SJC-12877

COMMONWEALTH vs. KEYSHAUN TAYLOR.

Norfolk. April 7, 2020. - December 17, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.[1]

Firearms. Constitutional Law, Double jeopardy. Judicial Estoppel. Practice, Criminal, Double jeopardy, Required finding.

Complaint received and sworn to in the Quincy Division of the District Court Department on December 26, 2017.

A motion to dismiss was heard by Diane E. Moriarty, J., and questions of law were reported by her to the Appeals Court.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Seena A. Pidani for the defendant.

Michael McGee, Assistant District Attorney (Emil Ata, Assistant District Attorney, also present), for the Commonwealth.

Timothy St. Lawrence, for Lee Ashford, amicus curiae, submitted a brief.

[1] Chief Justice Gants participated in the deliberation on this case prior to his death. Justice Lenk participated in the deliberation on this case prior to her retirement.

GAZIANO, J. General Laws c. 269, § 10 (n), provides that whoever violates G. L. c. 269, § 10 (a), carrying a firearm without a license, or G. L. c. 269, § 10 (c), unlawful possession of a machine gun or sawed-off shotgun, "by means of a loaded [weapon] shall be further punished by imprisonment in the house of correction for not more than [two and one-half] years, which sentence shall begin from and after the expiration of the sentence for the violation of [§ 10 (a) or (c)]." The Commonwealth charged the defendant with carrying a loaded firearm, in violation of § 10 (n), but not either of the required predicate offenses of § 10 (a) or (c). See Commonwealth v. Brown, 479 Mass. 600, 604 (2018). At trial, after the close of the Commonwealth's case, a District Court judge granted the defendant's motion for a required finding of not guilty based on this defect in charging. The Commonwealth subsequently obtained a second complaint charging the defendant with violating G. L. c. 269, § 10 (a), based on the same alleged conduct. The defendant moved to dismiss on grounds of double jeopardy, and the motion judge reported four questions to the Appeals Court.[2] After the Appeals Court issued its decision, we allowed the defendant's application for further appellate review. We conclude that double jeopardy bars the current prosecution because the termination

[2] See Commonwealth v. Markvart, 437 Mass. 331, 333 (2002); note 4, infra.

of the trial, which properly is considered a mistrial rather than an acquittal, was not justified by manifest necessity.[3]

Background. In April of 2017, a complaint issued against the defendant, charging him with a single count of carrying a loaded firearm, in violation of G. L. c. 269, § 10 (n). That count contained the allegation that the defendant carried a loaded firearm, in violation of both G. L. c. 269, § 10 (a) (carrying a firearm without a license), and G. L. c. 269, § 10 (n) (carrying a loaded firearm), as well as descriptions of the potential penalties for each of those offenses. The complaint did not, however, contain a separate count for either of the required predicate offenses, G. L. c. 269, § 10 (a), or G. L. c. 269, § 10 (c) (unlawful possession of a machine gun or sawed-off shotgun). See Brown, 479 Mass. at 604.

After the close of the Commonwealth's case, the defendant moved for a required finding of not guilty. He argued that the Commonwealth could not prove a finding of a violation of a predicate crime, an element of G. L. c. 269, § 10 (n). The trial judge agreed that the lack of a predicate charge impeded the prosecution, and he stated that a charge under § 10 (n) requires an additional count of one of the predicate offenses.

The Commonwealth did not dispute this interpretation, but requested that the judge instruct the jury on G. L. c. 269,

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[3] We acknowledge the amicus brief of Lee Ashford.

§ 10 (a), rather than § 10 (n). In response, the defendant argued that amendment would be improper because § 10 (a) was not a lesser included offense of § 10 (n). The defendant also said that if the Commonwealth were to bring charges again, that would implicate the protections against double jeopardy. The Commonwealth later moved to amend the complaint to a single violation of G. L. c. 269, § 10 (a). Without explicitly ruling on either of the Commonwealth's requests, the trial judge allowed the defendant's motion for a required finding of not guilty on the solitary count of § 10 (n).

The Commonwealth subsequently charged the defendant in a second complaint with a violation of G. L. c. 269, § 10 (a), based on the same conduct as the previous complaint, and the defendant moved to dismiss on double jeopardy grounds. A District Court judge, who was not the trial judge in the first prosecution, at first allowed the defendant's motion to dismiss; after the Commonwealth sought reconsideration, the motion judge reported the following questions to the Appeals Court:[4]

[4] "We answer the reported questions only insofar as it is necessary to resolve the issues raised by the record. 'Although a judge may report specific questions of law in connection with an interlocutory finding or order, the basic issue to be reported is the correctness of his [or her] finding or order. Reported questions need not be answered in this circumstance except to the extent that it is necessary to do so in resolving the basic issue.'" Markvart, 437 Mass. at 333, quoting Commonwealth v. Bruno, 432 Mass. 489, 493 n.5 (2000).

