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20-P-1133

Appeals Court

COMMONWEALTH vs. ALLAH J. MALLORY (No. 1).

No. 20-P-1133.

Plymouth. December 9, 2025. - April 21, 2026.

Present: Vuono, Shin, & Smyth, JJ.

Firearms. License. Practice, Criminal, Bifurcated trial, Presumptions and burden of proof, Required finding, Prior conviction. Evidence, Presumptions and burden of proof, Firearm, Prior violent conduct. Statute, Construction.

Indictments found and returned in the Superior Court Department on June 28, 2016.

The cases were tried before Mark C. Gildea, J.

Matthew Spurlock, Committee for Public Counsel Services, for the defendant.

Arne Hantson, Assistant District Attorney, for the Commonwealth.

SHIN, J. A Superior Court jury convicted the defendant of unlawful possession of a firearm without a firearm identification (FID) card and unlawful possession of ammunition without an FID card in violation of G. L. c. 269, § 10 (h) (1)

(firearms convictions), among other charges. After a bifurcated trial, a different jury found the defendant guilty of committing firearms violations after having been previously convicted of three predicate crimes under the Massachusetts armed career criminal act (ACCA), G. L. c. 269, § 10G (c), subjecting the defendant to sentencing enhancements. The judge then sentenced the defendant to concurrent terms of from sixteen to eighteen years' imprisonment on the firearms convictions, within the range called for by the ACCA. The defendant appeals.<sup>1</sup>

The primary issue before us is whether the Commonwealth met its burden of proving that the defendant's prior convictions were for "violent crimes" within the meaning of the ACCA. G. L. c. 269, § 10G (c). The defendant pleaded guilty in 1998 to one of the prior crimes, assault and battery by means of a dangerous weapon (ABDW), and he was convicted after jury trials in 2003 and 2007 of the other two crimes, both for assault and battery. At the ACCA trial, the Commonwealth presented no evidence about what facts were presented at the 1998 plea hearing or at the

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<sup>1</sup> The defendant was also convicted of trafficking in heroin, trafficking in cocaine, and possession of a firearm during a felony, but he makes no argument as to those convictions in this direct appeal. All of the defendant's convictions are at issue in his appeal from the judge's order denying his motion for a new trial, which we address in a separate published opinion issued today. See Commonwealth v. Mallory (No. 2), 106 Mass. App. Ct. (2026). The disposition of the remaining convictions is set forth in that opinion.

2003 and 2007 jury trials. Instead, the Commonwealth sought to meet its burden by offering witnesses who testified about their memory of the events that led to each of the defendant's prior convictions. We conclude that this testimony was insufficient to prove that the defendant was convicted of a violent crime in the prior cases and thus reverse the findings on the ACCA charges. Further concluding that the Commonwealth failed to prove that the defendant did not possess an FID card, we vacate the firearms convictions. See Commonwealth v. Guardado, 491 Mass. 666 (Guardado I), S.C., 493 Mass. 1 (2023) (Guardado II), cert. denied, 114 S. Ct. 2683 (2024).

Background. 1. Trial on firearms charges. The firearms convictions arose from the execution of a search warrant on an apartment in Brockton in April 2016. The Commonwealth presented evidence that the police recovered among other items a revolver loaded with ammunition, which was in an unlocked safe that also contained the defendant's birth certificate. The defendant testified that the firearm was not his, asserting that his stepbrother had moved in and he (the defendant) had temporarily moved out of the apartment a few months before the search warrant was executed.

On August 26, 2019, the jury (first jury) found the defendant guilty of the firearms charges.

2. ACCA trial. The ACCA charges were tried before a different jury (ACCA jury) over three days in September 2019. Prior to the trial, the defendant moved in limine to preclude the Commonwealth from calling witnesses to testify about the events underlying his prior convictions, arguing that the proposed testimony was irrelevant to the question whether he was previously convicted of a violent crime within the meaning of the ACCA. The judge denied the motion in a margin order, and at trial the Commonwealth sought to prove that the prior convictions were for violent crimes based on the following evidence.

