

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

13-P-164

COMMONWEALTH

vs.

DANIEL J. KNIGHT.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A jury in the Superior Court convicted the defendant of nineteen counts related to a series of break-ins and thefts.¹ On appeal, the defendant contends that (1) there was insufficient evidence to support his convictions of receiving a stolen motor vehicle and carrying a firearm without a license; (2) his trial counsel was ineffective for rejecting a continuance at trial to retain a firearms expert and failing to file a motion sever one of the offenses; (3) his right against self-incrimination under

¹ The defendant was convicted of the following: receiving a stolen motor vehicle (G. L. c. 266, § 28[a]); three counts of breaking and entering in the nighttime with intent to commit a felony (G. L. c. 266, § 16); two counts of larceny from a building (G. L. c. 266, § 20); two counts of breaking into a depository (G. L. c. 266, § 16); one count of larceny over \$250 (G. L. c. 266, § 30[1]); one count of vandalizing property (G. L. c. 266, § 126A); seven counts of carrying a firearm without a license (G. L. c. 269, § 10[a]); one count of being a common and notorious thief (G. L. c. 266, § 40); and, after a bifurcated trial, one count under the armed career criminal statute (G. L. c. 269, § 10G[b]).

the Fifth Amendment to the United States Constitution was violated when trial counsel acknowledged that the defendant committed one of the crimes; (4) there was insufficient evidence to support his conviction under the armed career criminal statute; and (5) the prosecutor made improper remarks during closing argument, to the effect that it was the jury's "duty" to find the defendant had been convicted of two separate drug distribution charges as predicates to the armed career criminal charge.² We affirm the defendant's convictions and the order denying the motion for a new trial.

1. Background. The defendant's convictions stem from what is appropriately described as a crime spree involving break-ins throughout western Massachusetts and New York State. After being convicted of carrying a firearm without a license (and on other charges as previously noted), the defendant was tried and convicted in a separate trial as an armed career criminal. G. L. c. 269, § 10G(b).

A. The break-ins. On August 8, 2011, the defendant, Joseph Berry, and Jason Fuller broke into a Pittsfield gasoline station and stole an automated teller machine (ATM). The group loaded the ATM into a stolen pickup truck and drove it to Potter Mountain in Lanesborough, where they broke into it and removed

² This is a consolidation of both the defendant's direct appeal and his appeal of the Superior Court judge's denial of his postconviction motion for a new trial.

the money inside. Marley Roraback, a member of the group, who was not present for the gas station break-in, testified against the defendant, claiming that the defendant stole the truck used in the break-in. Following the gas station heist, the group broke into a self-storage facility in Pittsfield, where they removed valuables from a number of the storage units.

At some point after the Pittsfield storage facility break-in, the defendant traveled with Berry, Fuller, and Roraback to Stephentown, New York, where they broke into another self-storage facility containing a number of individual units. One of the storage units the group broke into contained a collection of firearms and ammunition that were stored in a firearms safe. The defendant helped remove the firearms and ammunition from the storage unit and transported the weapons back to Massachusetts.³

The owner of that storage unit, William Cruickshank, testified that he and his sister stored sixteen firearms in an airtight firearms safe in the storage unit, and all of the firearms and ammunition were removed from the storage unit during the break-in. Cruickshank, an avid firearms collector, testified that prior to purchasing each firearm, he conducted a thorough inspection to ensure that the firearm was in working

³ Roraback testified that the defendant, Berry, and Fuller loaded the firearms and ammunition into a car and they drove back and unloaded them into Roraback's house. The record indicates that the defendant did not have a license to carry firearms when he transported them to Massachusetts.

condition and free of defects. Cruickshank maintained the firearms by cleaning and oiling each firearm twice per year. At some point in 2007, the sixteen firearms and 320 boxes of ammunition were placed in the airtight firearms safe in Cruickshank's storage unit.⁴ While Cruickshank testified that he did not see the firearms after storing them in the safe in 2007, he believed they were in working condition at the time they were put in the safe. Further, there was no indication that the firearms' operability had been compromised by moisture. Cruickshank also acknowledged that he had never fired two of the firearms, a .444 Marlin and .243 Remington. However, he purchased the firearms "brand new" and, based on his maintenance and inspection of the firearms, he believed that they were in working condition when stored in the safe.

