COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

HAMPDEN, SS NO. 2018-P-1545

COMMONWEALTH

v.

GADIEL RAMOS-CABRERA
Appellant

ON APPEAL FROM JUDGMENTS OF THE
HOLYOKE DISTRICT COURT

DEFENDANT-APPELLANT'S BRIEF AND ADDENDUM

Deirdre A. Gleason
BBO #681099
Attorney for Gadiel Ramos-Cabrera
Gleason Law Firm, LLC
377 Main St., Ste. 9
Greenfield, MA 01301
(413) 774-3165
gleasonlawfirm@gmail.com

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ISSUES PRESENTED

1. Whether the trial judge erred in denying Appellant's motion for a required finding on the charge of distribution of drugs within 100 feet of a public park, where the evidence was insufficient to permit a trier of fact to conclude that Valley Arena park was in fact a "park" within the meaning of the statute as interpreted by case law?
2. Whether the judge's instructions, which failed to require a jury determination of whether the area identified as Valley Arena Park was in fact a "park" within the meaning of the statute as interpreted by case law, were constitutionally deficient and created a substantial risk of miscarriage of justice?
3. Whether the lower court abused its discretion in refusing an agreed-to disposition under which the Commonwealth had agreed to dismiss count two, the school zone charge, and enter a guilty to count one with a six-month sentence, suspended for one year?

STATEMENT OF THE CASE

On February 16, 2017, Mr. Ramos-Cabrera was charged with distribution of heroin, G.L. c. 94C, §32(a), and the

same offense as committed within one hundred feet of a public park or playground, G.L. c.94C, §32J. R.A. 4[1].

On October 19, 2017, the trial court rejected an agreed to disposition under which Commonwealth had agreed to dismiss count two, the school zone charge, and enter a guilty to count one with a six-month sentence, suspended for one year, with the condition of remaining drug free (Shea, M. presiding). R.A. 5-18; T. 3/9. On February 14, 2018, Mr. Ramos-Cabrera's Motion in Limine for Voir Dire of Commonwealth Witness (Motion for Voir Dire) and his Defense Motion in Limine to Exclude Testimony were denied (Connly, J. presiding). R.A. 19-25; T. 5/10.

On April 9, 2018, the charges were tried to a jury in the Holyoke District Court (MacLeod, L., presiding). At the close of the Commonwealth's case, Mr. Ramos-Cabrera's motion for a required finding of not guilty on both counts was denied. R.A. 26; T. 6/122-125. The motion was renewed at the close of all evidence and was, again, denied. T. 6/137-139. The jury returned the verdicts of guilty. T. 6/162. Mr. Ramos-Cabrera was sentenced to a term of one day on the charge of distribution, to be served from and after a term of 2 years on the park zone offense at the Hampden

[1] The Record Appendix is cited as "R.A. page," the transcripts as "T. volume/page".

County Jail and House of Corrections in Ludlow. R.A. 3. T. 6/164.

Mr. Ramos-Cabrera's notice of appeal was filed on April 9, 2018. R.A. 27. The case was entered in this Court on November 7, 2018.

STATEMENT OF THE FACTS

The charges against Mr. Ramos-Cabrera and his co-defendant, Wilberto Perez arose out of an undercover police drug operation in the South Bridge Street area of Holyoke on the morning of February 15, 2017. South Bridge Street is "just adjacent" to Clemente Street (T. 6/45) and across the street from the bodega (T. 6/134). The bodega sells "drinks, sandwiches, cigarettes, candy…" and the area surrounding it is residential. T. 6/69.

Sergeant Patterson, an undercover coordinator for the Massachusetts State Police, was driving around Holyoke "trying to purchase narcotics from whoever." T. 6/43. Sgt. Patterson targeted a four-decker building, at 556 South Bridge Street, ("South Bridge Street"), which he described as a "high level drug place that [he] goes to every single time in Holyoke." T. 6/43-44. Sgt. Patterson had bought heroin at South Bridge Street "probably 30 times" before. T. 6/44. These drug deals are known as "buy rips," wherein several officers go to "areas known for … the distribution

of the narcotics and, with the use of an undercover, [] make purchases of illegal narcotics and then … make arrests." T. 6/72.

At around 10:40 a.m., Sgt. Patterson testified that he saw Mr. Ramos-Cabrera sitting at a table on Clemente Street, to whom he motioned and who then got into his car. T. 6/44 and 6/49. Sgt. Patterson testified that he drove the two of them to South Bridge Street where Mr. Ramos-Cabrera got out of the car, met up with Mr. Perez, and together they entered South Bridge Street. T. 6/50.

Once alone, Sgt. Patterson began dispatching information to the other officers taking part in the buy rip by radio, including a description of each suspect. T. 6/51. He described Perez as being "a little bit older than [Mr. Ramos-Cabrera]" and "a lot taller." T. 6/50. He provided a description of the suspects' clothing, but it is unclear what his description was. T. 6/51.[2] Sgt. Patterson makes these descriptions because he is "the only one that usually can see everything going on... and if there's numerous other people in the area, [they] don't want the

[2] Sgt. Patterson testified that: "…I was on the radio giving descriptions of who he was meeting, like the checkered jacket guy … If he had red sneakers on, I would say that." T. 6/70. It is not clear from his testimony whether he is describing what Mr. Ramos-Cabrera and Mr. Perez were wearing or whether he is describing what he might say under similar circumstances.

wrong guy to get grabbed." T. 6/51.

According to Sgt. Patterson, after exiting South Bridge Street, Mr. Ramos-Cabrera handed him four bags of heroin and Mr. Perez took the money. T. 6/52. The two then went across the street to the bodega and Sgt. Patterson radioed this information to the other officers. T. 6/52. Sgt. Patterson drove around the block and came back to the front of the bodega, which took about 1-2 minutes. T. 6/53. While he drove around the block, Sgt. Patterson heard on the radio that two suspects were being brought out of the bodega, at which time Sgt. Patterson drove by them and identified them as being the individuals he had "just dealt with." T. 6/53.