a. 1998 ABDW. The Commonwealth introduced a certified copy of a docket sheet showing that on June 5, 1998, the defendant admitted to sufficient facts to support a finding of guilt on an ABDW charge. In addition, the victim, a Brockton police officer, testified as follows. On April 25, 1998, the officer was working a midnight shift when he conducted a traffic stop of the defendant's vehicle. As the officer was "stepping out of the cruiser," the defendant "put the vehicle in reverse and then proceeded to strike the front of [the] cruiser," almost causing the officer to fall to the ground. The defendant then fled the scene.

b. 2003 assault and battery. The Commonwealth introduced a certified copy of a docket sheet showing that on April 16,

2003, the defendant was convicted after a jury trial of assault and battery. The victim also testified to the underlying events. Before the victim testified, however, defense counsel informed the judge of a potential self-incrimination issue, stating that the victim had testified at the 2003 trial that "nothing happened" and that the evidence that led to the defendant's conviction came from a third-party witness, who was deceased. This led the judge to appoint counsel for the victim and conduct a hearing under Commonwealth v. Martin, 423 Mass. 496 (1996) (Martin hearing). After the Martin hearing, the judge concluded that the victim did "not have a legitimate Fifth Amendment issue," apparently on the basis that the statute of limitations for perjury had expired.

Defense counsel then renewed her objection to the victim's testifying, noting that the police report reflected that the victim had told the police at the time that "nothing happened." Defense counsel argued that "[p]resumably that's what she said at [the 2003] trial" and that, were she to testify differently at the ACCA trial, "that doesn't give this jury any information about what [the defendant] was convicted of in [2003]." While acknowledging that "the testimony of [the victim] could not have been the basis of the [2003] conviction," the judge overruled the objection on the ground that "the Court can admit any

evidence that would have been admissible at the underlying trial."

The victim proceeded to testify that on July 5, 2002, she and the defendant argued and he struck her in the head with his fist. On cross-examination the victim claimed that she did not remember speaking to the police about the incident. She also claimed that she did not remember testifying falsely at the 2003 trial that the defendant had not assaulted her. At this point the judge paused the testimony and addressed the victim at sidebar, observing that her answer was contrary to what she had said during the Martin hearing. After the victim was given the opportunity to speak with her attorney, cross-examination resumed, and she then admitted that she had testified falsely at the 2003 trial.

c. 2007 assault and battery. The Commonwealth introduced a certified copy of a docket sheet showing that on March 16, 2007, the defendant was convicted after a jury trial of assault and battery. This case involved the same victim as the 2003 case, and she and two other witnesses testified at some length about the underlying incident. The substance of their testimony was that on October 16, 2005, the defendant came to the victim's home, dragged her out of bed by her hair, and punched her repeatedly in the head.

d. Defendant's case. At the close of the Commonwealth's case, the defendant moved for a required finding of not guilty, which the judge denied. The defendant then introduced, over the Commonwealth's objection, the following evidence related to the 2007 conviction: a transcript of the jury charge, which included an instruction that the jury could find the defendant guilty of assault and battery if the Commonwealth proved that the defendant intentionally committed a touching without justification or excuse and "that the touching was harmful or offensive"; and a portion of the trial testimony of the officer who wrote the police report pertaining to the incident.

Discussion. 1. Firearms convictions. In Guardado I, 491 Mass. at 690, the Supreme Judicial Court held that, to convict a defendant of unlawful possession of a firearm, the Commonwealth must prove that the defendant failed to comply with the licensure requirements for possessing a firearm. This rule applies to cases, like this one, that were pending on direct review when the United States Supreme Court issued its decision in New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (Bruen). See Guardado I, supra at 693.

At the trial on the firearms charges, the Commonwealth presented no evidence that the defendant did not possess an FID

card,<sup>2</sup> and the judge did not instruct the jury that the Commonwealth had the burden of proving nonlicensure as an element of the offenses. The judge and the prosecutor were without the benefit of the Supreme Court's decision in Bruen, but the errors nonetheless require that we vacate the convictions. See Guardado II, 493 Mass. at 2-3. We are unpersuaded by the Commonwealth's contention that the errors were harmless beyond a reasonable doubt because the defendant is a convicted felon and thus prohibited from acquiring an FID card. The Supreme Judicial Court rejected the same argument in Commonwealth v. Ferrara, 496 Mass. 483, 487 (2025), concluding that a new trial was required because "the Commonwealth did not present evidence that the defendant did not have a firearms license by proving that the defendant was a felon." Likewise, here, the Commonwealth presented no evidence at the trial on the firearms charges that the defendant was previously convicted of a felony or that this fact would have prohibited him from obtaining an FID card.