On August 29, 2011, the defendant engaged in a separate break-in, by himself, at a salon in Pittsfield. The defendant's break-in was captured by a surveillance camera and that footage was shown to the jury. The target of this break-in was an ATM located in the beauty salon. While trying to steal the ATM, the defendant cut himself and left a large amount of blood on the ATM. Several fingerprints were also recovered from the ATM and were later matched to the defendant.

⁴ The record indicates that Cruickshank gave the weapons to his sister and she was responsible for placing the firearms safe in the storage unit.

B. Armed career criminal trial. Following the defendant's seven convictions of carrying a firearm without a license in connection with the New York storage facility break-in, he was tried in a separate trial as an armed career criminal (ACC). G. L. c. 269, § 10G(b). The predicate offenses for the ACC charge were the firearms convictions and two heroin distribution convictions from 2006. The distribution charges arose out of a series of controlled buys between the defendant and a police informant. On January 19, 2006, the informant contacted the defendant and arranged to purchase five bags of heroin. The informant met the defendant in his car and purchased six bags of heroin instead of the five requested. The second controlled buy, conducted by the same informant, occurred on the following day, January 20, 2006. During the second buy, the defendant sold four bags of heroin to the informant. The defendant pleaded guilty to two counts of heroin distribution on May 24, 2006.

The defendant testified that the informant contacted him and ordered a "bundle" of heroin, constituting ten bags of heroin. The defendant testified that he was unable to provide all ten bags at once, so he split the order into two deliveries. Sergeant Marc Strout of the Pittsfield police department testified that the informant purchased heroin from the defendant on two separate occasions, but Strout had no recollection that

the informant ordered a bundle of heroin.⁵ The defendant was convicted as an armed career criminal and sentenced to the mandatory minimum of ten years in State prison, running concurrent with his sentence on the charge of receiving a stolen motor vehicle.

2. Discussion. We address each of the defendant's claims concerning the sufficiency of the evidence as to the stolen motor vehicle, the unlawful firearm possession and the ACC conviction, the improprieties in the Commonwealth's closing argument related to the ACC conviction, whether defense counsel was ineffective, and whether the defendant's Fifth Amendment rights were violated by defense counsel's acknowledgement that he committed the break-in at the salon.⁶

A. Sufficiency of evidence: receiving a stolen motor vehicle. To sustain a conviction of receiving a stolen motor vehicle, the Commonwealth is required to prove that "(1) the motor vehicle is stolen; (2) the defendant possessed the motor

⁵ Strout further testified that had he requested the informant to order a bundle of heroin, he would have documented that because it would indicate that the person selling heroin "is a bigger dealer."

⁶ The defendant argued in his brief that the trial judge erred in not conducting a colloquy before defense counsel conceded in her opening that the defendant was responsible for the break-in at the salon. As the defendant correctly acknowledges, that issue was recently decided in Commonwealth v. Evelyn, 470 Mass. 765, 772 (2015) (decision to conduct colloquy regarding concession of guilt is left to sound discretion of trial judge). We discern no abuse of discretion here.

vehicle; and (3) the defendant knew that the motor vehicle was stolen." Commonwealth v. Aponte, 71 Mass. App. Ct. 758, 760 (2008). G. L. c. 266, § 28(a). The defendant essentially argues that there was insufficient evidence to support a conviction of receiving a stolen motor vehicle because all of the evidence at trial indicated that the defendant stole the pickup truck, meaning that he could not have also received it. See Commonwealth v. Haskins, 128 Mass. 60, 61 (1880) ("[T]he guilty receiver of stolen goods cannot himself be the thief; nor can the thief be guilty of a crime of receiving stolen goods which he himself had stolen"). However, "where evidence would support a conviction of larceny, it does not prevent an alternative conviction of receipt of stolen goods arising from the same events if the evidence supports that conviction as well." Commonwealth v. Corcoran, 69 Mass. App. Ct. 123, 127 (2007) (jury are entitled to reject evidence tending to prove theft and to "infer receipt from the fact of possession, if [they] so choose[]").

