COMMONWEALTH vs. JESSE BRULE.

No. 19-P-30.

Bristol. November 5, 2019. - July 22, 2020.

Present: Rubin, Wolohojian, & Henry, JJ.

Assault and Battery by Means of a Dangerous Weapon. Firearms. Imprisonment, Credit for time served. Practice, Criminal, Waiver, Duplicative convictions.

Indictments found and returned in the Superior Court Department on September 29, 2016.

The cases were tried before Rosemary Connolly, J.

Kevin P. DeMello for the defendant.
Stephen C. Nadeau, Jr., Assistant District Attorney, for the Commonwealth.

HENRY, J. This case presents the question whether the defendant's conviction of assault and battery by means of a dangerous weapon causing serious bodily injury in violation of G. L. c. 265, § 15A (c) (i), is duplicative of his conviction of assault and battery by discharge of a firearm in violation of

G. L. c. 265, § 15E (a), where both convictions were based on a single discharge of a firearm that caused the victim serious bodily injury.[1] On appeal, the defendant claims that the two assault and battery convictions are duplicative, and further argues that the judge erred by permitting the Commonwealth to introduce evidence of the circumstances of his arrest in Rhode Island for possession of a firearm, and by denying his request to receive credit against his sentences for the time he spent incarcerated in Rhode Island. We affirm.

Background. The jury could have found the following facts. In the early morning hours of August 5, 2016, the victim, Angelo Patino, saw three people -- including the defendant -- looking into cars on parked on the street where Patino lived. When the three people approached Patino's car, he woke his friend, Daniel Smith, and they went outside.

Patino and Smith tried to talk to the people. The defendant fled, and Patino and Smith gave chase, first on foot and then by car. When the two caught up with the defendant, he pointed a gun at them and told them to get out of the car, which they did. The defendant then extended his arm and pointed the gun at Smith. Patino ran toward the defendant to try to take the gun away, at which point the defendant shot him in the right

[1] The defendant also was convicted of unlawful possession of a firearm, in violation of G. L. c. 269, § 10 (a).

shoulder area. Surveillance video footage captured this encounter and showed white flashing coming from Patino's hand as he ran toward the defendant.[2] After Patino had been shot, he then wrestled with the defendant on the ground to try to take possession of the gun. The defendant ended up on top of Patino and shot him in the chest before running away. Smith drove Patino to the hospital. The parties stipulated that Patino had two bullet hole entry wounds and two bullet hole exit wounds. Smith then brought a police officer to the scene of the shooting, where two spent .45 caliber shell casings stamped with "W-W," a spent projectile, and the defendant's passport were found.

The Commonwealth presented evidence that approximately two weeks after the shooting, the defendant was arrested in Rhode Island. A Pawtucket, Rhode Island police officer testified that he responded to a call from a homeowner in "one of the nicer" residential neighborhoods in Pawtucket around 11 P.M. on August 22, 2016, and encountered the defendant. The defendant appeared "uneasy" and seemed to the officer like he was "trying to look for a way to get away." The Pawtucket officer performed a Terry-type frisk "[d]ue to [the defendant's] inconsistency in his story, where he was coming and going, and his actions," and

[2] Patino denied having a weapon.

located a black Glock 21, generation 4, .45 caliber firearm in the defendant's waistband. This firearm was "consistent with" the .45 caliber shell casings found at the shooting scene. After his arrest, the defendant remained in custody in Rhode Island until his transfer to Massachusetts.

Discussion. 1. Evidence related to the defendant's arrest in Rhode Island. a. Admission of detailed testimony. The defendant first asserts that the judge erred in admitting testimony that officers responded to a call from a homeowner in a "really nice residential area," in Pawtucket, Rhode Island, and arrested the defendant upon finding him in the area and in possession of the Glock firearm. The defendant argues that this testimony cast him as a suspect for an unrelated, yet similar, burglary crime in Rhode Island and was unfairly prejudicial. The defendant objected to the testimony, and the judge overruled the objection without explanation. Accordingly, we examine the record to determine whether its admission constituted prejudicial error. Stated differently, we must ensure that the error "did not influence the jury, or had but very slight effect." Commonwealth v. Niemic, 483 Mass. 571, 580 n.14 (2019), quoting Commonwealth v. Canty, 466 Mass. 535, 545 (2013).

Even if we assume that the judge should not have admitted this testimony, reversal of the convictions is not warranted.

The jury also heard testimony that the victim saw the defendant looking through cars on the victim's street in the middle of the night with a flashlight, duffle bag, and backpack. Given this other evidence, the testimony about the defendant's presence in a nicer neighborhood in Rhode Island and his uneasiness during his encounter with the police two weeks after he shot the victim had little, if any, influence over any conclusions the jury might have drawn about the defendant's activities leading up to the confrontation with and shooting of the victim. It is undisputed the victim was shot, and the identity of the defendant was not in dispute. There was, therefore, no prejudicial error.

b. Lawfulness of frisk. The defendant next challenges the lawfulness of the patfrisk conducted by the Pawtucket police officer, arguing that the firearm found on the defendant should be excluded. See Commonwealth v. Narcisse, 457 Mass. 1, 6-7 (2010), citing Terry v. Ohio, 392 U.S. 1, 30 (1968). Because the defendant failed to raise this issue in a pretrial motion to suppress, he has waived the argument. Although we review unpreserved claims of error to determine whether there was a substantial risk of a miscarriage of justice, because the factual record was undeveloped at trial, any claim of error should have been brought first in a motion for a new trial. See Commonwealth v. Dew, 478 Mass. 304, 309-310 (2017). In this

case, the record does not permit such review of this waived issue; defense counsel not only failed to raise the issue below but also conceded that the officer acted in accordance with proper procedure. Where the Commonwealth was not put on notice of the need to present any evidence on this issue at trial, we must "decline to reach the merits of the issue raised for the first time on appeal because it depends on the development of facts not in the record before us." Commonwealth v. Santos, 95 Mass. App. Ct. 791, 798 (2019).