1. Change of Plea and Other Pre-Trial Proceedings

Mr. Ramos-Cabrera and Mr. Perez were each charged with distribution of heroin and violating the controlled substance law within one hundred feet of a public park. On October 19, 2017, both defendants appeared before the Holyoke District Court (Shea, M. presiding) and tendered an agreed-to plea and dispositions under which Commonwealth had agreed to dismiss count two, the school zone charge, and enter a guilty to count one with a six-month sentence, suspended for one year, with the condition of remaining drug free. R.A. 5; T. 3/9.

After a reading of the colloquy, for the purpose of tendering the agreed upon disposition to the court, Mr. Ramos-Cabrera would not admit to certain portions of those facts. T. 3/7. Specifically, Mr. Ramos-Cabrera would not admit to getting into the undercover officer's vehicle nor would he admit to handing the drugs to the undercover. T. 3/7. He would agree to "being part of [the transaction]" as part of a "joint enterprise… facilitating the sale." T. 3/7. Mr. Ramos-Cabrera was willing to admit that he made "arrangements with … [his co-defendant] Mr. Perez…" T. 3/7. He was also willing to agree that he "shared the intent … to sell the trooper drugs and helped coordinate the sale of those drugs with other individuals, including Mr. Perez[.]" T. 3/7-8.

Concluding that those facts were not sufficient to form a "factual basis for the plea" the District Court refused to accept it. T. 3/9. The case proceeded to trial. T. 3/9. At a subsequent trial readiness hearing, First Justice for the Holyoke District Court Maureen Walsh would note that Mr. Ramos-Cabrera's case would "be one of the first times that the Holyoke District Court has done a case to a jury trial for distribution of a Class A substance and drug violation near a school or a park." T. 4/3.

On February 14, 2018, the District Court (Connly, J.

presiding) heard and ultimately denied Mr. Ramos-Cabrera's Motion for Voir Dire and his Defense Motion in Limine to Exclude Testimony. R.A. 19-26; T. 5/10. Mr. Ramos-Cabrera argued that Valley Arena Park, (Valley Arena), "may not fit in the definition of a park" as provided by *Commonwealth v. Davie*, 46 Mass. App. Ct. 25 (1998). T. 5/4. He asked that Theresa Shepard, the Commonwealth's witness and director of the Holyoke Parks and Recreation Department (the Parks Department), be questioned prior to trial to determine whether "this park would qualify as … a park … as it relates to [the statute]." T. 5/4-5. Mr. Ramos-Cabrera was concerned about "a potential for jury confusion …" about what the issue is "as to whether or not it is truly a park… and that might deviate them from deciding … the case based on the merits." T. 5/5. Judge Connly denied the two motions finding the matter to be a factual issue for the jury. T. 5/10.

2. Trial

On April 9, 2018, the charges were tried to a jury in the Holyoke District Court (MacLeod, L., presiding). At trial, Sgt. Patterson testified to the facts set out above and also made an in-court identification of Mr. Ramos-Cabrera as the individual he picked up on Clemente Street (T. 6/49) and as the individual who handed him the bags of

heroin (T. 6/52).

Narcotics Vice Unit Detective Delgado, a Holyoke police officer, testified that he "shadowed" Sgt. Patterson's car throughout the buy rip from about a block away. T. 6/72-74. Det. Delgado testified that he saw someone get in Sgt. Patterson's car but did not identify whom. T. 6/73. Det. Delgado later met up with Sgt. Patterson to get the bags of heroin (T. 6/76) that were purchased with prerecorded buy money (T. 6/97-98) during the buy rip.

Detective Duke, a Holyoke Police Officer assigned to the Unit's "take-down" unit testified he was one of six officers who arrested Mr. Ramos-Cabrera and Mr. Perez inside the bodega. T. 6/86. T. 6/84-85. Sgt. Patterson was not among them. T. 6/53. Once Mr. Ramos-Cabrera and Mr. Perez were detained, the officers brought them out to the sidewalk. T. 6/86. Sgt. Patterson drove by and identified Mr. Ramos-Cabrera and Mr. Perez as the individuals from whom he had just bought heroin. T. 6/87. No prerecorded money was found on Mr. Ramos-Cabrera. T. 6/98.

Det. Duke wrote the police report. T. 6/94. Some of it based on what other investigating officers were describing they had observed and some of it based on what he himself observed. T. 6/94. Det. Duke did not witness the buy rip.

T. 6/96. Det. Duke recorded in his police report that only one person walked into the South Bridge Street after taking Sgt. Patterson's money, while Sgt. Patterson testified there were two. T. 6/51 and 6/97. In Det. Duke's police report it stated that Sgt. Patterson was "looking for some bags [of heroin]" (T. 6/96) and Sgt. Patterson testified that he had asked for "brown" (T. 6/44).

3. Valley Arena

Det. Duke testified he returned to the scene the next day and measured the distance from where the buy rip had occurred to an area identified as Valley Arena and found it to be 50.1 feet. T. 6/89, T. 6/91. Theresa Shepard, director of the Parks Department, described Valley Arena as "frightful, basically blight." T. 6/102. She testified that Valley Arena was "about to be renovated." T. 6/102. She explained that, in the 1990's, the installation of "a new piece of playground equipment" was terminated when the City discovered an "old furnace." T. 6/106. The Department of Environmental Protection (DEP) concluded that the furnace had contaminated the soil (T. 6/106-107), and, consequently, prohibited the City from having "any more activities or [to] ever turn the soil [at Valley Arena]" (T. 6/103).

When asked "what's in the park right now" Ms. Shepard replied: "there's nothing. There's … a half basketball court that's in bad disrepair." T. 6/103. After some prodding, Ms. Shepard testified that Valley Arena has some "green space." T. 6/103. Ms. Shepard explained that people will "use the park" but did not testify for what purpose. T. 6/112. Ms. Shepard did not testify *who* uses Valley Arena nor did she testify that children play at Valley Arena.

