

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT  
No.

APPEALS COURT  
2020-P-0933

COMMONWEALTH

V.

TEDROS HISHE

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ON APPEAL FROM DECISION OF THE MASSACHUSETTS APPEALS  
COURT

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APPLICATION FOR FURTHER APPELLATE REVIEW OF THE  
APPELLANT TEDROS HISHE

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COMMONWEALTH OF MASSACHUSETTS

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SUPREME JUDICIAL COURT  
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APPEALS COURT  
2020-P-0933

COMMONWEALTH

v.

TEDROS HISHE

APPLICATION FOR FURTHER APPELLATE REVIEW

Now comes the petitioner and requests, pursuant to Mass.R.A.P. 27.1, leave to obtain further appellate review of his conviction and the May 20, 2021 decision of the Massachusetts Appeals Court.<sup>1</sup>

RELEVANT PRIOR PROCEEDINGS

On February 27, 2018, Tedros Hishe was charged with carrying a loaded firearm without a license (M.G.L. c. 269 §10(n)), possession of ammunition without an FID card (M.G.L. c. 10(h)(1)), and armed career criminal (M.G.L. c. 269, §10G(a)). (R. 3-7)<sup>2</sup>

On July 2, 2018, trial counsel filed a motion to suppress evidence obtained and seized by law enforcement. (R. 26) On September 24, 2018, the Commonwealth filed an opposition to the motion to suppress. (R. 45) On February 4, 2019, an evidentiary hearing was held regarding the motion to

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<sup>1</sup> Commonwealth v. Tedros Hishe, 2020-P-0933

<sup>2</sup>References to the Record Appendix will be cited as “R. \_\_”, by page number. References to the Transcript will be cited by date and page number: “Tr. X/X/XX, Pg. \_\_”. References to the Addendum will be cited as “Add. \_\_”, by page number.

suppress. (R. 17) On April 2, 2019, the trial court denied Mr. Hishe's motion to suppress. (R. 17)

Mr. Hishe was tried along with his co-defendant Mr. James Kearse. Mr. Hishe and Mr. Kearse had a five-day jury trial from July 22, 2019 to July 26, 2019. (R. 11) On July 25, 2019, Mr. Hishe moved for a required finding of not guilty. (R. Tr. 7/25/19, Pg. 262) The required finding was denied. (Tr. 7/26/19, Pg. 4)

During the Commonwealth's closing arguments, the prosecutor misstated the law regarding constructive possession, omitting the intent element. (Tr. 7/26/19, Pg. 67-69) Trial counsel objected and requested a curative instruction, which the judge refused to give. (Tr. 7/26/19, Pg. 75)

Mr. Hishe was found guilty of possession of a firearm with a prior violent/drug crime. (R. 22) He was found not guilty on the remaining counts. (R. 22) Mr. Hishe was sentenced to five years of incarceration. (R. 24) A timely notice of appeal was filed on August 26, 2019. (R. 54) On May 20, 2021, the Appeals Court affirmed the trial court's decision. (Add. 21)

#### FACTS RELEVANT TO THE APPEAL

On January 8, 2018, Officers Callahan and O'Brien were on patrol in plain clothes and an unmarked cruiser. (Tr. 2/11/19, Pg. 11) They were patrolling the Chinatown area of Boston due to recent firearm incidents days earlier. (Tr. 2/11/19, Pg. 11) While patrolling the area, the officers saw a vehicle with two occupants, neither of whom were wearing their seatbelts. (Tr. 2/11/19, Pg. 13)

Officer O'Brien made quick eye contact with the driver, and then O'Brien made a U-turn and followed the car. (Tr. 7/24/19, Pg. 21) While following the car down Oak Street, which turns left into Tyler Street, the car made an abrupt right-hand turn into the Tai Tung Village parking lot. (Tr. 7/24/19, Pg. 21) The officers traveled the wrong-way down a one-way street, Tai Tung Street, and turned right onto Hudson Avenue to catch up to the car. (Tr. 7/24/19, Pg. 23-24) They saw the car exit the parking lot to Hudson Street and then re-enter another Tai Tung Village parking lot and back into a parking spot near a large snow bank and shut off its lights. (Tr. 7/24/19, Pg. 23-25) O'Brien continued down Hudson to Harrison Avenue, and then he backed into a spot at that intersection near Pine Street where he could see the parked car. (Tr. 7/24/19, Pg. 24)

The officers saw two people exit the car and walk from it toward the Tai Tung Village housing development. (Tr. 7/24/19, Pg. 26-27) The two entered the rear of 362 Harrison Avenue. (Tr. 7/24/19, Pg. 26-27) After five to ten minutes, the two people returned to the car and pulled out of the parking lot onto Harrison Avenue. (Tr. 7/24/19, Pg. 27) There is a four-way intersection at that spot. (Tr. 7/24/19, Pg. 27) According to the officers, the car drove through a red light at that intersection. (Tr. 7/24/19, Pg. 28)

