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23-P-225

Appeals Court

ELVIN CRUZ vs. COMMONWEALTH.

No. 23-P-225.

Middlesex. November 13, 2023. - August 12, 2024.

Present: Meade, Singh, & Smyth, JJ.

Assault by Means of a Dangerous Weapon. Pretrial Detention.
Statute, Construction.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on February 3, 2023.

Following transfer to the Appeals Court, the case was heard by Milkey, J., and the case was reported by him to a panel of the Appeals Court.

Thomas G. Shack, III, for the petitioner.
Melissa Weisgold Johnsen, Assistant District Attorney, for the Commonwealth.

SMYTH, J. The defendant's appeal arises from a single justice's denial of a petition seeking review of a Superior Court judge's order of pretrial detention of the defendant

pursuant to G. L. c. 276, § 58A, the dangerousness statute.¹ The dangerousness statute permits the pretrial detention of a defendant who presents a danger such that "no conditions of release will reasonably assure the safety of any other person or the community." G. L. c. 276, § 58A (3). When the Commonwealth moves for pretrial detention, the threshold question is always whether the defendant has been charged with committing a predicate offense under G. L. c. 276, § 58A (1). An offense qualifies as a predicate if it is specifically enumerated in the statute or is a "felony offense that has as an element of the offense the use, attempted use or threatened use of physical force against the person of another" (force clause). Id.

In this case, the Superior Court judge concluded, and the single justice agreed, that the defendant's indictments for assault by means of a dangerous weapon (ADW), in violation of G. L. c. 265, § 15B (b), qualified as predicate offenses. The sole issue before us is whether ADW, an offense that is not specifically enumerated as a predicate offense under G. L. c. 276, § 58A (1), falls within the ambit of the statute's force clause. We conclude that ADW qualifies as a predicate offense because proving ADW always requires establishing the "attempted

¹ Although the petitioner commenced this action by filing a petition in the Supreme Judicial Court for the county of Suffolk, for convenience, we refer to him as "the defendant."

use or threatened use of physical force against the person of another." G. L. c. 276, § 58A (1). We therefore affirm the order of the single justice.

1. Background.² The Commonwealth first successfully moved to detain the defendant pursuant to G. L. c. 276, § 58A, at his arraignment in the District Court on a complaint alleging eight counts of kidnapping in violation of G. L. c. 265, § 26; eight counts of ADW in violation of G. L. c. 265, § 15B (b); and one count of possession of a class B substance in violation of G. L. c. 94C, § 34.³ After obtaining fifteen indictments against the defendant charging eight counts of kidnapping, six counts of ADW (knife), and one count of possession of a class B substance, the Commonwealth moved to detain the defendant at his arraignment in the Superior Court. A Superior Court judge allowed the Commonwealth's motion after an evidentiary hearing, finding first, that ADW is a predicate offense under G. L. c. 276,

² We omit a summary of the facts underlying the charges because the defendant does not challenge the finding of dangerousness but, rather, challenges only whether ADW is a predicate offense. The factual basis underlying the ADW charges has no bearing on our examination as to whether ADW is a predicate offense under the strict element-based approach as discussed further below.

³ Although the Commonwealth also listed the charges of kidnapping as predicate offenses when seeking detention, the Superior Court judge and the single justice based their decisions on the ADW charges, and only the charges of ADW are at issue on appeal.

§ 58A (1), and second, that "based upon clear and convincing evidence . . . no conditions of release imposed upon the defendant will reasonably assure the safety of . . . the community."

The defendant sought review of the Superior Court judge's order pursuant to G. L. c. 211, § 3, arguing that ADW is not a predicate offense; the defendant did not challenge the finding of dangerousness. A single justice of the Supreme Judicial Court transferred the petition to a single justice of this court.⁴ Although the Appeals Court single justice denied the petition, he referred the case for further review after concluding that "the defendant has raised issues that are likely to repeat, that warrant plenary appellate review, but that could escape such review if not referred to a panel." We now conduct that review.