Ms. Shepard struggled to locate Valley Arena on a Google map (T. 6/104) despite her being "very familiar" with Valley Arena and her twenty-nine-year employment with the Parks Department (T. 6/101), twelve and a half of those years as director (T. 6/102). Ms. Shepard was eventually able to locate Valley Arena based on the "vacant building next to it that's gone" and the walkway she "believed" cut across the park. T. 6/104. She was also able to locate the "half basketball" court. T. 6/104.

Ms. Shepard testified that Valley Arena was "[a]lmost abandoned" by the City. T. 6/110. She did not know whether Valley Arena has a swing set, but knew the benches are "in really tough shape." T. 6/109-110. Ms. Shepard testified that the Parks Department plans to use a recent park grant to design a new park. T. 6/102. Over the last five or six years, the City has spent some money to get "the park back

up to snuff so we can *use it again*." T. 6/110. (Emphasis added).

In its closing, the Commonwealth suggested to the jury that Valley Arena falls within the meaning of a park because "the public has access to it," even though it is not "the nicest park within the city." T. 6/148. "Anybody can use it if they want to." T. 6/148. "It's open to the public." T. 6/148. In his closing, counsel for Mr. Ramos-Cabrera argued only: "Well, it's a park but, you know, … there's no - we can't overturn the soil. That's the park? It's just not there." T. 6/143.

4. Motions for Required Finding of Not Guilty

At the close of the Commonwealth's case, Mr. Ramos-Cabrera moved for a required finding of not guilty. R.A. 27; T. 6/122-125. He argued that the Commonwealth had not provided sufficient evidence to establish Valley Arena as being a park defined within the statute. T. 6/122. He argued that Ms. Shepard's testimony established Valley Arena is not a park. T. 6/122. "[H]er testimony was clear, through pretty descriptive words that she was using with respect to the park … calling it 'frightful' and 'blight'." T. 6/122-123. He argued: "the City has not maintained this property…" T. 6/123. "She … called it almost abandoned by the City…" T. 6/123.

The Commonwealth argued: "[t]here is nothing in the jury instruction about the level of maintenance, the level of quality…" T. 6/124. The Commonwealth further argued that accessibility is what defines it to be a park. T. 6/125. "It's open to the public." T. 6/125. The motion was denied because, the court reasoned, "it's a jury issue…" T. 6/125.

SUMMARY OF THE ARGUMENT

1. In *Davie*, this Court held that a park is an area set aside and maintained by a city or town for the purpose of recreation and ornament where children are likely to be present. 46 Mass. App. Ct. at 28-29. Viewed in the light most favorable to the prosecution, the evidence was not sufficient for a reasonable juror to find that Valley Arena is a park within the definition of the statute as interpreted by case law. Valley Arena is neither a place of beauty nor that of recreation maintained by the City for those purposes. 19. Valley Arena is "frightful, basically blight" and offers only a "half basketball court in bad disrepair," benches "in really tough shape," and "some green space." 19. For nearly thirty years the City has been prohibited from turning the soil or having any activities at Valley Arena. 20. Whether Valley Arena is an area that the Legislature intended to protect does not rest on its openness to the public or its accessibility. 17-19. The

purpose of the statute is to protect children from being exposed to drug activity. 15-16. No evidence on the record suggests children are likely to be found at Valley Arena. 19-20.

2. The Judge's instructions on the park zone charge were unconstitutional and in violation of the Fourteenth Amendment and Article Twelve of the Declaration of Rights, which require the Commonwealth to prove every element of a criminal offense beyond a reasonable doubt. 22-28. The instructions failed to convey to the jury that it was they who were to decide whether Valley Arena as a park as defined by the statute and interpreted by case law. 25. This resulted in a substantial risk of miscarriage of justice because the record shows a plausible inference that the jury's verdict might have been different absent the error. 22-28.

3. There was an abuse of discretion when the judge declined to accept Mr. Ramos-Cabrera's plea. 28. Mr. Ramos-Cabrera was willing to admit he took part in the transaction as a joint venture. 33. He was willing to admit he shared the intent to make the drug transaction. 33. The court's determination that these facts did not form a basis for the plea was clearly erroneous because they were

sufficient to find Mr. Ramos-Cabrera guilty as a joint venturer. 28-34.

ARGUMENT

I.

THE COMMONWEALTH DID NOT PRODUCE SUFFICIENT EVIDENCE TO PERMIT A REASONABLE JUROR TO CONCLUDE BEYOND A REASONABLE DOUBT THAT THE AREA IDENTIFIED AS VALLEY ARENA PARK SATISFIED WHAT WAS IN FACT A PARK WITHIN THE MEANING OF THE STATUTE AS INTERPRETED BY CASE LAW.

In reviewing the denial of a defendant's motion for a required finding of not guilty, an appellate court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Commonwealth v. Latimore*, 378 Mass. 671, 677 (1979), quoting *Jackson v. Virginia*, 443 U.S. 307, 318-329 (1979) (emphasis in original). In order to sustain the denial of a motion for required finding of not guilty, "it is not enough for the appellate court to find that there was some record evidence, however slight, to support each essential element of the offense." *Commonwealth v. Mullane*, 445 Mass. 702, 714 (2006), quoting *Latimore*, 378 Mass. at 677.

With respect to Count Two of the Complaint charging violation of a controlled substance law within one hundred feet of a public park, the Commonwealth was required to

prove that the area identified as Valley Arena satisfied what was in fact a park within the meaning of the statute as interpreted by case law. Under *Davie* a park is an area set aside and maintained by a city or town for the purpose of recreation and ornament. 46 Mass. App. Ct. at 28-29. The evidence in the light most favorable to the Commonwealth does not support a finding that Valley Arena was any of these things. This issue was preserved by trial counsel's Motion for Required Finding of Not Guilty. R.A. 27.

