18-P-336 Appeals Court

COMMONWEALTH vs. DERON N. SILVELO.[1]

No. 18-P-336.

Essex. December 6, 2018. - September 19, 2019.

Present: Green, C.J., Vuono, Meade, Sullivan, & Shin, JJ.

Firearms. Motor Vehicle, Firearms. Constitutional Law, Search and seizure. Search and Seizure, Automobile, Search incident to lawful arrest, Protective sweep. Practice, Criminal, Motion to suppress, Required finding, Argument by prosecutor, Instructions to jury. Evidence, Firearm.

Complaints received and sworn to in the Lawrence Division of the District Court Department on March 17, 2014, and December 2, 2015.

A pretrial motion to suppress evidence was heard by Michael A. Uhlarik, J.; a motion for reconsideration was considered by him; and the case was tried before Holly V. Broadbent, J.

Michelle A. Dame for the defendant.
Catherine P. Sullivan, Assistant District Attorney, for the Commonwealth.

[1] This case was initially heard by a panel comprised of Justices Vuono, Sullivan, and Shin. After circulation of a majority and a dissenting opinion to the other justices of the Appeals Court, the panel was expanded to include Chief Justice Green and Justice Meade. See Sciaba Constr. Corp. v. Boston, 35 Mass. App. Ct. 181, 181 n.2 (1993).

VUONO, J. Following a jury trial in District Court, the defendant was convicted of unlawful possession of a firearm and unlawful possession of a loaded firearm.[2] The charges stemmed from the discovery of a loaded revolver in a vehicle in which the defendant was a passenger. On appeal, he claims that (1) the motion judge erred in denying his motion to suppress the firearm, (2) the evidence was insufficient to prove that he knew the firearm was loaded, (3) certain comments made by the prosecutor in his closing argument were error that created a substantial risk of a miscarriage of justice, and (4) his conviction of possession of a loaded firearm should be reversed because the judge did not instruct the jury that the Commonwealth is required to prove beyond a reasonable doubt that the defendant knew the firearm was loaded, and the evidence was insufficient to prove that the defendant knew the firearm was loaded. We affirm.

Background. The jury could have found the following facts. On March 16, 2014, at approximately 11:15 P.M., State Police Trooper Daniel Schumaker was on patrol on Route 495 in Lawrence when he stopped a vehicle for not displaying a valid inspection sticker. The defendant was a passenger in the front seat. His

[2] See G. L. c. 269, § 10 (a), (n). An additional charge of unlawful possession of ammunition was dismissed prior to trial.

mother, who owned the car, was driving. Another adult, two young children, and a teenager were seated in the back seat.

Schumaker approached the car from the passenger side and saw that the defendant was not wearing a seat belt. Schumaker asked the defendant for identification so that he could issue a citation to him. The defendant reached into the left pocket of his cargo pants and retrieved a black object from his pants. Based on his training and experience, Schumaker believed the item was "[p]ossibly a weapon." The object fell between the seat and the center console, out of Schumaker's view. The defendant then produced a wallet and handed his identification to Schumaker. Schumaker believed that the object he saw was a weapon, but he did nothing at that point because there were children in the back seat and he wanted to avoid escalating the situation. Instead, Schumaker returned to his cruiser and conducted a records check. The check revealed that the defendant had several "active" warrants. Schumaker called for assistance and remained in his cruiser until backup arrived. About fifteen minutes later, when additional officers were on the scene, Schumaker returned to the car, ordered the defendant out, pat frisked him, and placed him under arrest. The defendant cooperated. After the defendant was handcuffed and seated in the cruiser, Schumaker returned to the car and searched the area where the defendant had been sitting. He

found under the passenger seat a .38 caliber snub-nosed revolver loaded with four rounds of ammunition. The revolver and the ammunition were introduced as exhibits at trial.[3]

The defendant did not testify. Through argument, cross-examination, and testimony provided by his mother, the defendant maintained that he had no knowledge that the gun was in the car, which his mother had purchased, preowned, seven days earlier. He vigorously challenged Schumaker's credibility, asserting that, had Schumaker seen the defendant remove a weapon from his pocket, Schumaker would not have left the defendant in the car while waiting for assistance to arrive. The defendant's mother also attempted to undermine Schumaker's version of events. She testified that another officer, not Schumaker, found the gun and had done so after searching the car three or four times. Lastly, defense counsel emphasized that the defendant's behavior was inconsistent with guilt because he did not appear nervous and acted, in Schumaker's words, like a "perfect gentleman."

Discussion. 1. Motion to suppress. The defendant filed a motion to suppress the firearm alleging that the search of the automobile was unconstitutional. Following an evidentiary hearing, at which Schumaker was the sole witness, the motion

[3] Both items were examined for fingerprints, but no identifiable prints were found. The police determined that the last known legal owner of the firearm had purchased it about one year earlier in Colorado.

judge denied the motion in a handwritten endorsement.[4] Based on Schumaker's testimony,[5] which the judge explicitly credited, the judge found as follows: (1) Schumaker made a valid motor vehicle stop based on the vehicle's noncompliance with "inspection laws"; (2) the defendant was not wearing a seat belt and, therefore, Schumaker was entitled to ask for his identification; (3) "[w]hile getting his [identification], the [defendant] removed what appeared to be a gun from his pants pocket [and] placed it between the console [and the] seat"; (4) Schumaker lawfully arrested the defendant on active warrants; and (5) "[a]fter [the defendant] was arrested [and] placed in [the] cruiser, the [trooper] searched the area around the passenger seat [and] found [and] seized a gun." On the basis of these facts the motion judge concluded that the search of the

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[4] We note that the criminal complaint that preceded this motion to suppress subsequently was dismissed for failure to prosecute. The dismissal was followed by the issuance of a new criminal complaint listing the same charges against the defendant. When the defendant filed a motion to reconsider the order denying his motion to suppress (under the dismissed complaint), the same motion judge denied it without a hearing.