O'Brien proceeded through the intersection, activated the emergency lights and pulled the car over at the corner of Harrison Avenue and Herald Street. (Tr. 7/24/19, Pg. 28) O'Brien approached the driver's side and Callahan went to the passenger side. (Tr. 7/24/19, Pg. 42) When Officer O'Brien asked Mr. Hishe for his license and registration, he appeared nervous. (R. 42) He fumbled for the

registration and could not produce an actual, physical license or identification. (Tr. 7/24/19, Pg. 46-49) Mr. Hishe told the officer he had lost his license the day before. (Tr. 7/24/19, Pg. 50) Officer O'Brien testified that although Mr. Hishe did not have his driver's license or identification on him that night, he checked and saw that he had a valid driver's license. (Tr. 7/24/19, Pg. 143) Officer O'Brien asked Hishe for his full name, and Mr. Hishe provided it without a problem. (Tr. 7/24/19, Pg. 151)

Officer O'Brien asked Mr. Hishe where they were coming from. (Tr. 7/24/19, Pg. 50) He said they were coming from visiting their cousin, Ms. Pugh.<sup>3</sup> (Tr. 7/24/19, Pg. 50) O'Brien then asked for their cousin's, Ms. Pugh's, first name. (Tr. 7/24/19, Pg. 50) According to O'Brien, "[t]hey said, I don't know. We just know her as Ms. P[ugh]." (Tr. 7/24/19, Pg. 50) Officer Callahan saw Mr. Kearse in the passenger seat texting with his right hand while he had his left elbow leaning on the center console. (Tr. 7/26/19, Pg. 136-137) Officer Callahan noted that Mr. Kearse did not lift his elbow for the entire interaction. (Tr. 7/26/19, Pg. 136-137)

The officers then issued an exit order to Mr. Hishe and Mr. Kearse. (Tr. 7/24/19, Pg. 52) Upon exiting the vehicle, Mr. Hishe and Mr. Kearse were pat-frisked for weapons, and no weapons, nor anything else of note, was found. (R. 42) Despite this, the police then proceeded to extend the search to the vehicle

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<sup>3</sup> The transcript spells this name as "Ms. Pay (ph)". (Tr. 7/24/19, Pg. 50) However, the final witness to testify, Amanda Pugh, who is the daughter of "Ms. Pay (ph)", testified that the correct spelling is "P-U-G-H." (Tr. 7/26/19, Pg. 274) This brief will use "Ms. Pugh."

itself. (R. 42) Officer O'Brien lifted the console cover, and underneath it found a tray. (Tr. 7/24/19, Pg. 54) After removing the tray, Officer O'Brien looked inside the center console and saw a black firearm. (Tr. 7/24/19, Pg. 54-55) The police claim that once he was no longer resting his elbow on the center console, it was slightly ajar. (Tr. 7/24/19, Pg. 54)

Officer O'Brien alerted Officer Callahan to the presence of the firearm, and then they handcuffed Mr. Hishe and Mr. Kearse. (Tr. 7/24/19, Pg. 55) The officers asked each for his license to carry a firearm. (Tr. 7/24/19, Pg. 60) Both Mr. Kearse and Mr. Hishe stated that they were not aware of the presence of the firearm. (Tr. 7/24/19, Pg. 60) The officers placed them under arrest. (Tr. 7/24/19, Pg. 60-61)

The car Mr. Hishe was driving also had an Uber decal on the front windshield. (Tr. 7/24/19, Pg. 82) Officer O'Brien had no information as to how long Mr. Hishe had driven the car before the officers saw him driving on Oak Street that night. (Tr. 7/24/19, Pg. 83) Officer O'Brien also had no information as to who else, besides Mr. Hishe and Mr. Kearse, had access to the vehicle. (Tr. 7/24/19, Pg. 83-84)

Amanda Pugh testified for the defense. (Tr. 7/25/19, Pg. 263) Ms. Pugh had known Tedros Hishe for over fourteen years, and also knew James Kearse, as they had all grown up together. (Tr. 7/25/19, Pg. 280-282) Ms. Pugh testified that she lived at 230 Harrison Avenue, which was in Tai Tung Village, with her mother, Rochelle Pugh, and her siblings until she was 23 years of age. (Tr. 7/25/19, Pg. 275-276) The Tai Tung Village apartment complex consists of four



buildings. (Tr. 7/25/19, Pg. 278) To enter any of the four buildings as a visitor, you must enter through the main entrance at 230 Harrison Avenue. (Tr. 7/25/19, Pg. 278-279) There are two parking lots available for visitors. (Tr. 7/25/19, Pg. 279) The entrance for one of them is located on Oak Street as it turns into Tyler Street. (Tr. 7/25/19, Pg. 279) The entrance to the other parking lot is on the other side of the buildings and is adjacent to Harrison Avenue. (Tr. 7/25/19, Pg. 284) The lot adjacent to Harrison Avenue was often closed by the hanging of a chain at night. (Tr. 7/25/19, Pg. 285) When that occurred, and a person was already parked inside the lot, they would have to reverse and go back onto Hudson Street to exit. (Tr. 7/25/19, Pg. 286)

In Ms. Pugh's experience, visitors park in the Tai Tung parking lots. (Tr. 7/25/19, Pg. 280) Although there is a towing policy, she testified that "it's not really enforced." (Tr. 7/25/19, Pg. 280) Ms. Pugh testified that her friends who visited have never been towed out of Tai Tung Village. (Tr. 7/25/19, Pg. 280) Ms. Pugh testified that she would see Hishe "[p]retty often." (Tr. 7/25/19, Pg. 281) Ms. Hishe often visited Pugh at her house and would interact with her mother. (Tr. 7/25/19, Pg. 282) He called her mother either "Ma" or "Ms. Pugh." (Tr. 7/25/19, Pg. 282) Ms. Pugh did not hear Mr. Hishe call her mother by her first name. (Tr. 7/25/19, Pg. 282)