Mr. Ramos-Cabrera's conviction on the school zone charge violated his rights under the Due Process Clause of the Fourteenth Amendment and Article Twelve of the Declaration of Rights. The judgment on this conviction therefore must be reversed and entered for Mr. Ramos-Cabrera. The evidence does not establish, beyond a reasonable doubt, that Valley Arena is the type of area the legislature intended to protect by enacting G.L. c. 94C, §32J. *See, State v. Lopez*, 559 N.W.2d 264, (Wis. Ct. App., 1996), *Virginia*, 443 U.S. at 318-319; *and Latimore*, 378 Mass. at 676-678 (1979).

Section 32J was enacted "to create drug-free school zones." *Commonwealth v. Lawrence*, 69 Mass. App. Ct. 596, 599 (2007). "The purpose of the statute is to keep children safe from 'the potential infection of drugs' by creating

safety zones where children may be present.'" *Id.* at 600. *See also*, *Commonwealth v. Bell*, 442 Mass. 118, 124 (2004(The intent of the Legislature in enacting Section 32J is "to provide drug-free school zones.").

Since the 1989 enactment, the statute has been twice expanded "to include other places where children would likely be present." *Lawrence*, 69 Mass. App. Ct. at 599. One expansion was the "area within one hundred feet of a public park or playground." *Id.* The evidence was not sufficient to establish Valley Arena is a safety zone where children may be present. In fact, the evidence points to the opposite result - that children should not be playing at Valley Arena.

"As with all matters of statutory interpretation, we look first to the plain meaning of the statutory language." *Commonwealth v. Mogelinski*, 466 Mass. 627, 633 (2013). "The ordinary language of the sentence guides our interpretation." *Commonwealth v. Daley*, 463 Mass. 620, 624 (2012). "[W]here the language of a statute is plain and unambiguous, it is conclusive as to legislative intent." *Thurdin v. SEI Boston, LLC*, 452 Mass. 436, 444 (2008). "[W]here ambiguity exists in a criminal statute we must resolve it in favor of the accused." *Commonwealth v.*

Gopaul, 86 Mass. App. Ct. 685, 687 (2014) (citing *Commonwealth v. Hamilton*, 459 Mass. 422, 436-437 (2011)).

"Our primary duty in interpreting a statute is to 'effectuate the intent of the Legislature in enacting it.'" *Commonwealth v. Peterson*, 476 Mass. 163, 167 (2017) (quoting *Sheehan v. Weaver*, 467 Mass. 734, 737 (2014)). If the language is "plain and unambiguous, it is conclusive as to legislative intent." *Peterson*, 476 Mass. at 167 (quoting *Thurdin v. SEI Boston, LLC*, 452 Mass. 436, 444 (2008)). "That said, we do not adhere blindly to a literal reading of a statute if doing so would yield an 'absurd' or 'illogical' result." *Id.* (quoting *Commonwealth v. Parent*, 465 Mass. 395, 409-410 (2013)).

This Court in *Davie* found that the "word 'park' as used in s. 32J, is 'sufficiently clear to permit a person of average intelligence to comprehend what conduct is [made criminal]' without guess work or speculation." 46 Mass. App. Ct. at 29 (citations omitted). The statute itself does not define what a park is within its context, and the *Davie* court turned to various dictionary definitions and case law to determine what the term "park" means within the statute. *Id.* at 28.

A "park", is "a piece of ground in or near a city or town kept for ornament and recreation" and "an area

maintained in its natural state as public property." Webster's Third New Intl. Dictionary (online edition, https://www.merriam-webster.com/dictionary/park). A "park" is "[a]n area of land set aside for public use, as: (a) a piece of land with few or no buildings within or adjoining a town, maintained for recreational and ornamental purposes; (b) a landscaped city square, (c) a large tract of rural land kept in its natural state and usually reserved for the enjoyment and recreation of visitors." American Heritage Dictionary, (online edition, https://www.ahdictionary.com/word/search.html?q=park).

A park is "[a]n enclosed pleasure ground in or near a city, set apart for the recreation of the public." Black's Law Dictionary, (online edition https://thelawdictionary.org/park/). "[T]he term 'park' usually signifies an open or inclosed tract of land set apart for the recreation and enjoyment of the public; or, 'in the general acceptance of the term, a public park is said to be a tract of land, great or small, dedicated and maintained for the purpose of pleasure, exercise, amusement, or ornament; a place to which the public at large may resort to for recreation, air and light." *Cohen v. Lynn*, 33 Mass. App. Ct. 271, 278 (1992).

A park is "maintained" or "set aside" for public recreation and it is a "place of beauty". *Id.* at 28. "[T]he invitation to public recreation inherent in these definitions of 'park' suggests the likelihood of the presence of children." *Davie*, 46 Mass. App. Ct. at 29. The presence of children at Valley Arena is unlikely. Valley Arena's soil contamination must certainly discourage parents from having their children play there. T. 6/102-103.

Although Ms. Shepard testified that the City "maintains" Valley Arena, she did not specify as to what that entails. T. 6/103. The record indicates that the City is prohibited from such maintenance due to the soil contamination. T. 6/102. Further, even if the required maintenance were possible, the record indicates that the City does not do it, which is evidenced by the half basketball court, Ms. Shepard's lack of knowledge regarding the swings, and the benches that are "in really tough shape." T. 6/103, T. 6/109-110. Valley Arena is not a place of beauty, it is "frightful, basically blight." T. 6/102.

Valley Arena was "almost abandoned." T. 6/110. The City recently received money to get Valley Arena "back up to snuff so [the City] can use it again." T. 6/110. Ms. Shepard, despite her twenty nine year employment with The

Parks Department, had difficulty locating Valley Arena on a Google map (T. 104), did not know whether the swing set has swings (T. 109) and, only after being led by the prosecutor, admitted that there was "some green space" in Valley Arena (T. 104-105).