2. Credit for time served. The defendant next contends that he should receive credit for the 290 days he spent in custody in Rhode Island before being transferred to Massachusetts to avoid serving "dead time" not credited to any sentence. See Commonwealth v. Milton, 427 Mass. 18, 24 (1998). The Rhode Island charges have remained outstanding for over two years with no attempt to prosecute them.

Generally, to avoid "dead time" where different offenses are separately charged, "[f]airness requires that a prisoner not be penalized or burdened by a denial of credit because he has been acquitted or because the prosecutor has seen fit not to go forward on the [unrelated] charges." Commonwealth v. Foley, 17 Mass. App. Ct. 238, 243-244 (1983), overruled on other grounds, Commonwealth v. Amirault, 415 Mass. 112, 117 n.9 (1993). Here, however, the charges are still pending in Rhode Island.

Therefore, the time served is not "dead time," at least not yet, and we decline to speculate as to whether the Rhode Island charges will be prosecuted or whether the defendant will be convicted of an offense in that State. On this record, the trial judge properly declined to award credit for the time spent in custody in Rhode Island.

3. Duplicative convictions. The defendant contends that his convictions of (1) assault and battery by discharge of a firearm (AB-DFA), in violation of G. L. c. 265, § 15E (a), and (2) assault and battery with a dangerous weapon causing serious bodily injury (ABDW-SBI), in violation of G. L. c. 265, § 15A (c) (i), are duplicative, and the judgment on the charge of AB-DFA should be vacated and that verdict should be set aside. Whether two different crimes are duplicative is a legal question, and our review is de novo. See Commonwealth v. Rodriguez, 476 Mass. 367, 369 (2017). The defendant preserved the issue.

In this case, the Commonwealth does not dispute that the two convictions were based on a single discharge of a firearm.[3]

[3] Given that multiple shots were fired and hit the victim, the Commonwealth might have avoided the issue we now decide had it sought indictments for each shot and asked that the jury be instructed on distinct acts. See Commonwealth v. Maldonado, 429 Mass. 502, 509 (1999) (where defendant shot victim twice, "[w]hether the shootings were separate and distinct acts or part of a single criminal episode was a question of fact for the jury to resolve"). See also Commonwealth v. Beal, 474 Mass. 341,

A defendant may be punished for two crimes arising out of the same conduct so long as each crime requires proof of an element that the other does not. See Commonwealth v. Vick, 454 Mass. 418, 431 (2009); Morey v. Commonwealth, 108 Mass. 433, 434 (1871). Under this elements test, "[a]s long as each offense requires proof of an additional element that the other does not, neither crime is a lesser-included offense of the other, and convictions [of] both are deemed to have been authorized by the Legislature and hence not [duplicative]" (quotation and citation omitted). Vick, supra. "[W]e consider only the elements of the crimes, not the facts to be proved or the evidence adducted to prove them" (citation omitted). Id.

ABDW-SBI "requires the Commonwealth to prove [(1)] that the defendant intentionally touched the victim, however slightly; [(2)] the touching was unjustified; [(3)] the touching was done with an inherently dangerous weapon or an object used in a dangerous fashion; and [(4)] the touching caused serious bodily injury." Vick, 454 Mass. at 432. No case has enumerated the elements of AB-DFA in violation of G. L. c. 265, § 15E (a), which became effective on January 1, 2015. Based on the

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347-348 (2016) (on facts of case, "judge's failure to instruct the jury that each charge must be based on a separate and distinct act create[s] a substantial risk of a miscarriage of justice" [citation omitted]); Commonwealth v. Kelly, 470 Mass. 682, 702 (2015) (same). The Commonwealth did not proceed in this manner, and the jury were not so instructed.

statutory language, the elements are (1) the defendant intentionally touched the victim, however slightly; (2) the touching was unjustified; and (3) the touching was done by discharging a "firearm," as defined in G. L. c. 140, § 121.[4]

The defendant argues that proof of AB-DFA would necessarily be proof of assault and battery by means of a dangerous weapon (ABDW), which is a lesser included offense of ABDW-SBI. Commonwealth v. Beal, 474 Mass. 341, 347 (2016) ("assault by means of a dangerous weapon is a lesser included offense of assault and battery by means of a dangerous weapon causing serious bodily injury"). The defendant is correct that proof of AB-DFA is necessarily proof of ABDW. A touching by means of the discharge of a firearm will always be proof of a touching by means of a dangerous weapon, because a firearm is an inherently dangerous weapon. Commonwealth v. Appleby, 380 Mass. 296, 303 (1980) (firearm generally inherently dangerous weapon). Because "a 'lesser included offense is one which is necessarily accomplished on commission of the greater crime,'" Commonwealth

[4] General Laws c. 265, § 15E (a), provides in relevant part as follows: "Whoever commits an assault and battery upon another by discharging a firearm, large capacity weapon, rifle, shotgun, sawed-off shotgun or machine gun, as defined in section 121 of chapter 140, shall be punished by imprisonment in the state prison for not more than [twenty] years or by imprisonment in the house of correction for not more than [two and one-half] years or by a fine of not more than $10,000, or by both such fine and imprisonment."

v. Porro, 458 Mass. 526, 531 (2010), quoting Commonwealth v. D'Amour, 428 Mass. 725, 748 (1999), ABDW is a lesser included offense of AB-DFA.