2. Statutory scheme. The dangerousness statute "sets forth 'a comprehensive scheme of measures available with respect to arrested persons charged with crime.'" Commonwealth v. Escobar, 490 Mass. 488, 491 (2022), quoting Mendonza v. Commonwealth, 423 Mass. 771, 774 (1996). The purpose of the statute is "systematically to identify those who may present a

⁴ See Supreme Judicial Court, Order Regarding Transfer of Certain Single Justice Matters During the COVID-19 Pandemic, first par., No. OE-144 (June 8, 2020).

danger to society and to incapacitate them before that danger may be realized" (citation omitted). Escobar, supra. "Among the measures described in [G. L. c. 276, § 58A,] is pretrial detention." Commonwealth v. Young, 453 Mass. 707, 709 (2009). "When the Commonwealth seeks the pretrial detention of a defendant under G. L. c. 276, § 58A, the 'threshold question in every case is whether the defendant has committed a predicate offense.'" Escobar, supra at 492, quoting Young, supra at 711. As stated above, predicate offenses are described in G. L. c. 276, § 58A (1), beginning with the force clause and continuing with an extensive list of specifically enumerated violent offenses.

3. Discussion. It is undisputed that the offense of ADW is a felony that is not a specifically enumerated predicate offense in G. L. c. 276, § 58A (1). Thus, the sole issue is whether ADW qualifies under the statute's force clause. The defendant argues that ADW, a lesser included offense of assault and battery by means of a dangerous weapon causing serious bodily injury (ABDW), G. L. c. 265, § 15A (c) (i), must be excluded from the force clause to remain consistent with Escobar, 490 Mass. at 500, in which the Supreme Judicial Court determined that ABDW is not a predicate offense under that clause. The defendant also contends that proof of ADW does not categorically require establishing the attempted use or

threatened use of physical force so as to qualify under the force clause. Finally, the defendant argues that including ADW as a predicate offense would be absurd because it is less "serious" than other nonqualifying offenses.

a. Standard of review. We review a decision of a single justice pursuant to G. L. c. 211, § 3, for clear error of law or abuse of discretion. See Vega v. Commonwealth, 490 Mass. 226, 230 (2022). Where relief is sought from a Superior Court judge's detention order, we must also consider the propriety of the Superior Court judge's underlying order. See id. "In reviewing both the single justice's judgment and the [Superior Court] judge's order, we . . . consider the legal rights at issue and independently determine and apply the law, without deference to their respective legal rulings" (citation omitted). Id.

The Superior Court judge and the Appeals Court single justice based their respective decisions on an interpretation of G. L. c. 276, § 58A. We review questions of statutory interpretation de novo, starting with the plain meaning of the language used. See Escobar, 490 Mass. at 493. "Where the language of a statute is plain and unambiguous, it is indicative of legislative intent, and a reviewing court relies upon that statutory language, unless to do so would create an absurd result." Id.

b. The force clause. The force clause defines as a predicate offense "a felony offense that has as an element of the offense the use, attempted use or threatened use of physical force against the person of another." G. L. c. 276, § 58A (1). Although the statute does not define "physical force," the Supreme Judicial Court has defined this term as amounting to "violent or substantial force capable of causing pain or injury" when interpreting an identical force clause contained in the definition of "violent crime" under G. L. c. 140, § 121.⁵ Commonwealth v. Vieira, 483 Mass. 417, 427 (2019). We further note that the plain language of the force clause limits inclusion to offenses committed intentionally, thus excluding offenses that may be committed either recklessly or wantonly. See Escobar, 490 Mass. at 494 ("phrase 'against the person of another' requires the physical force to be intentionally directed at another").