Ms. Shepard testified that people will "use the park" but did not testify for what purposes it is used. Tr. 6/112. Ms. Shepard did not testify *who* uses Valley Arena. Ms. Shepard did not testify that children play at Valley Arena. Mr. Ramos-Cabrera testified that he sees "people" play basketball there sometimes. T. 6/135. The record does not indicate Valley Arena has any play structures, such as a swing set with swings, a full basketball court, or even benches with seats. In fact, the City has been prohibited from providing structures for children to play on or provide any activities that would attract children.

For nearly thirty years, Valley Arena has not been maintained and set aside for public recreation. Nearly thirty years ago the installation of a piece of playground equipment was terminated when an old furnace was discovered and, until the contaminated soil is cleaned up, the City cannot maintain Valley Arena as a park within the definition of the statute.

Valley Arena is not a "place of beauty or of public

recreation." Even if people do "use" the park it is not clear what it is used for. Even if people play on the half basketball court, the court has not been maintained for the use of the public. For nearly thirty years, Valley Arena cannot have been "kept for ornament and recreation" because of the soil contamination. Valley Arena cannot be "landscaped" because that would require the prohibited turning of the contaminated soil.

The result here is absurd and illogical. The record shows that Valley Arena is not a park within the statute as defined by case law. The purpose of the statute is to protect children and Valley Arena is not a place for children to play given the lack of play structures and the risks of playing near contaminated soil. The Commonwealth did not meet its burden and Mr. Ramos-Cabrera's motion for required finding of not guilty should have been allowed as to count two.

II.

THE JUDGE'S INSTRUCTIONS ON THE PARK ZONE CHARGE WERE INADEQUATE TO DEFINE THE OFFENSE BECAUSE THEY FAILED TO REQUIRE A FINDING THAT VALLEY ARENA WAS IN FACT A PARK WITHIN THE MEANING OF THE STATUTE AND DEFINED BY CASE LAW.

From the very beginning of this case, whether Valley Arena was a park was an issue. On three separate occasions, defense counsel raised the issue of Valley Arena's status

as a park, and each time the court found that the issue was one for the fact finder to decide. Defense counsel raised the issue prior to trial with his Motion for Voir Dire (R.A. 24), then again at the close of the Commonwealth's case with his motion for required finding of not guilty (R.A. 27; T. 6/125) and, finally, when he renewed that motion at the close of all evidence (T. 6/139). Notwithstanding these concerns, and despite the court's several times deciding that it was an issue for the fact finder, the court provided the following instruction:

> Now, if you find Mr. Ramos-Cabrera guilty of the charge of distribution of a Class A substance, you must go on to consider whether the Commonwealth has proven beyond a reasonable doubt that the offense was committed within 100 feet of a public park or playground. It is not necessary for the Commonwealth to prove that Mr. Ramos-Cabrera knew that he was within that distance from a public park or playground.

In reviewing the adequacy of jury instructions, those instructions are evaluated "as a whole" and are interpreted "as would any reasonable juror." *Commonwealth v. Kelly*, 470 Mass. 682, 697 (2015) (citing *Commonwealth v. Trapp*, 423 Mass. 356, 361, cert. denied, 519 U.S. 1045 (1996)). "[W]hether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." *Commonwealth v. Munoz*, 384 Mass. 503, 508 (1981) (citations omitted). The

judge is not required to use particular words when instructing the jury but must convey "the relevant legal concepts properly." *Trapp*, 423 Mass. at 359.

When a defendant does not object to the instructions, the Court first determines whether there was an error, and, if so, "whether that error created a substantial risk of a miscarriage of justice." *Kelly*, 470 Mass. at 697 (citing *Commonwealth v. Belcher*, 446 Mass. 693, 696 (2006)). The error creates a substantial risk of justice when it "materially influences" the guilty verdict. *Commonwealth v. Eberle*, 81 Mass. App. Ct. 235, 240-241 (2012), quoting *Commonwealth v. Palmer*, 59 Mass. App. Ct. 415, 425 (2003). "In making that determination, we consider [1] the strength of the Commonwealth's case against the defendant, [2] the nature of the error, [3] whether the error is 'sufficiently significant in the context of the trial to make plausible an inference that the jury's result might have been otherwise but for the error,' and [4] whether it can be inferred 'from the record that counsel's failure to object was not simply a reasonable tactical decision.'" *Id.*

The Commonwealth had the burden of proving beyond a reasonable doubt that Valley Arena is a park within the definition of the statute and that the transaction occurred within 100 feet of that park. G.L. c. 94C, §32. "It has

long been the rule that 'the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *Munoz*, 384 Mass. at 509 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)).

A park is a place of beauty, is maintained for the purpose of recreation, and is a place that children are likely to be found. *Davie*, 46 Mass. App. Ct. at 28-29. The instruction did not inform the jury that they were to decide that Valley Arena fit this definition. On the facts of this case, the instruction's failure to address or require such proof resulted in a substantial risk of miscarriage of justice.

The strength of the Commonwealth's case regarding Valley Arena's status as a park was not overwhelming. Ms. Shepard described Valley Arena as being "frightful, basically blight," it needs to be "renovated," it is in "really tough shape," it offers a half basketball court, she was not sure the state of the benches, identified a "grassy area" only after being prompted by the prosecutor, and the City has been prohibited for nearly thirty years from turning Valley Arena's contaminated soil. T. 6/102-103.

The Commonwealth's entire case regarding the park zone charge was reliant on Ms. Shepard's testimony, most of which undercut its case and created a plausible inference that the jury's verdict might have been different absent the error. Had the jury known that they needed to decide whether Valley Arena fit into a definition of a park, it is likely, based on Ms. Shepard's testimony, they would have returned a verdict of not guilty on that charge. *Compare with*, *Eberle*, 81 Mass. App. Ct. 235 (Commonwealth's case was similarly underwhelming and the failure to instruct on self-defense was significant error that "created a plausible inference that the jury's result might have been different without the error."); *and* *Commonwealth v. Hutchinson*, 93 Mass. App. Ct. 1119 (2018) (unpublished)(No substantial error for failing to instruct because the "evidence supporting the defendant's guilt was abundant.").