> "1. Is G. L. c. 269, § 10 (n)[,] a freestanding crime?"[5]
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> "2. Is G. L. c. 269, § 10 (a)[,] a lesser included offense of G. L. c. 269, § 10 (n)[,] under Morey v. Commonwealth, 108 Mass. 433 (1871)?"
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> "3. In the context of double jeopardy, is the doctrine of judicial estoppel applicable as against a defendant?"
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> "4. If the answers to questions 1–3 are 'Yes,' did the court, in the circumstances of this case, properly conclude that the [C]ommonwealth may proceed upon the complaint charging the defendant with a violation of G. L. c. 269, § 10 (a)[,] without violating the defendant's protections afforded under principles of double jeopardy?"

See Mass. R. Crim. P. 34, as amended, 442 Mass. 1501 (2004).

Accompanying her report, the motion judge included a legal analysis. She determined that G. L. c. 269, § 10 (n), is a freestanding offense, of which G. L. c. 269, § 10 (a), is a lesser included offense. She concluded, however, that judicial estoppel precluded the defendant's double jeopardy claim. Because, in response to the Commonwealth's request for the judge to instruct on § 10 (a), the defendant had argued that § 10 (a) was not a lesser included offense of § 10 (n), the motion judge reasoned that the defendant subsequently was precluded from arguing that double jeopardy bars the current prosecution of § 10 (a) as a lesser included offense of the prior § 10 (n) charge.

The Appeals Court concluded that G. L. c. 269, § 10 (n), is not a freestanding crime, but, rather, a sentencing

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[5] As discussed infra, we consider a freestanding crime to be one for which a defendant can be charged and convicted without any accompanying charges.

enhancement. See Commonwealth v. Taylor, 96 Mass. App. Ct. 143, 146 (2019), citing Brown, 479 Mass. at 604. Based on this conclusion, the court determined that § 10 (a) cannot be a lesser included offense of § 10 (n). See Taylor, supra at 146-147. The court then ruled that judicial estoppel did not preclude the defendant's arguments. See id. at 147-149.

Lastly, the Appeals Court ruled that double jeopardy did not bar the current prosecution. See Taylor, 96 Mass. App. Ct. at 149. The court reasoned that because G. L. c. 269, § 10 (n), is a sentencing enhancement, the first complaint was a nullity over which the District Court had no jurisdiction. See Taylor, supra at 151. Therefore, the court concluded, under the jurisdictional exception, jeopardy never attached. See id., citing Commonwealth v. Love, 452 Mass. 498, 504 (2008). The court further determined that, even if jeopardy had attached, it did not terminate because the acquittal was not on the "facts and merits." See Taylor, supra, quoting Commonwealth v. Gonzalez, 437 Mass. 276, 282 (2002), cert. denied, 538 U.S. 962 (2003). We subsequently granted the defendant's application for further appellate review.

Discussion. We conclude that G. L. c. 269, § 10 (n), is not a freestanding crime. Moreover, under the facts of this case, G. L. c. 269, § 10 (a), is a lesser included offense of § 10 (n). Additionally, we agree with the Appeals Court that judicial estoppel does not preclude the defendant's argument

that a trial on § 10 (a) would be prohibited under the protections against double jeopardy.

As to the substance of the double jeopardy claim, we conclude that jeopardy attached when the jury were sworn, but that the trial judge's order was not based on the facts and merits of the evidence; thus, the order was equivalent to the declaration of a mistrial. Because the defendant did not consent to reprosecution, the second complaint is barred unless there was a manifest necessity for the mistrial. As an alternative to ending the trial, the judge could have granted the Commonwealth's request to instruct on the lesser included offense of G. L. c. 269, § 10 (a), instead of the defective, greater offense of § 10 (n). Thus, there was no manifest necessity for the mistrial, and the defendant's motion to dismiss on double jeopardy grounds should be granted.

To set the stage for our double jeopardy analysis, we first discuss certain aspects of the statutes at issue.

1. Statutory scheme. General Laws c. 269, § 10 (a), provides for the punishment of anyone who knowingly possesses a firearm, outside the individual's residence or place of business, absent compliance with the relevant licensing provisions. General Laws c. 269, § 10 (n), states that "[w]hoever violates [§ 10 (a) or (c)] by means of a loaded firearm . . . shall be further punished by imprisonment in the house of correction for not more than [two and one-half] years, which sentence shall begin from and after the

expiration of the sentence for the violation of [§ 10 (a) or (c)]" (emphasis added).[6] "Further punishment, of course, can only occur if there is punishment in the first instance." Commonwealth v. Dancy, 90 Mass. App. Ct. 703, 705 (2016). By the same token, the § 10 (n) sentence can be "from and after" only if there is a previous sentence. Cf. Commonwealth v. Taylor, 413 Mass. 243, 246 n.2 (1992).

