

COMMONWEALTH OF MASSACHUSETTS

WORCESTER COUNTY

SUPREME JUDICIAL COURT
NO. _____

APPEALS COURT
NO. 2018-P-0029

COMMONWEALTH

v.

DARRYL L. THOMAS

APPLICATION FOR FURTHER APPELLATE REVIEW

Now comes the defendant and respectfully applies
for further review of his conviction and denial of new
trial motion in Worcester Superior Court no.
1385CR01356, which was affirmed in part and vacated in
part by the Appeals Court on March 4, 2019, 95 Mass.
App. Ct. 1101.

Respectfully submitted,
The Defendant, Darryl Thomas
by his attorney:



Madeline Weaver Blanchette
Foster and Blanchette
1242 Main Street, Suite 402B
Springfield, Massachusetts 01103
(413) 737-1001 ext. 2
BBO # 672735

Dated: March 25, 2019

Certification of Compliance

I hereby certify that, to the best of my knowledge, this application for further appellate review complies with the rules of court that pertain to the filing of applications, including, but not limited to, the following: Mass. R. App. P. 27.1(a); 27.1(b); 27.1(d); and Mass. R. App. P. 20. Further, the font I used to create not more than ten (10) pages of argument was Courier New at 12-point size.

MWBlanchette

Madeline Weaver Blanchette

Certificate of Service of Application and Memorandum

I hereby certify that a copy of the above application and the memorandum in support of the defendant's application were served by e-filing on this 25th day of March, 2019, to:

Attorney Jerome Parker-O'Grady
Worcester District Attorney's Office
225 Main Street
Room G301
Worcester, MA 01608

MWBlanchette

Madeline Weaver Blanchette
Foster and Blanchette
1242 Main Street, Suite 402B
Springfield, Massachusetts 01103
(413) 737-1001 ext. 2
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SUPREME JUDICIAL COURT
NO. _____

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COMMONWEALTH

v.

DARRYL L. THOMAS

DEFENDANT'S MEMORANDUM IN SUPPORT OF HIS APPLICATION
FOR FURTHER APPELLATE REVIEW

STATEMENT OF PRIOR PROCEEDINGS

The defendant, Darryl L. Thomas, was convicted on February 20, 2015 in Worcester Superior Court (Ricciardone, J., presiding) of: two (2) counts of assault and battery with a dangerous weapon in violation of G. L. c. 265, § 15A(b) (Counts II and IV), both with habitual criminal penalty enhancements in violation of G. L. c. 279, § 25 (Counts III and V); a single count of a firearm violation with two previous violent/drug crimes, in violation of G. L. c. 269, § 10G(b) (Count VII); a single count of an ammunition violation with two previous violent/drug crimes in violation of G. L. c. 269, § 10G(b) (Count IX); a single count of possession of an unlicensed loaded firearm in

violation of G. L. c. 269, § 10(n) (Count XI)¹, and a single count of possession of a firearm while committing a felony in violation of G. L. c. 265, § 18B (Count XIII).

Thereafter, the trial judge sentenced Mr. Thomas to the following: Count VII (lead count), armed career criminal II - ten (10) to fifteen (15) years of incarceration; Count IX, armed career criminal II - ten (10) to fifteen (15) years concurrent with Count VII; Counts III and IV, assault with a dangerous weapon, habitual offender - ten (10) years on and after Count VII; Counts V and VI, assault with a dangerous weapon, habitual offender - ten (10) years concurrent with Counts III and IV; and, for Count XIII, possession of a firearm in commission of a felony - five (5) to six (6) years, concurrent with Count VII. (ST.II, 44-45).²

¹ This Count along with several other sentencing enhancement counts were dismissed as duplicative prior to sentencing.

² On May 6, 2016, the appellate division of the trial court reduced that sentence to Count VII (lead count), armed career criminal II - ten (10) to eleven (11) years; Count IX, armed career criminal II - ten (10) to eleven (11) years concurrent with Count VII; Counts III and IV, assault with a dangerous weapon, habitual offender - ten (10) years concurrent with Count VII; Counts V and VI assault with a dangerous weapon, habitual offender - ten (10) years concurrent with Counts III and IV; and, for Count XIII, possession of weapon of a firearm in commission of a felony - five (5) to seven (7) years, on and after Count VII. (R.173-177).

Mr. Thomas filed a timely notice of appeal on January 8, 2016. (R.313). His case was consolidated in the Appeals Court with his subsequent appeal of a denial of a motion for new trial also from Worcester Superior Court. On March 4, 2019, the Appeals Court released a Memorandum and Order pursuant to Rule 1:28, 95 Mass. App. Ct. 1101 (2019)³, holding that on "the count of the indictment charging the defendant as an ACC II, we reverse the judgment, set aside the finding, and remand for resentencing as an armed career criminal I (ACC I). We otherwise affirm the judgments and the order denying the motion for new trial." Memo at *1.

STATEMENT OF FACTS RELEVANT TO THE APPEAL

This case arises from a late-night fight outside of a bar in Worcester, MA on October 18, 2013, which culminated in one man receiving a gunshot wound to the chest, and Mr. Thomas being charged with his assault and batteries along with various weapon charges. Memo at *1.

STATEMENT OF ISSUES WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

1. Whether in holding that an indictment and conviction for the sentencing enhancement G.L. c 265, § 18B does not require an underlying criminal charge, the Appeals Court violated Mr.

