COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-438

COMMONWEALTH

vs.

MAHAMADOU KANTE.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

A jury convicted the defendant of unlawful possession of a firearm and possession of a firearm with a defaced serial number. After a subsequent jury-waived trial, a judge found the defendant guilty of being an armed career criminal under G. L. c. 269, § 10G (a). On appeal the defendant challenges the denial of his motion to suppress, the sufficiency of the evidence that he possessed a firearm with a defaced serial number, and the constitutionality of the model jury instruction pertaining to that offense. The defendant also argues that the evidence was insufficient for the judge to find him guilty of being an armed career criminal. We affirm the judgments but reverse the armed career criminal finding and remand for resentencing.

1. Motion to suppress. We summarize the motion judge's factual findings, supplemented with uncontroverted testimony that she credited. See Commonwealth v. Jones-Pannell, 472 Mass. 429, 431 (2015).

Around 9:10 A.M. on February 26, 2017, Fall River police Officers Matthew Mendes and Kevin Bshara were in an unmarked police vehicle when Mendes saw a car, driven by the defendant, travel through an intersection. Mendes was familiar with the defendant from prior interactions. Almost simultaneously, the defendant made eye contact with Mendes and appeared to recognize him. As the officers followed the car, Bshara ran the defendant's information through the registry of motor vehicles database, which indicated that his license was suspended or expired.[1]

After briefly losing sight of the car, the officers traveled to an area that the defendant was known to frequent. Within a few minutes, the defendant and a second man walked through a gate and onto the sidewalk. The defendant spotted the officers and immediately walked toward a pickup truck parked on the side of the street. Mendes saw the defendant crouch down

[1] For purposes of the motion to suppress, the Commonwealth stipulated that the defendant's license had been reinstated and was active on February 26, 2017.

near one of the truck's tires, which Mendes found to be "suspicious."[2]

The officers got out of their vehicle and approached the defendant and the other man. When asked where he was coming from, the defendant did not respond and continued walking. Mendes then instructed both men to sit on the curb. The defendant complied and was placed in handcuffs and pat frisked. Additional officers then responded to the scene, inspected the area around the truck, and found a loaded firearm resting on top of one of the tires.

Based on these findings, the judge concluded that the defendant abandoned the firearm and did not have a reasonable expectation of privacy in the place where it was found. On appeal the defendant does not renew any claims to the contrary but argues instead that the officers illegally stopped, pat frisked, and arrested him and the firearm was fruit of the poisonous tree.[3] In considering this argument, "we accept the judge's subsidiary findings of fact absent clear error 'but conduct an independent review of [her] ultimate findings and conclusions of law.'" Commonwealth v. Molina, 459 Mass. 819,

[2] Mendes's observations were corroborated by a video surveillance recording, which was entered in evidence at the hearing.

[3] The Commonwealth contends that the defendant waived this argument by not raising it to the judge. Although it is a close question, we will assume that the argument is preserved.

820 (2011), quoting Commonwealth v. Scott, 440 Mass. 642, 646 (2004).

"The fruit of the poisonous tree doctrine is properly invoked when evidence, although legally obtained, is derived from an illegal source," such as an unconstitutional search or seizure. Commonwealth v. Buccella, 434 Mass. 473, 487-488 (2001), cert. denied, 534 U.S. 1079 (2002). To determine whether the doctrine applies, we ask whether the evidence was obtained by exploiting the unlawful conduct "or instead by means sufficiently distinguishable to be purged of the primary taint." Commonwealth v. Lunden, 87 Mass. App. Ct. 823, 826 (2015), quoting Wong Sun v. United States, 371 U.S. 471, 488 (1963).

Here, even assuming there was an illegal stop, patfrisk, or arrest, the discovery of the firearm did not result therefrom. Mendes saw the defendant crouch by the truck in a "suspicious" manner before any of the officers approached the defendant. Police did not gain additional information after the stop that led to the firearm; there was no evidence, for instance, that the defendant made any statements or movements that the officers exploited. The seizure of the firearm was therefore not a product of the defendant's detention but stemmed directly from prior police observations. See Commonwealth v. Mauricio, 477 Mass. 588, 596-597 (2017) (evidence not fruit of poisonous tree

where "police did not discover [it] as either a direct or indirect result of unlawful conduct").

The defendant argues nonetheless that the firearm was fruit of his detention because police only searched the area around the truck after failing to find contraband during the patfrisk. But it is speculative at best to suggest that it was the lack of contraband on the defendant's person -- and not Mendes's earlier observation of the defendant's "suspicious" movement -- that led the officers to investigate the truck. Such speculation does not transform the firearm into fruit of any illegal conduct. "Where the connection between the [evidence] and the illegality . . . is so tenuous, the application of the fruit of the poisonous tree doctrine would risk untethering it from its underlying principles." Mauricio, 477 Mass. at 597.