In determining whether an offense qualifies under the force clause, we take a "categorical approach," meaning that we limit our examination to whether an element of the offense always

⁵ General Laws c. 140, § 121, provides, in pertinent part, as follows. "'Violent crime'[] shall mean any crime punishable by imprisonment for a term exceeding one year . . . that: (i) has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another."

amounts to the "use, attempted use or threatened use of physical force against the person of another." Scione v. Commonwealth, 481 Mass. 225, 228 (2019), quoting G. L. c. 276, § 58A (1). We do not consider the facts or circumstances surrounding the alleged conduct. See id.

c. Analysis. We first consider whether the offense of ADW always satisfies the force clause's intentionality requirement. To prove ADW, the Commonwealth must establish that a defendant (1) committed an assault, (2) intended to commit an assault, and (3) committed the assault by means of a dangerous weapon. See Commonwealth v. Buttimer, 482 Mass. 754, 767 (2019). An assault may be perpetrated in one of two ways, either by "an attempted battery" or by "an immediately threatened battery." Commonwealth v. Melton, 436 Mass. 291, 294 (2002), quoting Commonwealth v. Gorassi, 432 Mass. 244, 247 (2000). "Under the attempted battery theory, the Commonwealth must prove that the defendant intended to commit a battery, took some overt step toward accomplishing that intended battery, and came reasonably close to doing so." Melton, supra at 295. To establish the immediately threatened battery form of assault, "the Commonwealth must prove that the defendant intentionally engaged in menacing conduct that reasonably caused the victim to fear an imminent battery." Id. at 295 n.4. Because each theory of assault requires a defendant to act consciously and

intentionally toward another individual, the offense of ADW necessarily satisfies the force clause's intentionality requirement. See Escobar, 490 Mass. at 494.

We next consider whether the types of batteries inherent to the assault element must always involve "violent or substantial force capable of causing pain or injury," sufficient to satisfy the force clause. Vieira, 483 Mass. at 427. Our common law recognizes two forms of intentional batteries. A harmful battery is "[a]ny touching 'with such violence that bodily harm is likely to result.'" Commonwealth v. Eberhart, 461 Mass. 809, 818 (2012), quoting Commonwealth v. Burke, 390 Mass. 480, 482 (1983). This type of battery categorically involves the type of physical force necessary to satisfy the force clause. In contrast, an offensive battery "occurs when 'the defendant, without justification or excuse, intentionally touched the victim, and . . . the touching, however slight, occurred without the victim's consent.'" Eberhart, supra, quoting Commonwealth v. Hartnett, 72 Mass. App. Ct. 467, 476 (2008). "Such 'de minimis touchings,' like tickling or spitting, without additional context to increase the potentially harmful nature of the conduct, do not necessarily amount to physical force sufficient to satisfy the force clause. Vieira, supra at 424. See Eberhart, supra at 818-819 (assault and battery cannot categorically qualify as violent offense under G. L. c. 140,

§ 121, force clause because battery can be committed through "de minimis touchings"). Thus, in order for ADW to qualify under the force clause, every attempted or immediately threatened battery committed by means of a dangerous weapon must be either a harmful battery or an offensive battery that necessarily constitutes an attempted use or threatened use of violent or substantial force capable of causing pain or injury.

We therefore turn to the dangerous weapon element of ADW. The dangerous weapon element of ADW may be satisfied by proof that the requisite assault was committed with a weapon that was either "dangerous per se" or "dangerous as used." Commonwealth v. Tevlin, 433 Mass. 305, 310 (2001). "Dangerous per se" weapons are "instrumentalit[ies] designed and constructed to produce death or great bodily harm" (citation omitted). Id. "Dangerous as used" weapons include objects that, "as used by the defendant, [are] capable of producing serious bodily harm" (citation omitted). Id.

