SJC-13252

COMMONWEALTH vs. ROLAND F. ESCOBAR, JR.

Bristol. May 4, 2022. - August 12, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Bail. Pretrial Detention. Statute, Construction. Wanton or Reckless Conduct. Homicide. Motor Vehicle, Homicide. Assault and Battery by Means of a Dangerous Weapon.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on September 17, 2021.

After transfer to the Appeals Court, a petition for interlocutory review was heard by Amy L. Blake, J., and the appeal was reported by her. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Mary Lee, Assistant District Attorney, for the Commonwealth.
Patrick Levin, Committee for Public Counsel Services, for the defendant.

GAZIANO, J. While driving in Taunton, the defendant struck multiple parked and moving vehicles and a pedestrian, who died as a result of the collision. The Commonwealth charged the

defendant with a number of offenses relating to the incident, including manslaughter and assault and battery by means of a dangerous weapon causing serious bodily injury. On the basis of these two offenses, the Commonwealth moved for pretrial detention pursuant to G. L. c. 276, § 58A, the dangerousness statute.

The dangerousness statute permits the Commonwealth to hold a criminal defendant without bail pending trial where the defendant is charged with any one among an enumerated list of predicate offenses set forth in G. L. c. 276, § 58A (1). Included in this list is any "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." Id. At issue in this case is whether this so-called "force clause" includes the crimes of manslaughter and assault and battery by means of a dangerous weapon causing serious bodily injury. The defendant argues that it does not, because the force clause does not extend to crimes that can be committed recklessly or wantonly. The Commonwealth maintains that offenses resulting in death or serious bodily injury necessarily require the use of physical force against another person, but contends, in the alternative, that if we do interpret the force clause to exclude reckless or wanton conduct, we could adopt a "modified categorical approach" in analyzing whether a crime is a predicate offense under the

force clause. Under this approach, a court considers the facts of each case individually rather than considering the statutory elements of the offense. The Commonwealth contends that, employing this approach, the facts here show that the defendant intentionally used physical force against others.

We conclude that a crime that may be committed with a mens rea of recklessness does not fall within the ambit of the force clause in G. L. c. 276, § 58A (1). Nor do we accept the Commonwealth's suggestion that we adopt a modified categorical approach to the force clause in the context of pretrial detention. Applying our well-established categorical approach, we conclude that, because both offenses may be committed recklessly, manslaughter and assault and battery by means of a dangerous weapon (a motor vehicle) causing serious bodily injury are not predicate offenses under the force clause of G. L. c. 276, § 58A (1).

1. Background. We recite the facts based on the evidence proffered at the hearings on the defendant's petition for bail review. On August 3, 2021, the defendant was driving a sport utility vehicle (SUV) on Main Street in Taunton. After his SUV collided with the rear of a moving vehicle, the defendant side-swiped multiple parked vehicles on the right-hand side of the road. He continued driving, traveling in a lane that ordinarily was reserved for parking. A pedestrian who was walking toward

the driver's side of her parked vehicle was struck by the front of the SUV. Following these collisions, the defendant continued driving along Main Street, collided with the passenger's side of a pick-up truck, and turned right onto Summer Street. There, the defendant's SUV rear-ended another moving vehicle, causing the SUV to roll onto its side and strike a number of other vehicles before coming to a stop. In total, approximately twelve vehicles were involved in these collisions. The pedestrian who had been hit suffered serious injuries to her head and internal organs. She was taken to a hospital, where she died shortly thereafter.

When police arrived at the scene, they found the defendant unconscious in the SUV. They determined that the SUV was registered to the defendant. After observing signs that he had suffered an opiate overdose, first responders treated the defendant with nalaxone and transported him to a hospital in Brockton. Once the defendant regained consciousness, he was given the Miranda warnings and agreed to speak with a State police trooper in the emergency room. The defendant told the trooper that he had been cut off by another vehicle and "blacked out," and then woke up later inside an ambulance. The defendant also said that, before the crash, he had consumed two shots of whiskey and two or three different prescription drugs, at least

one opiate and one anticonvulsant (that he had not been prescribed). After the interview, the defendant was arrested.