Ms. Pugh's mother, now sixty years of age, suffers from breast cancer, fibromyalgia, diabetes and a few other ailments. (Tr. 7/25/19, Pg. 282-283). She has been sick for approximately seven to eight years. (Tr. 7/25/19, Pg. 283) People would often go to visit her mother, because "everybody knows [Pugh's]

mom and she's one of the few people still in the area, so they just come by to say hi, check on her, see how she's doing." (Tr. 7/25/19, Pg. 283) Mr. Hishe has visited her mother over the years. (Tr. 7/25/19, Pg. 283)

POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW  
IS SOUGHT

1. Given that the evidence presented only showed that the defendant had a general desire to avoid interacting with the police, and that there was no evidence to connect the defendant to the gun located in the car as would be needed for constructive possession, should the motion for a required finding have been granted?
2. Given that the defendant's is a black man who was being stopped by a police force with a known history of racial profiling, should his evasive actions and nervousness, combined with other innocuous factors, have justified an exit order leading to the search that discovered the gun?
3. Given that the Commonwealth misstated the law in their closing argument, lowering the standard of proof needed regarding a critical issue in the case, was the trial judge's lack of a curative instruction following this misstatement of law prejudicial error?

WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

Further appellate review is appropriate because the Appeals Court decision failed to consider the significance of the defendant's race in regard to why he would be nervous around police and want to avoid an encounter with them, both in relation to the unjustified exit order and the lack of evidence connecting the defendant to the gun in the car. Further, the Appeals Court failed

to consider the prejudice caused by the Commonwealth's misstatement of the standard of law in their closing arguments.

I. There Was Insufficient Evidence to Show Constructive Possession

In affirming the trial court's decision, the Appeals Court stated that there was sufficient evidence to show constructive possession, relying heavily on Mr. Hishe's evasive driving and nervousness upon encountering the police. (Add. 26, 28, 31, 32)

**A. Insufficient Evidence to Show Knowledge**

Knowledge is an essential element of constructive possession, "[k]nowledge is essential because it would not be a reasonable interpretation that a[n] [object] is within the control of someone who does not know he has it." Commonwealth v. Snow, 76 Mass. App. Ct. 116, 119 (2010) (internal citations omitted)

The Appeals Court was incorrect in finding that Mr. Hishe's evasive driving and nervousness was sufficient to show that he had knowledge of the gun located in the center console. The Appeals Court ignores the significance of Mr. Hishe's race. As a black man in Boston, Mr. Hishe has very good reason to not want to be stopped by police, and then to be nervous upon being stopped by police. See Commonwealth v. Warren, 475 Mass. 530, 539 (2016) (where the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department (department) report documenting a pattern of racial profiling of black males in the city of Boston) One need only look at the cases of Daunte Wright, Rayshard Brooks, Philando Castille, and many others to

see that a black man can die during what is supposedly a simple traffic stop. See Commonwealth v. Evelyn, 485 Mass. 691, 701 (2020) (We agree that the troubling past and present of policing and race are likely to inform how African-Americans and members of other racial minorities interpret police encounters) Mr. Hishe's desire to avoid police interaction does not equate to constructive possession of the gun, it just shows that he is aware of what can happen in this country when a black man is pulled over by police.

Even if Mr. Hishe's evasive behavior and nervousness was more than just racial issues with police, it still would not show that he had constructive possession of the gun. All it shows is his desire to avoid interacting with the police, which could show that he was committing some type of illegal activity, but is not sufficient to show constructive possession of the gun in the car. See Commonwealth v. Caterino, 31 Mass. App. Ct. 685, 689 (1991) (behavior suggesting that the defendant may have been guilty of some offense does not show that he had constructive possession of the illegal item)

The Appeals Court likely relies so heavily on Mr. Hishe's evasive actions and nervous demeanor because there is nothing else that would show he was aware of the gun. There were no fingerprints recovered from the firearm, and no evidence of DNA. (Tr. 7/25/19, Pg. 259-260; 268-270) Despite the police specifically looking in the car for personal items that would connect Mr. Hishe to the gun, no personal items of Mr. Hishe were found. (Tr. 7/25/19, Pg. 146-147) See Commonwealth v. Frongillo, 66 Mass. App. Ct. 677, 684, (2006) (Constructive possession not shown where there was a lack of personal effects connecting the

defendant to the guns and ammunition) Even though he was driving, the car did not belong to Mr. Hishe, and the gun was not visible prior to being discovered by the police. (Tr. 2/4/19, Pg. 126) It was Mr. Hishe's co-defendant, and not Mr. Hishe, who had his elbow on the center console where the gun was located. (Tr. 7/26/19, Pg. 136-137) Ultimately, there is nothing to show that Mr. Hishe had knowledge of the gun, and therefore he cannot be shown to have constructive possession.