2. Possession of firearm with defaced serial number. General Laws c. 269, § 11C, makes it unlawful to "remove[], deface[], alter[], obliterate[] or mutilate[] in any manner the serial number or identification number of a firearm" and to "receive[] a firearm with knowledge that its serial number or identification number has been removed, defaced, altered, obliterated or mutilated in any manner." "Possession or control of a firearm the serial number or identification number of which has been removed, defaced, altered, obliterated or mutilated in any manner shall be prima facie evidence that the person having

such possession or control is guilty of a violation of" the statute. G. L. c. 269, § 11C. This prima facie inference can be rebutted by evidence that the person having possession or control "had no knowledge whatever" of the defacement or "that he had no guilty knowledge thereof." Id.

Here, the evidence at trial, viewed in the light most favorable to the Commonwealth, see Commonwealth v. Ayala, 481 Mass. 46, 51 (2018), was sufficient to sustain the defendant's conviction. The jury could have found that the defendant possessed the gun before depositing it on the tire of the pickup truck. A detective who examined the firearm for a serial number and a manufacturer's stamp testified that he did not see either marking on it and that it appeared that "the slide had been machined by . . . some brushing type of tool." A ballistician similarly testified that "[t]he serial number was obliterated," meaning, "[y]ou could no longer see it." This evidence gave rise to a prima facie inference of guilt under the statute. See Commonwealth v. Ferrer, 68 Mass. App. Ct. 544, 547-548 (2007); Commonwealth v. Rupp, 57 Mass. App. Ct. 377, 385-386 (2003). Contrary to the defendant's contention, the Commonwealth was not required to prove that the firearm had "trace[s]" of a serial number or some other obvious signs of defacement, such as scratches. The statute provides that possession or control of a firearm with a serial number that has been defaced "in any

manner" shall be prima facie evidence of guilt. G. L. c. 269, § 11C. And the defendant presented no evidence that would have required the jury to find that he "rebut[ted] the inference raised by the statute." Commonwealth v. Grant, 57 Mass. App. Ct. 334, 341 (2003).

The defendant's constitutional challenge to the model jury instruction[4] fails in light of our decision in Ferrer. The instruction tracks the statutory language, which "creates a permissible inference rather than a mandatory finding and 'does not involve lowering the Commonwealth's substantive burden of proof.'" Ferrer, 68 Mass. App. Ct. at 548 n.5, quoting Commonwealth v. Maloney, 447 Mass. 577, 582 (2006). The trial judge properly instructed the jury that they were "permitted," but not required, to accept evidence of possession of the firearm as sufficient proof of guilt and that, "[i]n the end, [they] must be satisfied that on all the evidence it's been proven beyond a reasonable doubt that the defendant" either defaced the serial number himself or received the firearm knowing that its serial number had been defaced. There was no error. See Ferrer, supra.[5]

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[4] In particular, the defendant challenges Instruction 7.640 of the Criminal Model Jury Instructions for Use in the District Court (2009).

[5] The defendant separately challenges the following part of the instruction: "If there is contrary evidence on that issue, you are to treat the testimony about the defendant's receipt of the

3. Armed career criminal. The Massachusetts Armed Career Criminal Act (ACCA) imposes enhanced penalties "for certain weapons-related offenses if a defendant has been previously convicted of a 'violent crime' or a serious drug offense." Commonwealth v. Wentworth, 482 Mass. 664, 670 (2019). Violent crime is defined, in relevant part, as "any crime punishable by imprisonment for a term exceeding one year . . . that . . . has as an element the use, attempted use or threatened use of physical force . . . against the person of another." G. L. c. 140, § 121. See G. L. c. 269, § 10G (e). "'Physical force' as used in [G. L. c. 140, § 121] means 'violent or substantial force capable of causing pain or injury.'" Commonwealth v. Mora, 477 Mass. 399, 407 (2017), quoting Commonwealth v. Eberhart, 461 Mass. 809, 818 (2012).

The prior conviction at issue in this case is resisting arrest. Because the crime of resisting arrest can be

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firearm like any other piece of evidence . . . ." According to the defendant, "that issue" is ambiguous and could be interpreted as referring to receipt of the firearm, not to whether he knew that the serial number had been defaced. We do not think the instruction is reasonably susceptible of that reading; the remainder of the sentence makes clear that the "issue" is whether the defendant had the requisite knowledge of the defaced serial number, and that the jury is to weigh evidence of receipt of the firearm with the rest of the evidence to determine whether the Commonwealth proved knowledge beyond a reasonable doubt.

accomplished without violent force,[6] we use the modified categorical approach to determine whether the conviction qualifies as a predicate offense. See Wentworth, 482 Mass. at 672; Mora, 477 Mass. at 408 & n.7. Under this approach, although "the Commonwealth need not retry the prior conviction," it must "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). Thus, here, the Commonwealth was required to present sufficient evidence to permit a fact finder to conclude beyond a reasonable doubt that the basis of the defendant's conviction of resisting arrest was the use or threatened use of "physical force or violence against the police officer or another." G. L. c. 268, § 32B (a). See Commonwealth v. Ashford, 486 Mass. 450, 460 (2020); Wentworth, supra; Mora, supra.