On August 4, 2021, the defendant was arraigned in the District Court. He was charged with manslaughter, G. L. c. 265, § 13; assault and battery by means of a dangerous weapon causing serious bodily injury, G. L. c. 265, § 15A (c) (i); misdemeanor and felony motor vehicle homicide by means of operating while under the influence of drugs and negligent operation, G. L. c. 90, § 24G (a), (b); operating a motor vehicle while under the influence of drugs, second offense, G. L. c. 90, § 24 (1) (a) (1); leaving the scene of personal injury with death resulting, G. L. c. 90, § 24 (2) (a 1/2) (2); leaving the scene of property damage, G. L. c. 90, § 24 (2) (a); and operation of an uninsured motor vehicle, G. L. c. 90, § 34J. The prosecutor moved for pretrial detention pursuant to G. L. c. 276, § 58A, on the ground that the crimes of manslaughter and assault and battery by means of a dangerous weapon causing serious bodily injury are predicate offenses under the force clause.

Following a hearing, a District Court judge allowed the motion for pretrial detention and ordered the defendant held without bail. The defendant then filed a petition for bail review in the Superior Court; he argued that the offenses of manslaughter and assault and battery by means of a dangerous

weapon causing serious bodily injury are not predicate offenses under the force clause of G. L. c. 276, § 58A. A Superior Court judge held two hearings on the petition; the judge thereafter allowed the petition and ordered the defendant released on $10,000 bail with conditions. Seeking to vacate the order allowing bail, the Commonwealth sought extraordinary relief in the county court pursuant to G. L. c. 211, § 3, seeking to have the order allowing bail vacated. Citing the emergency COVID-19 orders by this court regarding transfers of bail cases, the single justice granted the Commonwealth leave to bring an interlocutory appeal in the Appeals Court from the order allowing the defendant's petition for bail review. We then transferred the case from the Appeals Court on our own motion.[1]

[1] While this case was pending on appellate review, the Commonwealth indicted the defendant, dismissed the charges in the District Court, and arraigned him in the Superior Court on charges of manslaughter, G. L. c. 265, § 13; manslaughter by means of operating while under the influence of drugs, G. L. c. 265, § 13 1/2; leaving the scene of personal injury with death resulting, G. L. c. 90, § 24 (2) (a 1/2) (2); two counts of assault and battery by means of a dangerous weapon, G. L. c. 265, § 15A (b); two counts of leaving the scene of property damage, G. L. c. 90, § 24 (2) (a); misdemeanor motor vehicle homicide by means of operating while under the influence of drugs and negligent operation, G. L. c. 90, § 24G (b); and operating a motor vehicle while under the influence of drugs, G. L. c. 90, § 24 (1) (a) (1). The Commonwealth also moved for pretrial detention in the Superior Court. A Superior Court judge declined to conduct a dangerousness hearing pending resolution of this appeal.

2. Statutory scheme. The dangerousness statute, G. L. c. 276, § 58A, sets forth "a comprehensive scheme of measures available with respect to arrested persons charged with crime." Mendonza v. Commonwealth, 423 Mass. 771, 774 (1996). "Among the measures described in [G. L. c. 276, § 58A,] is pretrial detention." Commonwealth v. Young, 453 Mass. 707, 709 (2009). The purpose of the statute is "systematically to identify those who may present a danger to society and to incapacitate them before that danger may be realized" (citation omitted). Scione v. Commonwealth, 481 Mass. 225, 226 (2019).

The ability to detain an individual who has not been convicted pending trial is subject to crucial constitutional limits. "[I]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." Brangan v. Commonwealth, 477 Mass. 691, 704, S.C., 478 Mass. 361 (2017), quoting Aime v. Commonwealth, 414 Mass. 667, 677 (1993). "Prior to conviction, a criminal defendant is presumed not to have committed the crimes charged." Commonwealth v. Vieira, 483 Mass. 417, 420 (2019). Thus, "[p]retrial detention is a measure of last resort." Id. "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.'" Id. at 421, quoting United States v. Salerno, 481 U.S. 739, 747, 750 (1987).

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." Young, 453 Mass. at 711. As discussed, these offenses are enumerated in G. L. c. 276, § 58A (1), beginning with the force clause,[2] and continuing with an extensive list of specific violent offenses.[3] If a defendant has been charged with

[2] After the force clause, G. L. c. 276, § 58A (1), also includes a so-called "residual clause," which purports to encompass "any other felony that, by its nature, involves a substantial risk that physical force against the person of another may result." In Scione v. Commonwealth, 481 Mass. 225, 232 (2019), this court determined that the residual clause was unconstitutionally vague and did not comport with art. 12 of the Massachusetts Declaration of Rights.