³ A copy of the Appeals Court's opinion is appended hereto and is cited as Memo at *_.

Thomas's due process rights and contradicted prevailing case law?

2. Whether the Appeals Court's decision that Mr. Thomas could be convicted for ACC I when the indictment for ACC lists no qualifying underlying charges and refers instead to the habitual offender statute violates Mr. Thomas's rights under art. 12?
3. Whether the Appeals Court's decision violates prevailing case law and the prohibition on double jeopardy by allowing Mr. Thomas to face multiple sentencing enhancements in one conviction, many relying on the same previous conviction?

REASONS WHY FURTHER
APPELLATE REVIEW IS APPROPRIATE

1. Further appellate review is founded upon substantial reasons affecting the public as it critical for this Court to determine whether there needs to be an articulated underlying criminal charge to support an indictment and conviction for G.L. c 265, § 18B, a sentencing enhancement that is "indeed harsh." See Commonwealth v. Ruiz, 480 Mass. 683, 694 n.21 (2018).
2. Further appellate review is founded upon substantial reasons affecting the public interest as this Court is already reviewing this same trial judge's rulings on the same issue - the sufficiency of an indictment for an armed career criminal (ACC) enhancement - in Commonwealth v. Wentworth, SJC-12633, argued March 7, 2019.
3. Further appellate review is founded upon substantial reasons affecting the public as it is critical for this Court to determine whether a defendant can receive three (3) different sentencing enhancement for a single set of convictions contrast Commonwealth v. Richardson, 469 Mass. 248, 249 (2014) ("a defendant may be sentenced under only one sentencing enhancement statute ..."), most relying on the same underlying previous conviction. Contrast Luk v. Commonwealth, 421 Mass. 415, 419 (1995) ("The double jeopardy clause of the Fifth Amendment to the United States Constitution protects against ... multiple punishments for the same offense.").

ARGUMENT

- I. IN HOLDING THAT AN INDICTMENT FOR A SENTENCING ENHANCEMENT DID NOT REQUIRE AN UNDERLYING CHARGE, THE APPEALS COURT DISREGARDED FUNDAMENTAL DUE PROCESS REQUIREMENTS OF NOTICE TO THE DEFENDANT AND THE PRINCIPLE THAT A GRAND JURY MUST BE PRESENTED WITH EVIDENCE ON EVERY ELEMENT OF A CRIME TO INDICT

The Commonwealth conceded that when Mr. Thomas was charged with the enhancement G.L. c 265, § 18B, there was no accompanying underlying substantive charge. (Comm.Br.34-39). And, the Appeals Court agreed with Mr. Thomas that "[t]he defendant's charges could not provide the root felony for G. L. c. 265, § 18B, because they 'consist[ed] in whole or in part of using a dangerous weapon' (quotation omitted). Commonwealth v. Hawkins, 21 Mass. App. Ct. 766, 768 (1986)." Memo at *3.

In a radical break from fundamental due process principles, the Appeals Court then stated that "G. L. c. 265, § 18B, does not require the root felony to be a charged offense." Memo at *3. Because there is zero published case law to support that notion, the Appeals Court relied on a case that had nothing to do with sentencing enhancements: "See Commonwealth v. Gernrich, 476 Mass. 249, 251 (2017) ('The language of a statute is

interpreted in accordance with its plain meaning"). Memo at *3.

This is in sharp contrast to a recent decision of this court which reiterated the fundamental rule that "[a] sentence enhancement charge cannot be brought alone; instead, it must accompany a substantive criminal *charge*." Commonwealth v. Ruiz, 480 Mass. 683, 693 (2018) (emphasis added). Likewise, § 18B is simply a "penalty-enhancement statute[]." Commonwealth v. Hawkins, 21 Mass. App. Ct. 766, 769 (1986). See also Commonwealth v. Richardson, 469 Mass. 248, 252 (2014) ("Statutes providing for enhanced sentencing based on a defendant's prior convictions do not create independent crimes, but enhance the sentence for the underlying crime.").

Instead, the Appeals Court followed the Commonwealth's vain appellate attempt to salvage the erroneous conviction by retroactively assigning an uncharged charge to Mr. Thomas - a heretofore unknown *third* assault and battery with a dangerous weapon. (Comm.Br.34-39). This late-arriving uncharged charge arises only from the Commonwealth's appellate viewing and interpretation of the surveillance video. See Comm.Br.13n4,36.

"The surveillance video, played for the jury and admitted as an exhibit at trial, shows the defendant

strike the victim with a firearm three distinct times. However, the defendant was only charged with two counts of assault and battery by means of a dangerous weapon. The third, uncharged strike could have served as the predicate offense for G. L. c. 265, § 18B."

This is erroneous for several reasons. First of all, the Appeals Court ignores the glaring fact (argued in the Defendant's principal brief at 32) that at the grand jury stage, the Commonwealth had mistakenly treated the enhancement G. L. c. 265, § 18B, as a "freestanding" charge where the indictment fails to identify any root felony charge to which it was attached. (R.36-37). Thus, the grand jury could not have possibly found probable cause to support the indictment and it must be vacated. Commonwealth v. Bynum, 429 Mass. 705, 708 (1999). See also Hawkins, 21 Mass. App. Ct. at 770 (where the indictment fails for probable cause, "[t]he judgment on the § 18B indictment is to be reversed, the guilty finding on that charge vacated, and the indictment dismissed."). "Such a defect is jurisdictional in nature; and, in accordance with the usual rule, a jurisdictional problem may be raised at any stage of the proceedings" Id at 767. Therefore, Mr. Thomas's indictment and conviction under § 18B should have been vacated since "fundamental considerations of fairness require that a court dismiss an indictment" that does not

at least present evidence on every element of the crime charged. Commonwealth v. Moran, 453 Mass. 880, 884 (2009).

