarious liability may arise: felony murder under § 53a-54c; *Pinkerton* liability;[1] and accessorial liability under § 53a-8. The defendant was found guilty of felony murder and accessorial liability; he was not charged with liability under the *Pinkerton* doctrine.

The felony murder statute "reflects a legislative determination that certain crimes, such as robbery, create a *foreseeable* risk of death to a victim of, or bystander to, the crime and, accordingly, imposes criminal liability not only on the person who caused the death, but also on any other participant to the underlying felony." (Emphasis added.) *State* v. *Apodaca*, 303 Conn. 378, 393, 33 A.3d 224 (2012). "[A] defendant may be convicted of felony murder *even if neither he nor his confederates had any intent to kill* . . . ." (Emphasis added.) *State* v. *Coltherst*, 263 Conn. 478, 494, 820 A.2d 1024 (2003).

"[U]nder the *Pinkerton* doctrine . . . a defendant may not be convicted of murder unless one of his criminal associates, acting foreseeably and in furtherance of the conspiracy, caused the victim's death with the intent to do so. . . . Thus . . . under *Pinkerton*, *a coconspirator's intent to kill may be imputed to a defendant who does not share that intent* . . . ." (Citation omitted; emphasis added; internal quotation marks omitted.) Id. The rationale for liability under this theory is that "[w]hen the defendant has played a necessary part in setting in motion a discrete course of criminal conduct . . . he cannot reasonably complain that it is unfair to hold him vicariously liable . . . for the natural and probable results of that conduct that, *although he did*

not intend, he should have foreseen."[2] (Emphasis added; internal quotation marks omitted.) *State* v. *Martinez*, 278 Conn. 598, 614, 900 A.2d 485 (2006).

Finally, "[t]o be guilty as an accessory one must *share* the criminal intent and community of unlawful purpose with the perpetrator of the crime and one must knowingly and wilfully assist the perpetrator in the acts which prepare for, facilitate or consummate it." (Emphasis added; internal quotation marks omitted.) *State* v. *Sargeant*, 288 Conn. 673, 680, 954 A.2d 839 (2008). Thus, "[u]nlike coconspirator liability under *Pinkerton* . . . accessorial liability pursuant to § 53a-8 requires the defendant to have the specific mental state required for the commission of the substantive crime." (Citation omitted.) *State* v. *Martinez*, supra, 278 Conn. 615. "[A]ccessorial liability is not a distinct crime, but only an alternative means by which a substantive crime may be committed . . . . Consequently, to establish a person's culpability as an accessory to a particular offense, the state must prove that the accessory, like the principal, had committed each and every element of the offense." (Internal quotation marks omitted.) Id., 618. Each such element must be proved beyond a reasonable doubt. *State* v. *Sargeant*, supra, 680.

"In order to be convicted under our murder statute, the defendant must possess the specific intent to cause the death of the victim. . . . To act intentionally, the defendant must have had the conscious objective to cause the death of the victim. . . . Intent is generally proven by circumstantial evidence because direct evidence of the accused's state of mind is rarely available. . . . Therefore, intent is often inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom. . . . Intent is a question of fact, the determination of which should stand unless the conclusion drawn by the trier is an unreasonable one." (Citation omitted; internal quotation marks omitted.) *State* v. *Robertson*, supra, 254 Conn. 783–84.

"[T]he defendant's state of mind at the time of the shooting may be proven by his conduct before, during and after the shooting. Such conduct yields facts and inferences that demonstrate a pattern of behavior and attitude toward the victim by the defendant that is probative of the defendant's mental state." (Internal quotation marks omitted.) *State* v. *Aviles*, 107 Conn. App. 209, 218, 944 A.2d 994, cert. denied, 287 Conn. 922, 951 A.2d 570 (2008); accord *State* v. *Gary*, 273 Conn. 393, 407, 869 A.2d 1236 (2005).

