

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-1488

COMMONWEALTH

vs.

LUIS ROSARIO.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant pleaded guilty to, among other charges, armed assault with intent to murder, pursuant to G. L. c. 265, § 18 (b), and possession of a firearm during the commission of a felony, pursuant to G. L. c. 265, § 18B. A Superior Court judge denied, in part, the defendant's motion to vacate guilty pleas and to correct sentences. On appeal, he asserts that this violated double jeopardy because both convictions punish the same conduct -- namely, possession of a firearm while committing an offense. Applying the Supreme Judicial Court's decision in Commonwealth v. Thomas, 484 Mass. 1024 (2020), we hold that these convictions do not violate the principles of double jeopardy. Finding no merit to the defendant's other arguments on appeal, we affirm.

1. Background. a. Facts pertaining to guilty pleas.¹

During a cookout, which the defendant and three codefendants attended, two hooded individuals (gunmen) fired shots into the yard. Both gunmen fled, and the defendant and codefendants pursued them. Witnesses saw the defendant fire a large capacity firearm at the two gunmen, both of whom were hiding behind a parked vehicle. The incident was captured on surveillance videos, which showed the defendant firing the large capacity firearm, it jamming, and the defendant clearing the jam and firing again. A total of eleven shots were fired. Police forensics later found eleven spent casings and one live round. After the defendant stopped shooting and the gunmen fled, the defendant and codefendants discussed how to find them, entered into a car, and left the scene.

The defendant pleaded guilty to (1) armed assault with intent to murder, pursuant to G. L. c. 265, § 18 (b); (2) possession of a firearm during the commission of a felony, pursuant to G. L. c. 265, § 18B; (3) carrying a firearm without a license, pursuant to G. L. c. 269, § 10 (a); (4) carrying a loaded firearm without a license, pursuant to G. L. c. 269, § 10

¹ We summarize the facts as found by the judge and supplement those findings with uncontroverted evidence in the record that implicitly was credited by the judge. See Commonwealth v. Scott, 467 Mass. 336, 344 (2014); Commonwealth v. Antone, 90 Mass. App. Ct. 810, 811 n.1 (2017).

(n); and (5) possession of a large capacity firearm, pursuant to G. L. c. 269, § 10 (m).²

b. Motion to vacate guilty pleas and to correct sentences. Approximately two years later, the defendant moved to vacate his guilty pleas and to correct his sentences. The judge (the same one who had accepted the pleas) allowed the motion as to the charge of carrying a firearm without a license, and otherwise denied the motion.

2. Discussion. We review a judge's decision denying a motion to withdraw a guilty plea for an abuse of discretion or other significant error of law. See Commonwealth v. Resende, 475 Mass. 1, 12 (2016).

a. Sufficiency of plea recitation. A judge may not accept a guilty plea unless there are sufficient facts to establish each element of the offense. Commonwealth v. Hart, 467 Mass. 322, 325 (2014). A judge need not determine whether the defendant is or is not guilty of the offense charged;³ instead, the judge "need determine only whether the evidence which he had heard, plus any information he has obtained in the plea hearing, is sufficient, when considered with reasonable inferences which

² The Commonwealth dismissed one count of possession of ammunition without a firearm identification card, pursuant to G. L. c. 269, § 10 (h).

³ "[B]y pleading guilty, a defendant waives his right to be convicted on proof beyond a reasonable doubt." Commonwealth v. Armstrong, 88 Mass. App. Ct. 756, 758 (2015).

may be drawn therefrom, to support the charge to which the defendant is offering a plea of guilty." Commonwealth v. Jenner, 24 Mass. App. Ct. 763, 773 (1987). On appeal, the defendant challenges the sufficiency of the evidence related to possession of a large capacity firearm and armed assault with intent to murder. We address each in turn.

i. Knowledge element of possession of large capacity firearm. The defendant challenges the sufficiency of the factual basis that he knew that the firearm he possessed was a large capacity firearm. See Commonwealth v. Cassidy, 479 Mass. 527, 535-536 (2018). This element may be established, *inter alia*, by showing the defendant knew that the firearm was capable of holding more than ten rounds of ammunition. See id. at 536. See also G. L. c. 140, § 121 (setting forth definitions of "large capacity" firearm). Such knowledge may be inferred from circumstantial evidence signaling the nature of the weapon. See Cassidy, supra at 537. Here, the evidence presented by the prosecutor at the plea hearing included that the defendant fired a "large capacity firearm" and "eleven rounds" at the two gunmen. "[E]leven shell casings" were recovered from the scene, as was one live round, consistent with the defendant clearing a jam that interrupted his shooting. Surveillance videos showed that the defendant used only one weapon, the firearm jammed, and the defendant cleared the jam before continuing to fire at the

gunmen. Together, this evidence provided a sufficient factual basis for the element that the defendant knew the firearm was capable of holding more than ten rounds, and thus was a large capacity firearm.

ii. Armed assault with intent to murder. The defendant next maintains that the evidence was insufficient to show the malice element of armed assault with intent to murder. "The crime of armed assault with intent to murder has three elements: assault; intent to kill; and malice, which in this context means an absence of justification, excuse, or mitigation."