For these reasons, we have held that "in order to be convicted under G. L. c. 269, § 10 (n), an individual must first have been convicted under G. L. c. 269, § 10 (a) or (c)." Brown, 479 Mass. at 604. See Commonwealth v. Loadholt, 456 Mass. 411, 423–424 (2010), S.C., 460 Mass. 723 (2011). Thus, the parties and the trial judge properly concluded that, had the jury been instructed only on G. L. c. 269, § 10 (n), the defendant could not have been convicted lawfully.

The foregoing observations, however, do not answer all pertinent questions regarding the statute, as evinced by the differing determinations reached by the Appeals Court and the motion judge regarding whether G. L. c. 269, § 10 (n), is a freestanding crime and whether G. L. c. 269, § 10 (a), is its lesser included offense. See Taylor, 96 Mass. App. Ct. at 146-147.

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[6] General Laws c. 269, § 10 (c), which is not at issue in this case, criminalizes the possession of a machine gun or sawed-off shotgun.

In Bynum v. Commonwealth, 429 Mass. 705, 708-709 (1999), we distinguished between freestanding crimes and sentencing enhancements. We determined that G. L. c. 94C, § 32A (d),[7] the statute at issue in that case, was a quintessential sentencing enhancement. See Bynum, supra. It increased the sentence to be imposed for a different crime, based on previous convictions of certain enumerated offenses. See id. Conversely, the plain meaning of the term "freestanding crime" indicates a crime for which a defendant may be charged and convicted without any accompanying charges. As we explain, infra, G. L. c. 269, § 10 (n), does not fit neatly into either category.

General Laws c. 269, § 10 (n), does not establish a freestanding offense. The requirement of § 10 (n), that its "further" punishment be "from and after" the predicate punishment, demonstrates that the two sentences must be imposed in the same proceeding. If the Commonwealth could bring the charges in separate proceedings, a defendant could complete his or her sentence of incarceration under G. L. c. 269, § 10 (a), prior to the final disposition in the

[7] General Laws c. 94C, § 32A (d), currently provides that "[a]ny person convicted of violating the provisions of subsection (c)[, which prohibits, inter alia, the possession of certain drugs with intent to distribute,] after [one] or more prior convictions of manufacturing, distributing, dispensing or possessing with the intent to manufacture, distribute, or dispense a controlled substance, . . . shall be punished by a term of imprisonment in the state prison for not more than [fifteen] years."

successive prosecution under G. L. c. 269, § 10 (n). Such a factual scenario necessarily would entail a gap between the two punishments; a "from and after" sentence under § 10 (n) would be impossible. Thus, dismissal of the pending § 10 (n) charge would be required upon completion of the § 10 (a) sentence. We therefore conclude that G. L. c. 269, § 10 (n), is not a freestanding crime; it must be accompanied by a charge of G. L. c. 269, § 10 (a) or (c).[8] See Brown, 479 Mass. at 604 ("§ 10 (n) . . . does not create a stand-alone offense").

Due to the dependent nature of G. L. c. 269, § 10 (n), this court and the Appeals Court previously have referred to it as a sentencing enhancement. See Brown, 479 Mass. at 604; Commonwealth v. Brown, 91 Mass. App. Ct. 286, 289 (2017), S.C., 479 Mass. 600 (2018). See also Dancy, 90 Mass. App. Ct. at 705 (referencing "penalty enhancement provision in § 10 [n]"). We have made similar statements regarding G. L.

[8] Our holding in Commonwealth v. Taylor, 413 Mass. 243, 247 (1992), regarding the similar statute G. L. c. 94C, § 32J, is not to the contrary. Although we stated in that case that the school zone statute "creates and punishes a distinct offense which can be charged separately from the underlying offense," this statement was dependent on the unusual procedural posture of the case, in which the defendant was convicted of both a drug offense and a school zone violation, but appealed only the school zone violation to a de novo trial in the jury session. See Taylor, supra. See also Berry v. Commonwealth, 393 Mass. 793, 799 (1985) ("defendant's voluntary choice of a bench trial and subsequent choice of a trial de novo create a situation in which double jeopardy is not implicated" [quotation and citation omitted]). Cf. St. 1992, c. 379, § 139 (abolishing de novo jury trial system).

c. 94C, § 32J, which, as with the statute at issue here, provides for an additional "from and after" sentence when certain drug crimes are committed within a school or park zone. See Commonwealth v. Garvey, 477 Mass. 59, 61 (2017) (describing statute as "school zone enhancement"); Commonwealth v. Bradley, 466 Mass. 551, 556 (2013) ("Although framed as a separate crime, a school zone violation under G. L. c. 94C, § 32J, is effectively a sentencing enhancement . . ."); Commonwealth v. Bell, 442 Mass. 118, 125 (2004) ("enhanced penalties"); Commonwealth v. Alvarez, 413 Mass. 224, 235 (1992) ("two-year mandatory enhancement"); Commonwealth v. Pixley, 77 Mass. App. Ct. 624, 630 (2010) ("provides for enhanced penalties"). Indeed, both G. L. c. 269, § 10 (n), and G. L. c. 94C, § 32J, provide for additional punishment when the underlying crime is committed in certain types of circumstances.