Because the panel's findings were limited to those facts found unanimously, we examine the record for any other evidence relevant to the charge of aiding and abetting, mindful that we ultimately must view that evidence in the light most favorable to sustaining the verdict. The record reveals the following facts and rea-

sonable inferences therefrom, adduced solely from the state's case-in-chief. Maner had met James Caffrey for the first time on October 26, 2008, under nonconfrontational circumstances; there is nothing in the record to suggest that the defendant had ever met Caffrey. Caffrey's possession of cash and drugs prompted Maner's decision to return to the apartment. Although there was no evidence regarding the substance of the telephone conversations between Maner and Caffrey before arriving at Caffrey's apartment, the conversations in connection with the fact that Maner and the defendant each carried loaded guns to the scene evidenced a concerted purpose and preparation to do more than merely brandish a weapon if necessary.[3]

When the defendant and Maner arrived at the apartment and summoned Caffrey to the door, a conversation of approximately five seconds took place before Maner fired the single fatal shot. Although Bright heard voices during this brief exchange, we do not know who spoke, what was said, the tone of the exchange, or whether some words or actions by Caffrey provoked Maner to shoot. After Maner fired the shot, the defendant did not render aid to, or summon aid for, Caffrey. Nor did the defendant react to Maner's action by audibly expressing shock or abandoning the enterprise. Rather, he proceeded without delay into the bedroom, held his gun to Bright's head and demanded to know, in effect, where Caffrey kept the money and drugs.[4] It was only at the point that Caffrey's mother came across her son's prostrate body and began to scream that the defendant removed the gun from Bright's head and fled the scene with Maner. In sum, while the evidence reveals much about the defendant's actions after Maner fired the fatal shot, the evidence reveals little about the defendant's actions at the most critical points in time—prior to arriving at the apartment and during the brief period of time between his arrival at Caffrey's apartment and the shooting.

Our review of Connecticut appellate cases in which accessorial liability for murder properly was found underscores the deficiency of proof in the present case. In every other accessorial liability case, the defendant had engaged in some act to prepare for, aid, encourage, facilitate or consummate the murder; it was from such acts that intent reasonably was inferred.[5] In some cases, the defendant participated in the killing by inflicting, or attempting to inflict, harm on the victim while the principal inflicted the fatal injury, or the evidence was unclear as to whether the defendant actually inflicted the fatal injury. See, e.g., *State* v. *Allen*, 289 Conn. 550, 558, 958 A.2d 1214 (2008); *State* v. *Floyd*, 253 Conn. 700, 704, 756 A.2d 799 (2000); *State* v. *Henry*, 253 Conn. 354, 357, 752 A.2d 40 (2000); *State* v. *Delgado*, 247 Conn. 616, 619, 725 A.2d 306 (1999); *State* v. *Diaz*, 237 Conn. 518, 542, 679 A.2d 902 (1996); *State* v. *Wright*, 77 Conn. App. 80, 82–83, 822 A.2d 940, cert. denied, 266 Conn.

913, 833 A.2d 466 (2003); *State* v. *Ashe*, 74 Conn. App. 511, 513, 812 A.2d 194, cert. denied, 262 Conn. 949, 817 A.2d 108 (2003); *State* v. *Green*, 62 Conn. App. 217, 219–20, 774 A.2d 157 (2001), aff'd, 261 Conn. 653, 804 A.2d 810 (2002). In cases lacking such proof, the defendant otherwise actively participated in the murder through acts beneficial to the principal such as identifying the victim, taking the principal to the victim, distracting the victim, acting as a lookout to prevent interruption to the murder or facilitating the principal's escape. See, e.g., *State* v. *Garner*, 270 Conn. 458, 476, 853 A.2d 478 (2004); *State* v. *Turner*, 252 Conn. 714, 749, 751 A.2d 372 (2000); *State* v. *Smith*, 212 Conn. 593, 596–97, 600–601, 563 A.2d 671 (1989); *State* v. *Romero*, 42 Conn. App. 555, 556–57, 560, 681 A.2d 354, cert. denied, 239 Conn. 935, 684 A.2d 710 (1996); *State* v. *Malone*, 40 Conn. App. 470, 472, 483, 671 A.2d 1321, cert. denied, 237 Conn. 904, 674 A.2d 1332 (1996); *In re David M.*, 29 Conn. App. 499, 501–502, 504–505, 615 A.2d 1082 (1992). Oftentimes, evidence of a motive to kill had been established. See *State* v. *Allen*, supra, 558–59; *State* v. *Henry*, supra, 356; *State* v. *Delgado*, supra, 619; *State* v. *Smith*, supra, 595–96; *State* v. *Wright*, supra, 83; *State* v. *Ashe*, supra, 515; *State* v. *Conde*, 67 Conn. App. 474, 477, 787 A.2d 571 (2001), cert. denied, 259 Conn. 927, 793 A.2d 251 (2002); *State* v. *Green*, supra, 219; *State* v. *Romero*, supra, 556; *In re David M.*, supra, 502.