The Commonwealth's reliance on the evidence presented at the ACCA trial to a different jury is unavailing. To sustain

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<sup>2</sup> General Laws c. 269, § 10 (h) (1), makes it a crime to possess a firearm or ammunition without complying with G. L. c. 140, § 129C, which at the time of the defendant's trial provided that "[n]o person . . . shall own or possess any firearm . . . or ammunition unless he has been issued a firearm identification card by the licensing authority."

the firearms convictions, the Commonwealth had the burden at the underlying trial "to prove every essential element of the offense beyond a reasonable doubt." Commonwealth v. Brown, 477 Mass. 805, 815 (2017), cert. denied, 586 U.S. 826 (2018). The Commonwealth concedes that it did not prove the element of nonlicensure to the first jury, nor were the first jury instructed that that was the Commonwealth's burden. Evidence presented at a later trial to a different jury cannot retroactively cure these errors. We must therefore vacate the firearms convictions. See Ferrara, 496 Mass. at 487.<sup>3</sup>

2. ACCA enhancements. Our conclusion with regard to the firearms convictions necessarily requires us to vacate the findings on the ACCA charges, which are not "independent crimes, but enhance the sentence[s] for the underlying crime[s]."

Commonwealth v. Johnson, 447 Mass. 1018, 1019 (2006).

Nonetheless, we must address the defendant's argument that the evidence was insufficient to support the findings for purposes of determining whether he can be retried. See Commonwealth v. Ashford, 486 Mass. 450, 468 (2020); Commonwealth v. Beal, 474 Mass. 341, 353-354 (2016). Because the defendant moved for a required finding of not guilty at the close of the

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<sup>3</sup> We also vacate the firearms convictions for the separate reasons set out in our opinion resolving the defendant's appeal from the order denying his motion for a new trial. See note 1, supra.

Commonwealth's case, we consider the state of the evidence at that point in the trial to determine whether the defendant's motion should have been allowed. See Commonwealth v. West, 487 Mass. 794, 799 (2021).

The ACCA imposes harsher sentences for certain firearms offenses, including violations of G. L. c. 269, § 10 (h) (1), "based on the number of times that the individual previously has been convicted of a serious drug offense or 'violent crime.'"<sup>4</sup> Ashford, 486 Mass. at 456. As pertinent here, a "violent crime" is a "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." G. L. c. 140, § 121. See G. L. c. 269, § 10G (e) ("'violent crime' shall have the meaning set forth in section 121 of chapter 140"). Some crimes are "categorically" violent, meaning that "any course of conduct that would satisfy the elements of the crime also would constitute a violent crime within the meaning of the ACCA." Ashford, supra at 459. For these types of crimes, the Commonwealth can prove that they qualify as predicate crimes under the ACCA simply by offering "a court document, such as a judicial record of a judgment." Commonwealth v. Perez, 100 Mass. App. Ct. 7, 12 (2021).

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<sup>4</sup> The Commonwealth made no contention at trial that the defendant was previously convicted of a serious drug offense.

The analysis is more complex, however, where a defendant was previously "convicted under a broad statute that encompasses multiple crimes, not all of which are categorically violent" (quotations and citation omitted). Ashford, 486 Mass. at 459-460. In that situation the "modified categorical approach" applies, requiring the Commonwealth to offer evidence beyond the fact of conviction "such that the fact finder can conclude that the prior crime was a crime of violence within the meaning of the ACCA." Id. at 460. The predicates at issue here -- variants of assault and battery -- fall into this class of crimes because, of the three common-law forms of battery, only harmful battery qualifies as a violent crime under the ACCA. See id. at 461, 467; Perez, 100 Mass. App. Ct. at 12-13. Reckless battery is not a violent crime because, under the rule of lenity, reckless conduct does not meet the requirement that the defendant "use[d]" force "against the person of another." G. L. c. 140, § 121. See Ashford, supra at 462-465.<sup>5</sup> And offensive battery is not a violent crime because it does not

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<sup>5</sup> The defendant argues, and the Commonwealth concedes, that the judge (who did not have the benefit of Ashford) erred in instructing the jury that "as a matter of law the definition of violent crime includes the crime of [ABDW]" and "of the three crimes of assault and battery . . . , harmful battery and reckless battery are violent crimes." The parties dispute whether the errors, which were preserved, were harmless beyond a reasonable doubt. We need not resolve that dispute, however, because vacating the firearms convictions would require vacating the ACCA findings regardless.