Despite the use of this nomenclature, however, G. L. c. 269, § 10 (n), differs from traditional sentencing enhancements in several respects. Importantly, the statute is not based on previous convictions; rather, it concerns a single incident or course of criminal conduct. Cf. Bynum, 429 Mass. at 708-709, citing G. L. c. 94C, § 32A (d). Moreover, instead of leading to a single, longer sentence, the statute mandates two consecutive sentences. Compare G. L. c. 94C, § 32A (d), with G. L. c. 269, § 10 (n). Thus, while G. L.

c. 269, § 10 (n), is not a freestanding crime, it also deviates from traditional sentencing enhancements.

Although we agree with the Appeals Court that G. L. c. 269, § 10 (n), is not a freestanding crime, we disagree with the court's resulting conclusion that G. L. c. 269, § 10 (a), cannot be a lesser included offense of G. L. c. 269, § 10 (n). "Under our long-standing rule derived from Morey v. Commonwealth, 108 Mass. 433, 434 (1871), a lesser included offense is one whose elements are a subset of the elements of the charged offense" (citation omitted). Commonwealth v. Porro, 458 Mass. 526, 531 (2010). General Laws c. 269, § 10 (n), contains three elements. First, there must be a finding that the defendant violated either G. L. c. 269, § 10 (a) or (c), as alleged in a separate count. See Brown, 479 Mass. at 604, citing Dancy, 90 Mass. App. Ct. at 705. Second, the weapon at issue must have been loaded. G. L. c. 269, § 10 (n). Third, the defendant must have known that the weapon was loaded. See Brown, supra at 608. Here, because there was no alleged violation of § 10 (c), a finding of a violation of § 10 (a) was an element of the § 10 (n) charge, making § 10 (a) a lesser included offense under the Morey test. See Commonwealth v. Rivas, 466 Mass. 184, 189 n.7 (2013) ("under the traditional elements test of Morey[,

supra,] unlawful possession of a firearm is a lesser included offense of unlawful possession of a loaded firearm").[9]

Having addressed the relevant characteristics of the statutory scheme, we turn to the question of double jeopardy.

2. Double jeopardy. The Fifth Amendment to the United States Constitution mandates that "a person cannot twice be put in jeopardy for the same offence."[10] Marshall v. Commonwealth, 463 Mass. 529, 534 (2012), quoting Commonwealth v. Burke, 342 Mass. 144, 145 (1961). See Benton v. Maryland, 395 U.S. 784, 794 (1969) (holding that Fifth Amendment is applicable to States). The prohibition against double jeopardy protects primarily "against three specific evils -- a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense" (quotations and

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[9] Although in many cases G. L. c. 269, § 10 (a), is a lesser included offense of G. L. c. 269, § 10 (n), a defendant can be punished under both statutes in a single proceeding, because the Legislature clearly intended to allow for multiple punishments. See Commonwealth v. Rivas, 466 Mass. 184, 189 n.7 (2013), citing Commonwealth v. Johnson, 461 Mass. 44, 54 n.11 (2011). See also Missouri v. Hunter, 459 U.S. 359, 366 (1983) ("With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the [L]egislature intended"); Commonwealth v. Alvarez, 413 Mass. 224, 231 (1992).

[10] "Although not expressly included in the Massachusetts Declaration of Rights, the prohibition against double jeopardy has long been recognized as part of our common and statutory law." Commonwealth v. Carlino, 449 Mass. 71, 79 n.20 (2007), quoting Luk v. Commonwealth, 421 Mass. 415, 416 n.3 (1995). See G. L. c. 263, § 7.

citation omitted). Commonwealth v. Hebb, 477 Mass. 409, 411–412 (2017). "State and Federal double jeopardy protections [also] bar . . . retrial of a defendant whose initial trial ends over his [or her] objection and without a conviction [unless] a mistrial is declared as a matter of manifest necessity" (quotations omitted). Marshall, supra, quoting Commonwealth v. Steward, 396 Mass. 76, 78 (1985). See Arizona v. Washington, 434 U.S. 497, 503-505 (1978). We review determinations regarding double jeopardy de novo. See Hebb, supra at 411, citing Commonwealth v. Rodriguez, 476 Mass. 367, 369 (2017).