#### **B. Insufficient Evidence to Show Intent**

Even if knowledge had been shown, that still would not have been enough to show constructive possession. See Commonwealth v. Aiello, 49 Mass. App. Ct. 496, 498 (2000) (Knowledge of an illegal item is not the equivalent of possession) There is insufficient evidence to show that Mr. Hishe had an intent to exercise control over the gun. See Commonwealth v. Romero, 464 Mass. 648, 658 (2013) (the fact that the defendant was the operator of the vehicle served only to put him in the proximity of the firearm and did not provide evidentiary support for the proposition that he intended to control the firearm)

While Mr. Hishe was seated close to where the gun was ultimately discovered, this does not mean that he had the requisite intent to control the gun. See Commonwealth v. Romero, 464 Mass. 648, 658 (2013) (assessment regarding the defendant's intent to control the firearm is not altered after taking into consideration the defendant's proximity to the weapon, evidence more relevant to whether the defendant had the ability to control the firearm, than his intention to exercise that control) No evidence was presented to show Mr. Hishe's intent to

control the firearm. See Commonwealth v. Romero, 464 Mass. 648, 656-57, (2013) (Constructive possession not shown where the defendant was not wearing a holster sized to fit the firearm, nor was he carrying ammunition that matched the weapon, and he made no attempt to conceal the firearm) Similar to Romero, Mr. Hishe did not have a holster, ammunition, nor did he make any attempt to conceal the location of the gun. No personal items of Mr. Hishe were located in the car. (Tr. 7/25/19, Pg. 146-147) See Commonwealth v. Ramos, 51 Mass. App. Ct. 901, 902-903 (2001) (although knowledge was established...neither ability nor intent to control shotgun was established due to absence of personal belongings connecting defendant to premises); Commonwealth v. Delarosa, 50 Mass. App. Ct. 623, 628 (2000) (intent to exercise control of gun not shown where there was no evidence such as clothing or papers to show a personal connection between the defendant and the room where the gun was located)

The Appeals Court relies on Mr. Hishe's evasive actions and nervous demeanor to justify constructive possession. This behavior at most would have shown that Mr. Hishe was aware of the gun, or possibly that he was guilty of something, but not that he constructively possessed the gun located in the car. See Commonwealth v. Amparo, 43 Mass. App. Ct. 922, 924 (1997) (Behavior tending to show that the defendant knew of the presence of drugs in the apartment or that he was guilty of some offense is not sufficient, by itself, to prove that he had the ability and intent to control the drugs) Ultimately, there was insufficient evidence to show constructive possession, and the motion for a required finding should have been granted.

II. The Warrantless Search Should Have Been Suppressed as it Was Not Justified by Safety Concerns

The Appeals Court found that the search of the defendant was justified based on a combination of minor factors, placing significant emphasis on the defendant's evasive actions and nervous behavior upon encountering police. (Add. 26, 28, 31, 32) The Appeals Court in making this finding ignore the significance of the defendant's race. See Commonwealth v. Evelyn, 485 Mass. 691, 694 (2020) (an innocent African-American man in an urban area might flee from police for fear of racial profiling) It is very easy to understand why Mr. Hishe would want to avoid an encounter with police regardless of any potential illegal activity. See Commonwealth v. Evelyn, 485 Mass. 691, 701 (2020) (internal citations omitted) (Black males learn at an early age that confrontations with the police should be avoided)

The Appeals Court states “[t]o be sure, Hishe's failure to produce a driver's license, his nervousness, and both defendants' evasive responses to the officers' questions, standing alone, did not give rise to reasonable suspicion.” (Add. 28) But they do not actually state what factor, or combination of factors, suddenly justifies a safety search. The only other factors are Mr. Kearshe leaning his elbow on the center console, the general characterization of the area as a high crime area, and Mr. Hishe's extremely dated criminal record. (Add. 26) Mr. Hishe's firearm charge was twelve years old when the stop occurred. (Tr. 2/4/19, Pg. 95) Mr. Kearshe leaning his elbow on the center console would indicate that he may have been trying to hide something, not that he was trying to access any kind of weapon. This is further reinforced on the basis that neither Mr. Hishe nor Mr.

Kearse made any movement towards the center console, or made any furtive movement of any kind during the stop (R. 42)

The characterization of the area as a high crime area should have little to no bearing on the defendant, the shootings referred to in order to justify the characterization of the area as high crime had taken place three and five days earlier, they were not something that had just occurred. (Tr. 2/4/19, Pg. 152-153) There was no indication that the police were specifically investigating the defendant for a shooting. See Ybarra v. Illinois, 444 U.S. 85, 94 (1979) (the grounds for suspicion must be directed at the person to be searched and not just based on information about the premises where the search is taking place) Simply listing an unrelated crime from days earlier is not sufficient to justify a safety search.

The factors listed are all minor and innocuous, and simply listing numerous factors does not give rise to a justifiable safety search. See Commonwealth v. Bartlett, 41 Mass. App. Ct. 468, 472 (1996) (adding up eight innocuous observations-eight zeros - does not produce a sum of suspicion that justifies a line of interrogation, an order of persons out of their car, and a search of their car)

### III. The Closing Argument by the Commonwealth Misstates the Law

The Appeals Court found that the Commonwealth's closing statement was allowable, stating that there was no error. (Add. 33) This is patently incorrect, as the Commonwealth very clearly misstated the law of constructive possession by omitting the intent element. (Tr. 7/26/19, Pg. 67-69) Omitting a significant element of the law is more than just argument, it is an erroneous statement of the



law. The question is not whether this was error, but whether the error was significant enough to warrant reversal. Commonwealth v. Morales, 461 Mass. 765, 784-785 (2012)

This error does warrant reversal, as it goes to the heart of the issue. As was discussed, there is insufficient evidence to show constructive possession, particularly in regard to intention to control the gun found in the car. While the defendant holds that there was insufficient evidence to show knowledge, there was even less evidence to show intent, and by omitting this significant element from their closing argument, the Commonwealth lowered the bar on the standard of proof.