"have as an element the use of 'physical force' sufficient to implicate the sentencing enhancement." Commonwealth v. Eberhart, 461 Mass. 809, 818 (2012).

The question thus becomes whether the Commonwealth proved beyond a reasonable doubt that the defendant's prior convictions were based on harmful, rather than reckless or offensive, conduct. The Commonwealth argues that it met this burden, but in doing so it frames the analysis as though this were a direct appeal from the prior convictions. For instance, with respect to the 1998 ABDW, the Commonwealth argues that it proved that the defendant committed a harmful battery because the officer's testimony "allowed for the reasonable inference that the defendant intentionally put the car in motion, knowing that [the officer] was exiting his cruiser, and therefore intended to strike the officer with his [car]." Similarly, with respect to the 2003 and 2007 assault and batteries, the Commonwealth argues that the ACCA jury could have found that the defendant's conduct was harmful based on the witnesses' testimony that he punched the victim in the head on both occasions.

But whether the testimony would have been sufficient for the ACCA jury to convict the defendant of harmful battery is not the relevant inquiry. The purpose of an ACCA trial is not for the Commonwealth to "retry the prior conviction," but to "prove which statutory or common-law definition was the basis of the

prior conviction." Eberhart, 461 Mass. at 816, quoting Commonwealth v. Colon, 81 Mass. App. Ct. 8, 16 n.8 (2011). To meet this burden, the Commonwealth must necessarily present evidence of what transpired during the prior proceeding. See Perez, 100 Mass. App. Ct. at 14-15. Here, the Commonwealth lost sight of these principles and, instead of presenting evidence about the facts adduced at the earlier plea hearing and jury trials, treated the ACCA trial as though it were a trial de novo on the predicate offenses. Indeed, in its closing argument, the Commonwealth expressly told the ACCA jury that their role was not to decide "what another jury was thinking" but to decide based on the testimony they just heard whether the defendant committed a violent crime. This statement turned the ACCA inquiry on its head.

This is not to foreclose the possibility that the Commonwealth could meet its burden through witness testimony if that testimony is relevant to what occurred at the prior proceeding. As the Commonwealth observes, several Supreme Judicial Court opinions have endorsed the proposition, first stated in Colon, 81 Mass. App. Ct. at 16 n.8, that at an ACCA trial "the trial judge may admit any evidence that would have been admissible at the original trial of the alleged predicate offense." See Ashford, 486 Mass. at 468; Commonwealth v. Wentworth, 482 Mass. 664, 675 n.8 (2019); Eberhart, 461 Mass. at

816. But whatever form that evidence might take, it must at a minimum "be sufficiently tied to" the facts found by the prior jury or the facts to which the defendant previously pleaded guilty, Perez, 100 Mass. App. Ct. at 14, because only then would the evidence be relevant to whether the defendant was previously "convicted of" a violent crime.

In this case the testimony at the ACCA trial was untethered from what occurred during the prior proceedings and was thus insufficient to show that the defendant's predicate convictions were for violent crimes. With respect to the 1998 ABDW, Perez squarely controls. Because ABDW can be based on intentional or reckless conduct, and reckless ABDW is not a violent crime, see Ashford, 486 Mass. at 460, 467, the Commonwealth had to prove that the defendant pleaded guilty in 1998 to intentionally touching the officer with his vehicle. But as was the case in Perez, 100 Mass. App. Ct. at 15, the officer's testimony at the ACCA trial "could have supported a finding of either intentional or reckless conduct," and so, even assuming that the ACCA jury "could have found that the defendant agreed to the facts as described by the witness[],<sup>[6]</sup> the defendant's agreement would not necessarily have established intentional rather than

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<sup>6</sup> A dubious assumption here given that the Commonwealth offered no evidence that the facts described by the officer were the same facts adduced at the plea hearing.