In determining whether the defendant can be retried, we first consider whether judicial estoppel precludes the defendant's claim, and, if not, whether attachment, a prerequisite to the invocation of double jeopardy, occurred in the first proceeding. Next, we consider whether the order terminating the trial was not an acquittal but, rather, a declaration of a mistrial. Because we conclude that it was the latter, and because the defendant did not consent to retrial and there was no manifest necessity for a mistrial, the current prosecution is barred.

a. Judicial estoppel. In support of his motion for a required finding of not guilty in the first prosecution, the defendant argued that the trial judge should not instruct on G. L. c. 269, § 10 (a), because it was not a lesser included offense of the charged offense. In his motion to dismiss the

second complaint, on the other hand, the defendant argued that the second complaint was barred by double jeopardy because § 10 (a) was a lesser included offense of G. L. c. 269, § (n). Because these positions were in conflict with each other, the motion judge determined that the doctrine of judicial estoppel precluded the defendant's double jeopardy claim. We review for an abuse of discretion. See Otis v. Arbella Mut. Ins. Co., 443 Mass. 634, 640 (2005), and cases cited. As did the Appeals Court, we conclude that the motion judge erred in determining that the defendant's argument was estopped. See Taylor, 96 Mass. App. Ct. at 147-149.

Judicial estoppel, an equitable doctrine, is intended "to safeguard the integrity of the courts by preventing parties from improperly manipulating the machinery of the judicial system." See Otis, 443 Mass. at 642, quoting Alternative Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 35 (1st Cir. 2004). Estoppel may be appropriate where "a party has adopted one position, secured a favorable decision, and then taken a contradictory position in search of legal advantage." Otis, supra at 641, quoting InterGen N.V. v. Grina, 344 F.3d 134, 144 (1st Cir. 2003). Rather than ascribing to "inflexible prerequisites," however, the doctrine properly is invoked "whenever a party is seeking to use the judicial process in an inconsistent way that courts should not tolerate" (quotations and citations omitted). See Commonwealth v. Middlemiss, 465 Mass. 627, 637 (2013).

Without addressing whether the doctrine ever can be applied constitutionally against criminal defendants, we conclude that it is inapplicable here. First, it is not clear that the defendant's initial argument "secured a favorable decision." See Otis, 443 Mass. at 641. After the close of the Commonwealth's case, the defendant moved for a required finding of not guilty based on the Commonwealth's inability to prove a finding of a violation of G. L. c. 269, § 10 (a) or (c). Acknowledging the deficiency, the Commonwealth requested that the judge "conform to the evidence" and instruct the jury on § 10 (a) instead of § 10 (n). The judge responded, "That ship had sailed a long time ago." Defense counsel then argued that the Commonwealth's request was improper because § 10 (a) is not a lesser included offense of § 10 (n); the judge appeared to agree. Without directly responding to the Commonwealth's motion, the judge allowed the defendant's motion for a required finding.

While the judge's actions clearly amounted to a denial of the Commonwealth's request, the basis for that denial is unclear. The judge might have determined, as indicated by his statement that the "ship had sailed a long time ago," that the motion was untimely, regardless of its merits. Thus, we cannot conclude that the defendant secured a favorable decision based on his later-reversed position regarding lesser included offenses.

Second, although the defendant adopted conflicting positions at trial and in his motion to dismiss, he did not "improperly manipulat[e] the machinery of the judicial system." See Otis, 443 Mass. at 642, quoting Alternative Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d at 33. The first of the defendant's conflicting arguments consisted of a single sentence, made in response to the Commonwealth's last-minute oral motion. Shortly thereafter, any arguable impropriety was eliminated when defense counsel implied that the defendant would seek to dismiss any subsequent prosecution on double jeopardy grounds. These actions do not illustrate an intent to play "fast and loose with the courts" (citation omitted). See Otis, supra. Rather, they reflect the inherently imprecise nature of spur-of-the-moment legal arguments. We conclude that the motion judge erred in determining that the defendant was estopped from arguing for dismissal based on a violation of the protections against double jeopardy.

b. Attachment. The prohibition against double jeopardy is not implicated unless jeopardy attached in the first proceeding. See Love, 452 Mass. at 503, citing Serfass v. United States, 420 U.S. 377, 390–391 (1975). "There are few if any rules of criminal procedure clearer than the rule that 'jeopardy attaches when the jury is empaneled and sworn.'" Martinez v. Illinois, 572 U.S. 833, 839 (2014), quoting Crist v. Bretz, 437 U.S. 28, 35 (1978). Under the Commonwealth's jurisdictional exception, however, when a charge is brought in

a court that does not have jurisdiction, but another court does have jurisdiction, jeopardy does not attach. See Commonwealth v. Lovett, 374 Mass. 394, 397-398 (1978). This doctrine is justified by an "interest in not having an offender go entirely free from punishment because the government walked into the wrong forum." Commonwealth v. Norman, 27 Mass. App. Ct. 82, 90, S.C., 406 Mass. 1001 (1989).