No such evidence was proffered in the present case. Although it is reasonable to infer from the defendant's entry into Bright's bedroom with a loaded gun immediately following the shooting, simultaneously with Maner, that the defendant was in close proximity when Maner shot Caffrey and that he was in possession of a loaded gun at that time, it would be sheer speculation to conclude that the defendant threatened Caffrey with the gun or engaged in *any* act preceding the shooting that aided, encouraged or facilitated the shooting. "One who is present when a crime is committed but neither assists in its commission nor shares in the criminal intent of its perpetrator cannot be convicted as an accessory. 1 [J.] Bishop, Criminal Law (9th Ed. [1923]) p. 469. Mere presence as an inactive companion, passive acquiescence, or the doing of innocent acts which may in fact aid the one who commits the crime must be distinguished from the criminal intent and community of unlawful purpose shared by one who knowingly and wilfully assists the perpetrator of the offense in the acts which prepare for, facilitate, or consummate it." *State* v. *Pundy*, 147 Conn. 7, 11, 156 A.2d 193 (1959).

As to the defendant's conduct following the shooting, we are mindful that this court previously has stated that "[a] jury reasonably can infer an intent to kill from [a] defendant's failure to attempt to aid [the victim] or to show concern for [his] welfare following the shooting." (Internal quotation marks omitted.) *State* v. *Turner*,

supra, 252 Conn. 750. We have stated this principle, however, in the context of cases in which the defendant inflicted the fatal injury but claimed no intent to kill; see *State* v. *Mejia*, 233 Conn. 215, 225, 658 A.2d 571 (1995); *State* v. *Francis*, 228 Conn. 118, 128–29, 635 A.2d 762 (1993); *State* v. *Greenfield*, 228 Conn. 62, 77–78, 634 A.2d 879 (1993); or in cases in which such evidence was used to impeach a defendant's claim that he did not share the principal's intent because of a good relationship with the victim. See *State* v. *Turner*, supra, 750. We are unaware of any case, in this or other jurisdictions, however, in which intent to kill has been inferred solely or even principally from the defendant's failure to render aid to the victim.

The sum of the defendant's conduct after Maner shot James Caffrey—both acts and omissions—did not provide a sufficient evidentiary basis to infer his intent to kill. Rather, the fact that the killing did not deter or delay the defendant from carrying on with the planned burglary leads to the reasonable inferences that the defendant was indifferent to Caffrey's death or even that Caffrey's death was a foreseeable consequence of the burglary. Indifference, however, is not intent. Cf. *State* v. *Floyd*, supra, 253 Conn. 720 (agreeing with defendant that "mere participation in and awareness of the principal's conduct" would not be sufficient basis to infer intent to kill). Moreover, as we previously have explained, although a foreseeable risk of death to a victim in the course of a crime is a basis on which felony murder and *Pinkerton* liability may be established, foreseeability is not commensurate with the conscious objective to cause death required for accessorial liability. Indeed, it is precisely because murder is a foreseeable consequence of burglary that burglary is one crime for which felony murder may be imposed. See General Statutes § 53a-54c; *State* v. *Apodaca*, supra, 303 Conn. 393. To find intent to kill under the present circumstances would obliterate a critical distinction between these other theories of vicarious liability and accessorial liability. Moreover, even if we can infer from the defendant's reaction that he was not surprised by Maner's conduct, "[m]ere knowledge that a crime is going to be committed is not sufficient to establish liability as an accessory if the defendant does not encourage or intentionally aid in the commission of the crime." *State* v. *Aparo*, 223 Conn. 384, 404, 614 A.2d 401 (1992), cert. denied, 507 U.S. 972, 113 S. Ct. 1414, 122 L. Ed. 2d 785 (1993); accord *State* v. *Wakefield*, 88 Conn. 164, 172–73, 90 A. 230 (1914) ("Silent acquiescence, when [the defendant] knew the plan, was not enough to make her guilty of [murder as an accessory]. The [s]tate was bound to prove more than that, and show that she knowingly abetted, counseled or encouraged [the principal] in his guilty purpose.").