reckless assault[] and batter[y]." Instead, the defendant could "merely have agreed that he committed an assault and battery that could either be intentional or reckless." Id. Thus, without any evidence of what actually occurred at the plea hearing, the ACCA jury could not have found beyond a reasonable doubt that the defendant pleaded guilty to a violent crime. See id. at 14 ("Where the defendant pleaded guilty, a transcript of the plea hearing or a related document, such as a plea agreement, will be the best evidence of what the defendant was 'convicted of'" [citation omitted]).<sup>7</sup>

Regarding the 2003 assault and battery, the only evidence presented by the Commonwealth beyond the fact of conviction was the victim's testimony that in 2002 the defendant struck her in the head during an argument. But because that testimony conflicted with the testimony the victim gave at the 2003 trial -- at which she denied that the defendant had assaulted her -- it was not relevant to what the defendant was "convicted of" by the 2003 jury. Indeed, the judge acknowledged after the Martin hearing that the victim's testimony could not have been the basis of the 2003 conviction. And there is no other evidence in

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<sup>7</sup> The Commonwealth incorrectly characterizes Perez as holding that the evidence was sufficient to show that one of the defendant's predicate offenses for ABDW was a violent crime. The defendant "expressly conceded" that the ABDW conviction qualified as a violent crime. Perez, 100 Mass. App. Ct. at 17 n.8.

the record, such as a trial transcript, jury instructions, or verdict slips, that sheds any light on what in fact was the basis of the conviction. The Commonwealth thus failed to prove beyond a reasonable doubt that the 2003 jury convicted the defendant of harmful, as opposed to reckless or offensive, battery. Cf. Perez, 100 Mass. App. Ct. at 15 (Commonwealth failed to meet burden where evidence did not reveal "what actually transpired at the plea hearing").

The 2007 assault and battery presents a much closer question. As mentioned, three witnesses testified at the ACCA trial about the 2005 incident where the defendant dragged the victim by her hair and punched her in the head, and two of them stated that they had also testified at the 2007 trial. The victim, however, said only that she had testified before the grand jury, and the other two witnesses never told the ACCA jury that they were testifying to the same facts to which they testified in 2007. Had the Commonwealth proved that these two witnesses testified consistently in 2007, we would not question that their ACCA testimony might have supported an inference that the defendant was previously convicted of harmful battery. But the Commonwealth did not offer any evidence to that effect, and so no such inference is permissible. Indeed, on cross-examination, both witnesses admitted that they could not recall precisely what they testified to in 2007, with one noting that

"[i]t's been 13 years" and he "honestly [could not] remember" the details.

In these circumstances more evidence was required for the ACCA jury to be able to find beyond a reasonable doubt that the defendant was convicted of harmful battery in 2007. Because the testimony of the ACCA witnesses was not "tied to" what occurred at the 2007 trial, Perez, 100 Mass. App. Ct. at 14, it was not proof of what the defendant was actually convicted of by the 2007 jury. The Commonwealth offered no other evidence bearing on that question and thus failed to prove that the harmful form of battery was the basis of the prior conviction. Cf. id. at 15. Although we need go no further, we note that the jury instructions introduced by the defendant further illustrate the evidentiary deficiencies in the Commonwealth's case. Because the instructions allowed the 2007 jury to convict the defendant based on either a harmful battery theory or an offensive battery theory, it was incumbent on the Commonwealth to put forward evidence showing beyond a reasonable doubt that the 2007 jury must have convicted him under the former. The Commonwealth offered no such evidence and thus failed to prove that the 2007 conviction qualifies as a violent crime under the ACCA.<sup>8</sup>

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<sup>8</sup> Given our conclusion that the evidence was insufficient as to all three predicate offenses, we need not reach the defendant's argument that allowing the Commonwealth to offer testimony not adduced at the prior proceedings violated the

Conclusion. On the counts of the indictments charging unlawful possession of a firearm without an FID card and unlawful possession of ammunition without an FID card, the judgments are vacated and the verdicts are set aside. On the counts of those indictments charging the defendant as an armed career criminal under G. L. c. 269, § 10G (c), the judgments are reversed, the verdicts are set aside, and judgments shall enter for the defendant.<sup>9</sup>

So ordered.

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prohibition against double jeopardy and principles of due process.

<sup>9</sup> For the reasons discussed in our separate opinion on the defendant's appeal from the order denying his motion for a new trial, see note 1, supra, the remaining convictions also must be vacated. See Commonwealth v. Mallory (No. 2), 106 Mass. App. Ct. --- (2026).