Here, the Appeals Court concluded that G. L. c. 269, § 10 (n), is merely a sentencing enhancement that does not establish a crime on its own. See Taylor, 96 Mass. App. Ct. at 146. Thus, the court reasoned, the defendant's trial was a "nullity" over which the District Court did not have jurisdiction, and jeopardy never attached. See id. at 151. Although, as discussed, we agree that § 10 (n) is not a freestanding offense, we conclude that the jurisdictional exception is inapplicable in the circumstances here, and jeopardy therefore attached.[11]

In Commonwealth v. Labadie, 82 Mass. App. Ct. 263, 269 (2012), the Appeals Court set aside the defendants' convictions of embezzling money from a bank because the money was taken from a Federal credit union. Since there was no Massachusetts crime specifically prohibiting embezzlement from a Federal credit union, the court reasoned that "the original

[11] The Commonwealth did not argue in its brief that the jurisdictional exception applies. Indeed, at argument before us, the Commonwealth stated that the District Court had jurisdiction over the offense charged.

convictions were nullities in light of the lack of jurisdiction, [and therefore] double jeopardy [did] not preclude retrial." See id. at 269, citing Lovett, 374 Mass. at 397–398. Because embezzlement from a bank was a valid criminal prohibition over which the Superior Court had jurisdiction, we disagreed. See Commonwealth v. Labadie, 467 Mass. 81, 89, cert. denied sub nom. Carcieri v. Massachusetts, 574 U.S. 902 (2014). We concluded that the deficiency in the case was one of proof, not jurisdiction, and thus jeopardy had attached. See id. See also Love, 452 Mass. at 504 (exception inapplicable because court had jurisdiction); Norman, 27 Mass. App. Ct. at 90–91 (same).

Here, the analysis is similar. Carrying a loaded firearm is a crime, albeit not a freestanding one, over which the District Court undoubtedly has jurisdiction. See G. L. c. 218, § 26; G. L. c. 269, § 10 (n). The government did not "walk[] into the wrong forum" but, rather, failed properly to charge the defendant. See Commonwealth v. Hrycenko, 417 Mass. 309, 318 (1994), citing G. L. c. 263, § 7 ("that the indictment was defective in form or in substance does not prevent the defendant from raising the acquittal as a bar against subsequent prosecution"). See also United States v. Ball, 163 U.S. 662, 669–670 (1896) ("although the indictment was fatally defective, . . . if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable . . ."). As we discuss infra, the judge could have

instructed on G. L. c. 269, § 10 (a), and the jury could have convicted the defendant of that crime. Thus, we conclude that jeopardy attached when the jury were sworn.[12] See Love, 452 Mass. at 503.

Because jeopardy attached in the first proceeding, the protections against double jeopardy are implicated. Depending on the manner in which the proceeding ended, however, a future prosecution may not be prohibited.

c. Character of the terminating order. Under double jeopardy principles, there are two overarching categories of orders by which a judge can terminate a trial prior to a verdict by the fact finder: acquittals and procedural dismissals, often referred to as mistrials. See Evans v. Michigan, 568 U.S. 313, 319-320 (2013). The defendant argues that the trial ended in his acquittal.

An acquittal occurs where there is a ruling on "the facts and merits," Gonzalez, 437 Mass. at 282, quoting G. L. c. 263, § 7, such as "a ruling by the court that the evidence is

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[12] It is unclear whether the jurisdictional exception, which historically has been limited to situations in which a charge was brought in the incorrect court, see, e.g., Commonwealth v. Lovett, 374 Mass. 394, 400 (1978), ever can be invoked based on a crime being a "nullity." See Commonwealth v. Perry P., 418 Mass. 808, 813 (1994) ("trial judge described the trial on the murder count as a 'nullity' [based on lack of indictment,] and, in such circumstances, it may be that principles of double jeopardy do not bar a retrial . . ."). We need not answer that question here. See Commonwealth v. AdonSoto, 475 Mass. 497, 506 (2016) ("We do not decide constitutional questions unless they must necessarily be reached" [citation omitted]).

insufficient to convict, a factual finding [that] necessarily establish[es] the criminal defendant's lack of criminal culpability, [or] any other rulin[g] which relate[s] to the ultimate question of guilt or innocence" (quotations and citation omitted). See Evans, 568 U.S. at 319. See also United States v. Scott, 437 U.S. 82, 97 (1978), quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) ("defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged'"). "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that [a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution" (quotations and citation omitted). Martin Linen Supply Co., supra. This prohibition against appeal or retrial abides even where the acquittal was "based upon an egregiously erroneous foundation." See Commonwealth v. Lowder, 432 Mass. 92, 104 (2000), quoting Fong Foo v. United States, 369 U.S. 141, 143 (1962).

"In contrast, a 'termination of the proceedings . . . on a basis unrelated to factual guilt or innocence of the offense . . . ,' i.e., some procedural ground, does not pose the same concerns, because no expectation of finality attaches to a properly granted mistrial." Evans, 568 U.S. at 319-320,

quoting Scott, 437 U.S. at 98-99. "[W]hat constitutes an 'acquittal' is not to be controlled by the form of the judge's action." Martinez, 572 U.S. at 841-842, quoting Martin Linen Supply Co., 430 U.S. at 571. See Commonwealth v. Brangan, 475 Mass. 143, 147 (2016) ("We are not bound by labels or checkmarks on a form" [citation omitted]). Rather, "the relevant distinction is between judicial determinations that go to 'the criminal defendant's lack of criminal culpability,' and those that hold 'that a defendant, although criminally culpable, may not be punished because of a supposed' procedural error." Evans, supra at 323-324, quoting Scott, supra at 98.