[5] Schumaker's testimony at the motion hearing mirrored the testimony he gave at trial. Consequently, there is no need to summarize separately his testimony at the hearing. We note, however, that at the motion hearing Schumaker testified that the object the defendant removed from his pocket resembled a firearm. Specifically, Schumaker stated: "I observed when he was reaching in the left side of his pants and cargo pocket -- he had on some cargo type pants -- a dark object that resembled what I thought was a firearm came out of his pants, and was placed and fell down between the seat."

car was justified on two grounds: first, as a valid search incident to an arrest, and second, as a protective search for the trooper's safety.

"In reviewing a ruling on a motion to suppress, we accept the [motion] judge's subsidiary findings of fact absent clear error 'but conduct an independent review of [the] ultimate findings and conclusions of law'" (citation omitted). Commonwealth v. Cawthron, 479 Mass. 612, 616 (2018). "We review independently the application of constitutional principles to the facts found" (citation omitted). Commonwealth v. Amado, 474 Mass. 147, 151 (2016).

The motion to suppress was properly denied. First, as the defendant acknowledges, the stop of the automobile was legal. See Commonwealth v. Buckley, 478 Mass. 861, 865-866 (2018) (where police observe traffic violation, they are warranted in stopping vehicle). Next, the trooper's request for identification for the purpose of issuing a citation was proper, see Commonwealth v. Elysee, 77 Mass. App. Ct. 833, 843-844 (2010), and the defendant was lawfully arrested on active warrants, see Commonwealth v. Clermy, 421 Mass. 325, 326-327 (1995). The only remaining issue is whether Schumaker acted reasonably in looking under the front passenger seat to determine whether the object he saw was a firearm. We think he did.

"[A] Terry type of search may extend into the interior of an automobile so long as it is limited in scope to a protective end." Commonwealth v. Almeida, 373 Mass. 266, 272 (1977). Here, while standing outside the vehicle, Schumaker saw the defendant remove an object from his pocket and then place it between the seat and the center console. The motion judge explicitly credited the trooper's testimony that the object appeared to be a gun. These circumstances warranted further investigation. The investigation that then occurred, the search of the area under the front passenger seat, was confined to what was minimally necessary to learn whether the object was, in fact, a firearm or another weapon. Schumaker was not required to "gamble with [his] personal safety." Commonwealth v. Robbins, 407 Mass. 147, 152 (1990). We conclude that Schumaker's actions were reasonable and necessary for his protection and, therefore, the search was lawful.

Furthermore, contrary to the defendant's argument, it matters not that the defendant was handcuffed and seated in the cruiser at the time of the search. Two adults and three children were in the car. Thus, the threat to the trooper's safety and the safety of the occupants had not ceased. Robbins,

407 Mass. at 152. Indeed, to not investigate in the circumstances presented could have been dangerous.[6]

2. Sufficiency of the evidence. In reviewing a claim of insufficient evidence, we ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), quoting Jackson v. Virginia, 443 U.S. 307, 318-319 (1979). "To convict the defendant of unlawful possession of a loaded firearm, the Commonwealth [is] required to prove that the defendant knowingly possessed a firearm that was loaded with ammunition and met the legal requirements of a firearm." Commonwealth v. Johnson, 461 Mass. 44, 52 (2011). In a recent decision, decided after the trial in this case, the Supreme Judicial Court held that the Commonwealth also must prove that a defendant knew the firearm he possessed was loaded. See Commonwealth v. Brown, 479 Mass. 600, 608 (2018).

The defendant's challenge to the sufficiency of the evidence is limited to the element of knowledge as defined in Brown. That is, he contends the Commonwealth failed to satisfy

[6] Given our conclusion, we need not address the Commonwealth's alternative theory that the trooper conducted a lawful search incident to arrest.

its burden of proving that he knew the firearm was loaded. This argument fails for a simple reason: the firearm in question is a revolver and, as such, the bullets in the cylinder were clearly visible. As the court explained in Brown, supra, a rational jury could infer that an individual who possessed a firearm was aware that it was loaded from circumstantial evidence including whether it is possible to discern merely by observation whether the firearm is loaded. Here, it was possible to discern whether the revolver was loaded merely by looking at it. Consequently, the Commonwealth met its burden of proof.[7] Contrast Commonwealth v. Galarza, 93 Mass. App. Ct. 740, 748 (2018) (evidence not sufficient to support conviction of unlawful possession of loaded firearm because one could not discern from looking at firearm that it was loaded). In addition, the jury could have reasonably concluded that the defendant would have checked to see if the firearm was loaded before he put it in his pocket. See Commonwealth v. Resende, 94 Mass. App. Ct. 194, 200 (2018) (evidence sufficient to prove defendant knew firearm seized from waistband of his pants was loaded because reasonable to infer "that a person would check to

[7] The defendant's claim that the jury could not conclude that the defendant knew the firearm was loaded because none of the witnesses specifically testified about the appearance of the revolver has no merit. The revolver was introduced as an exhibit and the jurors could plainly see that the bullets would have been visible.

see if the firearm was loaded before putting it in his waistband").