The failure to inform the jury that they must decide whether Valley Arena was a park as interpreted by *Davie* was an error "sufficiently significant in the context of the trial to make plausible an inference that the jury's result might have been otherwise but for the error." *Eberle*, 81 Mass. App. Ct. at 240-241. *See e.g.*, *Palmer*, 59 Mass. App. Ct. at 424 (While it would have been better for the joint venture instruction to have specified that defendant must

know that his coventurer was armed, the court found that the substance of the idea, that the defendant knew his coventurer was armed, was conveyed with an instruction on the crime of masked armed robbery, which requires the individual to be armed.); *Commonwealth v. Campbell*, 92 Mass. App. Ct. 1117 (2017) (unpublished) (Knowledge of coventurer being in possession of a weapon, even if not explicitly stated, was sufficiently conveyed by the judge when the jury was instructed that the defendant had to have the "shared mental state" of the coventurer and to have "participated" in the crime of assault and battery by means of a dangerous weapon.); *and Commonwealth v. Duran,* 95 Mass. App. Ct. 1115, ¶ 3 (2019) (unpublished) (Failure to instruct more comprehensively on intent "did not result in the failure to instruct on the required elements of the charge" and, even if it had, such an error would not have materially influenced the verdict because the jury had twice been instructed on intent during trial.) Here, the jury likely did not know that whether Valley Arena is a park within the *Davie* definition was a fact for them to decide. Nothing during trial alerted them that it was and the instruction's failure to do so impermissibly lowered the Commonwealth's burden.

Further, for the reasons discussed above, it is clear from the record that failing to object to the park zone instruction as it was given could not have been a strategic move. *Compare*, *Eberle*, 81 Mass. App. Ct. at 242 (Defense counsel's prior objection to the instruction, even if not renewed at the time it should have been, suggested that "his failure to object was not a tactical decision."); *and Commonwealth v. Glover*, 459 Mass. 836, 837 (2011)(Strategic decision by defense counsel to omit an instruction because it would be counterintuitive to the defendant's assertion of self-defense was not manifestly unreasonable and therefore no substantial error.) Defense counsel's prior motions indicate that he did not abandon the issue for tactical reasons, such as ensuring the strength of a separate defense.

With no instruction on whether Valley Arena was a park within the definition of the statute, the jury likely did not deliberate on whether it was. The jury was likely unaware that it was a fact for them to determine, thereby impermissibly lowering the Commonwealth's burden of proof. The instruction did not convey the substance of the idea that Valley Arena must be a place of beauty, a place of recreation, and a place where children are likely to be present. Nothing during the trial alerted them to consider

this, such as an instruction during direct or cross examination of Ms. Shepard. The omission of such an instruction was substantial and therefore likely materially affected jury's verdict.

III.

THE COURT ABUSED ITS DISCRETION BY FAILING TO ACCEPT MR. RAMOS-CABRERA'S TENDERED PLEA OF GUILTY.

The judge's decision to decline to accept Mr. Ramos-Cabrera's plea is reviewed under the "abuse of discretion standard." *Commonwealth v. Kolenovic*, 471 Mass. 664, 672 (2015). Although there is "no absolute right to have a guilty plea accepted," *Lynch v. Overholser*, 369 U.S. 705, 719 (1962), such a plea may be rejected only in the "exercise of sound judicial discretion." *Santobello v. New York*, 404 U.S. 257, 262 (1971). "The disposition of criminal charges by agreement between the prosecutor and the accused … is an essential component of the administration of justice. Properly administered, it is to be encouraged." *Id.* at 260. "The plea bargain is an indispensable tool for the administration of criminal law." *U.S. v. Torres-Echavarria*, 129 F.3d 692, 695 (2d Cir. 1997).

Sound reasons for rejecting a guilty plea include the court believing the defendant was not testifying truthfully

in his plea allocution, *U.S. v. Severino*, 800 F.2d 42, 47 (2d Cir. 1986), and concern that a resulting sentence is either too lenient or too harsh. *See, Torres-Echavarria*, 129 F.3d at 695; *U.S. v. Jeter*, 315 F.3d 445, 447 (5th Cir. 2002); *and U.S. v. Skidmore*, 998 F.2d 372, 376 (6th Cir. 1993). "[I]f the court has reasonable grounds for believing that acceptance of the plea would be contrary to the sound administration of justice, it may reject the plea." *Severino*, 800 F.2d at 46.

A plea judge has an obligation to ensure that there are sufficient facts on the record establishing each element of the case. *Commonwealth v. Hart*, 467 Mass. 322, 325 (2014)(citations omitted). "A defendant's choice to plead guilty will not alone support conviction; the defendant's guilt in fact must be established." *Commonwealth v. DelVerde*, 398 Mass. 288, 297 (1986). (citing *Henderson v. Morgan*, 426 U.S. 637, 648 (1976), *Commonwealth v. McGuirk*, 376 Mass. 338, 342-343 (1978), cert. denied, 439 U.S. 1120, 99 S.Ct. 1030, 59 L.Ed.2d 80 (1979)). At the same time, a judge is not precluded from accepting the plea for the defendant's failure to "acknowledge all aspects of the factual basis." Mass. R. Crim. P. 12(c)(5)(A). The judge "need determine only whether the evidence … is sufficient … to support the

charge to which the defendant is offering a plea of guilty." *Commonwealth v. Jenner*, 24 Mass. App. Ct. 763, 773 (1987).

Although acceptance of a guilty plea is "wholly discretionary with the judge," exercise of that discretion is not wholly unfettered. *Commonwealth v. Dilone*, 385 Mass. 281, 285 (1982)(citing *Santobello*, 404 U.S. 257). "When the trial judge is presented with a 'factual basis for the plea,' … an intelligent and voluntary counselled plea should not be refused simply because the defendant … is unable or unwilling to testify as to guilt in factual terms." *See U.S. v. Gaskins*, 485 F.2d 1046, 1048 (D.C.Cir. 1973)(rejection of plea on ground that defendant refused to admit guilt was abuse of discretion)(quoting Fed. R. Crim. P. 11); and *U.S. v. Delegal*, 678 F.2d 47, 50 (7th Cir. 1982)(rejection of a plea on the ground that it was not in writing and the plea proceeding an agreement had been transcribed by a court reporter, was an abuse of discretion).