[3] These offenses include "the crimes of burglary and arson whether or not a person has been placed at risk thereof, or a violation of an order pursuant to [G. L. c. 208, § 18, 34B, or 34C; G. L. c. 209, § 32; G. L. c. 209A, § 3, 4, or 5; or G. L. c. 209C, § 15 or 20], or arrested and charged with a misdemeanor or felony involving abuse as defined in [G. L. c. 209A, § 1,] or while an [abuse prevention order] was in effect against said person, an offense for which a mandatory minimum term of [three] years or more is prescribed in [the Controlled Substances Act], arrested and charged with a violation of [G. L. c. 268, § 13B,] or a charge of a third or subsequent violation of [G. L. c. 90, § 24,] within [ten] years of the previous conviction for such violation, or convicted of a violent crime as defined in [G. L. c. 140, § 121,] for which a term of imprisonment was served and arrested and charged with a second or subsequent offense of felony possession of a weapon or machine gun as defined in [G. L. c. 140, § 121], or arrested and charged with a violation of [G. L. c. 269, § 10 (a), (c), or (m)], [G. L. c. 266, § 112,]

a predicate offense, the Commonwealth may move, on that basis, for pretrial detention under G. L. c. 276, § 58A. A hearing on the motion must be held on the defendant's first appearance before the court or, if the Commonwealth seeks a continuance, within three business days. G. L. c. 276, § 58A (4). At that hearing, the Commonwealth must establish by clear and convincing evidence that the defendant is dangerous and, if so, that no conditions of release reasonably would assure the safety of any other person or the community. See G. L. c. 276, § 58A (3); Mendoza, 423 Mass. at 788-789.

3. Discussion. It is undisputed that the offenses of manslaughter and assault and battery by means of a dangerous weapon causing serious bodily injury are not specifically enumerated predicate offenses in G. L. c. 276, § 58A (1). The Commonwealth maintains, however, that both offenses fall within the meaning of the force clause because each has "as an element of the offense the use, attempted use or threatened use of physical force against the person of another." See G. L. c. 276, § 58A (1). The Commonwealth argues, in the alternative, that if this court were to determine that the force clause only encompasses crimes in which a defendant intended to use force against another person, the court could employ a modified

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or [G. L. c. 272, § 77 or 94,] . . . or arrested and charged with a violation of [G. L. c. 269, § 10G]."

categorical approach to determine whether the charged offense is a predicate offense. Under this approach, the motion judge at a dangerousness hearing would consider the specific facts and circumstances of the case to determine whether the offense charged involved the intentional use of force against another person, rather than reckless or wanton conduct.

The defendant contends that the force clause does not include crimes that, in some circumstances, can be committed recklessly or wantonly. He argues that the court should continue to employ the categorical approach, under which a judge considers the elements of the offense charged to determine whether the offense always involves the intentional use of force against another. Because both manslaughter and assault and battery by means of a dangerous weapon causing serious bodily injury can be committed recklessly, the defendant argues, they are not predicate offenses under G. L. c. 276, § 58A (1).

a. Statutory interpretation. We review questions of statutory interpretation de novo. See Commonwealth v. Tinsley, 487 Mass. 380, 385 (2021).

In every question of statutory interpretation, we begin our analysis with the plain language of the statute. Anderson v. National Union Fire Ins. Co. of Pittsburg PA, 476 Mass. 377, 381 (2017). 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. See Providence & Worcester R.R. v. Energy Facilities Siting Bd., 453 Mass. 135, 142 (2009); Commissioner of Revenue v. Cargill, Inc., 429 Mass. 79, 82 (1999). Where a statute does not define a term, "[w]e derive the words' usual and accepted meanings from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions." Commonwealth v. Morasse, 446 Mass. 113, 116 (2006), quoting Commonwealth v. Bell, 442 Mass. 118, 124 (2004). Where the statutory language "does not provide a definite answer to the question," we consider other sources, including legislative history, to obtain a resolution. Matter of the Liquidation of Am. Mut. Liab. Ins. Co., 440 Mass. 796, 801-802 (2004), quoting Boylston v. Commissioner of Revenue, 434 Mass. 398, 401 (2001). "A fundamental principle of statutory interpretation 'is that a statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Harvard Crimson, Inc. v. President & Fellows of

Harvard College, 445 Mass. 745, 749 (2006), quoting Hanlon v. Rollins, 286 Mass. 444, 447 (1934).

b. The force clause. In determining whether the force clause encompasses offenses that can be committed recklessly or wantonly, we begin with the plain statutory language. See Cargill, Inc., 429 Mass. at 82. As stated, the 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).