The state contends, however, that the present case is akin to *State* v. *Robertson*, supra, 254 Conn. 739, in

which this court affirmed a judgment of conviction for murder as an accessory. In particular, the state contends that the requisite intent was found in *Robertson* from the defendant's act of shooting his gun into the air, whereas the defendant's conduct in the present case of putting a loaded gun to Bright's head is more probative of intent to kill. We disagree. The proof in *Robertson* extended well beyond the one act on which the state relies. In that case, not only did the defendant have a motive to kill the victim, but the sole reason for the encounter was to kill the victim, and the defendant facilitated the murder by identifying the victim and coordinating the attack with the principal.[6] Id., 784–85. Moreover, the firing of the gun by the defendant in *Robertson* while the principal shot at the victim conveyed both a threat to the victim, as well as an endorsement of the principal's actions in shooting the victim.

In the present case, there was no motive to kill independent of the burglary; indeed, the state conceded as much in its closing argument to the trial panel.[7] There also is no evidence to support an inference that the defendant aided or encouraged Maner with respect to the fatal act or that the defendant threatened Caffrey directly in any manner.[8] Although the defendant threatened Bright by placing a gun to her head, which conveyed an implied threat to kill her if she did not cooperate, there is no evidence from which we can infer that he intended to follow through on that threat. The defendant never discharged his gun, even when encountering another witness to the crime, Emilia Caffrey, while fleeing the scene. Moreover, the state has provided us with no authority, and our research has revealed none, supporting the proposition that we can infer the defendant's intent to kill Caffrey from such an implied threat to Bright.[9] In our view, the evidence in the present case would have made a strong case for murder under a theory of *Pinkerton* liability, but falls short of the requisite proof for accessorial liability. Therefore, because the state did not advance a theory of liability under the *Pinkerton* doctrine, and the state did not prove beyond a reasonable doubt that the defendant intended to cause James Caffrey's death, the defendant's conviction for murder as an accessory cannot stand.

II

We next turn to the defendant's claim that his waiver of his constitutional right to a trial by jury was not knowingly made. Specifically, the defendant contends that this waiver was invalid because his counsel was not present during the part of the canvass in which the trial court informed him that a trial to a three judge panel need only result in a majority verdict of guilty, whereas a trial to a jury would require a unanimous verdict. The defendant concedes that he did not challenge the canvass before the trial court, but contends

that he is entitled to review and, in turn, to prevail on his claim under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). We find no merit to the defendant's claim.

The record reveals the following undisputed facts. On September 3, 2009, the trial court, *Damiani*, *J.*, canvassed the defendant in the presence of his special public defender, Lawrence S. Hopkins, regarding the defendant's election to proceed with a trial to the three judge panel in lieu of a jury. In that canvass, the trial court, inter alia, explained various differences between a trial by jury and a trial to a three judge panel, but did not inform the defendant that the panel, unlike a jury, need not be unanimous. The defendant confirmed his desire to proceed with the trial to the three judge panel, and the court thereafter found a knowing, intelligent and voluntary waiver of the defendant's right to a jury trial.

Later that same afternoon, the trial court brought the defendant back into court, at which time the following exchange ensued, without Hopkins being present:

"The Court: . . . Just to tell you I forgot to ask you one question and that's why—I tried to catch [Attorney] Hopkins before he left and I missed him. But he did say that he had explained to you that with a jury verdict it's got to be unanimous with a three judge panel it does not have to be. It could be a majority, two to one. Do you understand that, sir?

"The Defendant: Yes.

"The Court: And, know[ing] that, do you still wish to waive your right to a jury trial to a court trial?

"The Defendant: Yes."

During this second canvass, the trial court failed to state on the record that the defendant was accompanied by Supervisory Assistant Public Defender Theresa A. Dalton in Hopkins' absence. The trial court remedied that omission in the following exchange that ensued on September 23, 2009:

"The Court: . . . What I wanted to place on the record today, which I neglected to do when you were here last, remember I brought you back up around 2:00?