Second, the Appeals Court's decision is a clear violation of the edict that "a crime must be proved as charged and must be charged as proved." Commonwealth v. Grasso, 375 Mass. 138, 139 (1978). Mr. Thomas received no notice what underlying alleged misconduct he should be defending in order to avoid conviction on this Count. The Appeals Court's decision allowing a prosecutor to *ex post facto* name uncharged alleged conduct violates Mr. Thomas's rights under Article 12 of the Massachusetts Declaration of Rights. "No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him" Id.

II. THE APPEALS COURT ERRED IN IGNORING UNCONTROVERTED RECORD EVIDENCE THAT THE INDICTMENT FOR ACC WAS FATALLY FLAWED WHERE IT REFERRED TO THE HABITUAL OFFENDER STATUE AND THEN RECEIVED DOCTORING BY THE TRIAL JUDGE OVER THE OBJECTION OF TRIAL COUNSEL

"[L]ike the underlying felony charges they accompany, sentence enhancements must be included in charging documents and voted on by a grand jury." Ruiz, 480 Mass. at 693. And, those indictments must adequately notify a defendant of the enhancements charged. Commonwealth v. Miranda, 441 Mass. 783, 789 (2004). And, while the Appeals

Court agreed that the ACC II conviction cannot stand (Memo at *2), neither can Mr. Thomas's conviction for ACC I.

The record is uncontroverted that the two (2) listed prior convictions that appear on the ACC indictments (R.30,32)⁴ fail to meet the statutory requirements for ACC II since unlawful possession of a firearm is not considered a violent crime. See G.L. c. 140, § 121. Compounding this error and making the indictments *even more oblique and confusing*, they also explicitly refer to the name of the enhancement charged as "habitual criminal" and cite the habitual offender statute at "G.L. c. 279, § 25." (R.31,33).

On their face, the indictments do not "fairly" inform Mr. Thomas of what charge he must defend. Hamling v. United States, 418 U.S. 87, 117 (1974). Here, where the listed prior convictions, if proven, could actually support the habitual offender statute, and that statute is explicitly listed on the indictment by name and number, it is simply unreasonable to say that Mr. Thomas was given adequate notice of what he was supposed to be defending against at trial, and the convictions must be vacated. See Miranda, 441 Mass. at 789. The Commonwealth may seek to prove at

⁴ A copy of the Indictments is appended hereto.

trial only those felonies for which the defendant has been indicted and the indictment itself is the document that defines those limits, not the grand jury transcript. See Commonwealth v. Barbosa, 421 Mass. 547, 550-553 (1995). "No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him[.]" Art. 12; Barbosa, 421 Mass at 549.

Second, trial counsel objected and the issue was preserved (ST.I, 7), in response to which the trial judge acknowledged the problem - that the Commonwealth wanted to present evidence at the sentencing trial to obtain ACC II convictions which "do[] not square with the actual working of the indictment." (ST.I,9). Cf Commonwealth v. Mora, 477 Mass. 399, 408 (2017) (to indict under ACCA, Commonwealth must supply grand jury with "*certified record of conviction*.") (emphasis added).

What followed was a frank violation of the edict that "a crime must be proved as charged and must be charged as proved." Commonwealth v. Grasso, 375 Mass. 138, 139 (1978). Specifically, the judge stepped in and rescued the Commonwealth from the indictment mess - allowing a *de facto* amendment by setting aside the "actual working of the

indictment" and allowing the Commonwealth to proceed with its ACC case against Mr. Thomas. (ST.I,9).

This was a clear error that demands reversal of the ACC indictments and convictions since "an amendment to an indictment as to a matter of substance would not be permissible. That would impair the integrity of the functions of the grand jury as established by the Constitution." Commonwealth v. Snow, 269 Mass. 598, 606 (1930). See also Commonwealth v. Bolden, 470 Mass. 274, 282 (2014) ("an indictment may be properly amended only in matters of form and those not essential to the description of the crime charged.").

Here, particularly where Mr. Thomas had been presented with a slew of sentencing enhancement indictments arising from the grand jury hearing meager testimony about a bundled plea of convictions lacking dates or correct docket numbers (R.40-41) - the last-minute indictment fixes were considerably more than the permissible *de minimis* tweaks to form (Comm.Br.28), they were substantive changes and certainly prejudicial to Mr. Thomas since, without them, he could not have been convicted. See Commonwealth v. Knight, 437 Mass. 487, 492 (2002).

III. THE APPEALS COURT DECISION TO ALLOW THREE ENHANCEMENTS IN A SINGLE SENTENCING SCHEME,

SEVERAL OF WHICH REST ON A SINGLE UNERLYING
CONVICTION VIOLATES THE PROHIBITION AGAINST
DOUBLE JEAPORDY

It was an error for the Appeals Court to affirm the "stacking" enhancements where Mr. Thomas received three (3) different enhancement in a single sentencing scheme - habitual offender enhancements for the assault and batteries, and ACC enhancements and G. L. c. 265, § 18B for the weapon charges. See Commonwealth v. Richardson, 469 Mass. 248, 249 (2014) ("a defendant may be sentenced under only one sentencing enhancement statute ...").