Nonetheless, the defendant's convictions of ABDW-SBI and AB-DFA are not duplicative because each of ABDW-SBI and AB-DFA requires proof of an element the other does not have. For ABDW-SBI, that element is serious bodily injury. To prove AB-DFA, the Commonwealth need prove only a touching by the discharge of a firearm. G. L. c. 265, § 15E (a). Similarly, AB-DFA requires proof that the defendant discharged a firearm, which requires, as relevant here, proof that the weapon was "a pistol, revolver or other weapon . . . from which a shot or bullet can be discharged and of which the length of whose barrel or barrels is less than sixteen inches." G. L. c. 140, § 121. ABDW-SBI requires that the assault and battery be committed by means of a dangerous weapon, but not specifically a firearm as defined by G. L. c. 140, § 121, and not necessarily a firearm that was discharged. In other words, a person may commit ABDW-SBI by discharging a gun that does not meet the statutory definition of firearm, by hitting someone with a gun that is not discharged, or by using a different weapon altogether. Indeed, the specification of the particular weapon used in the ABDW-SBI is superfluous. Commonwealth v. Wolinski, 431 Mass. 228, 236 (2000) ("language in indictment charging assault and battery by

means of a dangerous weapon specifying particular weapon used is superfluous"). See Commonwealth v. Buttimer, 482 Mass. 754, 770 (2019) (discussing whether particular object, a rifle, "fulfilled the dangerous weapon element of G. L. c. 265, § 15B").

The concurrence's reliance on Commonwealth v. Walker, 426 Mass. 301 (1997), to conclude the convictions are the same offense under the elements test does not persuade us. The court concluded in Walker that indecent assault and battery of a child under age fourteen is a lesser included offense of rape of a child under age sixteen. Id. at 304-305. Significantly, it is impossible to commit the crime of rape without committing the lesser crime of indecent assault and battery. When the charges are rape of a child under sixteen and indecent assault and battery of a child under fourteen, the only difference is in proof of the element of age. The court's conclusion accords with the bedrock principle that, while "[t]he elements of a lesser included offense are necessarily a subset of the elements of the greater offense[,] [a]n offense is a lesser included offense only if one cannot be found guilty of the greater offense without also being guilty of the lesser offense" (citations omitted). Commonwealth v. Torres, 468 Mass. 286, 289 (2014).

The Supreme Judicial Court departed in Walker from a strict elements-based test -- and continues to do so for age elements in other crime, see Commonwealth v. Roderiques, 462 Mass. 415 (2012)[5] -- to avoid the anomaly of granting a person accused of raping an adult the option of the jury being able to convict him of only the lesser included offense of indecent assault and battery while depriving a person accused of the more serious crime of rape of a child the same benefit. The court, as it stated, recoiled from not allowing "the jury . . . to convict of the offense established by the evidence, rather than forcing it to choose between convicting the defendant of an offense not fully established by the evidence or acquitting, even though the defendant is clearly guilty of some offense." Walker, 462 Mass. at 305, quoting Commonwealth v. Walker, 42 Mass. App. Ct. 14, 16 (1997).[6] Accordingly, in both Walker and Roderiques, the Supreme Judicial Court held that two offenses with "small technical

[5] In Roderiques, the court determined that a conviction pursuant to G. L. c. 265, § 13L, is a lesser included offense of one variation of the crime of assault and battery on a child pursuant to G. L. c. 265, § 13J (b), fourth par. Again, both statutes have an element that the victim be under a certain age. Roderiques, 462 Mass. at 422-423 (§ 13L requires that child be under eighteen years of age, whereas § 13J, fourth par., requires the child be under fourteen years of age).

[6] It is useful to recall here that it was not until more than twenty years later that we first declared that age is not an element of indecent assault and battery on an adult. See Commonwealth v. Dobbins, 96 Mass. App. Ct. 593, 595-596 (2019).

differences in their statutory elements" might still be cognate crimes. Commonwealth v. Pileeki, 62 Mass. App. Ct. 505, 519 (2004) (Brown, J., concurring).

Both Walker and Roderiques are distinguishable. It is possible, even likely, to commit the crime of AB-DFA without committing the crime of ABDW-SBI, just as it is possible, and likely, to commit the crime of ABDW-SBI without committing the crime of AB-DFA. AB-DFA cannot be a lesser included offense of ABDW-SBI because one can be found guilty of ABDW-SBI (the greater offense) without also being guilty of AB-DFA (the offense the concurrence would hold is the lesser offense). Furthermore, with both crimes, the jury will have the option of convicting the defendant of the lesser crime of ABDW, thus eliminating the concern elucidated in Walker, 462 Mass. at 305.[7]

In addition, since Walker was decided, the Supreme Judicial Court has expressly disapproved of considering the underlying factual allegations. The inquiry is objective and based on the elements of the crimes at issue. See Vick, 454 Mass. at 431, quoting Commonwealth v. Cabrera, 449 Mass. 825, 827 (2007) ("we

[7] If AB-DFA were a lesser included offense of ABDW-SBI as the defendant argues, the Commonwealth could indict a defendant only for ABDW-SBI, request a lesser included offense instruction for AB-DFA, and thereby subject the defendant to a sentence that is potentially five years greater. This will be particularly important where, as is true in many of our cases, the parties dispute whether an injury is sufficient to constitute "serious bodily injury."