3. Closing argument. The defendant maintains that several of the prosecutor's remarks in his closing argument were improper. Because the defendant did not object to these remarks at trial, we review any error for whether it created a substantial risk of miscarriage of justice. See Commonwealth v. Dirgo, 474 Mass. 1012, 1016 (2016). "The substantial risk standard requires us to determine 'if we have a serious doubt whether the result of the trial might have been different had the error not been made.'" Id., quoting Commonwealth v. Azar, 435 Mass. 675, 687 (2002), S.C., 444 Mass. 72 (2005). Bearing in mind that statements made during closing arguments are considered in the context of the whole argument, the evidence admitted at trial, and the judge's instructions to the jury, see Commonwealth v. Cole, 473 Mass. 317, 333 (2015), we conclude there was no substantial risk of a miscarriage of justice.

The defendant first contends that the prosecutor improperly used the pronoun "we," thereby aligning himself with the jury to convey his personal belief in the Commonwealth's case. Referring to Schumaker's testimony, the prosecutor stated: "We don't know what would have happened if [Trooper Schumaker] would have removed [the defendant] when he [Schumaker] first sees that firearm. We don't know that. What we do know is what he saw,

what he did, and we're here as a result of it, on a deescalated situation."

Our cases have advised against the use of the word "we" so as to avoid the possibility of improper vouching for a witness. See Commonwealth v. Jenkins, 458 Mass. 791, 797 (2011), and cases cited. See also Mass. G. Evid. § 1113(b)(3)(B) (2019). That admonition notwithstanding, it is clear that the prosecutor was arguing what the trooper knew to be true, not what he as a prosecutor knew to be true. See Commonwealth v. Melendez, 427 Mass. 214, 220 (1998). Furthermore, use of the word "we" was infrequent and appears to have been used simply as a mechanism to review the evidence. There was no error.

Second, the defendant contends that the prosecutor improperly suggested that it was unfair of defense counsel to question Schumaker's credibility. We disagree. The defense hinged on whether the jury believed Schumaker's testimony. As a result, defense counsel attempted to undermine Schumaker's credibility in closing argument. At one point, defense counsel stated that "[the trooper] never saw anything" and argued that if Schumaker had seen a gun he would not have walked away from the car. The prosecutor responded by suggesting that Schumaker was "in control of this entire situation involving a firearm, and he didn't have to draw his own," and then asked with a rhetorical flourish: "And, we question that police work." This

argument did not go beyond appropriate advocacy. The prosecutor was entitled to respond to the suggestion that Schumaker had fabricated a story about seeing a firearm and fairly suggested that his conduct demonstrated his control of the situation. We conclude there was no error, let alone a substantial risk of a miscarriage of justice.

Next, the defendant claims there was no evidentiary support for the prosecutor's suggestion to the jury that the defendant knew about the active warrants. The remark complained of arose in response to defense counsel's statement that the defendant cooperated and acted like a "gentleman" because he did not know the gun was in the car and he had nothing to hide. The prosecutor offered an alternative reason for the defendant's calm demeanor and asked the jury to draw a "reasonable inference" that the defendant cooperated with Schumaker because he knew he had active warrants and was subject to arrest and, therefore, he discarded the gun. The defendant was calm, the prosecutor argued, because the gun was not on his person when he was arrested.

To begin with, we do not think it unreasonable to suggest that the defendant was aware that he had active warrants. We ascribe a certain sophistication to jurors and are confident that the impact of this statement, even if error, did not create a substantial risk of a miscarriage of justice. Moreover, the

prosecutor was entitled to offer an alternative reason for the defendant's calm demeanor. Accordingly, this claim fails.

Finally, the prosecutor concluded his argument by saying: "Your common sense, ladies and gentlemen, is the greatest tool you brought here with you today in assessing the evidence in this case. Find the defendant guilty." The defendant claims that these remarks improperly implied that the jury had a duty to convict. We disagree. "It 'cross[es] the permissible line of advocacy' for a prosecutor 'to suggest[] it is the jury's "job" or "duty" to return verdicts of guilty.'" Commonwealth v. Collins, 92 Mass. App. Ct. 395, 400 (2017), quoting Commonwealth v. Adams, 434 Mass. 805, 822 (2001). Here, however, the challenged comment was not an explicit statement of a duty to convict. For example, in Commonwealth v. Deloney, 59 Mass. App. Ct. 47, 53 (2003), a case upon which the defendant relies, the prosecutor stated, "Now is the time for justice. Find him guilty." Although we did not approve of the comment, we determined that it was not prejudicial. Id. Similarly, even if we were to conclude that the comment here could be understood in the manner suggested by the defendant, it did not create a substantial risk of a miscarriage of justice.

4. Jury instruction. The trial judge did not instruct the jury that the Commonwealth is required to prove beyond a reasonable doubt that the defendant knew the firearm was loaded.

See Brown, 479 Mass. 608.[8] Thus, the trial judge omitted an essential element of the offense. Because the defendant did not object, we must determine whether the error created a substantial risk of miscarriage of justice.[9] Commonwealth v. Gabbidon, 398 Mass. 1, 4-5 (1986). In the performance of this task, we "review the evidence and the case as a whole, considering the strength of the Commonwealth's case, as well as the nature and significance of the alleged errors," Commonwealth v. Chase, 433 Mass. 293, 299 (2001), and "pay particular attention to those issues actively contested at trial," Gabbidon, supra at 5.[10] We will reverse a conviction "only in the extraordinary situation where, after such a review, we are left with uncertainty that the defendant's guilt has been fairly adjudicated." Chase, supra.

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[8] As we previously noted, Brown was decided after the trial in this case had concluded.