And, the double jeopardy clause "protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." Commonwealth v. Crawford, 430 Mass. 683, 686 (2000). In contrast, the September 23, 2005 guilty plea for assault to murder provided the underpinning for both the habitual offender enhancements and the ACC enhancements in violation of Mr. Thomas's right to be free from double jeopardy. See Luk v. Commonwealth, 421 Mass. 415, 419 (1995) ("The double jeopardy clause of the Fifth Amendment to the United States Constitution protects against ... multiple punishments for the same offense.").

CONCLUSION

For the foregoing reasons, the defendant's application
for further appellate review should be granted.

Respectfully submitted,
DARRYL L. THOMAS
By his attorney,

MWBlanchette

Madeline Weaver Blanchette
Foster and Blanchette
1242 Main Street, Suite 402B
Springfield, MA 01103
(413) 737-1001 ext. 2
BBO # 672735

Dated: March 25, 2019

APPENDIX

Commonwealth v. Darryl L. Thomas, 95 Mass. App. Ct. 1101
(March 4, 2019).

Indictments

95 Mass.App.Ct. 1101

Unpublished Disposition

NOTE: THIS OPINION WILL NOT APPEAR
IN A PRINTED VOLUME. THE DISPOSITION
WILL APPEAR IN THE REPORTER.

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).

Appeals Court of Massachusetts.

COMMONWEALTH

v.

Darryl THOMAS.

18-P-29

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Entered: March 4, 2019

By the Court (Kinder, Neyman & [Desmond](#), JJ. ¹)

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

*1 Following a jury trial in the Superior Court, the defendant, Darryl Thomas, was convicted of multiple offenses arising from a fight, captured on surveillance video, outside of a bar in Worcester. ² After a bench trial on the sentencing enhancement portion of his trial, the defendant was sentenced as an armed career criminal II (ACC II) and also sentenced as a habitual offender. On the count of the indictment charging the defendant as an ACC II, we reverse the judgment, set aside the finding, and remand for resentencing as an armed career criminal I (ACC I). We otherwise affirm the judgments and the order denying the motion for new trial.

Background. On the night of October 18, 2013, the victim and his cousins were at a bar in Worcester. At some point, the victim saw his cousins run out of the bar, and observed a fight taking place. ³ During the fight, the defendant struck the victim on the shoulder with a gun, struck the victim on the head with the gun as the victim attempted to stand up, and, while the victim was lying on the ground, struck him on the head another time with the gun. As the victim again attempted to stand up, the defendant shot him in the chest at close range. ⁴

After the police responded to the scene, Officer Terrance Gaffney watched the surveillance video of the shooting that other officers had obtained from the bar. Officer Gaffney recognized the defendant as the shooter. The owner of the bar, Jason Piskator, also watched the surveillance video and identified the defendant as the shooter.

The defense centered on mistaken identity. The defendant did not testify and did not call any witnesses to testify at trial.

Discussion. 1. Armed career criminal convictions. The defendant argues that his ACC convictions cannot stand because the indictments failed to list any qualifying previous convictions. He further argues that the judge erred by allowing the Commonwealth to de facto amend the indictments to rely on convictions that lacked probable cause and emanated from a single plea.

On September 23, 2005, the defendant pleaded guilty to an armed assault and a drug offense, either of which were sufficient to qualify for an ACC I enhancement. See G. L. c. 269, § 10G (a) (“Whoever, having been previously convicted of a violent crime or of a serious drug offense” is subject to ACC I sentencing enhancement). However, because the drug offense and the armed assault arose from the same guilty plea, this “represented a single ‘incidence’ for purposes of § 10G.” Commonwealth v. Resende, 474 Mass. 455, 470 (2016). The two offenses could therefore serve as the basis for an ACC I enhancement, but not as the basis for an ACC II enhancement. Id.

*2 We agree with the Commonwealth's concession and accordingly reverse the defendant's conviction under G. L. c. 269, § 10G (b), as an armed career criminal based on two predicate offenses, and remand for his resentencing as an armed career criminal based on one predicate offense,

G. L. c. 269, § 10G (a).⁵ [Commonwealth v. Widener](#), 91 Mass. App. Ct. 696, 703-705 (2017).

2. Habitual offender convictions. There is no dispute that the predicate offenses for the habitual offender convictions involved separate qualifying crimes committed on separate dates. Nonetheless, the defendant contends, for the first time on appeal, that the habitual offender convictions under G. L. c. 279, § 25 (a), cannot stand because there was insufficient evidence presented for the grand jury to determine whether the prior convictions arose out of separate episodes.⁶ We disagree.

An indictment under G. L. c. 279, § 25 (a), must present the grand jury with probable cause that the defendant was previously convicted of two felonies, for which he received a sentence of not less than three years for each felony. G. L. c. 279, § 25 (a). The predicate convictions also must have occurred during “separate qualifying criminal incidents or episodes.” [Commonwealth v. Ruiz](#), 480 Mass. 683, 690 (2018). However, the convictions may arise from a single bundled plea. *Id.* The defendant did not preserve this issue, and we therefore review for a substantial risk of a miscarriage of justice.⁷ See [Commonwealth v. Alphas](#), 430 Mass. 8, 13 (1999).