The intent to exercise dominion and control is crucial, without intent the defendant could be punished for simply being present near an illegal item. See Commonwealth v. Romero, 464 Mass. 648, 654 (2013) While the judge later gave jury instructions that included intent, we cannot be certain that the jury had not already been tainted by hearing the Commonwealth's misstatement of the law which occurred without a curative instruction to mitigate the damage.

Due to this, and other errors in the Appeals Court decision, the Appellant was denied his right to a fair trial under the Fourth and Fourteenth Amendments to the Constitution, and Articles 12 and 14 of the Massachusetts Declaration of Rights.

### CONCLUSION

For all the reasons set out above, the defendant's Application for Further Appellate Review should be granted.

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CERTIFICATE OF COMPLIANCE

I the undersigned, counsel to the defendant herein, hereby certify that this application for further appellate review complies with the rules of court that pertain to the filing of briefs, including, but not limited to, Mass. R.A.P. 16(a)(1), (3), (4), (9), and (11) -(15), and that length of this brief was determined using number of words.

/s/ Philip Weber

CERTIFICATE OF SERVICE

I, Philip Weber, hereby certify that I have this day served electronically, by the e-filing system, a copy of the foregoing Application for Further Appellate Review upon:

Benjamin Shorey  
Suffolk District Attorney's Office  
One Bulfinch Place  
Boston, MA, 02114

/s/Philip Weber

ADDENDUM

<u>Commonwealth vs. Hishe,</u> Mass. App. Ct., No. 20-P-0933.....	Add. 21
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NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as 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 23.0 or 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

20-P-932

20-P-933

COMMONWEALTH

vs.

JAMES KEARSE (and two companion cases<sup>1</sup>).

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Tried together in the Superior Court, the defendants, James Kearse and Tedros Hishe, were convicted of various offenses arising out of their joint possession of a firearm seized from the center console of a vehicle that Hishe was driving with Kearse as his sole passenger.<sup>2</sup> Their primary claims on appeal

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<sup>1</sup> One is against James Kearse and one is against Tedros Hishe.

<sup>2</sup> Kearse was convicted of carrying a firearm without a license, G. L. c. 269, § 10 (a), and possessing ammunition without a firearm identification (FID) card, subsequent offense, G. L. c. 269, § 10 (h) (1). He was acquitted of carrying a loaded firearm without a license, G. L. c. 269, § 10 (n). Hishe was convicted of possession of a firearm having previously been convicted of a violent crime or serious drug offense in violation of G. L. c. 269, § 10G (a). He was acquitted of possession of ammunition without an FID card, G. L. c. 269, § 10 (h) (1), and of carrying a loaded firearm without a license, G. L. c. 269, § 10 (n).

concern the denial of their motions to suppress and the sufficiency of the evidence. We affirm.

1. Motions to suppress. The defendants assert that because the Commonwealth failed to show that the police had justification to order them out of the vehicle, to pat frisk them, or to search the interior of the vehicle, the judge erred in denying their motions to suppress. "In reviewing a ruling on a motion to suppress evidence, we accept the judge's subsidiary findings of fact absent clear error . . . . We review independently the application of constitutional principles to the facts found." Commonwealth v. Amado, 474 Mass. 147, 151 (2016), quoting Commonwealth v. Wilson, 441 Mass. 390, 393 (2004).

a. Findings of fact. We recite the facts as found by the motion judge, "supplemented by additional undisputed facts where they do not detract from the judge's ultimate findings." Commonwealth v. Kaplan, 97 Mass. App. Ct. 540, 541 n.3 (2020), quoting Commonwealth v. Jessup, 471 Mass. 121, 127-128 (2015).

At 7 P.M. on an evening in January 2018, Officers Timothy Callahan and Jonathan O'Brien were patrolling the Chinatown neighborhood of Boston after two recent firearms incidents in the area.<sup>3</sup> The officers were in plain clothes in an unmarked

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<sup>3</sup> Three days earlier there had been a "shots fired" incident nearby, in which O'Brien had recovered a firearm. Another

police cruiser. Noticing that the operator and passenger of a passing vehicle, later identified as Hishe and Kearse, respectively, were not wearing seatbelts, the officers made a U-turn and began following them. The defendants made an abrupt turn into a parking lot, drove through to an adjacent street, and then entered the parking lot of an apartment complex, where they parked behind a snowbank, extinguished the headlights, and waited for about five minutes. The judge credited the officers' characterization of the car's travel as "evasive" and their belief that the defendants were "hiding." The defendants then left the car and walked through the parking lot out of the officers' view, returning five minutes later. Hishe then pulled out of the parking lot onto the street and ran through a red light at the first intersection.