In Lee v. United States, 432 U.S. 23, 30 (1977), the trial judge dismissed the case after jeopardy had attached, but "stressed that the only obstacle to a conviction was the fact that the information had been drawn improperly." The United States Supreme Court determined that "the order entered by the [judge] was functionally indistinguishable from a declaration of mistrial." Id. at 31.

Here, the analysis is quite similar. The trial judge ended the trial because, as he correctly stated, the complaint "would need at least two charges" in order for the defendant to be convicted under G. L. c. 269, § 10 (n). The complaint contained all of the elements of both G. L. c. 269, § 10 (a) and (n), but mistakenly combined them into only one count, rather than setting forth two distinct counts. The defendant

made the reasonable, but ultimately mistaken, argument that the deficiency here was based on the facts and merits. He contended that because a violation of § 10 (a) is an element of § 10 (n), an inherently merits-based deficiency, the Commonwealth could not prove an element of the crime. But neither the defendant nor the judge made any reference to the evidence presented, or the lack thereof. Cf. Smith v. Massachusetts, 543 U.S. 462, 469 (2005) (judge "evaluated the Commonwealth's evidence and determined that it was legally insufficient to sustain a conviction" [citation omitted]). Indeed, "the only obstacle to a conviction was the fact that the [complaint] had been drawn improperly." See Lee, 432 U.S. at 30.

Because the termination of the trial was procedural, the judge's order did not constitute an acquittal for purposes of double jeopardy. Rather, it played the functional role of a declaration of a mistrial. See Lee, 432 U.S. at 31. We thus analyze whether double jeopardy bars the current prosecution under our jurisprudence concerning mistrials. See United States v. Council, 973 F.2d 251, 254 (4th Cir. 1992) (determining that judge's "acquittal" was procedurally based, and therefore analyzing it as mistrial).

d. Mistrial. "[T]he [d]ouble [j]eopardy [c]lause affords a criminal defendant a 'valued right to have his trial completed by a particular tribunal.'" Oregon v. Kennedy, 456 U.S. 667, 671–672 (1982), quoting Wade v. Hunter, 336 U.S.

684, 689 (1949). Thus, where a mistrial is entered "without the defendant's request or consent," retrial is impermissible unless there was a manifest necessity for the mistrial. See United States v. Dinitz, 424 U.S. 600, 606–607 (1976), citing Illinois v. Somerville, 410 U.S. 458, 461 (1973). See also Commonwealth v. Nicoll, 452 Mass. 816, 818 (2008). On the other hand, "when a defendant persuades the court to declare a mistrial, jeopardy continues and retrial is generally allowed." Evans, 568 U.S. at 326, citing Dinitz, supra. This is so because the defendant is considered to have elected "to forgo his valued right to have his guilt or innocence determined before the first trier of fact." Scott, 437 U.S. at 93.

i. Consent. When a defendant moves for a mistrial or agrees to one proposed by the prosecutor or judge, the Commonwealth may seek retrial. See Poretta v. Commonwealth, 409 Mass. 763, 765 (1991). The successive prosecution is permissible because "in such circumstances the defendant consents to a disposition that contemplates reprosecution, whereas when a defendant moves for acquittal he does not." See Evans, 568 U.S. at 326, citing Sanabria v. United States, 437 U.S. 54, 75 (1978). "The important consideration, for purposes of the [d]ouble [j]eopardy [c]lause, is that the defendant retain primary control over the course to be followed . . . ." Scott, 437 U.S. at 93–94, quoting Dinitz, 424 U.S. at 609.

The United States Supreme Court has held that where a defendant did not have an opportunity to object to the discharge of the jury, the defendant is not deemed to have consented. See United States v. Jorn, 400 U.S. 470, 487 (1971) (had defendant "been disposed . . . to object to the discharge of the jury, there would have been no opportunity to do so"). Similarly, we have concluded that where a defendant has impliedly but not expressly articulated opposition to a mistrial, the defendant has not consented. See Commonwealth v. Cassidy, 410 Mass. 174, 177 n.2 (1991); Picard v. Commonwealth, 400 Mass. 115, 116 & n.1 (1987).

The defendant here moved for a required finding of not guilty, making the reasonable, yet ultimately insufficient, argument that acquittal was required because the Commonwealth had failed to prove one of the elements of G. L. c. 269, § 10 (n). He explicitly argued that, if the motion were granted, double jeopardy protections would bar a future prosecution. Had the judge denied the motion for a required finding and instead proposed a mistrial, the defendant might have objected, believing that his odds with the existing jury were better than they would be with another. Or, posed to use his knowledge of the Commonwealth's tactics from the first trial to his future advantage, he might have consented to a mistrial. We can never know. Accordingly, the rule allowing for retrial when a defendant successfully moves for a mistrial does not control here. To hold otherwise would be to ignore

the directive that the defendant "retain primary control over the course to be followed." See Dinitz, 424 U.S. at 609. See also Jorn, 400 U.S. at 485 ("defendant has a significant interest in the decision whether or not to take the case from the jury").