The grand jury were presented with an indictment for G. L. c. 279, § 25, that listed two qualifying convictions in 2005.⁸ The indictment lists the offenses along with the corresponding sentences and different docket numbers for each offense. Under the particular circumstances of this case, where the grand jury were presented with different docket numbers pertaining to different crimes and where the defendant did not argue insufficiency of the indictments at the prior proceedings, we are satisfied that the grand jury had probable cause to indict the defendant.⁹ See [Commonwealth v. Barbosa](#), 477 Mass. 658, 675 (2017) (probable cause to sustain indictment is “low standard” [quotation omitted]); [Globe Newspaper Co. v. District Attorney for Middle Dist.](#), 439 Mass. 374, 382 (2003) (docket numbers assigned chronologically).

*3 3. Firearm conviction. The defendant also argues that his conviction for possession of a firearm during the commission of a felony under G. L. c. 265, § 18B, cannot stand because the indictment was not linked to any of the other charges, and all of the other charges are disqualified because of the prohibition against double jeopardy. This

argument was not preserved for review, and we therefore review for a substantial risk of a miscarriage of justice.¹⁰ See [Alphas](#), 430 Mass. at 13. We discern no such risk.

The defendant's charges could not provide the root felony for G. L. c. 265, § 18B, because they “consist[ed] in whole or in part of using a dangerous weapon” (quotation omitted). [Commonwealth v. Hawkins](#), 21 Mass. App. Ct. 766, 768 (1986). However, G. L. c. 265, § 18B, does not require the root felony to be a charged offense.¹¹ See [Commonwealth v. Gernrich](#), 476 Mass. 249, 251 (2017) (“The language of a statute is interpreted in accordance with its plain meaning”).

The surveillance video, played for the jury and admitted as an exhibit at trial, shows the defendant strike the victim with a firearm three distinct times. However, the defendant was only charged with two counts of assault and battery by means of a dangerous weapon. The third, uncharged strike could have served as the predicate offense for G. L. c. 265, § 18B.¹² Under the circumstances of this case, where (a) the defendant did not raise this issue at trial; (b) the alleged error had nothing to do with the defense proffered at trial; and (c) the evidence from the video demonstrates the defendant committing the predicate felony just prior to the shooting, we discern no substantial risk of a miscarriage of justice. See [Alphas](#), 430 Mass. at 13.

4. Motion for a new trial. The defendant challenges the identification of the defendant by Gaffney and Piskator and argues that the motion judge erred in denying his motion for a new trial due to the flawed identifications.¹³ We disagree.

In determining the admissibility of a lay witness's identification of a person appearing in a photograph or video, the courts consider several factors, including the quality of the images; the level of familiarity of the witness with the person depicted in the video; and whether the suspect has altered his appearance since the time of the crime or was disguised in the video. [Commonwealth v. Pleas](#), 49 Mass. App. Ct. 321, 325-326 (2000).

*4 Here, the judge did not err in allowing Gaffney's and Piskator's identifications. First, the surveillance video is somewhat grainy and shot at night, albeit on a well-lit street corner.¹⁴ See [Pleas](#), 49 Mass. App. Ct. at

325, quoting [United States v. Jackman](#), 48 F.3d 1, 5 (1st Cir. 1995) (lay opinion may be admitted if video is neither “so unmistakably clear or so hopelessly obscure that the witness is no better-suited than the jury to make the identification”). Moreover, both Gaffney and Piskator were familiar with the defendant prior to their identifications of him.¹⁵ See [Pleas](#), *supra* at 325-326. The video quality and the witnesses' familiarity with the defendant make it more likely that they were in a better position than the jury to make a correct identification of the defendant from the surveillance video. See *id.* Therefore, the judge did not err or abuse his discretion in admitting the identifications of the defendant.¹⁶

In addition, the basis of the defendant's motion for a new trial consisted of his identification arguments. Where we discern no error with the judge's admission of the identifications, we also discern no abuse of discretion in the judge's denial of the motion for a new trial, without an evidentiary hearing.¹⁷ [Commonwealth v. Vargas](#), 475 Mass. 338, 354 (2016) (denial of motion for new trial “lies within the sound discretion of the judge and will not be reversed unless it is manifestly unjust or unless the trial was infected with prejudicial constitutional error” [quotation

permitted])). [Commonwealth v. Goodreau](#), 442 Mass. 341, 348 (2004).

5. Conclusion. On the count of the indictment charging the defendant as an ACC II, the judgment is reversed and the finding is set aside; the matter is remanded for resentencing as an ACC I. See [Commonwealth v. Sallop](#), 472 Mass. 568, 570 (2015), quoting [Commonwealth v. Cole](#), 468 Mass. 294, 310 (2014) (“Under double jeopardy principles, the new sentence on a conviction must not increase the ‘aggregate punishment’ imposed under the original sentence”). See also [Commonwealth v. Scott](#), 86 Mass. App. Ct. 812, 816-817 (2015) (judge may resentence defendant on count on which he has not completed his sentence). The remaining judgments are affirmed. The order denying the motion for new trial is affirmed.