After observing the traffic violation, the officers sounded their siren and stopped the vehicle. O'Brien approached the driver's side, while Callahan approached the passenger's side. Callahan recognized Kearse, who was sitting in the front passenger's seat. He knew that Kearse had multiple firearms charges on his record, believed that he was affiliated with a gang, and was aware that one of the gang's members had recently been shot. Kearse's seat was almost fully reclined, and he was

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incident involving firearms had taken place two days before that.

manipulating his cell phone with his right hand while keeping his left elbow "awkwardly" on top of the center console. The officers believed, and the judge found, that this was "odd and concerning" behavior.

Meanwhile, O'Brien asked Hishe for his license and registration. Hishe said he had lost his license; when retrieving the registration, "Hishe's hands shook, he fumbled, and he appeared very nervous." O'Brien returned to the cruiser to verify Hishe's license status. O'Brien confirmed that Hishe had valid license, but he also learned from the online criminal justice database that Hishe had a firearms charge on his record. The officers then asked the defendants where they were coming from; they responded that they had been visiting a cousin, whose first name they could not provide. The judge found that the officers "reasonably disbelieved" the defendants' story.

The officers ordered the defendants out of the car. When Kearse exited, the officers noticed that the center console on which he had been leaning was "slightly ajar." The officers pat frisked the defendants, finding nothing. O'Brien then searched of inside the car, under the front seats and inside the center console. Underneath a tray inside the console O'Brien discovered a firearm.

b. Validity of exit order, patfrisks, and search of vehicle's interior. "[A]n exit order is justified during a



traffic stop where (1) police are warranted in the belief that the safety of the officers or others is threatened; (2) police have reasonable suspicion of criminal activity; or (3) police are conducting a search of the vehicle on other grounds."

Commonwealth v. Torres-Pagan, 484 Mass. 34, 38 (2020). The officers' belief "must be grounded in 'specific, articulable facts and reasonable inferences drawn therefrom.'" Commonwealth v. Silvelo, 486 Mass. 13, 16 (2020), quoting Commonwealth v. Edwards, 476 Mass. 341, 345 (2017). A patfrisk "requires more; that is, police must have a reasonable suspicion, based on specific articulable facts, that the suspect is armed and dangerous." Torres-Pagan, supra at 38-39. In addition, officers may conduct a limited search of the interior of a vehicle, confined to areas from which the occupants of the vehicle might readily gain possession of a weapon, if the officers would be warranted in believing that their safety would be endangered when the occupants returned to the vehicle at the conclusion of the stop and frisk. See Commonwealth v. Douglas, 472 Mass. 439, 445-446 (2015), and cases cited therein. See also Silvelo, supra at 16 (protective search permitted where "defendant may access a weapon left behind upon returning to the vehicle"); Commonwealth v. Galarza, 93 Mass. App. Ct. 740, 744 (2018) ("Police may conduct a protective sweep of the interior

of a motor vehicle for a weapon so long as the search is limited to areas from where the defendant could access a weapon").

We agree with the motion judge's conclusion that the facts, "considered in totality," Torres-Pagan, 484 Mass. at 41, quoting Commonwealth v. Vazquez, 74 Mass. App. Ct. 920, 923 (2009), provided a reasonable basis for the officers not only to be concerned for their safety, but also to believe that the defendants were armed and dangerous, justifying the exit order, the patfrisks, and the search of the console. The officers were patrolling a neighborhood where recent incidents involving firearms had occurred. See Torres-Pagan, supra (judge properly considered reports of shots fired, gang activity, and violent crimes in vicinity within week preceding traffic stop). Upon seeing the officers, the defendants took evasive action. They parked behind a snowbank, waited in the vehicle with the headlights off, walked away, returned to the vehicle, and then again tried to evade the officers by running a red light. See Commonwealth v. Hernandez, 473 Mass. 379, 386 (2015) ("driver's evasive movements . . . may be considered"). After the stop,<sup>4</sup> Hishe was unusually nervous, while Kearse assumed an unnatural,

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<sup>4</sup> On appeal, the defendants do not challenge the validity of the stop, which was lawfully based on the traffic violation the officers observed. See Commonwealth v. Santana, 420 Mass. 205, 207 (1995), quoting Commonwealth v. Bacon, 381 Mass. 642, 644 (1980) ("Where the police have observed a traffic violation, they are warranted in stopping a vehicle").

awkward posture, suggesting he was concealing something in the center console. See Commonwealth v. Stampley, 437 Mass. 323, 327 (2002) (gestures "suggestive of the occupant's retrieving or concealing an object, raise legitimate safety concerns to an officer conducting a traffic stop"). In addition, the defendants gave an explanation for their prior conduct, that the officers reasonably disbelieved. Cf. Commonwealth v. Watson, 430 Mass. 725, 734 (2000), quoting Commonwealth v. Riggins, 366 Mass. 81, 88 (1974) ("implausible answers to police questions will, with other facts, support a finding of probable cause to conduct a search"). Both men had firearms charges on their records, and Kearse was associated with a gang that had recently been involved in a shooting. See Commonwealth v. Gomes, 453 Mass. 506, 512-513 (2009) (history of "weapons-related offenses" relevant to reasonable suspicion analysis). Commonwealth v. Elysee, 77 Mass. App. Ct. 833, 841 (2010) (firearms charges and gang affiliation properly considered; "the police are not required to blind themselves to the significance of either gang membership or the circumstances in which they encounter gang members, which are all part of the totality of the circumstances they confront and must assess").