consider only the elements of the crimes, not the facts to be proved or the evidence adduced to prove them"). Indeed, the Supreme Judicial Court used logic similar to the concurrence in concluding in Commonwealth v. Santos, 440 Mass. 281, 293 (2003), overruled by Commonwealth v. Anderson, 461 Mass. 616, 633, cert. denied, 568 U.S. 946 (2012), that a conviction of assault by means of a dangerous weapon was duplicative of a conviction of armed robbery. The court "acknowledged [in Santos] that the crime of assault by means of a dangerous weapon was not '[t]echnically' a lesser included offense of armed robbery, because each required an element not required in the other, but concluded that it was effectively a lesser included offense in the circumstances of that case because the robbery was perpetrated in an assault by means of a dangerous weapon -- the defendant pointed the gun at the victims' heads and demanded money." Anderson, supra, citing Santos, supra at 293-294 & n.7. However, in Anderson the court expressly overruled Santos and reaffirmed the adherence to the elements-based approach. Anderson, supra at 633-634.

It is, of course, true that anytime a defendant is convicted of AB-DFA, if one additional element is proven, that the assault and battery caused serious bodily injury, the defendant may be convicted of ABDW-SBI. Similarly, anytime a defendant is convicted of ABDW-SBI, if one additional element is

proven, i.e., that the assault and battery was committed by the discharge of a firearm, the defendant may be convicted of AB-DFA. The rule of law is that because each crime requires an additional element the other crime does not, the two crimes are separate and distinct.

In fact, this holds true in every case with overlapping elements. Anytime a defendant is convicted of burning a motor vehicle, if one additional element is proven, that he did so with the intent to defraud an insurer, the defendant may be convicted of burning insured property with the intent to defraud an insurer. But the Supreme Judicial Court has held that those two crimes are not duplicative, Commonwealth v. Jones, 441 Mass. 73, 75-76 (2004), precisely because each crime requires an additional element the other crime does not.

It is easy to see why the Legislature choose to treat the offenses of ABDW-SBI and AB-DFA separately. The Legislature rationally sought, through the crime of AB-DFA, to discourage any discharge of a firearm that results in a touching of another, even if the injury was minor, while still imposing additional punishment if that conduct resulted in serious bodily injury.[8]

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[8] The Supreme Judicial Court has recognized two categories of crimes, those that "punish[] the defendant for conduct offensive to society, as distinct from [crimes that] punish[] the defendant for the effect of that conduct on particular

The ABDW-SBI and AB-DFA convictions are not duplicative.

Judgments affirmed.

victims." Commonwealth v. Traylor, 472 Mass. 260, 268-269 (2015), quoting Commonwealth v. Botev, 79 Mass. App. Ct. 281, 287 (2011).

RUBIN, J. (concurring in part and concurring in the judgment). Contrary to the conclusion of the court, there can be no question that assault and battery by discharge of a gun (AB-DG), in violation of G. L. c. 265, § 15E (a), and assault and battery by means of a dangerous weapon causing serious bodily injury (ABDW-SBI), in violation of G. L. c. 265, § 15A (c) (i), arising out of a single discharge of a firearm in this case, are the "same offense" under the elements test that is ordinarily used to identify duplicative convictions.[1] The "by means of discharge of a gun" element of AB-DG is not an additional element absent from ABDW-SBI. It is a subset of the "by means of a dangerous weapon" element of that latter offense. It is clear, therefore, that under the elements test, these are the "same offense." See Commonwealth v. Roderiques, 462 Mass. 415, 421 (2012). If the court were correct, therefore, that failing the elements test is, in fact, dispositive of all claims that two convictions are duplicative, we would be required to vacate one of the two convictions here.

With respect, however, to the prohibition on multiple punishments for crimes tried together, which is just one of the

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[1] Although the court refers to the first statute as assault and battery by discharge of a firearm, in fact it criminalizes "assault and battery upon another by discharging a firearm, large capacity weapon, rifle, shotgun or machine gun, as defined in section 121 of chapter 140." Accordingly, I will refer to it as assault and battery by discharge of a gun.

prohibitions imposed by double jeopardy principles, the cases indicate that, in unusual circumstances, punishment for two crimes is permissible even when the elements test demonstrates they are the "same offense." For example, since this application of double jeopardy principles is not a constitutional command, when the intent of the Legislature to permit multiple punishments has been made explicit, multiple punishments are permissible. See Commonwealth v. Rivas, 466 Mass. 184, 188 (2013). Likewise, the Supreme Judicial Court has allowed multiple punishments even when the elements test is not met when the two related crimes in question have "differing distinct elements" and the Legislature's determination to punish each was intended to "further distinct policies." Commonwealth v. Jones, 441 Mass. 73, 75-76 (2004). Cf. United States v. Halper, 490 U.S. 435, 450 (1989) (where question is whether multiple punishments rather than multiple trials are permitted with respect to two statutes, fact that offenses are "same" under elements test does not necessarily mean multiple punishments are barred); Missouri v. Hunter, 459 U.S. 359, 368-69 (1983) (implying same); Department of Revenue of Mont. v. Ranch, 511 U.S. 767, 801 n.1 (1994) (Scalia, J. dissenting) (under double jeopardy clause, "in the context of criminal proceedings, legislatively authorized multiple punishments are

permissible if imposed in a single proceeding, but impermissible if imposed in successive proceedings").