[9] Although the omission of an essential element of the charged crime is an error of constitutional dimension, it "is not among the very limited class of structural errors subject to automatic reversal, and upon proper objection would be subject to harmless error analysis." Commonwealth v. Redmond, 53 Mass. App. Ct. 1, 7 (2001), citing Chapman v. California, 386 U.S. 18, 24 (1967). See Commonwealth v. Pfeiffer, 482 Mass. 110, 128-130 (2019).

[10] Ordinarily, we also consider the possibility that the absence of an objection was the result of a reasonable tactical decision. See Azar, 435 Mass. at 687. However, that factor is not present here and we need not address it.

We begin with the strength of the Commonwealth's case to determine whether the evidence was sufficient to prevent a substantial risk of a miscarriage of justice. That is, we ask whether the element of knowledge can be ineluctably inferred from the evidence. See Commonwealth v. McCray, 93 Mass. App. Ct. 835, 837 (2018), quoting Azar, 435 Mass. at 688 (erroneous instruction that allows jury to convict without finding essential element of offense does not create substantial risk of miscarriage of justice when element at issue can be "ineluctably inferred" from evidence). To put it differently, we ask whether the evidence required the jurors to find that the defendant knew the revolver was loaded. Azar, supra.

The uncontroverted evidence in this case permits us to conclude that the element of knowledge can be ineluctably inferred. In order to convict the defendant, the jury necessarily credited Schumaker's testimony and accepted the Commonwealth's version of events. Thus, the jury first found beyond a reasonable doubt that the defendant had a revolver in his pocket, which he removed and placed or dropped between his seat and the center console when Schumaker approached the car. Second, the jury necessarily found beyond a reasonable doubt that the firearm was loaded. Because the bullets in the cylinder were clearly visible and a person carrying a firearm on his person would know whether or not it was loaded, had the

jurors been properly instructed, they necessarily would have found that the defendant knew the firearm was loaded. Contrast Brown, 479 Mass. at 608 (defendant could not have discerned whether gun was loaded merely by looking at it); Galarza, 93 Mass. App. Ct. at 748 (same).[11] That is, the jury could have reasonably concluded that the defendant would have checked to see if the firearm was loaded before he put it in his pocket. See Resende, 94 Mass. App. Ct. at 200 (evidence sufficient to prove defendant knew firearm seized from his waistband was loaded because reasonable to infer "that a person would check to see if the firearm was loaded before putting it in his waistband"). The evidence cannot rationally lead to a contrary conclusion. It is simply unreasonable to conclude that the

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[11] This case is unlike Commonwealth v. Mitchell, 95 Mass. App. Ct. 406 (2019), upon which the dissent relies. Post at . In Mitchell, supra at 412-414, a majority of our court concluded that the failure to instruct the jury that the Commonwealth must prove the defendant knew the firearm was loaded resulted in a substantial risk of a miscarriage of justice, in part, because the jury returned a split verdict, indicating that the jurors did not credit all of the Commonwealth's evidence. Here, there is no question that the jury found the Commonwealth's evidence credible. Azar, 435 Mass. at 688, cited by the dissent, is likewise distinguishable. Post at . In Azar, the judge erroneously instructed the jury on the third prong of malice. Id. at 682. The error created a substantial risk of a miscarriage of justice because the element of malice was contested, the evidence did not require a finding of malice under the correct definition, and the prosecutor's argument invited the jury to proceed under the erroneous definition. Id. at 688-690. None of those factors is present here.

defendant never looked at the firearm -- at any time -- before he put it in his pocket. In other words, the evidence was inconsistent with anything other than a finding that the element of knowledge was satisfied. See Commonwealth v. Shea, 398 Mass. 264, 270-271 (1986).

Moreover, contrary to the assertion in the dissent, the absence of direct evidence about how the defendant came into possession of the gun is of no consequence. Post at . The jury did not need to know precisely the manner in which the defendant obtained the gun in order to be certain that, when he put it in his pocket, he knew it was loaded. When we evaluate the evidence under the substantial risk of a miscarriage of justice standard, we do not engage in theoretical possibilities. The possibility that the gun belonged to someone else or the possibility that the jury could examine the firearm and conclude that a person holding it would not know it was loaded does not amount to a substantial risk of a miscarriage of justice. "As the terminology implies, a 'substantial risk of a miscarriage of justice' refers to a risk that has some genuine substance to it. That standard does not encompass an abstract, theoretical possibility of a miscarriage of justice, utterly divorced from the case as it was tried." Commonwealth v. Russell, 439 Mass. 340, 351 (2003). See Commonwealth v. Proulx, 61 Mass. App. Ct. 454, 466 (2004), quoting Commonwealth v. Amirault, 424 Mass.

618, 652 (1997) ("A mere possibility of a different outcome will not satisfy [the burden to show there is a substantial risk that the outcome of the trial would have been different]. . . . [T]he formula asks if there is a substantial risk of a miscarriage of justice").[12]

Because there was "no likelihood the jury's verdict would have been different if the omitted instruction had been given," Commonwealth v. Palmer, 59 Mass. Ap. Ct. 415, 426 (2003), we conclude that this case falls within the category of cases where a flawed jury instruction does not require us to order a new trial.

Judgments affirmed.

[12] The dissent contends that the issue of knowledge that the gun was loaded was actively contested because that question is related to the issue of possession, which was disputed. Post at . The dissent is correct that, once the jury resolved the question of possession, had it been properly instructed, it would have proceeded to grapple with the issue whether the defendant knew the gun was loaded. Post at . But, again, because a visual inspection of the firearm revealed only one thing, namely that the firearm was loaded, the jury would have been compelled to find knowledge. Contrast Commonwealth v. Cowans, 52 Mass. App. Ct. 811, 820-821 (2001) (error in jury instruction created substantial risk of miscarriage of justice where it was clear from jury's questions that they grappled with elements of offense).