Thus, under the unusual circumstances of this case, we conclude that the defendant did not consent to reprosecution, notwithstanding the fact that he filed the motion that led to termination of the trial. See Lowder, 432 Mass. at 106 ("principle that a defendant who invites a mistrial usually may not claim double jeopardy protection against retrial . . . does not apply to directed acquittals" [citations omitted]). Therefore, the defendant can be retried only if there was a manifest necessity for the mistrial. See State v. Lynch, 155 N.J. Super. 431, 443 (App. Div. 1978), aff'd, 79 N.J. 327 (1979) (concluding that if judge's action, in response to defendant's midtrial motion to dismiss, were to be considered declaration of mistrial, "then it was done by the judge on his own motion, without defendant's request or consent, and, we would conclude, would not have been compelled by any manifest necessity" [quotation omitted]).

ii. Manifest necessity. In determining whether a mistrial is manifestly necessary, a judge must weigh two competing policy considerations: "the defendant's valued right to have his [or her] trial completed by a particular tribunal and the interest of the public in fair trials

designed to end in just judgments" (quotations and citations omitted). Commonwealth v. Bryan, 476 Mass. 351, 358 (2017). See Washington, 434 U.S. at 503 & n.11; Kennedy, 456 U.S. at 672. We review a determination regarding manifest necessity for an abuse of discretion. See Cruz v. Commonwealth, 461 Mass. 664, 669-670 (2012). Two principles guide our review: "(1) counsel must [have been] given full opportunity to be heard and (2) the trial judge must [have given] careful consideration to alternatives to a mistrial." Ray v. Commonwealth, 463 Mass. 1, 4 (2012), quoting Nicoll, 452 Mass. at 818. See Jones v. Commonwealth, 379 Mass. 607, 622 (1980), citing Washington, supra at 516-517 ("Appellate deference will be accorded the trial judge's discretionary determination that 'manifest necessity' exists only if the record reflects that the trial judge gave reasoned consideration to the various available alternatives . . .").

Here, there was a clearly superior alternative to a mistrial. In response to the defendant's motion for a required finding, the Commonwealth requested that the judge instruct the jury on a single count of G. L. c. 269, § 10 (a), instead of the charged count of G. L. c. 269, § 10 (n). "[W]hen the evidence permits a finding of a lesser included offense, a judge must, upon request, instruct the jury on the possibility of conviction of the lesser crime." Commonwealth v. Gallett, 481 Mass. 662, 679 (2019), quoting Commonwealth v. Roberts, 407 Mass. 731, 737 (1990). This requirement applies

to requests made by the Commonwealth. See Commonwealth v. Woodward, 427 Mass. 659, 663 (1998). More precisely, the test is "whether the evidence at trial presents a rational basis for acquitting the defendant of the crime charged and convicting him of the lesser included offense." Commonwealth v. Russell, 470 Mass. 464, 480 (2015), quoting Porro, 458 Mass. at 536.

As discussed, under the circumstances of this trial, G. L. c. 269, § 10 (a), was a lesser included offense of § 10 (n). Thus, the judge was required to grant the Commonwealth's request for an instruction if a rational basis existed for finding the defendant guilty of the lesser included offense but not of the greater. Under the defective complaint, a conviction of the greater offense was impossible, thereby providing a rational basis for the jury to convict only on the lesser offense. Instructing solely on G. L. c. 269, § 10 (a), as requested by the Commonwealth, would have been adequate to satisfy the public's interest in the enforcement of the criminal laws. Contrast Somerville, 410 U.S. at 459–460 ("indictment was fatally deficient under Illinois law"); Commonwealth v. Perry P., 418 Mass. 808, 814 (1994) ("mistrial was unavoidable").

For these reasons, we conclude that there was not a manifest necessity for a mistrial. Thus, the defendant cannot again be prosecuted for the "same offence," including the lesser included offense at issue here. See Harris v.

Oklahoma, 433 U.S. 682, 682-683 (1977), citing Brown v. Ohio, 432 U.S. 161 (1977), and Nielsen, petitioner, 131 U.S. 176 (1889); Rodriguez, 476 Mass. at 370-371.

Conclusion. We answer the reported questions as follows:

"1. General Laws c. 269, § 10 (n), is not a freestanding crime."

"2. Under the facts of this case, G. L. c. 269, § 10 (a), is a lesser included offense of G. L. c. 269, § 10 (n)."

"3. Judicial estoppel should not preclude the defendant's double jeopardy claim."

"4. The defendant's motion to dismiss on double jeopardy grounds should be granted."

The matter is remanded to the District Court for further proceedings consistent with this opinion.

So ordered.