***5 So ordered.**

Reversed in part; affirmed in part

All Citations

Slip Copy, 95 Mass.App.Ct. 1101, 2019 WL 1012531 (Table)

Footnotes

- 1 The panelists are listed in order of seniority.
- 2 The jury convicted the defendant of two counts of assault and battery by means of a dangerous weapon, unlawful possession of a firearm, unlawful possession of ammunition, unlawful possession of a loaded firearm, and unlawful possession of a firearm while in the commission of a felony. The jury found the defendant not guilty of armed assault with intent to murder.
- 3 Surveillance video captured the fight, including the defendant's actions. The video was played for the jury during the trial and introduced as an exhibit.
- 4 The victim was brought to the hospital and survived the shooting.
- 5 We disagree that the indictments failed to list any qualifying previous convictions and that the judge erroneously allowed a de facto amendment of the indictments. The indictment stated that the defendant “had previously been convicted of two violent crimes or two serious drug offenses, as defined in [G. L. c. 269, § 10G (e)], or any combination thereof totaling one, making [the defendant] subject to the penalty provisions of [G. L. c. 269, § 10G].” This statement, coupled with the citations in the indictment to the ACC statute, provided sufficient information on which to indict the defendant, and provided the defendant with notice of the charges.
- 6 The defendant limits this argument to the grand jury phase of the proceedings.
- 7 The defendant did not file a motion to dismiss the indictment pursuant to [Commonwealth v. McCarthy](#), 385 Mass. 160, 162 (1982), he did not raise this issue in his motion for a new trial, he did not claim ineffective assistance of counsel on this issue, and he did not claim the evidence at trial was insufficient on this issue. See [Commonwealth v. Shippee](#), 83 Mass. App. Ct. 659, 665 (2013), quoting [Commonwealth v. Senior](#), 454 Mass. 12, 14 (2009) (defendant must raise challenge to sufficiency of indictment “by a motion to dismiss prior to trial or it will be deemed waived, unless the defendant raises a claim that the court lacks jurisdiction or the indictment fails to charge an offense”).
- 8 The Commonwealth presented evidence at the sentencing hearing that the predicate offenses arose from “separate qualifying criminal incidents or episodes.” See [Ruiz](#), 480 Mass. at 690.

- 9 The defendant's citation to [Commonwealth v. Garvey](#), 477 Mass. 59 (2017), and [Commonwealth v. Hawkins](#), 21 Mass. App. Ct. 766 (1986), is unpersuasive. In [Garvey](#), the defendant raised the sufficiency argument in a motion to dismiss, which was not done here. [Garvey](#), *supra* at 61. [Hawkins](#) involved a jurisdictional challenge to the indictment, which likewise is not the case here. [Hawkins](#), *supra* at 767.
- 10 We note that the defendant did not raise this issue in a [McCarthy](#) motion, a motion for new trial, or as an ineffective assistance of counsel claim.
- 11 [General Laws c. 265, § 18B](#), provides, in pertinent part: "Whoever, while in the commission of or the attempted commission of an offense which may be punished by imprisonment in the state prison, has in his possession or under his control a firearm, rifle or shotgun shall, in addition to the penalty for such offense, be punished"
- 12 Additionally, the language of [G. L. c. 265, § 18B](#), is similar to the language in the felony-murder statute. The Supreme Judicial Court has held that uncharged offenses may serve as the predicate felony for a felony-murder conviction. See [Commonwealth v. Rivera](#), 464 Mass. 56, 81 (2013); [Commonwealth v. Stokes](#), 460 Mass. 311, 315 (2011); [Commonwealth v. Smiley](#), 431 Mass. 477, 491 (2000); [Commonwealth v. Eagles](#), 419 Mass. 825, 839 n.16 (1995).
- 13 The defendant contends that the judge erred by allowing the admission of Officer Gaffney's and Piskator's in-court and out-of-court identification from the surveillance video. He also argues that Piskator's identification procedure was unduly suggestive.
- 14 We have viewed the videotape. See [Commonwealth v. Hoyt](#), 461 Mass. 143, 148-149 (2011) (appellate court in same position as trial court in reviewing videotape and will take independent review of documentary evidence).
- 15 As Gaffney testified, he had observed the defendant about five times during the year prior to the shooting, with one encounter consisting of a conversation in "very close proximity" for about ten minutes. Gaffney also testified that he observed the defendant throughout the city in his vehicle. After a voir dire with Gaffney, the judge ruled that Gaffney had "independent knowledge and familiarity" of the defendant. Piskator testified that he had known the defendant for ten years from bartending in Worcester. He also testified that on the night of the shooting, he greeted the defendant while the defendant was outside of the bar in a vehicle.
- 16 We further note that there was no error in admitting Piskator's out-of-court identification because the identification was not "unnecessarily suggestive" where Piskator had familiarity with the defendant for ten years and the defendant did not show that Piskator's identification was influenced by the presence of police during his identification. See [Commonwealth v. Martin](#), 447 Mass. 274, 279-280 (2006). We also disagree that the judge erred in allowing the in-court identifications, because the witnesses made prior identifications of the defendant and therefore this was not analogous to an "in-court showup." See [Commonwealth v. Crayton](#), 470 Mass. 228, 241 (2014).
- 17 Moreover, the defendant could not show that trial counsel's representation prejudiced him. See [Commonwealth v. Millien](#), 474 Mass. 417, 432 (2016) (we do not "have a serious doubt whether the jury verdict would have been the same had the defense been presented").