In the unusual circumstances of this case, given the history of the adoption of these statutes, I believe that these two statutes fall into that category. Where an individual is charged with both crimes arising out of the same conduct, he or she may not be tried for them in consecutive trials. But if he or she is tried for them at the same trial, as the defendant was in this case, a separate punishment may be imposed on each conviction. Consequently, although I disagree with the court's analysis, I concur in its conclusion that multiple punishments may be imposed for the convictions of both in this case.

1. Double jeopardy. As a matter of Massachusetts law, a person may not twice be placed in jeopardy for the same criminal offense. "The prohibition applies to (1) subsequent prosecution for the same offense after acquittal, (2) subsequent prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." Vizcaino v. Commonwealth, 462 Mass. 266, 274 (2012). In Commonwealth v. Vick, 454 Mass. 418, 431 (2009), the Supreme Judicial Court reiterated that to determine when two charges arising out of the same conduct are for the "same offense," "[t]he traditional rule in Massachusetts, as embodied in Morey v. Commonwealth, 108 Mass. 433, 434 (1871) (Morey), and its progeny, is that 'a defendant

may properly be punished for two crimes arising out of the same course of conduct provided that each crime requires proof of an element that the other does not.' Commonwealth v. Valliere, 437 Mass. 366, 371 (2002)." Under this elements test, "[a]s long as each offense requires proof of an additional element that the other does not, neither crime is a lesser-included offense of the other, and convictions [of] both are deemed to have been authorized by the Legislature and hence not [duplicative]" (quotation and citation omitted). Vick, supra.

With respect to the prohibition against successive prosecutions for the same offense, at the core of the prohibition on double jeopardy contained in our common law, it is a hard and fast rule: Unless two offenses are different under the elements test, a person may not be prosecuted for one offense having already been tried and either convicted or acquitted of the other.

However, to the extent that the question is whether punishment for both crimes is permitted if the charges are tried together, passing the elements test is not always necessary. Most clearly, such multiple punishments are permitted if the Legislature makes clear that that is its intent. "Under our common law rule, the fact that [a] crime . . . is a lesser included offense of [another] crime . . . does not automatically make unlawful the imposition of separate consecutive sentences

on a defendant who is convicted of both crimes. As has already been noted, because the Legislature has broad power to define crimes, and to create punishments for them, it may permissibly impose consecutive punishments." Commonwealth v. Alvarez, 413 Mass. 224, 231 (1992). Indeed, the Supreme Judicial Court has explained that "[w]here the Legislature has not stated its intent to impose multiple punishments for the same criminal conduct, we utilize the elements test set forth in Morey . . ., 108 Mass. [at] 434 . . ., to determine whether the Legislature intended to punish the same conduct under multiple statutory offenses." Rivas, 466 Mass. at 188. Cf. Hunter, 459 U.S. at 368-369 ("Where . . . a legislature specifically authorizes cumulative punishments under two [State] statutes, regardless of whether those two statutes proscribe the 'same' conduct under [the test asking "whether each provision requires proof of a fact which the other does not"], a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial").

There is also, however, at least one case in which the Supreme Judicial Court has permitted multiple punishments under two statutes under which a defendant was convicted in a single trial, despite an absence of any statement by the Legislature that this was its intent. In Jones, 441 Mass. at 74, the

defendant had someone set fire to his car so he could collect insurance proceeds. The court concluded he could be punished for violation of both "G. L. c. 266, § 5, [which] punishes the wrongful burning of the 'personal property of whatsoever class or character . . . of another' and the wrongful burning of one's own or another's 'boat, motor vehicle . . . or other conveyance,'" and "[§] 10 of G. L. c. 266 [which] more generally punishes a person who wrongfully burns 'a building, or any goods, wares, merchandise or other chattels, belonging to himself or another' with intent to defraud an insurer" for which he was convicted at a single trial. Jones, supra at 75. The court did not conclude, at least in so many words, that the two crimes met the elements test, and there was no statement from the Legislature that it intended multiple punishments. The court did so because the two "related offenses" had "differing distinct elements," and the Legislature's determination to punish each was intended to "further distinct policies." Id. The same is true in this case and, consequently, multiple punishment under the two statutes is not forbidden.

2. The elements test. As the court notes, in this case, there is no dispute that the two convictions were based on a single discharge of a firearm. Applying the elements test, the court concludes that the convictions in this case are not duplicative. That application of the elements test is, under

the decisions of the Supreme Judicial Court, clearly incorrect. Under the elements test, the two convictions at issue in this case are for the "same offense." Thus, if that were dispositive, the conviction of one of the offenses would have to be vacated.

Each of the two crimes at issue in this case has the same first two elements, (1) assault, and (2) battery. The third element of ABDW-SBI is of course (3) that the assault and battery was committed by means of a dangerous weapon. The court concludes that the third element of AB-DG in this case, (3) that the assault and battery was committed by means of discharge of a "firearm," as defined in G. L. c. 140, § 121, is an additional element absent from ABDW-SBI, and that, since ABDW-SBI has an additional element absent from ABDG, (4) causing serious bodily injury, the two convictions are not duplicative.

But the Supreme Judicial Court opinions that explain how to analyze a case like this under the elements test compel the conclusion that third element of AB-DG is not an additional element absent from ABDW-SBI. The third element of AB-DG is a subset of the third element of ABDW-SBI -- an assault committed by a touching by means of the discharge of a firearm will always be an assault by means of a dangerous weapon because a firearm is an inherently dangerous weapon. Commonwealth v. Appleby, 380 Mass. 296, 303 (1980) (firearm "usually classified as dangerous

per se"). The rule is this: "When statutory crimes can be violated in multiple ways, comparison of their elements must focus on the specific variations that the defendant is alleged to have committed. . . . Conversely, when a lesser offense contains an element that can be satisfied in multiple ways, and the purportedly greater offense can be satisfied in only one of those ways, the former is still included within the latter." Roderiques, 462 Mass. at 421.