"The Defendant: Yes.

"The Court: And Attorney Dalton was standing next to you because [Attorney] Hopkins had agreed we could do it that way after talking to [Attorney] Dalton and she explained that to you, right?

"The Defendant: Mm-hmm.

"The Court: And that was when I told you that on a three judge panel the verdict does not have to be unanimous, it could be two to one. Remember that?

"The Defendant: Yes.

"The Court: Okay. And that's clear and you have no problem with that anymore, right?

"The Defendant: Yes."

We note at the outset that, despite the fact that the defendant frames his claim as an unknowing waiver, he does not contend that he did not understand the canvass as given. Rather, he claims that his waiver was not knowingly made because his counsel of record was not present at the second canvass. We conclude that, even if we were to accept the defendant's dubious contention that the second canvass was constitutionally defective, any such defect would have been cured by the third canvass, at which time: Hopkins was present; the trial court reiterated the unanimity distinction; and the defendant confirmed his intention to proceed with the trial to the panel despite that distinction. Therefore, we conclude that the defendant's waiver of his right to a jury trial was valid.

The judgment is reversed in part with respect to the murder conviction and the case is remanded with direction to render a judgment of not guilty on that charge; the judgment is affirmed in all other respects.[10]

In this opinion ROGERS, C. J., and PALMER and VERTEFEUILLE, Js., concurred.

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

[1] See *Pinkerton* v. *United States*, 328 U.S. 640, 647–48, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946). This court first recognized the theory of liability set forth in *Pinkerton* as a matter of our state's law in *State* v. *Walton*, 227 Conn. 32, 40–54, 630 A.2d 990 (1993), and applied it to the crime of murder in *State* v. *Diaz*, 237 Conn. 518, 525–33, 679 A.2d 902 (1996).

[2] This court has qualified that a coconspirator's intent to kill may be imputed to a defendant who does not share that intent as long as the nexus between the defendant's role and his coconspirator's conduct was not so attenuated or remote that it would be unjust to hold the defendant responsible. See *State* v. *Diaz*, 237 Conn. 518, 533, 679 A.2d 902 (1996).

[3] As support for the proposition that carrying a loaded gun is probative evidence of intent to kill, the dissent cites *United States* v. *Fekete*, 535 F.3d 471, 481 (6th Cir. 2008), a federal case involving conditional intent, specifically, the federal carjacking statute, 18 U.S.C. § 2119, under which the element of intent to cause death or serious bodily harm can be met with proof of an intent to kill or harm if necessary to effect a carjacking. Id., 476–77. We note that this court had not yet considered the question of whether criminal statutes involving specific intent to kill or harm require the state to prove that a defendant had an unconditional intent to achieve that end in all events or whether it merely requires proof of an intent to kill or harm if necessary to achieve the ultimate crime intended. Other courts are divided on this question. See *Holloway* v. *United States*, 526 U.S. 1, 10 n.8 and 10–11, 119 S. Ct. 966, 143 L. Ed. 2d 1 (1999) (noting split of authority); *Date* v. *Schriro*, 619 F. Sup. 2d 736, 751, 770 (D. Ariz. 2008) (same). In the present case, the state has not asserted a theory of conditional intent, and, therefore, we have no occasion to express an opinion on the merits of that theory.

[4] Bright offered the following testimony on direct examination by Senior Assistant State's Attorney John J. Davenport:

"Q. Now after James [Caffrey] goes to answer the door, what happens next?

"A. You can hear a brief conversation.

"Q. All right. Could you hear the words of the conversation?

"A. No.

"Q. Did you have any sense of the tone of the conversation?

"A. No.

"Q. Okay. After this conversation, how long did that conversation take place for? . . . .

"A. Maybe five seconds.

"Q. After this five second conversation, *what happens next*?

"A. I go to get out of bed, and there's two black men walking in the bedroom.

"Q. Okay. *How long was it, between the gunshot and the presence of these two black men in your room*?

"A. *Just long enough to walk through the rooms*." (Emphasis added.)

Thus, Bright reported no conversation between the defendant and Maner after the shooting and no delay between the shooting and the entry of the defendant and Maner into the bedroom.