13-1356

Assault and Battery, Dangerous Weapon
C. 265, §15A(b)

344

Commonwealth of Massachusetts

Worcester, To Wit:

At the **SUPERIOR COURT**, begun and holden at the **CITY OF WORCESTER**, within and for the County of Worcester, on the First Monday of December in the year of our Lord two thousand and thirteen.

THE JURORS for the **COMMONWEALTH OF MASSACHUSETTS** on their oath present,

That **Darryl Thomas**

on the 19th day of **October** in the year of our Lord **two thousand and thirteen** at **Worcester**, in the County of Worcester aforesaid, **did assault and beat Jamal Wilson, by means of a dangerous weapon, to wit: a firearm.**

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

The Jurors aforesaid, on their Oath aforesaid, do further Present that said

Darryl Thomas

on the 19th day of **October** in the year of our Lord **two thousand and thirteen** at **Worcester**, in the County of Worcester, **has been before the commission of the felony hereinbefore charged at least twice, convicted of crime, sentenced, and committed to prison in this or another state for terms of not less than three years each;** to wit, said Darryl Thomas was convicted of Possession of a Firearm without FID card (Worcester Superior Court docket number 0511701) and sentenced by the Worcester Superior Court on September 23, 2005 to three to five years and was duly committed; and Darryl Thomas was convicted of the Armed Assault with Intent to Murder (Worcester Superior Court docket number 0400571) and sentenced by the Worcester Superior Court on September 23, 2005 to five to six years and was duly committed.

Negative Treatment

There are no Negative Treatment results for this citation.

History

There are no History results for this citation.

Citing References

There are no Citing References for this citation.

Filings

There are no Filings for this citation.

It appears, therefore that the said Darryl Thomas, upon conviction of the felony hereinbefore charged, is an habitual criminal and subject to the provision of Massachusetts General Laws chapter 279, §25.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Lam A Lam
Foreperson of the Grand Jury.

Ken Sutt
Assistant District Attorney.

Superior Court

20 2013 — Returned by the Grand Jury and filed in Court.

R. 27

R M Hill
Assistant Clerk

13-1356 546

Commonwealth of Massachusetts

Worcester, To Wit:

At the **SUPERIOR COURT**, begun and holden at the **CITY OF WORCESTER**, within and for the County of Worcester, on the First Monday of December in the year of our Lord two thousand and thirteen.

THE JURORS for the **COMMONWEALTH OF MASSACHUSETTS** on their oath present,

That **Darryl Thomas**

on the 19th day of **October** in the year of our Lord **two thousand and thirteen** at **Worcester**, in the County of Worcester aforesaid, **did assault and beat Jamal Wilson, by means of a dangerous weapon, to wit: a firearm.**

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

The Jurors aforesaid, on their Oath aforesaid, do further Present that said

Darryl Thomas

on the 19th day of **October** in the year of our Lord **two thousand and thirteen** at **Worcester**, in the County of Worcester, **has been before the commission of the felony hereinbefore charged at least twice, convicted of crime, sentenced, and committed to prison in this or another state for terms of not less than three years each;** to wit, said Darryl Thomas was convicted of Possession of a Firearm without FID card (Worcester Superior Court docket number 0511701) and sentenced by the Worcester Superior Court on September 23, 2005 to three to five years and was duly committed; and Darryl Thomas was convicted of the Armed Assault with Intent to Murder (Worcester Superior Court docket number 0400571) and sentenced by the Worcester Superior Court on September 23, 2005 to five to six years and was duly committed.

It appears, therefore that the said Darryl Thomas, upon conviction of the felony hereinbefore charged, is an habitual criminal and subject to the provision of Massachusetts General Laws chapter 279, §25.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Lane A. June
Foreperson of the Grand Jury.

Ken Smith
Assistant District Attorney.

Superior Court

DEC 20 2013

— Returned by the Grand Jury and filed in Court.

R. 29

L M Bell
Assistant Clerk

Commonwealth of Massachusetts

Worcester, To Wit:

At the SUPERIOR COURT, begun and holden at the CITY OF

WORCESTER, within and for the County of Worcester, on the First Monday of December in the year of our Lord two thousand and thirteen.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present,

That **Darryl Thomas**

on the 19th day of October in the year of our Lord two thousand and thirteen at Worcester, in the County of Worcester aforesaid, not being present in or on his residence or place of business, and not having complied with the provisions mandated by M.G.L. c.269 §10(a), did knowingly have in his possession or under his control in a motor vehicle, a firearm, as defined in M.G.L. c.140 §121, and at such time the said Darryl Thomas had previously been convicted of two violent crimes or two serious drug offenses, as defined in M.G.L. c.269, §10G(e), or any combination thereof totaling one, making the said Darryl Thomas subject to the penalty provisions of M.G.L. c.269, §10G.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

The within defendant charged having one or more prior qualifying convictions, the current offense is therefore alleged as a Second Offense or Subsequent offense.