In testifying against the defendant, Roraback and Berry indicated that the defendant was in possession of the truck, and they believed he stole it. It is the exclusive province of the jury to decide whether to "accept or reject, in whole or in part, the testimony presented to them." Commonwealth v. Fitzgerald, 376 Mass. 402, 411 (1978). Particularly where the

defendant's coventurers testified against him, a reasonable jury could have found that the defendant was in possession of the stolen pickup truck and knew it was stolen, and, at the same time, the jury could have rejected the testimony that he was the one who stole it. Accordingly, there was sufficient evidence for the jury to find that the defendant received the stolen motor vehicle.

B. Sufficiency of evidence: firearms. The defendant was convicted of seven counts of carrying a firearm without a license. G. L. c. 269, § 10(a). On appeal, he challenges only the convictions relating to the .444 Marlin and the .243 Remington. The defendant asserts that there was insufficient evidence to establish operability because the firearms were not test fired, and the only evidence of operability came from Cruickshank's testimony.

"The Commonwealth was required to prove as an essential element of its case that the weapon recovered was a working or operable firearm; that is, that the gun was capable of discharging a shot or bullet." Commonwealth v. Barbosa, 461 Mass. 431, 435 (2012) (burden to prove that weapon is firearm "is not a heavy one" [citation omitted]). Operability need only be established by "some competent evidence from which the jury reasonably can draw inferences that the weapon will fire." Commonwealth v. Nieves, 43 Mass. App. Ct. 1, 2 (1997).

Cruickshank testified that he was an experienced gun collector who understood how firearms operated, particularly the firing mechanisms. He not only purchased the firearms "brand new" but he also inspected each firearm to ensure that it was in working condition prior to purchase. When the firearms were stored in the airtight safe, Cruickshank believed that they were in working condition, and there was no evidence that the firearms were damaged while stored in the safe. Furthermore, Cruickshank cleaned, oiled, and inspected the firearms twice per year to ensure they were in working condition. Thus, although Cruickshank never fired the weapons in question, his detailed testimony concerning inspecting and maintaining the firearms was sufficient for the jury to conclude that the firearms were operable.

C. Ineffective assistance of counsel. We review a claim of ineffective assistance of counsel under the familiar standard of Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). "A strategic or tactical decision by counsel," as is the case here, "will not be considered ineffective assistance unless that decision was 'manifestly unreasonable' when made." Commonwealth v. Acevedo, 446 Mass. 435, 442 (2006), quoting from Commonwealth v. Adams, 374 Mass. 722, 728 (1978).

First, the defendant contends that his trial counsel was ineffective for refusing to continue the trial in order to

consult with a firearms expert to better prepare a challenge to the operability of the firearms. This argument is unpersuasive. Defense counsel made a tactical decision to reject the proposed continuance. A continuance would have provided the Commonwealth additional time to test the firearms, potentially establishing that the firearms were in fact operable. Instead, defense counsel invested time educating herself about firearms and issues related to operability in order to conduct a competent cross-examination of Cruickshank. Accordingly, we are convinced that rejecting the continuance was a tactical decision by defense counsel that was not manifestly unreasonable and did not prejudice the defendant.

Second, the defendant claims that his trial counsel was ineffective in failing to move to sever the offenses related to the break-in at the salon from the other charges against him. Where a claim for ineffective assistance of counsel is based on defense counsel's failure to file a motion, such as that to sever, the defendant must "show that the motion would likely have been granted." Commonwealth v. Diaz, 448 Mass. 286, 289 (2007). See Commonwealth v. Comita, 441 Mass. 86, 91 (2004).

Related offenses may be joined "if they are based on the same criminal conduct or episode or arise out of a course of criminal conduct or series of criminal episodes connected together or constituting parts of a single scheme or plan."

Commonwealth v. Spray, 467 Mass. 456, 468 (2014), quoting from Mass.R.Crim.P. 9(a), 378 Mass. 859 (1979). These offenses met that standard.