We agree with the defendant that the Commonwealth failed to meet its burden. At the ACCA enhancement trial, Fall River police Sergeant James Smith testified that on August 1, 2011, he observed the defendant engage in an apparent drug transaction.

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[6] A person is guilty of resisting arrest if "he knowingly prevents or attempts to prevent a police officer, acting under color of his official authority, from effecting an arrest of the actor or another," and either "us[es] or threaten[s] to use physical force or violence against the police officer or another" or "us[es] any other means which creates a substantial risk of causing bodily injury to such police officer or another." G. L. c. 268, § 32B (a).

When the defendant saw Smith, who was in full uniform, he began running, refused Smith's orders to stop, and led police on a chase into oncoming traffic. Another officer, David Reed, testified that he responded to the area and found the defendant in some bushes. The defendant refused to comply with orders to get on the ground and instead "came at" Reed with his hand out, trying to push him out of the way. When the defendant's hand made contact with Reed's, Reed grabbed him, and both went to the ground. After a few seconds of struggling, the defendant complied with orders to put his arms behind his back, and Reed handcuffed him. In addition to this testimony, the Commonwealth introduced the police report of the incident and a certified record reflecting that the defendant pleaded guilty to resisting arrest. The police report details the defendant's flight into oncoming traffic and his resistance to being handcuffed but does not mention his attempt to push Reed or his contact with Reed's hand.

Relying on Reed's testimony, the Commonwealth argues that the evidence was sufficient to show that the defendant resisted arrest through the use of physical force. But even assuming, without deciding, that the defendant's attempt to push Reed constituted "violent or substantial force capable of causing pain or injury," Mora, 477 Mass. at 407, quoting Eberhart, 461 Mass. at 818, the Commonwealth's burden under the ACCA was more

specific -- it had to prove not just that the defendant used physical force, but that the use of such force was "the basis" of the defendant's conviction of resisting arrest. Eberhart, supra at 816. The Commonwealth did not meet this burden where it offered no evidence, such as a transcript of the plea colloquy, establishing the factual basis of the defendant's guilty plea. Although the plea transcript is included in the appellate record, the Commonwealth acknowledges that it was not offered in evidence at the ACCA enhancement trial. In any event, like the police report, the factual recitation at the plea hearing describes the defendant's flight through traffic and resistance to being handcuffed but does not mention the attempted push. Cf. Wentworth, 482 Mass. at 667, 673-674 (evidence sufficient to prove that prior conviction of assault and battery was violent crime, where defendant agreed with prosecutor's factual recitation establishing that defendant had struck victim in face and shoved her). The Commonwealth thus failed to prove beyond a reasonable doubt that the defendant pleaded guilty to resisting arrest through the use of "physical force or violence," as opposed to some "other means which create[d] a substantial risk of causing bodily injury" to the officers. G. L. c. 268, § 32B (a). See Commonwealth v. Montoya, 457 Mass. 102, 105-106 (2010) (flight from police in dangerous physical conditions created substantial risk of bodily

injury within meaning of resisting arrest statute); Commonwealth v. Sylvia, 87 Mass. App. Ct. 340, 342-343 (2015) (flight across public roadway and resistance to being handcuffed created substantial risk of bodily injury to officers).[7]

4. Conclusion. The armed career criminal finding under G. L. c. 269, § 10G (a), is reversed, and the case is remanded for resentencing. The judgments are affirmed.

So ordered.

By the Court (Neyman, Shin & Singh, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: April 6, 2021.

[7] Given our ruling, we need not address the defendant's argument that the admission of Reed's testimony violated the defendant's constitutional rights. We mention in passing that this case does not present a scenario where the Commonwealth established that the prior conviction involved the use of force, and the purpose of the live testimony was to flesh out details concerning the degree of force used. The case law suggests that testimony offered for that purpose would be admissible. See Wentworth, 482 Mass. at 675 n.8 (at ACCA enhancement trial, "judge may admit any evidence that would have been admissible at the original trial of the alleged predicate offense"). But here, because the Commonwealth offered no evidence that the basis of the defendant's guilty plea was the use of force, Reed's testimony cannot be viewed as simply fleshing out missing details.

[8] The panelists are listed in order of seniority.