[5] Our survey of case law from other jurisdictions is consistent with ours on this point. See, e.g., *People* v. *Prettyman*, 14 Cal. 4th 248, 259, 926 P.2d 1013, 58 Cal. Rptr. 2d 827 (1996) ("[w]hen the offense charged is a specific intent crime, the accomplice must share the specific intent of the perpetrator; this occurs when the accomplice knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime" [internal quotation marks omitted]). We note that, although the defendant contests only whether the evidence demonstrated that he shared Maner's specific intent to kill, that question cannot be answered in the present case without consideration of the defendant's acts or omissions that may have aided Maner's fatal act.

[6] As we explained in *Robertson*: "There was evidence that the defendant had an agreement with [the principal], a fellow gang member, to avenge the death of one of their 'brothers' by murdering the victim [who belonged to a rival gang]. The defendant was in the lobby of the apartment building speaking with [a bystander] prior to the murder. When [the victim's companion] entered the lobby, the defendant asked him who was outside sitting on the dirt bike. After the defendant confirmed that the victim was outside, the defendant went upstairs and summoned [the principal]. Shortly thereafter, both the defendant and [the principal], armed with handguns, returned to the lobby from the stairwell above, and peeked around the corner in the direction of the victim. [The principal] asked the defendant if he was ready, the defendant answered yes, and [the principal] started firing. . . . Although the defendant diverted his aim from the victim and fired only once into the air, [the principal] fired several rounds at the victim. The defendant and [the principal] then escaped through the lobby, where [the bystander] asked them why they had shot the victim. Either [the principal] or the defendant responded that they had done so in retaliation for the recent murder of one of their 'brothers.' " *State* v. *Robertson*, supra, 254 Conn. 784–85.

[7] The state argued: "And so [Maner and the defendant] came to Waterbury in the early morning hours of October [28] and they came for one reason and that was to rob James Caffrey, a kid who was puffing to a guy in his living room, he didn't know who he was talking [to]."

[8] We note that all but one of the cases cited by the dissent in support of its position are readily distinguishable from the present case by evidence of the defendant's threatening and/or directly violent conduct toward the victim. In the lone case cited in which the defendant was an accessory, there was considerable evidence that the defendant shared the principal's intent to kill in the course of a robbery beyond the mere fact that the defendant carried a loaded gun. See *Specht* v. *State*, 838 N.E.2d 1081, 1084–85 (Ind. App. 2005) (evidence presented included: prior to robbery, defendant spoke of stabbing store clerk with broken glass bottle to rob gas station in order to pay off drug debt; after forming plan with others to rob convenience store/gas station and arriving at store, defendant gave his gloves and gun to principal, principal talked about killing people before going into store; after principal shot clerk, defendant entered store and aided in robbery; defendant later attempted to sell gun used in shooting; and day after shooting, defendant used money from robbery to pay off drug debt).

[9] Although this court has not directly addressed this question, some courts have indicated that pointing a loaded gun at the victim, *in and of itself*, is not sufficient to establish an intent to kill. See, e.g., *Merritt* v. *Commonwealth*, 164 Va. 653, 657–58, 180 S.E. 395 (1935) ("[e]ven if the jury had believed that the accused pointed a loaded gun at [the victim], they would not have been justified in finding him guilty of an attempted murder, unless they believed that at the time he pointed the pistol he had formed the purpose, the intent, to murder, and the act was done in furtherance of that specific intent"); see also *State* v. *Smith*, 499 So. 2d 340, 342 (La. App. 1986); *State* v. *Eley*, 77 Ohio St. 3d 174, 180, 672 N.E.2d 640 (1996).

[10] The trial court merged the conviction for murder with the conviction

for felony murder, and imposed a sixty year term of imprisonment, twenty-five of which were mandatory, for the felony murder conviction. Therefore, because no sentence was imposed for the murder conviction, the aggregate package of sentencing theory is not implicated. See *State* v. *Miranda*, 274 Conn. 727, 735 n.5, 878 A.2d 1118 (2005) ("Pursuant to [the aggregate package of sentencing] theory, we must vacate a sentence in its entirety when we invalidate any part of the total sentence. On remand, the resentencing court may reconstruct the sentencing package or, alternatively, leave the sentence for the remaining valid conviction or convictions intact.").