As the Supreme Judicial Court has explained, in analyzing two such elements in different statutes, an element of the greater offense, here the third element of ABDW-SBI, "encompasses [the] corresponding element of [the lesser offense, here the third element of AB-DG], and because there are no additional elements in [the lesser offense] that are not in [the greater offense, the former] is a lesser included offense of [the latter]." Roderiques, 462 Mass. at 425.

In Roderiques, the court concluded that that reckless endangerment of a child under the age of eighteen, G. L. c. 265, § 13L, is a lesser included offense of wantonly or recklessly permitting another to commit an assault and battery on a child under the age of fourteen, G. L. c. 265, § 13J (b), fourth par. Roderiques, 462 Mass. at 424. These two statutes have elements that are very different, and, as I will describe, that case is far more complex than this one. The court said:

> "Comparing the elements of each offense reveals that the elements of § 13J (b), fourth par., encompass all the elements of § 13L. The elements of § 13J (b), fourth par., are (i) a child under fourteen; (ii) in care and custody; (iii) a substantial bodily injury; (iv) the defendant wantonly or recklessly permitted this substantial bodily injury, or wantonly or recklessly permitted another to commit an assault and battery on the child causing substantial bodily injury. The elements of § 13L are (i) a child under eighteen; (ii) a substantial risk of serious bodily injury or sexual abuse; (iii) the defendant wantonly or recklessly engaged in conduct that created this substantial risk, or failed to take reasonable steps to alleviate such risk where there is a duty to act."

Id.

The court began its analysis by comparing the first element of the two offenses. "With respect to the first element, the age of the child, § 13J (b) requires that the child be under fourteen while § 13L requires that the child be under eighteen. Logically, every child that is under fourteen is also under eighteen. Thus, every situation that satisfies this element in § 13J (b) also satisfies this element in § 13L." Roderiquez, 462 Mass. at 423.

The Roderiques court cited Commonwealth v. Walker, 426 Mass. 301 (1997). Roderiques, 462 Mass. at 423 n.1. In Walker, the defendant was charged with two counts of forcible rape of a child under sixteen years, G. L. c. 265, § 22A. Walker, supra at 302. The victims were six years old. Id. The question in that case was whether indecent assault and battery on a child

under fourteen years, G. L. c. 265, § 13B, was in those circumstances a lesser included offense. Id. at 303.

Of course, the rape charge required proof of an additional element, penetration. But, as the court explained, "we have not considered whether the different age threshold for liability under G. L. c. 265, § 13B [for indecent assault and battery on a child under fourteen years], requires proof of an element different from, and in addition to, those constituting the claimed greater offense," forcible rape of a child under sixteen years (quotation and citation omitted). Walker, 426 Mass. at 304. The situation was thus precisely as it is here.

The court said in Walker, in relevant part:

> "We observe first that the age element in the lesser included offense may be different from, but is not in addition to, the age element in the greater offense. Proving the age of the lesser offense proves it also for the greater offense, even though the converse may not always be true. Second, in this case there was no dispute as to the ages of the victims, nor that their tender ages at the time of the alleged crimes (they both were six years old) would constitute proof of the age element in each crime charged and the claimed included offense. The substantive facts supporting each element that the Commonwealth had to prove in these circumstances are identical for both crimes, except for the aggravating factor of penetration in the rape charge that distinguishes the greater offense from the lesser offense committed against these children. . . . [W]e hold that in the circumstances of a case such as this, where there is no dispute that a child is under the age of fourteen, G. L. c. 265, § 13B, is a lesser included offense of G. L. c. 265, § 22A."

Walker, 426 Mass. at 304, 305-306. Walker thus held that in a case like this in which a first statute with an element that was encompassed by an element in a second statute did not require any other additional element, and the second statute did, the first statute was a lesser included offense of that second statute.

Even if the Roderiques analysis, 462 Mass. at 422-424, stopped here, Roderiques and Walker would be analogous to this case. The element of "by discharging a firearm" in G. L. c. 265, § 15E (a), is, to use Walker's language, "different from, but is not in addition to" the element of "by means of a dangerous weapon" in G. L. c. 265, § 15A (c) (i). Using the purely elements-based approach, of which Walker and Roderiques are explications, then, would lead to the conclusion that the convictions here are duplicative, even if all we had was the discussion in both cases about the elements in the two statutes in each case that differed in describing what must be proved about the age of the victim.

The analysis in Roderiques, though, went further. The court said:

> "The third element of [G. L. c. 265,] § 13J (b), fourth par., substantial bodily injury, necessarily includes the second element of [G. L. c. 265,] § 13L, substantial risk of serious bodily injury or sexual abuse. The occurrence of an injury presupposes that a risk of injury has been created. Stated differently, in the former case the risk of injury has come to fruition in the form of an actual

> injury. See Commonwealth v. Porro, 458 Mass. 526, 533 (2010) (assault as attempted battery is 'clearly' lesser included offense of intentional assault and battery, because only additional element in latter is completion by actual touching); Commonwealth v. Martin, 425 Mass. 718, 722 (1997). It is true that, in § 13L, this element can be satisfied through an alternative means, namely through creating a substantial risk of sexual abuse of a child. Nevertheless, this alternative means is not required for violation of § 13L and does not prevent § 13L from being a lesser included offense. See Commonwealth v. Santos, [440 Mass. 281,] 289 [2003]."