The Jurors aforesaid, on their Oath aforesaid, do further Present that said

Darryl Thomas

on the 19th day of October in the year of our Lord two thousand and thirteen at Worcester, in the County of Worcester, has been before the commission of the felony hereinbefore charged at least twice, convicted of crime, sentenced, and committed to prison in this or another state for terms of not less than three years each; to wit, said Darryl Thomas was convicted of Possession of a Firearm without FID card (Worcester Superior Court docket number 0511701) and sentenced by the Worcester Superior Court on September 23, 2005 to three to five years and was duly committed; and Darryl Thomas was convicted of the Armed Assault with Intent to Murder (Worcester Superior Court

It appears, therefore that the said Darryl Thomas, upon conviction of the felony hereinbefore charged, is an habitual criminal and subject to the provision of Massachusetts General Laws chapter 279, §25.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

James A. Gure
Foreperson of the Grand Jury.

Ken Smit
Assistant District Attorney.

Superior Court

20 2000 — Returned by the Grand Jury and filed in Court.

R. 31

W. M. Hall
Assistant Clerk

13-1356 - 9 + 10

Commonwealth of Massachusetts

Worcester, To Wit:

At the **SUPERIOR COURT**, begun and holden at the **CITY OF WORCESTER**, within and for the County of Worcester, on the First Monday of December in the year of our Lord two thousand and thirteen.

THE JURORS for the **COMMONWEALTH OF MASSACHUSETTS** on their oath present,

That **Darryl Thomas**

on the 19th day of **October** in the year of our Lord **two thousand and thirteen** at **Worcester**, in the County of Worcester aforesaid, **did knowingly and unlawfully possess ammunition, without complying with the provisions of the General Laws, Chapter 140, Section 129C, in violation of M.G.L. c.269, §10(h), and at such time the said Darryl Thomas had previously been convicted of two violent crimes or two serious drug offenses, as defined in M.G.L. c.269, §10G(e), or any combination thereof totaling two, making the said Darryl Thomas subject to the penalty provisions of M.G.L. c.269, §10G.**

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

The Jurors aforesaid, on their Oath aforesaid, do further Present that said

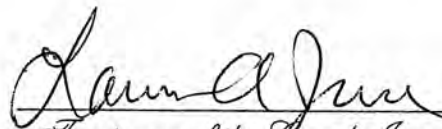
Darryl Thomas

on the 19th day of **October** in the year of our Lord **two thousand and thirteen** at **Worcester**, in the County of Worcester, **has been before the commission of the felony hereinbefore charged at least twice, convicted of crime, sentenced, and committed to prison in this or another state for terms of not less than three years each;** to wit, said Darryl Thomas was convicted of Possession of a Firearm without FID card (Worcester Superior Court docket number 0511701) and sentenced by the Worcester Superior Court on September 23, 2005 to three to five years and was duly committed; and Darryl Thomas was convicted of the Armed Assault with Intent to Murder (Worcester Superior Court docket number 0400571) and sentenced by the Worcester Superior Court on September 23, 2005 to five to six years and was duly committed.

It appears, therefore that the said Darryl Thomas, upon conviction of the felony hereinbefore charged, is an habitual criminal and subject to the provision of Massachusetts General Laws chapter 279, §25.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.


Foreperson of the Grand Jury.

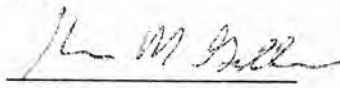

Assistant District Attorney.

Superior Court

DEC 20 2013

— Returned by the Grand Jury and filed in Court.

R. 33


Assistant Clerk

13-1356-13+
14

Possession of Firearm while Committing a Felony
C. 265, §18B

Commonwealth of Massachusetts

Worcester, To Wit:

At the **SUPERIOR COURT**, begun and holden at the **CITY OF WORCESTER**, within and for the County of Worcester, on the First Monday of December in the year of our Lord two thousand and thirteen.

THE JURORS for the **COMMONWEALTH OF MASSACHUSETTS** on their oath present,

That **Darryl Thomas**

on the 19th day of **October** in the year of our Lord **two thousand and thirteen** at **Worcester**, in the County of Worcester aforesaid, **did, while in the commission of or the attempted commission of an offense which may be punished by imprisonment in the state prison, have in his possession or under his control a firearm, rifle or shotgun, as defined in section 121 of chapter 140.**

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

The Jurors aforesaid, on their Oath aforesaid, do further Present that said

Darryl Thomas

on the 19th day of **October** in the year of our Lord **two thousand and thirteen** at **Worcester**, in the County of Worcester, **has been before the commission of the felony hereinbefore charged at least twice, convicted of crime, sentenced, and committed to prison in this or another state for terms of not less than three years each;** to wit, said Darryl Thomas was convicted of Possession of a Firearm without FID card (Worcester Superior Court docket number 0511701) and sentenced by the Worcester Superior Court on September 23, 2005 to three to five years and was duly committed; and Darryl Thomas was convicted of the Armed Assault with Intent to Murder (Worcester Superior Court docket number 0400571) and sentenced by the Worcester Superior Court on September 23, 2005 to five to six years and was duly committed.

It appears, therefore that the said Darryl Thomas, upon conviction of the felony hereinbefore charged, is an habitual criminal and subject to the provision of Massachusetts General Laws chapter 279, §25.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

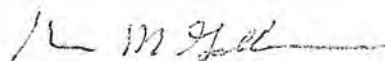

Foreperson of the Grand Jury.


Assistant District Attorney.

Superior Court

~~DEC 20 2013~~ Returned by the Grand Jury and filed in Court.

R. 37


Assistant Clerk