Considering that either the "overt step toward accomplishing [the attempted] battery," Melton, 436 Mass. at 295, or the "menacing conduct" constituting the immediately threatened battery, id. at 295 n.4, must be accomplished by means of a weapon that is either designed to, or used in a manner that is capable of, producing serious bodily harm or death, it logically follows that the potential harm threatened

by an ADW is necessarily more violent than a mere offensive touching. Consequently, it is the element of a dangerous weapon that imports to the underlying battery the level of violence against another needed to satisfy the force clause. See United States v. Whindleton, 797 F.3d 105, 114 (1st Cir. 2015), cert. denied, 580 U.S. 881 (2016) (ADW's dangerous weapon requirement imports to offense of simple assault level of violence against another needed to satisfy force clause of Federal Armed Career Criminal Act). See also Commonwealth v. Tu Trinh, 458 Mass. 776, 784 n.12 (2011) (judge properly instructed jury that "[a]s a general rule you are permitted to infer that a person who intentionally uses a dangerous weapon on another person is acting with malice"). Because proof of ADW always includes as an element the intentional conduct with the requisite potential risk of harm directed at another to constitute an "attempted use or threatened use of physical force," we thus conclude that ADW is a predicate offense under G. L. c. 276, § 58A (1).⁶

⁶ Our conclusion is consistent with that reached by the United States Court of Appeals for the First Circuit when considering whether ADW is categorically an offense that has as an element the use, attempted use, or threatened use of physical force against the person of another. See United States v. Fields, 823 F.3d 20, 33-35 (1st Cir. 2016) (ADW satisfies career offender guideline's force clause, U.S.S.G. § 4B1.2[a]); United States v. Hudson, 823 F.3d 11, 16 (1st Cir. 2016), cert. denied, 580 U.S. 1056 (2017) ("we reaffirm that a Massachusetts ADW conviction meets the physical force requirement under the force clause of the [Armed Career Criminal Act]").

The defendant argues that ADW cannot qualify as a predicate offense because it is a lesser included offense of ABDW, an offense that does not qualify as a predicate. This argument misconstrues the Supreme Judicial Court's decision in Escobar, 490 Mass. at 499, a case in which the court concluded that ABDW does not qualify as a predicate offense under G. L. c. 276, § 58A (1), because the crime "may be prosecuted under two discrete theories concerning a defendant's mental state," one of which does not require that the defendant act intentionally. More specifically, the Supreme Judicial Court noted that the requisite mens rea for an ABDW may be either "the intentional and unjustified use of force upon the person of another," or "reckless conduct that results in a touching producing physical injury to another person" (emphases added). Id., quoting Commonwealth v. Porro, 458 Mass. 526, 529-530 (2010). "Unlike intent, which requires a conscious act with the determination of the mind to do an act, wanton or reckless conduct does not require that the actor intended the specific result of [his or] her conduct" (quotations and citations omitted). Escobar, supra at 495. Thus, the Supreme Judicial Court concluded that ABDW does not qualify as a predicate offense under the force clause, because the reckless theory of ABDW does not have as an element the use, attempted use, or threatened use of physical force against another. See id. at 500. The court reasoned that

excluding reckless conduct from the force clause was mandated by the plain reading of the statute and consistent with the Legislature's purpose in enacting G. L. c. 276, § 58A. See Escobar, supra at 495-496.

As discussed above, the crime of ADW requires either the conscious attempt, or threat, to use physical force against another; the crime cannot be committed recklessly. See United States v. Hudson, 823 F.3d 11, 17 n.8 (1st Cir. 2016), cert. denied, 580 U.S. 1056 (2017) ("[a]lthough ABDW may be committed recklessly, . . . ADW cannot be"). See also Commonwealth v. Barbosa, 399 Mass. 841, 845 n.7 (1987) (recognizing assault as "any manifestation, by a person, of that person's present intention to do another immediate bodily harm"). As such, ADW is not a lesser included of all ABDW offenses, only intentional ABDW. See Commonwealth v. D'Amour, 428 Mass. 725, 748 (1999) ("lesser included offense is one which is necessarily accomplished on commission of the greater crime").