Admission to guilt is not "a constitutional requisite to the imposition of criminal penalty." *North Carolina v. Alford*, 400 U.S. 25, 37 (1970). "An individual accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he

is unwilling or unable to admit his participation in the acts constituting the crime." *Alford*, 400 U.S. at 37. Admission to guilt is not required in an Alford plea and a defendant may choose to accept a penalty for other reasons other than guilt.

The crime of distribution is defined as follows: "Any person who knowingly or intentionally manufactures, distributes or possesses with intent to manufacture, distribute or dispense a controlled substance in Class A…" G.L. c. 94C, §32(a). Distribute means "to deliver other than by administering or dispensing a controlled substance." G.L. 94C, §1. To deliver means "to transfer, whether by actual or constructive transfer, a controlled substance from one person to another, whether or not there is an agency relationship." G.L. 94C, §1.

"Where there is evidence that more than one person may have participated in the commission of a crime, the Commonwealth must prove … beyond a reasonable doubt" the following: (1) "the defendant knowingly and intentionally participated in some meaningful way in the commission of the alleged offense, alone or with (another);" and (2)

"that he did so with the intent required for that offense." Massachusetts Model Jury Instruction 4.200.[3]

During the colloquy for both Mr. Ramos and his co-defendant, Mr. Perez, the Commonwealth stated first that Mr. Perez, leaned "into the [undercover police] vehicle" and handed "the trooper four glassy packets, consistent with heroin." T. 3/5. Later, after the judge said "And who - who - who - Mr. Cabrera then got the drugs from inside, came out and sold it to the trooper or - ". T. 3/6. To which the Commonwealth provided a different version of events than what he said prior "—Perez then waives the trooper up. Then he hands - Cabrera hands the drugs over to the trooper." T. 3/6. Mr. Ramos-Cabrera denied "ever handing anything to Trooper Patterson." T. 3/8.

Clearly, the police did not know whether it was Mr. Ramos-Cabrera who handed the drugs to the undercover or whether it was Mr. Perez. The Commonwealth could not provide a clear explanation of what happened and the judge, possibly in an attempt to bring clarity to the issue, created a discrepancy as to what he required Mr. Ramos-Cabrera to admit to in order to find sufficient facts to enter a plea. Mr. Ramos-Cabrera denied handing the drugs to

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[3] This instruction is available at https://www.mass.gov/files/documents/2016/08/qv/4200-aiding-or-abetting.pdf (last visited March 15, 2019).

the undercover, but this fact alone should not have precluded the judge from finding sufficient facts to accept the plea. Mr. Ramos-Cabrera was not required to have handed the drugs to the undercover in order to have participated in the joint venture with Mr. Perez.

After the colloquy was read, and after Mr. Ramos-Cabrera declined to admit to all the facts read, Mr. Ramos-Cabrera clarified that he was willing to admit that he "was part of the joint enterprise … facilitating the sale." T. 3/7. He was willing to admit that he "shared the intent … to sell the trooper drugs and helped coordinate the sale of those drugs with other individuals." T. 3/7. Those admissions constitute a sufficient factual basis to find Mr. Ramos-Cabrera guilty of distribution pursuant to the statute. *Compare with*, *Commonwealth v. Langathianos*, 91 Mass. App. Ct. 1119, ¶3 (2017) (unpublished)(defendant provided no further explanation as to why she did not agree with the colloquy as it was read and judge's rejection of defendant's plea was within his discretion). Here, Mr. Ramos-Cabrera's provided further explanation of what he was willing and not willing to admit. Given Mr. Ramos-Cabrera's explanation, which facts sufficed to find him guilty of the crime of distribution as a joint venturer, the judge should have accepted the tendered plea.

Mr. Ramos-Cabrera did not ask the court to accept an Alford plea and maintain his innocence, which decision is "wholly discretionary" with the judge. Mr. Ramos-Cabrera does not argue that the judge should have accepted an Alford plea when he refused to admit to all the facts. Instead, he proffered an admission to sufficient facts to establish the elements of distribution. No sound reason exists for that proffer to have been rejected.

Further, Mr. Ramos-Cabrera was facing a mandatory minimum of two years if he was found guilty at trial. This is a hugely inappropriate sentence for someone who had no prior record. Proceeding to trial was also a great risk given it would be one of the first times that a case like this had gone to a jury trial in the Holyoke District Court. T. 4/3. Given the importance of plea negotiations in the trial courts, and the consequence of going to trial, this plea should have been accepted.

CONCLUSION

For the reasons discussed above, the defendant now respectfully requests that this court vacate his conviction as to Count two, allow Defendant's motion for required finding of not-guilty as to Count two and enter a not guilty on that count and remand for sentencing. In the

alternative, the defendant respectfully requests that this court remand for an acceptance of his guilty plea.

Respectfully Submitted,
Gadiel Ramos-Cabrera

By his attorney,

Deirdre A. Gleason
Gleason Law Firm, LLC
377 Main St., Ste. 9
Greenfield, MA 01301
BBO# 681099
(413) 774-3165
gleasonlawfirm@gmail.com

Dated: September 3, 2019

Addendum

Table of Contents

Part I ADMINISTRATION OF THE GOVERNMENT

Title XV REGULATION OF TRADE

Chapter 94C CONTROLLED SUBSTANCES ACT

Section 32J CONTROLLED SUBSTANCES VIOLATIONS IN, ON OR NEAR SCHOOL PROPERTY OR PUBLIC PARKS OR PLAYGROUNDS

[Text of section applicable as provided by 2018, 69, Sec. 237.]