Altogether, the officers could reasonably conclude that the defendants were armed and dangerous, with at least one gun within reach -- under Kearse's elbow in the center console. The

officers' reasonable suspicions, based on specific and articulable facts and not just a mere hunch, see Commonwealth v. Silva, 366 Mass. 402, 406 (1974), justified their actions of ordering the defendants out of the car, pat frisking them for weapons on their persons, and searching the center console for weapons. See Galarza, 93 Mass. App. Ct. at 744 (search of center console proper where defendant refused to open console and placed hand over compartment to prevent access).

To be sure, Hishe's failure to produce a driver's license, his nervousness, and both defendants' evasive responses to the officers' questions, standing alone, did not give rise to reasonable suspicion. See Commonwealth v. Cordero, 477 Mass. 237, 243-244 (2017), and cases cited; Commonwealth v. Santos, 65 Mass. App. Ct. 122, 125-126 (2005). Likewise, the officers' familiarity with Kearse's gang affiliation alone would be insufficient to support a reasonable belief that the defendants posed a "threat to the safety of an officer." Elysee, 77 Mass. App. Ct. at 841. Nevertheless, the fact "[t]hat there may be an innocent explanation for the defendant[s'] actions 'does not remove [those actions] from consideration in the reasonable suspicion analysis.'" Commonwealth v. Gomes, 453 Mass. at 511, quoting Commonwealth v. DePeiza, 449 Mass. 367, 373 (2007). This is not a case like Commonwealth v. Bartlett, 41 Mass. App. Ct. 468, 472 (1996), where "[a]dding up eight innocuous

observations -- eight zeros - d[id] not produce a sum of suspicion." "Viewed through the eyes of experienced police officers and as a whole," the defendants' conduct gave rise to reasonable suspicion. Commonwealth v. Cabrera, 76 Mass. App. Ct. 341, 346 (2010). The judge properly denied the motions to suppress.

2. Sufficiency of the evidence. At trial, the Commonwealth proceeded on the theory of constructive possession. "Constructive possession requires 'knowledge coupled with the ability and intention to exercise dominion and control.'" Commonwealth v. Reyes, 98 Mass. App. Ct. 797, 801 (2020), quoting Commonwealth v. Tiscione, 482 Mass. 485, 494 (2019). Hishe and Kearse each contend that the evidence was insufficient to prove that either knew the gun was present or to prove that either intended to exercise dominion and control over it.

Constructive possession of contraband found in a vehicle cannot be proven solely by evidence that the defendant was the driver or an occupant of the vehicle. "[N]aked reliance on these factors comes 'perilously close to endorsing guilt by presence at the scene of contraband, a concept we have disavowed.'" Commonwealth v. Romero, 464 Mass. 648, 658 (2013), quoting Commonwealth v. Sespedes, 442 Mass. 95, 102 (2004). "Rather, our cases emphasize the need for 'other incriminating evidence' -- a so-called 'plus factor' -- in addition to

evidence of proximity." Commonwealth v. Santana, 95 Mass. App. Ct. 265, 268 (2019), quoting Commonwealth v. Ortega, 441 Mass. 170, 174 (2004). "[P]resence, supplemented by other incriminating evidence, 'will serve to tip the scale in favor of sufficiency.'" Romero, supra at 653, quoting Commonwealth v. Albano, 373 Mass. 132, 134 (1977).

"[A] sufficiency of the evidence evaluation for constructive possession is necessarily fact-specific, and turns on the totality of the evidence." Santana, 95 Mass. App. Ct. at 268. The Commonwealth may rely on circumstantial evidence and reasonable inferences drawn therefrom. See Romero, 464 Mass. at 653. The evidence must be viewed in the light most favorable to the Commonwealth. See Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979).

The evidence at trial was essentially the same as that adduced at the suppression hearing, minus the evidence of the defendants' criminal records, their firearms activity, and Kearse's gang affiliation. Significantly, O'Brien testified that the unmarked police cruiser he was driving had a fixed antenna, "exterior low profile lights" (that is, affixed on the outside but not on the roof), and was "readily identifiable as a police vehicle." When O'Brien made brief eye contact with Hishe, Hishe quickly averted his eyes. Hishe then "made an immediate and abrupt out of nowhere" turn into the parking lot

of a nearby apartment complex, where he parked the car behind a snowbank and turned off the headlights. After ten minutes, Hishe drove out of the parking lot and ran a red light.

During his interaction with police, Hishe appeared unusually nervous -- O'Brien testified that he could see Hishe's chest rising and falling at a rapid rate -- and told the officers that he and Kearse had been visiting "our cousin," who was known to him only by her last name, which was transcribed as "Ms. Pay."<sup>5</sup> In addition, the Commonwealth produced evidence that the gun was "racked," meaning that "there was a round in the chamber" and "the gun could have been fired at any time with the pull of the trigger."

This evidence thus permitted the jury to conclude that Hishe drove evasively to avoid an interaction with police and thereby prevent detection of the firearm that had recently been placed in the center console, proving that he had knowledge of its presence and the intent to exercise control over it. See Commonwealth v. Jefferson, 461 Mass. 821, 826-827 (2012)

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<sup>5</sup> The defense thoroughly cross-examined O'Brien about his ability to see Hishe's heart beating, and the defense also offered evidence that Hishe sometimes visited a woman who lived at the apartment complex, whom he called either "Ma" or "Ms. Pugh." "The interpretation of the troopers' testimony regarding the defendant's conduct concerns 'the weight and the credibility of the evidence, a matter wholly within the province of the jury.'" Commonwealth v. Cotto, 69 Mass. App. Ct. 589, 593 n.6 (2007), quoting Commonwealth v. Ortega, 441 Mass. 170, 174 (2004).