The defendant asserts that this language can be viewed as two distinct phrases describing the required element of the offense, one mandating the "use of physical force," and the other explaining that the force must be used "against the person of another." Specifically, the defendant emphasizes that the phrase the "use of force," when combined with the word "against," means that the physical force used must be intentionally directed at another person.

We agree that the phrase "against the person of another" requires the physical force to be intentionally directed at another. The word "against," which ties the "use of physical force" to the "person of another," is critical to this understanding. "Against," in common usage, means "[i]n a direction or course opposite to." American Heritage Dictionary

of the English Language 32 (3d ed. 1992). "[W]hen modifying the 'use of force,'" the word against "demands that the perpetrator direct his [or her] action at, or target, another individual." Borden v. United States, 141 S. Ct. 1817, 1825 (2021). "And the pairing of volitional action with the word 'against' supports that word's oppositional, or targeted, definition"; "the 'against' phrase reveals at whom the conduct is consciously directed. Id. at 1826. See Commonwealth v. Ashford, 486 Mass. 450, 459-460 (2020) ("[the] use of physical force" means "actively to employ" such force). "While one may, in theory, actively employ something in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident" (emphasis added). Leocal v. Ashcroft, 543 U.S. 1, 9 (2004).

Unlike intent, which requires "a conscious act with the determination of the mind to do an act," Commonwealth v. Nickerson, 388 Mass. 246, 253-254 (1983), "wanton or reckless conduct does not require that the actor intended the specific result of [his or] her conduct," Commonwealth v. Hardy, 482 Mass. 416, 421 (2019). See Commonwealth v. Blow, 370 Mass. 401, 407 (1976) (intent "is the purpose or objective of the defendant at the time the crime was committed"). For instance, compare a driver who "drives his car straight at a reviled neighbor, desiring to hit him," Borden, 141 S. Ct. at 1826, with a driver

who weaves through traffic and follows other vehicles too closely, ultimately mistakenly striking another vehicle, Commonwealth v. DeSimone, 349 Mass. 770, 770-771 (1965). While both drivers used physical force by actively driving their vehicles, only the first directed such force toward another person. As this example suggests, although the language of the force clause reaches a defendant who intends to use force against another person, it does not reach a defendant who recklessly uses force, and in the course of doing so, inadvertently causes another person to be struck. See Ashford, 486 Mass. at 467.

The Legislature's purpose in adopting G. L. c. 276, § 58A, supports the conclusion that reckless or wanton conduct does not fall within the ambit of the force clause. General laws c. 276, § 58A, was adopted in 1994, see St. 1994, c. 68, § 6, following our conclusion in Aime, 414 Mass. at 681-683, that its predecessor statute, G. L. c. 276, § 58, as amended through St. 1992, c. 201, § 3, did not comport with due process. We concluded that the predecessor statute was constitutionally defective because, inter alia, it "applied to all persons arrested or subject to arrest, regardless of the seriousness of the offense charged." Commonwealth v. Diggs, 475 Mass. 79, 83 n.5 (2016), citing Aime, supra at 682. In enacting a new dangerousness statute, St. 1994, c. 68, § 6, the Legislature

limited its scope to "a specified set of offenses," explicitly enumerated in G. L. c. 276, § 58A (1). See Diggs, supra at 83.

Accordingly, in light of the Legislature's subsequent, constitutionally mandated enumeration in G. L. c. 276, § 58A, of a narrow set of specific violent offenses, "we cannot rewrite or torture the statute's language," Young, 453 Mass. at 717, to include within the ambit of the force clause offenses that can be committed recklessly. To do so effectively would transform the force clause into a vehicle essentially for the reanimation of the residual clause, which included as predicate offenses "any other felony that, by its nature, involves a substantial risk that physical force against the person of another may result." G. L. c. 276, § 58A (1). We previously deemed the residual clause unconstitutionally vague under art. 12 of the Massachusetts Declaration of Rights. See Scione, 481 Mass. at 232. We cannot adopt an interpretation of the force clause that mirrors the language of a clause we already have determined is unconstitutional. See Bellalta v. Zoning Bd. of Appeals of Brookline, 481 Mass. 372, 378 (2019) (court avoids statutory interpretations that lead to absurd results).

c. Categorical or modified categorical approach. The Commonwealth asserts that, if we conclude that the force clause does not encompass reckless or wanton conduct, we can use a modified categorical approach to support a conclusion that

manslaughter and assault and battery by means of a dangerous weapon causing serious bodily injury are predicate offenses under the force clause.