SHIN, J. (dissenting, with whom Sullivan, J., joins). I respectfully dissent from that part of the majority opinion concluding that no new trial is warranted despite the omission of an instruction on an essential element of the crime of unlawful possession of a loaded firearm. The substantial risk of a miscarriage of justice standard requires that we order a new trial where "we are left with uncertainty that the defendant's guilt has been fairly adjudicated." Commonwealth v. Chase, 433 Mass. 293, 299 (2001). Although there are scenarios consistent with the evidence that would have permitted a properly instructed jury to acquit, the majority nonetheless concludes that there is no substantial risk of a miscarriage of justice because, on their view of the evidence, those scenarios would not have factored into the jury's deliberations. Ante at . But our role is not to decide what evidence (or lack thereof) a hypothetical jury would or would not consider; rather, the relevant inquiry is whether we are left with doubt that the defendant's guilt was fairly adjudicated by the finder of fact. And here, the defendant's guilt was not adjudicated at all by the finder of fact because the jury were not instructed on one of the essential elements that make up the crime.

Because a defendant has the fundamental right to have a jury determine whether he has been proven guilty, the Supreme Judicial Court has said that an instructional error on an

element of the offense can be overcome by the strength of the evidence only where the evidence is so overwhelming that the element can be "ineluctably inferred". Commonwealth v. Azar, 435 Mass. 675, 688 (2002), S.C., 444 Mass. 72 (2005). The evidence in this case does not meet that standard. Because neither party focused on whether the defendant knew the firearm was loaded, no evidence whatsoever was offered on how he came into possession of the firearm, when he did (for instance, whether before or after entering the car), whether he had the opportunity to examine it, whether he in fact did so, or whether he viewed it from a vantage point that would have allowed him to see the bullets.[1] On this record, while a properly charged jury might still have found the defendant guilty, the missing element of knowledge cannot be ineluctably inferred.

A new trial is required in these circumstances. The omission of the instruction was an error of constitutional dimension because it resulted in "the absence of a 'complete verdict'" in "violat[ion of] the Sixth Amendment's jury trial

[1] As set forth in the majority's rendition of facts, the stop occurred in the nighttime, and there were two other adults and a teenager in the car, which had been purchased, preowned, by the defendant's mother only seven days prior. Ante at . In addition, the revolver was loaded with four bullets, visible from certain angles, but capable of holding five. There was no direct evidence that the defendant brought the firearm into the car with him or that he had been seen with the firearm previously.

guarantee." Neder v. United States, 527 U.S. 1, 12 (1999). See Commonwealth v. Redmond, 53 Mass. App. Ct. 1, 7 (2001). While the defendant did not preserve the error, he is still entitled to a new trial if the error created a substantial risk of a miscarriage of justice. See Commonwealth v. Thomas, 401 Mass. 109, 117-118 (1987); Commonwealth v. Gabbidon, 398 Mass. 1, 5 (1986).[2] In making that determination, we "consider the strength

[2] Recently, in Commonwealth v. Pfeiffer, 482 Mass. 110, 128-130 (2019), the Supreme Judicial Court reviewed an instruction that misdescribed an element of the crime under the substantial risk of a miscarriage of justice standard, but held alternatively that, even assuming a preserved error, it was harmless. But while the case law is clear that an unpreserved error is analyzed for whether it created a substantial risk of a miscarriage of justice, neither the Supreme Judicial Court nor this court has specifically decided whether a preserved error would give rise to structural error under art. 12 of the Massachusetts Declaration of Rights. In fact, there appears to be no case prior to Pfeiffer that has addressed a preserved error in this context. Although several decisions of this court, beginning with Redmond, 53 Mass. App. Ct. at 7, have said in dicta that omitting or misdescribing an element of the crime would, upon proper objection, be subject to harmless error review, those decisions cite only cases deciding the question as a matter of Federal constitutional law. See, e.g., Commonwealth v. McCray, 93 Mass. App. Ct. 835, 846 (2018). Several State courts have held, as a matter of State constitutional law, that taking an element of the crime away from the jury is an error of such magnitude that it constitutes structural error requiring automatic reversal. See, e.g., Jordan v. State, 420 P.3d 1143, 1154-1157 (Alaska 2018); Harrell v. State, 134 So.3d 266, 270-275 (Miss. 2014) (en banc); State v. Kousounadis, 159 N.H. 413, 428-429 (2009). These courts agree with Justice Scalia's dissent in Neder, in which he concluded that "[h]armless-error review applies only when the jury actually renders a verdict -- that is, when it has found the defendant guilty of all the elements of the crime." 527 U.S. at 38 (Scalia, J., concurring in part and dissenting in part).

of the Commonwealth's case, the nature of the error, the significance of the error in the context of the trial, and the possibility that the absence of an objection was the result of a reasonable tactical decision." Azar, 435 Mass. at 687.

The nature of the error here weighs heavily in the analysis. The jury trial right is of such basic importance that, "[w]hen an error 'pertains to the definition given to the jury of the crime charged, the possibility of a substantial risk of a miscarriage of justice is inherent.'" Commonwealth v. Cowans, 52 Mass. App. Ct. 811, 820 (2001), quoting Commonwealth v. Hall, 48 Mass. App. Ct. 727, 730 (2000). See Azar, 435 Mass. at 687 (substantial risk of miscarriage of justice "standard is particularly well suited to a situation . . . where the elements of a crime are erroneously stated in the jury charge"); Commonwealth v. Glenn, 23 Mass. App. Ct. 440, 445 (1987) ("For us to conclude . . . that the error . . . did not create a substantial risk of a miscarriage of justice would be to minimize the importance of jury instructions correctly defining what conduct the Legislature has sought to make a criminal offense"). Still, even where such error has occurred, it has not been uncommon for our appellate courts to affirm convictions based on the absence of a substantial risk of a miscarriage of justice. The three unifying considerations that emerge from those cases, however, have no application to this one.