(sufficient evidence of constructive possession of firearm where driver sped away from police and passenger threw firearm from car); Santana, 95 Mass. App. Ct. at 268 ("whether [defendant] took any evasive actions" relevant to constructive possession analysis). "The evidence placed this case in the category of automobile decisions in which a defendant's proximity, access, and collateral conduct . . . permitted the inference of an intention to exercise control over contraband or forbidden weaponry in the vehicle." Commonwealth v. Crapps, 84 Mass. App. Ct. 442, 445 (2013).

As to Kearse, his positioning of his elbow over the center console, which became ajar after he removed his elbow, permitted an even stronger inference that he knew the gun was there and intended to exercise control over it. See Commonwealth v. Cooper, 97 Mass. App. Ct. 772, 773-774 (2020), citing Galarza, 93 Mass. App. Ct. at 744, 748 (coupled with defendant's nervousness, "attempts to block officers' access to the center console were sufficient to prove that the defendant knowingly possessed the firearm"); Commonwealth v. Cotto, 69 Mass. App. Ct. 589, 592-593 (2007), quoting Commonwealth v. Whitlock, 39 Mass. App. Ct. 514, 519 (1995) ("attempts to conceal . . . contraband . . . permit an inference of unlawful possession").

"Taken in its totality, the evidence was sufficient to prove beyond a reasonable doubt that the defendant[s] knew of



the firearm . . . and that [they] had the ability and intention to exercise control over [it]." Commonwealth v. Summers, 93 Mass. App. Ct. 260, 263 (2018).

3. Closing argument. Prior to closing arguments, the judge instructed the jury on the burden of proof and the elements of the crimes charged. In their closings, defense counsel argued that the Commonwealth had failed to prove that the defendants had the intent to exercise dominion and control over the gun. The defendants assert that the prosecutor misstated the law in his closing by discussing the defendant's ability to exercise dominion and control without mentioning their intent to do so. Defense counsel timely objected and requested a curative instruction, but the judge declined to comment, stating that "it was argument" and that the jury would be given a written copy of the instructions -- as they were.

We discern no error. "Remarks made during closing arguments are considered in the context of the whole argument, the evidence admitted at trial, and the judge's instructions to the jury." Commonwealth v. Felder, 455 Mass. 359, 368 (2009). "[L]awyers are permitted some leeway during closing argument to discuss the law as it pertains to their case, to give context to the facts they argue, but they are not required to do so," as long as they do not misstate the law. Commonwealth v. Niemiec, 472 Mass. 665, 671 (2015).

The prosecutor's failure to discuss the intent element of constructive possession did not amount to a misstatement of the law. The prosecutor emphasized the aspects of the applicable law favorable to the Commonwealth, just as defense counsel had emphasized aspects of the law favorable to their clients. See Commonwealth v. Feroli, 407 Mass. 405, 409 (1990) ("A prosecutor is entitled to emphasize the strong points of the Commonwealth's case"). Importantly, the prosecutor prefaced the challenged portion of his argument by telling the jurors that they would have the judge's instructions to refer to, stating, "[Y]ou're going to have this in writing with you back there, you're going to read it yourself." We presume that the jurors followed those instructions. See Commonwealth v. Orton, 58 Mass. App. Ct. 209, 213 (2003).

4. Officer's statement that he knew Kearse. Kearse claims that reversible error arose from O'Brien's stating "I knew Mr. Kearse" when asked on cross-examination whether Kearse provided his full name during the traffic stop. The judge promptly sustained defense counsel's objection and struck the testimony from the record. The judge denied Kearse's motion for a mistrial the next day, noting that he had sustained the

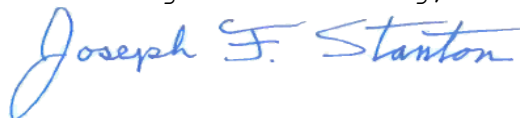
objection, granted the motion to strike, and would instruct the jury "what all that means."<sup>6</sup>

This case "does not present a situation where the force of the [struck testimony] was overwhelmingly prejudicial and likely to leave an indelible imprint on the jurors' minds."

Commonwealth v. Morgan, 449 Mass. 343, 361 (2007), quoting Commonwealth v. Fazio, 375 Mass. 451, 455 (1978). We presume the jury followed the judge's instruction to disregard the stray remark. See Commonwealth v. Caldwell, 459 Mass. 271, 278 (2011). Likewise, the struck testimony was an isolated comment and not so inflammatory or prejudicial as to preclude the possibility of a fair trial. The judge did not abuse his discretion in denying the motion for a mistrial. See Commonwealth v. Silva, 93 Mass. App. Ct. 609, 615-616 (2018).

Judgments affirmed.

By the Court (Meade,  
Wolohojian & Massing, JJ.<sup>7</sup>),



Clerk

Entered: May 20, 2021.

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<sup>6</sup> In the final charge, the judge instructed, "So, if I told you to ignore a witness' answer by striking the answer, you cannot consider it in your deliberations."

<sup>7</sup> The panelists are listed in order of seniority.