In our prior cases, we have explained that the proper approach to determining whether a crime falls within the meaning of the force clause of G. L. c. 276, § 58A, was the categorical approach, and we consistently have employed that approach. See, e.g., Vieira, 483 Mass. at 422. Under the categorical approach, a reviewing court focuses on the "elements of the offense," Scione, 481 Mass. at 228, "rather than the facts of or circumstances surrounding the alleged conduct.'" Id. See Young, 453 Mass. at 712. An offense is a predicate offense under the categorical approach if, and only if, the elements of the offense always fall within the ambit of the force clause. See Borden, 141 S. Ct. at 1822. See also Commonwealth v. Perez, 100 Mass. App. Ct. 7, 12 (2021) (crime fits categorically within force clause "if proof of the required elements will always satisfy the statutory definition"). This high bar reflects the underlying purpose of the categorical approach, which helps to ensure, as constitutionally required, that a defendant will not be deprived of his or her liberty "on the basis of facts that were not found by a jury." Commonwealth v. Wentworth, 482 Mass. 664, 676 (2019), citing Descamps v. United States, 570 U.S. 254, 269-270 (2013).

Moreover, as we previously have observed, G. L. c. 278, § 58A, "is similar in most respects to the Federal Bail Reform Act." Young, 453 Mass. at 712 n.8, quoting Mendonza, 423 Mass. at 773. "[T]he force clause of the dangerousness statute, G. L. c. 276, § 58A, was modeled on that in the Federal Bail Reform Act of 1984." Vieira, 483 Mass. at 427. A strict elements-based approach "comports with the analysis utilized under the Federal Bail Reform Act, 18 U.S.C. § 3142." Young, supra, citing United States v. Singleton, 182 F.3d 7, 10-12 (D.C. Cir. 1999), and other cases.

Rather than considering the elements of the offense charged, the Commonwealth urges us to adopt a modified categorical approach, which would require a reviewing court to examine for each offense individually the relevant facts and circumstances of that offense to determine whether the particular conduct qualified as a predicate offense under G. L. c. 276, § 58A. See Ashford, 486 Mass. at 460. In support of this argument, the Commonwealth relies upon our decision in Ashford, supra at 467-468, where we used a modified categorical approach to determine whether an offense was a "violent crime" within the meaning of the Massachusetts armed career criminal act (ACCA). The Commonwealth emphasizes that the definition of "violent crime" in the ACCA mirrors the language of the force clause in the dangerousness statute, and argues that, because we

adopted the use of a modified categorical approach in the specific context of the ACCA, the same approach can be used in interpreting the dangerousness statute.

The ACCA, G. L. c. 269, § 10G, "imposes harsher sentences based on the number of times that the individual previously has been convicted of a serious drug offense or 'violent crime.'" Ashford, 486 Mass. at 456. As the Commonwealth asserts, the ACCA defines a "violent crime" using language similar to the force clause. G. L. c. 140, § 121. In relevant part, "violent crime" under the ACCA is defined as "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." Id. "[A] defendant is entitled to a jury trial to determine whether a sentence enhancement under the ACCA is applicable." Wentworth, 482 Mass. at 675.

The Commonwealth's argument overlooks our statute-specific rationale for applying the modified categorical approach in the context of the ACCA. In those cases, the jury are available to examine the underlying facts and circumstances of a crime, ensuring that the defendant will not be deprived of his or her liberty on the basis of facts found by a judge. Wentworth, 482 Mass. at 675. See Commonwealth v. Gebo, 489 Mass. 757, 764 (2022), quoting Singer v. United States, 380 U.S. 24, 35 (1965)

("Trial by jury is the 'normal . . . and preferable mode of disposing of issues of fact in criminal cases'"). Dangerousness hearings, however, are "pretrial determinations conducted by a judge in the Superior Court," without the involvement of a jury. Wentworth, supra at 671 n.4. Accordingly, we decline the Commonwealth's suggestion that we adopt the modified categorical approach when analyzing whether an offense is a predicate offense under the force clause of G. L. c. 276, § 58A. Consistent with our well-established precedent, see Scione, 481 Mass. at 228; Young, 453 Mass. at 712, we will continue to employ the categorical approach.[4] If any version of the offense would allow a conviction of the offense based on wanton or reckless conduct, it does not qualify as a predicate offense under the categorical approach.