Roderiques, 462 Mass. at 423.

This, too, describes precisely the situation here. The third element of ABDW-SBI can be proved by showing an assault was by means of discharge of a firearm, but it can also "be satisfied through an alternative means," the use of a different dangerous weapon. Roderiques, 462 Mass. at 423. "Nevertheless, this alternative means is not required for violation of" ABDW-SBI. Id.

Finally, the court stated that

> "[t]he final element of § 13J (b), fourth par., criminalizes child abuse resulting from acts of omission. See Commonwealth v. Garcia, 47 Mass. App. Ct. 419, 419-420 (1999). This element thus encompasses the latter alternative of the third element of § 13L -- wantonly or recklessly failing to take reasonable steps to alleviate risk of serious bodily harm when there is a duty to act. Because the second element of § 13J (b), fourth par., restricts the statute to those who have 'care and custody of a child,' every person who violates § 13J (b) also had a 'duty to act.' Commonwealth v. Robinson, 74 Mass. App. Ct. 752, 759 (2009), and cases cited."

Roderiques, 462 Mass. at 423-424.

"In sum, because each element of § 13J (b), fourth par., encompasses a corresponding element of § 13L, and because there are no additional elements in § 13L that are not in § 13J (b), fourth par., § 13L is a lesser included offense of § 13J (b), fourth par. See . . . Porro, [458 Mass.] at 531; . . . Martin, [425 Mass. at 722]." Roderiques, 462 Mass. at 424.

The court held this even though the third element of § 13L was both narrower and broader than two elements of § 13J (b), fourth par. That third element required "wantonly or recklessly failing to take reasonable steps to alleviate risk of serious bodily harm," where the last element of § 13J (b), fourth par., applied more broadly to any act of omission. The third element of § 13L also required proof that the defendant for any reason had a duty to act. But the second element of § 13J (b) made that statute applicable only to the subset who had "care and custody of a child." Roderiques, 462 Mass. at 423-424.

A conviction of ABDW-SBI, the third element of which encompasses the third element of AB-DG, does require proof of an additional element that ABDG does not – causing serious bodily injury. But ABDG requires no additional element. Thus, under the elements test, as explained in Roderiques and Walker, AB-DG is a lesser included offense of ABDW-SBI. Although the circumstance in which the lesser included offense is the more serious in terms of authorized punishment is unusual, it does

occur. As Judge Posner wrote in United States v. Peel, in the circumstances of that case, although "obstruction of justice . . . carries the higher statutory maximum sentence . . . it is a lesser-included offense of bankruptcy fraud. It is lesser in the sense of having fewer elements . . . . That is the only sense of 'lesser' that matters" for double jeopardy purposes. United States v. Peel, 595 F.3d 763, 767-768 (7th Cir. 2010), cert. denied, 562 U.S. 1178 (2011). Or, as our court has put it, "[t]he lesser included offense is the one with fewer elements, regardless of the penalty provided for by the Legislature or actually imposed by the court." Commonwealth v. Johnson, 75 Mass. App. Ct. 903, 904 (2009).

The court concludes to the contrary that these offenses pass the elements test, but it essentially ignores the Supreme Judicial Court's clear, relatively recent pronouncement on this matter in Roderiques. It does attempt to distinguish Walker, but that attempt fails. First the court says that Walker "accords with the bedrock principle that, while '[t]he elements of a lesser included offense are necessarily a subset of the elements of the greater offense[,] [a]n offense is a lesser included offense only if one cannot be found guilty of the greater offense without also being guilty of the lesser offense." Ante at . But that is obviously wrong. One can be found guilty of forcible rape of a child under sixteen

years without being guilty of indecent assault and battery on a child under fourteen years. Indeed, it happens in the case of every conviction in which a victim is fourteen or fifteen years of age. Yet the Supreme Judicial Court nonetheless found that indecent assault and battery on a child under fourteen years was a lesser included offense of forcible rape of a child under sixteen years. See Walker, 426 Mass. at 305-306.

The court also asserts that Walker and Roderiques "departed . . . from a strict elements-based test." Ante at . But the decisions explicitly state that they are applying that test. Nor does the Supreme Judicial Court's decision in Commonwealth v. Anderson, 461 Mass. 616, 633 (2012), to overrule Santos, 440 Mass. at 293, and to eliminate the closely related conduct test under which some convictions had been found duplicative even when they were not under an elements-based approach, have any bearing on the vitality of the Walker-Roderiques rule.[2] Neither

[2] In Santos, decided subsequent to Walker, the court concluded under the elements test that assault by means of a dangerous weapon was not a lesser included offense of armed robbery. Rather, the convictions were held duplicative explicitly on the ground that "even if not literally a lesser included offense, a conviction may be duplicative if the crimes are so closely linked to a single event as to constitute a single crime" (quotation and citation omitted). Santos, 440 Mass. at 292-293. In Anderson, Santos was overruled because the court had "clarified in the Vick decision that, in determining whether convictions are duplicative, we adhere to the elements-based approach, and reject the closely related conduct-based approach except where one crime is a lesser included offense of the other, or where there are multiple counts of the same

Walker nor Roderiques were decided on the basis of the closely-related conduct test. Indeed, Roderiques was decided after Anderson on the very basis of the elements test.