The defendant's claim that ADW does not qualify as a predicate offense under G. L. c. 276, § 58A (1), because the crime may be committed without the "use of actual physical force against the person of another" rests on a faulty premise that

conflates the force clause with the statute's "residual clause."⁷ The Supreme Judicial Court has deemed the residual clause unconstitutionally vague and has interpreted the statute such that the force clause stands independently from the residual clause. See Scione, 481 Mass. at 232.

Furthermore, we reject the defendant's contention that it would be an absurd result for ADW to be deemed a predicate offense because the Supreme Judicial Court in Escobar, 490 Mass. at 500, disqualified ABDW, which the defendant characterizes as a "more serious offense." This argument ignores the Legislature's decision, in enacting an explicitly predictive pretrial detention law, see Mendonza, 423 Mass. at 780, to emphasize an offender's intent as an important factor in determining the individual's future risk to public safety, see Escobar, supra at 495-496.⁸ It is the present intent to attempt

⁷ Following the force clause, G. L. c. 276, § 58A (1), incorporates a "residual clause," which accounts for "any other felony that, by its nature, involves a substantial risk that physical force against the person of another may result." The Supreme Judicial Court has deemed the residual clause unconstitutionally vague under art. 12 of the Massachusetts Declaration of Rights. See Scione, 481 Mass. at 232.

⁸ Other factors include, but are not limited to the following: "the nature and seriousness of the danger posed to any person or the community that would result by the person's release, the nature and circumstances of the offense charged, the potential penalty the person faces, the person's family ties, employment record and history of mental illness, his reputation, the risk that the person will obstruct or attempt to

or threaten the use of a dangerous weapon against another which constitutes the "menace of dangerousness" presented by the crime of ADW. Mendonza, supra at 787. It is not illogical that the Legislature would assign more weight to the attempted or threatened use of a dangerous weapon against another, as compared with an ABDW committed recklessly, in its predictive dangerousness calculus. See Borden v. United States, 141 S. Ct. 1817, 1823-1824 (2021) ("Purpose and knowledge are the most culpable levels in the criminal law's mental state 'hierarchy.' . . . Recklessness and negligence are less culpable mental states because they instead involve insufficient concern with a risk of injury").

Moreover, the defendant's focus on the seriousness of the underlying conduct contradicts both the plain language of the force clause⁹ and "the underlying purpose of the categorical approach, which helps to ensure, as constitutionally required,

obstruct justice or threaten, injure or intimidate or attempt to threaten, injure or intimidate a prospective witness or juror, [and] his record of convictions, if any." G. L. c. 276, § 58A (5).

⁹ "The statute's plain language directs courts to focus on whether a felony offense, if not one of the specifically listed crimes, 'has as an element of the offense the use, attempted use, or threatened use of physical force against the person of another[,]'. . . [thus] demonstrat[ing] that the predicate offense inquiry focuses on the elements of the crime, rather than the particular facts underlying a complaint or indictment." Young, 453 Mass. at 712.

that a defendant will not be deprived of his or her liberty 'on the basis of facts that were not found by a jury.'" Escobar, 490 Mass. at 497, quoting Commonwealth v. Wentworth, 482 Mass. 664, 676 (2019).

Finally, we disagree with the defendant's argument that to include ADW as a predicate offense would result in an unconstitutionally overbroad interpretation of G. L. c. 276, § 58A. "The practice of pretrial detention on the basis of dangerousness has been upheld as constitutional in part because the Legislature carefully limit[ed] the circumstances under which detention may be sought to the most serious of crimes, e.g., a specific category of extremely serious offenses" (quotations and citation omitted). Escobar, 490 Mass. at 492. As we have explained above, ADW satisfies the constitutional mandate of being included in that "specific category of extremely serious offenses" (citation omitted), id., because proof of the offense categorically falls within the ambit of the dangerousness statute's force clause.

Order of the single justice
affirmed.