Commonwealth v. Moran, 453 Mass. 880, 884 (2009). Such mitigation includes "heat of passion induced by reasonable provocation, sudden combat, or excessive force in self-defense." Commonwealth v. Johnston, 446 Mass. 555, 558 (2006). Mitigation was not raised during the plea hearing; nonetheless, the defendant contends that there was evidence of mitigation because the gunmen were the first aggressors.

The prosecutor's recitation, however, included evidence from which the judge could reasonably conclude that there was time for "tempers to cool" such that the defendant's capacity for reflection and restraint was no longer eclipsed. See Commonwealth v. Pierce, 419 Mass. 28, 31 (1994). Specifically, following the gunmen's shooting at the cookout, the defendant and codefendants chased them. The defendant began firing at the

gunmen, as they cowered behind a parked car. The defendant took the time to clear a jam in his firearm, and then proceeded to continue to shoot at the gunmen. All told, eleven shots were fired. It was not an abuse of discretion for the judge to conclude there was sufficient evidence on which to find that the element of malice was met.

b. Double jeopardy. The defendant argues that his conviction of armed assault with intent to murder, G. L. c. 265, § 18 (b), cannot serve as the root felony for his conviction of possession of a firearm during the commission of a felony, G. L. c. 265, § 18B, without violating double jeopardy. In particular, he contends that each punished the same conduct, i.e., possession of a firearm while committing an offense.

We stayed this appeal pending the Supreme Judicial Court's decision in Thomas, 484 Mass. at 1024-1027, in which a similar claim was made. That decision, which issued after oral argument in the present appeal, is dispositive. Briefly, in Thomas, the defendant challenged his conviction under § 18B because he asserted that using his conviction of assault and battery by means of a dangerous weapon as the root felony violated double jeopardy. See id. at 1025. The court rejected the argument. See id. at 1026. The court reasoned that nothing in the statute itself prohibited the use of assault and battery by means of a dangerous weapon as the root felony, noting that the Legislature

had amended a prior version of § 18B to remove a restriction that had prohibited application of § 18B where the root felony consisted of the use of a dangerous weapon. See id. Moreover, the court also held that, unlike sentence enhancing statutes, § 18B "creates an independent crime punishable by a separate sentence that the Legislature has required to be served 'in addition to' the penalty for the underlying offense." Id., quoting G. L. c. 265, § 18B. Given the Legislature's intent that a sentence for a conviction under § 18B be served "in addition to" the sentence for the root felony, the court held that imposition of both sentences did not violate principles of double jeopardy. Id. at 1027. See Commonwealth v. Alvarez, 413 Mass. 224, 232 (1992) ("Where the Legislature has specifically authorized cumulative punishment under two statutes, even if the two statutes proscribe the same conduct . . . a court's job of statutory construction is terminated, and the intent of the Legislature is to be enforced"). The same reasoning is fatal to the defendant's argument in this appeal.⁴

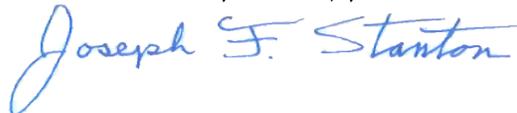
c. Sentencing. The judge vacated the defendant's guilty plea on the charge of carrying a firearm without a license as duplicative of his conviction of possession of a large capacity firearm. Contrary to the defendant's contention, he was not

⁴ We need not reach the defendant's argument that the predicate felony cannot be an uncharged felony. See Thomas, 484 Mass. at 1027.

entitled to resentencing on the other convictions.⁵ Nothing in the record suggests that the judge's "decision as to the appropriate punishment for the defendant's [five] convictions" was influenced by the defendant's conviction of carrying a firearm without a license. Commonwealth v. Costa, 472 Mass. 139, 144 (2015), quoting Commonwealth v. Renderos, 440 Mass. 422, 435 (2003).

Order denying in part and
allowing in part motion to
vacate guilty pleas and to
correct sentences affirmed.

By the Court (Sullivan,
Maldonado &
Wendlandt, JJ.⁶),



Clerk

Entered: May 22, 2020.

⁵ The defendant was sentenced to concurrent terms of from five years to five years and one day in State prison for his convictions of armed assault with intent to murder (count 1) and possession of a firearm during the commission of a felony. He was sentenced to eighteen months in a house of correction on the vacated charge of carrying a firearm without a license, to run concurrently with count 1. On possession of a large capacity firearm, he received a sentence of from two and one-half years to three years in State prison, to run concurrently with count 1. On carrying a loaded firearm without a license, the defendant was sentenced to two years of probation, with special conditions, from and after his State prison sentences.

⁶ The panelists are listed in order of seniority.