First, some cases, consistent with Azar, have found no substantial risk of a miscarriage of justice because the presence of the omitted or misdescribed element could be "'ineluctably inferred' from the evidence." Commonwealth v. Gilbert, 447 Mass. 161, 170 (2006), quoting Azar, 435 Mass. at 688. See Commonwealth v. Proulx, 61 Mass. App. Ct. 454, 462-463 (2004); Commonwealth v. Young, 56 Mass. App. Ct. 60, 64-65 (2002). The quantum of evidence required has been variously described as "overwhelming," Commonwealth v. Alphas, 430 Mass. 8, 15 (1999); Commonwealth v. Palmer, 59 Mass. App. Ct. 415, 426 (2003); Commonwealth v. Medina, 43 Mass. App. Ct. 534, 536 (1997); "virtually irrefutable," Alphas, supra at 14; "inconsistent with [anything] other than" a finding that the element was satisfied, Commonwealth v. Shea, 398 Mass. 264, 270 (1986); and so compelling that there was "no likelihood that the jury's verdict would have been different if the omitted instruction had been given," Palmer, supra.[3] The common thread uniting these cases is that the strength of the evidence

[3] I note that Federal courts applying plain error review, which requires a determination whether an error affected the defendant's substantial rights, have also consistently looked to whether the evidence on an omitted or misdescribed element was overwhelming. See, e.g., Johnson v. United States, 520 U.S. 461, 470 (1997); United States v. Recio, 371 F.3d 1093, 1103 (9th Cir. 2004); United States v. Guevera, 298 F.3d 124, 127 (2d Cir. 2002); United States v. Barbosa, 271 F.3d 438, 461 (3d Cir. 2001); United States v. Duarte, 246 F.3d 56, 62 (1st Cir. 2001); United States v. Strickland, 245 F.3d 368, 382 (4th Cir. 2001).

"required" the jury to find that the Commonwealth met its burden of proving the omitted or misdescribed element. Gilbert, supra at 173, citing Azar, supra at 682.[4]

Second, as we held recently in Commonwealth v. Woods, 94 Mass. App. Ct. 761, 768 (2019), and Commonwealth v. McCray, 93 Mass. App. Ct. 835, 847-848 (2018), no substantial risk of a miscarriage of justice arises from an omitted or erroneous instruction on an element of the offense where the other

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[4] I view Commonwealth v. Pfeiffer, 482 Mass. 110 (2019), to fall within this category of cases, with an additional distinguishing factor. There, the judge gave an instruction on arson that provided the jury two alternative routes to convict: (1) if they found that the defendant intentionally set the fire; or (2) if they found that she accidentally or negligently set the fire, but then willfully or maliciously failed to extinguish or to report it. Id. at 124. The court concluded that the second part of the instruction was erroneous because the arson statute does not criminalize the accidental or negligent setting of fires. Id. at 123-128. But the court went on to conclude that the error did not result in a substantial risk of a miscarriage of justice, or alternatively was harmless, because the Commonwealth "consistently argued" and the evidence "compel[led]" a finding that the defendant set the fire intentionally, resulting in a valid conviction under the first part of the instruction. Id. at 128. See id. at 129 ("Commonwealth never argued that the fire was accidentally or negligently set," and jury could not "have reached such a conclusion based on any reasonable view of the evidence"). But see id. at 142 (Gants, C.J., dissenting) (instruction not harmless and created substantial risk of miscarriage of justice because it "allowed the jury to convict the defendant . . . even if they had a reasonable doubt whether the defendant intended to burn any part of the building"). In contrast, here, the jury were not given an alternative route to convict that would have cured the constitutional infirmity in the instruction; the required element of knowledge was omitted altogether.

verdicts returned by the jury demonstrate that they necessarily found the element in question. See Commonwealth v. Britt, 465 Mass. 87, 98-99 (2013) (in case of murder in first degree, omission of instruction on knowledge of dangerous weapon did not create substantial likelihood of miscarriage of justice where it was clear from jury's verdicts that they necessarily found that defendant herself possessed a firearm). Cf. Commonwealth v. Mitchell, 95 Mass. App. Ct. 406, 420-421 (2019) (substantial risk of miscarriage of justice resulted from omitted instruction on knowledge that firearm was loaded where jury returned split verdict, suggesting they may not have credited some of Commonwealth's evidence).

Third, a number of decisions have found no substantial risk of a miscarriage of justice where the omitted or misdescribed element did "not relate to an issue actively contested at trial." Gabbidon, 398 Mass. at 5. In these cases the defense either effectively conceded the element,[5] or the defense theory was misidentification[6] or alibi[7] (i.e., that the defendant was

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[5] See Commonwealth v. Spearin, 446 Mass. 599, 609 (2006); Commonwealth v. Figueroa, 83 Mass. App. Ct. 251, 263-264 (2013); Commonwealth v. Mitchell, 67 Mass. App. Ct. 556, 565-566 (2006).