[4] In Scione, 481 Mass. at 237, we held, for purposes of the abuse clause of G. L. c. 276, § 58A, that "a judge may look beyond the elements of a crime to the surrounding circumstances of the alleged offense to determine whether it is [a] 'misdemeanor or felony involving abuse.'" We expressly limited our holding to the abuse clause and noted that the force clause requires a "categorical approach." Id. at 228. We reasoned that the abuse clause, unlike the force clause, did not include the language, "has as an element of the offense," and therefore a strict elements-based approach was not necessary. Id. at 235-237. Thus, our decision in Scione, which diverges from the categorical approach, is inapposite here.

d. Analysis.[5] We turn to consideration whether the offenses of manslaughter and assault and battery by means of a dangerous weapon causing serious bodily injury can be committed recklessly or wantonly, thus placing them outside the meaning of the force clause in the dangerousness statute.

Massachusetts has two forms of manslaughter, voluntary and involuntary. See Commonwealth v. Lugo, 482 Mass. 94, 103-104 (2019). "Voluntary manslaughter is 'a killing from a sudden transport of passion or heat of blood, upon a reasonable provocation and without malice, or upon sudden combat.'" Id. at 104, quoting Commonwealth v. Walden, 380 Mass. 724, 727 (1980). "Involuntary manslaughter is an unintentional killing occurring while a defendant is engaged in wanton or reckless

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[5] The Commonwealth argues that manslaughter and assault and battery by means of a dangerous weapon causing serious bodily injury fit within the reach of the force clause because both crimes necessarily involve the infliction of serious injuries and, therefore, the use of force against the person of another. The Commonwealth acknowledges that, in some cases, the nexus between the physical force involved and the serious injury sustained may be attenuated. See, e.g., Commonwealth v. Carrillo, 483 Mass. 269, 283 (2019); Commonwealth v. Carter, 481 Mass. 352, 364 (2019); Commonwealth v. Levesque, 436 Mass. 443, 454 (2002); Commonwealth v. Twitchell, 416 Mass. 114, 117 (1993).

This argument does not address the question whether charged offenses, which can be committed recklessly or wantonly, fall within the ambit of the force clause. Because we conclude that such offenses are not predicate offenses, the Commonwealth's emphasis on the nature of the force applied in cases involving manslaughter and assault and battery by means of a dangerous weapon causing serious bodily injury is immaterial.

conduct that creates a high degree of likelihood that substantial harm will result to another." Lugo, supra at 103. Because proof of the offense of involuntary manslaughter requires only reckless or wanton conduct, rather than intentional conduct, the crime of manslaughter does not qualify as a predicate offense under the force clause of the dangerousness statute. Accordingly, as the defendant was charged with "manslaughter," unspecified, the offense charged does not fall within the force clause of G. L. c. 276, § 58A.

With respect to the charge of assault and battery by means of a dangerous weapon, the crime of assault and battery may be prosecuted under two discrete theories concerning a defendant's mental state. "An intentional assault and battery is 'the intentional and unjustified use of force upon the person of another, however slight.'" Commonwealth v. Porro, 458 Mass. 526, 529 (2010), quoting Commonwealth v. McCan, 277 Mass. 199, 203 (1931). "A reckless assault and battery is committed when an individual engages in reckless conduct that results in a touching producing physical injury to another person; an unconsented touching is not sufficient." Porro, supra at 529-530.

Similarly, aggravated assault and battery, where the offense involves a dangerous weapon, may be prosecuted under either a theory of intent or a theory of recklessness. See

Commonwealth v. Appleby, 380 Mass. 296, 303, 306-307 (1980). See also Gebo, 489 Mass. at 773 ("An object may be dangerous as used even if ordinarily it is innocuous"). For example, an assault and battery by means of a dangerous weapon might occur where an individual intentionally used a lit cigarette to burn someone. See Commonwealth v. Farrell, 322 Mass. 606, 611, 618-619 (1948). This crime also might occur, however, where an individual recklessly punches through a glass window, causing glass shards to eject and seriously injure bystanders. See Commonwealth v. McIntosh, 56 Mass. App. Ct. 827, 829-831 (2002). Thus, because assault and battery by means of a dangerous weapon causing serious bodily injury may be committed recklessly or wantonly, it does not categorically have as an element "the use . . . of physical force against the person of another." Accordingly, it is not a predicate offense under the force clause of G. L. c. 276, § 58A.

Order allowing petition for review of bail affirmed.