

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).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1291

COMMONWEALTH

vs.

WILLIAM MORALES-LOPEZ.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury trial in Superior Court, William Morales-Lopez was convicted of assault and battery by means of a dangerous weapon in violation of G. L. c. 265, § 15A (b), assault by means of a dangerous weapon in violation of G. L. c. 265, § 15B (b), and assault with intent to kill as a lesser included offense of G. L. c. 265, § 18 (b), (assault with intent to murder).¹ On appeal, the defendant asserts that the convictions of assault and battery by means of a dangerous weapon and assault by means of a dangerous weapon are duplicative.² We agree, and we vacate the § 15B conviction.

¹ An additional conviction of carrying a loaded firearm without a license in violation of G. L. c. 269, § 10 (n), was dismissed after the jury verdict at the request of the Commonwealth.

² The Commonwealth did not file a brief, but instead conceded that the convictions are duplicative. After independent review, we agree that the Commonwealth's concession was appropriate.

Background. Under the standard of Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979), we view the evidence in the light most favorable to the Commonwealth. On October 4, 2014, at approximately 2 A.M., the victim was leaving a residence in Leominster. When the victim opened the side door to leave the building, he encountered the defendant. The defendant reached toward his waistband, pulled out a gun, and immediately fired, making a "pow, pow, pow" sound, at the victim. The victim took off running upon realizing he had been shot in the hand. The defendant then shot the victim in the back of the head. The victim called 911 and told the operator that "Willie" (the defendant) had shot him.

Discussion. Whether charges are duplicative is a question of law, see Commonwealth v. Reynolds, 67 Mass. App. Ct. 215, 224 (2006), and is therefore reviewed de novo. Commonwealth v. Rodriguez, 476 Mass. 367, 369 (2017).

The proper test whether one crime is a lesser included offense of another is whether each offense requires proof of an additional element that the other does not. Commonwealth v. Vick, 454 Mass. 418, 431 (2009). Here, G. L. c. 265, § 15A (b), authorizes conviction where there exists (1) assault and (2) battery (3) by means of a dangerous weapon. In contrast,

See Commonwealth v. Poirier, 458 Mass. 1014, 1015 (2010), and cases cited.

G. L. c. 265, § 15B (b), authorizes conviction where there exists (1) assault (2) by means of a dangerous weapon. Therefore, only the element of battery in § 15A distinguishes the two offenses, and the § 15B charge is a lesser included offense. See Commonwealth v. Porro, 458 Mass. 526, 535-536 (2010) (assault is lesser included offense of assault and battery).

Where, as here, one offense is a lesser included offense of another, "convictions for both offenses must rest on separate and distinct acts." Commonwealth v. King, 445 Mass. 217, 225 (2005). Here, we agree with the parties that the defendant's removing his gun from his waistband and immediate shots were "part of a continuous stream of conduct occurring within a short time frame and governed by a single criminal design."

Commonwealth v. Howze, 58 Mass. App. Ct. 147, 153 (2003).

Accordingly, on the indictment charging assault by means of a dangerous weapon (count four), the judgment is vacated, the verdict is set aside, and the indictment is to be dismissed.

The remaining judgments are affirmed.

So ordered.

By the Court (Massing,
Henry & McDonough, JJ.³),



Clerk

Entered: January 13, 2020.

³ The panelists are listed in order of seniority.