[6] See Shea, 398 Mass. at 269; Gabbidon, 398 Mass. at 5; Commonwealth v. Garcia, 82 Mass. App. Ct. 239, 250 (2012); Proulx, 61 Mass. App. Ct. at 462-463; Commonwealth v. Picher, 46 Mass. App. Ct. 409, 411 (1999); Commonwealth v. Mezzanotti, 26 Mass. App. Ct. 522, 529 (1988).

not even present at the scene of the crime), or fabrication[8] (i.e., that the events of the crime did not occur at all). While several of the cases go on to assess the strength of the evidence,[9] others find no substantial risk of a miscarriage of justice based solely on the nature of the defense at trial. The implicit assumption underlying this latter group of cases -- and one that I think informs the analysis of what constitutes a "contested" issue in this context -- is that, once the jury rejects a defense theory of misidentification, alibi, or fabrication, they would not then go on to grapple with the elements of the crime.

That assumption is difficult to square with the principle, invoked with regularity in a variety of other contexts, that juries are presumed to follow the instructions they are given. It requires us to accept that a jury, empaneled for the very purpose of deciding whether the defendant is guilty of a crime, would not consider whether the Commonwealth proved the elements that make up the crime. But Cowans illustrates why we should

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[7] See Commonwealth v. Jenkins, 47 Mass. App. Ct. 286, 292 (1999).

[8] See Commonwealth v. Robinson, 444 Mass. 102, 106-107 (2005); Commonwealth v. Mienkowski, 91 Mass. App. Ct. 668, 671, 675 (2017).

[9] See Shea, 398 Mass. at 269-270; Gabbidon, 398 Mass. at 5-6; Proulx, 61 Mass. App. Ct. at 464-465.

question the assumption. There, the judge gave an instruction on the fourth element of home invasion (force or the threat of imminent force) that incorrectly omitted the requirement of intent. Cowans, 52 Mass. App. Ct. at 816-819. Though the sole theory of the defense was misidentification, we concluded that the erroneous instruction gave rise to a substantial risk of a miscarriage of justice, in part because during deliberations the jury asked several questions about the elements of home invasion, including specifically about the element of force or the threat of imminent force. See id. at 820-821. Thus, the questions revealed that, while the jury rejected the defendant's theory that he was misidentified, they still went on to "grapple[] with the elements of" the crime, as the judge instructed them to do. Id. at 820. See Commonwealth v. Colon, 52 Mass. App. Ct. 725, 731 (2001) (though defense theory was misidentification, missing instruction on knowledge created substantial risk of miscarriage of justice because "Commonwealth had the burden of proving beyond a reasonable doubt" each element of crime).

Returning to the facts here, I believe that this case fits within none of the above categories and is instead in line with decisions finding a substantial risk of a miscarriage of justice arising from an instructional error on an element of the charged

crime.[10] The evidence, while sufficient to show that the defendant knew the firearm was loaded, did not require the jury to make such a finding. See Azar, 435 Mass. at 688 ("The question is whether the evidence required the jurors to find [the misdescribed element]; only then can we say that the erroneous instructions were nonprejudicial"). I grant that, because the jury convicted the defendant, they must have credited Schumaker's testimony that he saw the gun fall out of the defendant's pocket. But even so, given the total absence of evidence about how and when the defendant came into possession of the gun, and whether he had the opportunity to and did in fact examine it, the jury still could have found a lack of proof beyond a reasonable doubt that he knew it to be loaded. See id. at 689 (substantial risk of miscarriage of justice arose from erroneous instruction on malice because, though Commonwealth's evidence was strong, "malice, as it is properly defined, [could not] be ineluctably inferred"); Thomas, 401 Mass. at 119 (substantial risk of miscarriage of justice arose from omitted instruction on knowledge "insofar as the jury may have convicted the defendant . . . without a finding beyond a reasonable doubt"

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[10] See, e.g., Azar, 435 Mass. at 687-690; Thomas, 401 Mass. at 118-119; Commonwealth v. Resende, 94 Mass. App. Ct. 194, 202-203 (2018); Commonwealth v. Cherubin, 55 Mass. App. Ct. 834, 840-843 (2002); Redmond, 53 Mass. App. Ct. at 8; Cowans, 52 Mass. App. Ct. at 820-822; Colon, 52 Mass. App. Ct. at 731; Glenn, 23 Mass. App. Ct. at 444-445.

as to that element); Cowans, 52 Mass. App. Ct. at 821 (substantial risk of miscarriage of justice arose from erroneous instruction where evidence did not "compel[]" finding that misdescribed element was satisfied).

In concluding otherwise, the majority posits that knowledge can be ineluctably inferred because the firearm was a revolver with visible bullets and a jury could infer that the defendant would have inspected it before putting it in his pocket. Ante at . But in my view, that is the same as saying that the evidence was sufficient, which is not enough to overcome the constitutional defect in the instruction. So much is clear from the case law.[11]

The majority further states that it is not our role to consider theoretical views of the evidence that would support a jury verdict of not guilty. Ante at . But to the contrary, under Azar we must consider whether there are scenarios consistent with the evidence that would have allowed the jury to find a failure of proof on the omitted element; only then can we determine whether the evidence "required" the jury to find the element. 435 Mass. at 688. Those scenarios exist

[11] See Commonwealth v. Wassilie, 482 Mass. 562, 577 (2019); Azar, 435 Mass. at 688-689; Thomas, 401 Mass. at 118; Commonwealth v. Resende, 94 Mass. App. Ct. 194, 200-201, 203 (2018); Redmond, 53 Mass. App. Ct. at 8; Cowans, 52 Mass. App. Ct. at 821; Glenn, 23 Mass. App. Ct. at 444.