The court also attempts to distinguish Walker and Roderiques on their facts, suggesting that the two case are only about "age elements." Of course, there is no explanation of why age elements would be treated any differently than any other kinds of elements, but in any event, the argument ignores the non-age related elements of G. L. c. 265, § 13L, that the court in Rodriques explicitly found encompassed by corresponding elements of § 13J (b), fourth par. The court also posits that the pairs of statutes in Walker and Roderiques have only "small technical differences." What matters of course so far as the elements test is concerned -- so far as double jeopardy principles are concerned -- is that the elements are different, and that one is a subset of a corresponding element in the other statute, not their size, or their characterization as "technical." But in any event, even the difference between a crime that can be committed only when a victim is under fourteen and a crime that can be committed only when a victim is under sixteen is neither small, nor technical. And one need do no

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offense." Anderson, 461 Mass. at 634, citing Vick, 461 Mass. at 433-435. Both Vick and Anderson thus left the elements test, of which Walker is an explication, untouched -- as Roderiques demonstrates.

more than read the portions of the opinion in Roderiques quoted above to see that that is not an apt characterization of the other elements at issue there, either.

Similarly, the court's attempt to distinguish Walker and Roderiques on the basis that "[i]t is possible, even likely, to commit the crime of [AB-DG] without committing the crime of ABDW-SBI, just as it is possible, and likely, to commit the crime of ABDW-SBI without committing the crime of [AB-DG]," falls flat. It is likewise possible and even likely to commit the crime of assault and battery on a child under fourteen without committing the crime of rape of a child under sixteen, just as it is possible and even likely to commit the crime of rape of a child under sixteen without committing indecent assault and battery on a child under fourteen. As our decisions reflect, each terrible crime is committed routinely without the commission of the other. The same is of course true of § 13L and § 13J (b), fourth par., discussed in Roderiques.

3. Multiple punishments and the elements test. If the elements test were always dispositive, we would be required to vacate one of the convictions. But there is a third case decided by the Supreme Judicial Court in which all the elements of one offense were encompassed within the elements of another: Jones, 441 Mass. at 75-76. And in that case, unlike Walker and

Roderiques, the Supreme Judicial Court allowed multiple punishments under the two statutes.

In Jones, in a prosecution arising from the defendant having someone set fire to his car so he could collect insurance proceeds, the court considered "G. L. c. 266, § 5, [which] punishes the wrongful burning of the 'personal property of whatsoever class or character . . . of another' and the wrongful burning of one's own or another's 'boat, motor vehicle . . . or other conveyance,'" and "[§] 10 of G. L. c. 266 [which] more generally punishes a person who wrongfully burns "a building, or any goods, wares, merchandise or other chattels, belonging to himself or another" with intent to defraud an insurer." Jones, 441 Mass. at 75. The element in the first statute of burning one's own boat, motor vehicle, or other conveyance is not an element of the latter statute, but will always satisfy its element of burning chattels belonging to oneself or another. Nonetheless, the court held that multiple punishments under the two statutes were permissible. Id.

The court in Jones articulated the elements test, but it did not conclude, at least in terms, that each statute contained an element the other did not. Rather, after noting that in enacting related legislation, the Legislature "usually intends to further distinct policies," and concluding that the Appeals Court had been correct that "[§]5 is aimed at protecting

personal property, and embodies a public safety component as well; § 10, by contrast, punishes what is at bottom an economic crime, which has widespread impact among all members of the insurer's risk pool" (citation omitted), Jones, 441 Mass. at 75, the court ruled that multiple punishments were permissible, stating, "It is sufficient to say that the two crimes have differing distinct elements, § 5 punishes the burning of an automobile, while § 10 punishes the destruction of any property with the added intent to defraud an insurer." Id. at 75-76.

In my view, Jones is best understood as a departure from pure application of the elements test for determining whether multiple punishments are permitted in a case in which all the elements of one offense are encompassed within the elements of another -- each does not have an additional element the other does not, though they do have "differing distinct elements" -- but the two related statutes at issue further distinct policies. And I think it controls here.

Assault and battery by means of a dangerous weapon has been a criminal act under the statutes of this Commonwealth at least since 1927. See St. 1927, c. 187, § 1. In 2002, the Legislature, presumably concluding that the crime was more serious when it causes serious bodily injury, added subsection (c) to the statute, providing that when ABDW causes serious bodily injury it can be punished by up to fifteen years'

incarceration in State prison. See G. L. c. 265, § 15A (c), as amended by St. 2002, c. 35, § 2.

AB-DG was enacted more than a decade later, as part of a 2014 statute entitled "An Act Relative to the Reduction of Gun Violence." Presumably concluding that assault and battery by discharge of a gun was more serious than assault and battery by means of a dangerous weapon committed in any other way, the Legislature created a new crime, AB-DG, with a maximum penalty of not more than twenty years' incarceration in State prison, regardless of whether injury occurred. G. L. c. 265, § 15E, inserted by St. 2014, c. 284, § 80.

AB-DG and ABDW-SBI are both about assault and battery by means of a dangerous weapon. But they are about two different subcategories of AB-DW that are particularly harmful in different ways. In this, they are more like offenses that meet the elements test than like a traditional greater and lesser included offense -- and more like Jones than like Roderiques and Walker. I think this is a case where, although all the elements of one are encompassed in the other, and where the two statutes thus fail the elements test, they "further distinct policies." Jones, 441 Mass. at 75. One is concerned with those more serious cases of ABDW where someone is seriously injured. But the other is concerned with addressing the scourge of gun violence. In these circumstances, under Jones, I believe

multiple punishments for one convicted in a single trial of having committed through a single act both offenses are permitted. Consequently, I concur in the court's conclusion that the multiple punishments imposed here were permissible, concur in its opinion, except for the section addressing that question, and concur in the judgment.