Each of the indictments concerned late night break-ins and thefts in Pittsfield and closely neighboring communities throughout August, 2011. Two of the break-ins, including the salon break-in, targeted ATMs. The facts that the defendant acted alone, that his methods of stealing the ATM were less effective, and that he left behind physical evidence does not make the salon break-in any less related to the other break-ins. Furthermore, evidence of the defendant's other criminal conduct may have been admissible in a trial for the salon break-in to "show a common scheme, pattern of operation, absence of accident or mistake, identity, intent, or motive." Commonwealth v. Mamay, 407 Mass. 412, 417 (1990), quoting from Commonwealth v. Helfant, 398 Mass. 214, 224 (1986). The defendant fails to establish that the claims were unrelated or that he was prejudiced in any way by the joinder of the charges. Moreover, because a motion to sever in this case would most likely not have been successful, we discern no ineffective assistance of counsel.

D. Sufficiency of evidence: armed career criminal. We reject the claim that there was insufficient evidence to support the defendant's conviction as an ACC because the two drug

transactions underlying the conviction constituted one offense. See G. L. c. 269, § 10G(b). The evidence reflects that two separate incidents of heroin distribution occurred, on January 19, 2006, and January 20, 2006. The defendant testified that the informant requested a "bundle" of heroin, comprising ten bags of heroin, and that he made the single sale over two days. Sergeant Strout testified that he did not recall that the informant ordered a bundle of heroin. Furthermore, Strout testified that "[w]e had on two separate occasions made two controlled purchases of heroin from [the defendant]." Because the sales were completed on separate days and the jury were free to reject the defendant's testimony, there was sufficient evidence for the jury to conclude that the defendant engaged in two separate incidents of drug distribution.⁷ See Fitzgerald, 376 Mass. at 411 (jury may "accept or reject, in whole or in part, the testimony presented to them").

E. Prosecutor's closing argument in ACC trial. The Commonwealth appropriately concedes that the prosecutor made an improper remark during closing argument of the ACC trial. The prosecutor stated the following:

⁷ We are unpersuaded by the defendant's argument that because the total amount of heroin sold was ten bags, or the quantity of a bundle, we should accept that the transactions occurring on separate days were actually one transaction. A reasonable jury could have found that these were two separate transactions. We are similarly unpersuaded by the defendant's statutory construction argument concerning G. L. c. 269, § 10G(b).

"When you go back into that room, you have to set aside your likes, your dislikes and your personal feelings and decide based on your common sense and life experience if things happened on different days, is that two different incidents? The defendant on two days handing something to someone, two separate and distinct incidents and that is your duty. Your likes and dislikes cannot and must not factor into your decisions." (Emphasis added.)

As there was no objection to the prosecutor's closing argument at trial, we review the alleged error to determine whether the improper argument created a substantial risk of a miscarriage of justice. Commonwealth v. Jones, 471 Mass. 138, 148 (2015). In determining whether the improper argument created a substantial risk of a miscarriage of justice, we look to whether the error went to the heart of the case, the judge's mitigating instructions, and whether the error possibly made a difference in the jury's conclusions. Commonwealth v. Arroyo, 442 Mass. 135, 147 (2004).

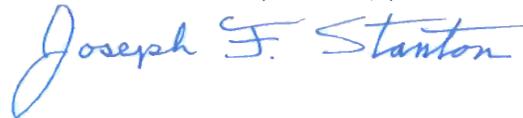
The trial judge instructed the jury that closing arguments were not evidence and, more importantly, he stated that "[t]he Commonwealth has to prove that there were two drug offenses under their theory as returned by the indictment, but they also have to prove that it was separate incidents." The trial judge's instructions made it clear to the jury that the burden was on the Commonwealth to prove that there were two separate incidents. Furthermore, the Commonwealth presented a strong case against the defendant, and there is no indication that the

prosecutor's misstep made any impact on the jury. Accordingly, we are confident that the prosecutor's improper remark did not create a substantial risk of a miscarriage of justice.

Judgments affirmed.

Order denying motion for new trial affirmed.

By the Court (Berry, Meade & Maldonado, JJ.⁸),



Clerk

Entered: January 7, 2016.

⁸ The panelists are listed in order of seniority.