here. For example, the evidence is not inconsistent with a jury finding that the gun belonged to someone else in the car and was handed to the defendant in circumstances where he did not have, or take, the opportunity to examine it. To conclude in this situation that the jury were nonetheless compelled to find that the defendant knew the gun was loaded removes the element of knowledge from the case entirely. Such a conclusion in effect sanctions a mandatory presumption -- it means that no substantial risk of a miscarriage of justice would have resulted even had the judge instructed the jury to presume the defendant's knowledge if the Commonwealth proved certain predicate facts (i.e., that the defendant had a loaded revolver on his person). But an instruction that directs a jury to apply a mandatory presumption would be unconstitutional because it "invade[s the] factfinding function which in a criminal case the law assigns solely to the jury" and relieves the Commonwealth of its burden "to prove beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged" (quotations and citation omitted). Sandstrom v. Montana, 442 U.S. 510, 523 (1979). See Francis v. Franklin, 471 U.S. 307, 317 (1985). Similarly, here, the Commonwealth must be put to its burden of proof, and whether knowledge can be inferred from the evidence that the defendant had the gun in his pocket is a question that must be decided by a jury of his peers. Cf. Commonwealth v.

Abubardar, 482 Mass. 1008, 1011 (2019) (missing self-defense instruction on nondeadly force created substantial risk of miscarriage of justice because it "effectively lowered the Commonwealth's burden of proof as to self-defense").

This case is also unlike the second category of cases described above where the verdicts returned by the jury allowed us to conclude that they necessarily found the elements in question. See Woods, 94 Mass. App. Ct. at 768; McCray, 93 Mass. App. Ct. at 847-848. The convictions here do not mean that the jury necessarily found that the defendant knew the firearm was loaded. In fact, we should presume that the jury did not find such knowledge because the trial judge, proceeding without the benefit of Commonwealth v. Brown, 479 Mass. 600 (2018), did not instruct them that they had to do so. This error was compounded by the prosecutor, also proceeding without the benefit of Brown, who argued in closing that the jury need determine only whether the firearm was loaded.

Nor does this case involve the situation where the omitted instruction did "not relate to an issue actively contested at trial." Gabbidon, 398 Mass. at 5. Although neither party focused on the defendant's knowledge that the firearm was loaded, presumably because neither knew it was an element of the crime, "a defendant cannot relieve the Commonwealth of its burden of proving every element of a crime beyond a reasonable

doubt by failing to contest an essential element of that crime at trial."[12] Id. Accord Shea, 398 Mass. at 269; Cowans, 52 Mass. App. Ct. at 821-822; Colon, 52 Mass. App. Ct. at 731. Again, the cases that assume a jury would not have grappled with the elements of the crime all arise in the context where the defendant conceded the misdescribed or omitted element or the defense theory was of such a nature as to not implicate the element at all. Putting aside the soundness of the assumption, the nature of the defense here precludes us from drawing it. The defense was lack of knowledge of the firearm. That issue is "relate[d] to" whether the defendant knew the firearm was loaded, Gabbidon, supra, and we can only reasonably assume that a jury, properly instructed, would have grappled with both questions. Cf. Azar, 435 Mass. at 689 ("jury might well have rejected, and apparently did reject, the defendant's explanation that the [victim's] injuries occurred accidentally," but still "could have found on [the] evidence that the defendant's acts, although intentional" were not committed with malice); Thomas, 401 Mass. at 118 (though defense theory was that defendant left victim's apartment without assaulting her, omission of

[12] Defense counsel can reasonably pursue a strategy to "marshal the evidence" supporting one defense and "leave the discussion of the law to the judge" on another. Commonwealth v. Callahan, 401 Mass. 627, 636 (1988). See Commonwealth v. Stockwell, 426 Mass. 17, 22 (1997).

instruction that he must have known that victim had intellectual disability created substantial risk of miscarriage of justice because jury "were not told that they must find that such knowledge existed in order to convict").

In the end, this case underscores why a strict application of the Azar standard should govern in the absence of a complete jury verdict because, otherwise, the validity of the conviction would depend on how an appellate panel, rather than a jury, assesses the strength of the evidence of the defendant's guilt. "[O]ur role," however, "is not to sit as a second jury"; rather, "our focus is on whether the evidence required the jury to find" the element on which they were not instructed. 435 Mass. at 689.[13] As in Azar, the evidence here did not, the error was

[13] This case does not give us occasion to decide how the substantial risk of a miscarriage of justice standard differs from the harmless error standard when we review an error of this kind. As discussed above, no case before Commonwealth v. Pfeiffer, 482 Mass. 110 (2019), has addressed a preserved error in this context. But I note that the standards converge in other contexts. For example, whether or not a defendant moved for a required finding of not guilty, there is little to no difference in how we review challenges to the sufficiency of the evidence introduced during the trial as a whole. See Commonwealth v. McGovern, 397 Mass. 863, 867-868 (1986) ("findings based on legally insufficient evidence are inherently serious enough to create a substantial risk of a miscarriage of justice"). See also United States v. Strickland, 245 F.3d 368, 380 (4th Cir. 2001) (applying Neder's harmless error test on plain error review of instructional error on element of offense, and recognizing that ultimate inquiry, "whether substantial rights of the defendant were affected," is same under both standards though burdens of proof are allocated differently).

magnified by the prosecutor's closing argument, and there was no reasonable tactical basis for defense counsel's failure to object to the instructions as given. See id. See also Glenn, 23 Mass. App. Ct. at 445 n.1. A substantial risk of a miscarriage of justice exists in these circumstances, requiring a new trial. I respectfully dissent.