Section 32J. Any person who violates the provisions of section 32, 32A, 32B, 32C, 32D, 32E, 32F or 32*I* while in, on or within 300 feet of the real property comprising a public or private accredited preschool, accredited headstart facility, elementary, vocational or secondary school if the violation occurs between 5:00a.m. and midnight, whether or not in session, or within 100 feet of a public park or playground and who during the commission of the offense: (i) used violence or threats of violence or possessed a firearm, rifle, shotgun, machine gun or a weapon described in paragraph (b) of section 10 of chapter 269, or induced another participant to do so during the commission of the offense; or (ii) engaged in a course of conduct whereby the person directed the activities of another person who committed any felony in violation of this chapter; or (iii) committed or attempted to commit a violation of section 32F or section 32K shall be

punished by a term of imprisonment in the state prison for not less than 2 1/2 nor more than 15 years or by imprisonment in a jail or house of correction for not less than 2 nor more than 2 1/2 years. No sentence imposed pursuant to this section shall be for less than a mandatory minimum term of imprisonment of 2 years. A fine of not less than $1,000 nor more than $10,000 may be imposed but not in lieu of the mandatory minimum 2 year term of imprisonment as established herein. In accordance with section 8A of chapter 279 such sentence shall begin from and after the expiration of the sentence for violation of section 32, 32A, 32B, 32C, 32D, 32E, 32F or 32*I*.

Lack of knowledge of school boundaries shall not be a defense to any person who violates this section.

93 Mass.App.Ct. 1119
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
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).
Appeals Court of Massachusetts.

COMMONWEALTH
v.
John M. HUTCHINSON, Jr.

17-P-828
|
Entered: July 16, 2018

By the Court (Meade, Desmond & Ditkoff, JJ.[1])

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** After a jury trial, the defendant was convicted of operating a motor vehicle while under the influence of alcohol (OUI).[2] On appeal, he claims that an error in the judge's preliminary jury instructions resulted in a substantial risk of a miscarriage of justice. We affirm.

Prior to opening statements and hearing testimony, the judge explained the mechanics of the trial to the jury. Relative to objections, he stated:

> "If I agree with an objection to a question the term I'll use is sustained. You are [to] disregard that question and you're not to speculate as to what the answer may or may not have been. In the same way, you are to disregard any evidence that I tell you is stricken from the record. If I reject or overrule an objection I'm going to permit the witness to answer and you may not consider that answer and you're not to give that answer any more weight than you would have if no objection had been made" (emphasis supplied).

There was no objection to this instruction, and thus, we review to determine if there was any error, and if so, whether that error created a substantial risk of a miscarriage of justice. See Commonwealth v. Randolph, 438 Mass. 290, 297 (2002).

To make this determination, we ask four questions:

> "(1) Was there error? (2) Was the defendant prejudiced by the error? (3) Considering the error in the context of the entire trial, would it be reasonable to conclude that the error materially influenced the verdict? (4) May we infer from the record that counsel's failure to object or raise a claim of error at an earlier date was not a reasonable tactical decision?"

Id. at 298 (citations omitted). "Only if the answer to all four questions is 'yes' may we grant relief." Ibid. Commonwealth v. Coutu, 88 Mass. App. Ct. 686, 693 (2015).

Despite the Commonwealth's argument that the charge read as a whole left the jury with a proper understanding of objected-to evidence, see Commonwealth v. Grant, 418 Mass. 76, 85 (1994) ("adequacy of instructions must be determined in light of their over-all impact on the jury" [quotation omitted]), it was error to instruct the jury that they could not consider a witness's answer to a question that was the subject of an overruled objection. See Commonwealth v. Cameron, 385 Mass. 660, 668 (1982) ("Jurors are expected to follow instructions to disregard matters withdrawn from their consideration").

Although we conclude there was error, when we consider the error in the context of the entire trial, it would not be reasonable to conclude that the error prejudiced the defendant or materially influenced the verdict. See Randolph, supra at 299-300. The defendant points to two incidents where he claims an overruled objection on cross-examination risked a miscarriage of justice. First, the defendant asked the first officer whether the defendant slurred less in the booking video than he had at roadside. The prosecutor objected, which was overruled, and the officer responded that the defendant slurred less in the

video. However, prior to objection, the officer had already (on more than one occasion), described the defendant's level of slurring, including that he slurred less in the video. Indeed, the prosecutor's objection was that the question had been asked and answered.

*2 Second, when the defendant asked the same officer whether mixing medications and alcohol would affect sobriety, the officer replied that he could not testify to that. After the officer's answer, the judge overruled the prosecutor's late objection. However, prior to this exchange, defense counsel had elicited that the officer did not ask the defendant what medication he was taking for his multiple sclerosis. Also, after the overruled question, defense counsel elicited that it does matter whether someone is taking medication. Given the point of the inquiry -- how the defendant's medication could have caused his symptoms of impairment -- the defendant was not prejudiced and the verdict was not materially influenced in light of the other salient facts the jury heard on the matter before and after the overruled objection.

Another evaluation of prejudice to the defendant requires us to look at the strength of the Commonwealth's case. See Commonwealth v. Alphas, 430 Mass. 8, 13 (1999). Although not overwhelming, due to the absence of field sobriety tests or breathalyzer results, the evidence supporting the defendant's guilt was abundant. He was driving at a rate well in excess of the posted speed limit, had difficulty following the officer's instructions to produce the proper documents upon being stopped, avoided eye contact and shook excessively, slurred his speech, had bloodshot and glassy eyes, was unsteady on his feet, and had the smell of alcohol emanating from his person. There were alcohol containers in the car, including at least one that appeared to have been consumed recently, as well as an admission from the defendant that he had consumed one to two alcoholic beverages earlier. See Commonwealth v. Dussault, 71 Mass. App. Ct. 542, 543-545 (2008). Because we do not answer all four of the Randolph inquires in the affirmative, there is no substantial risk that justice miscarried. See Randolph, 438 Mass. at 298; Commonwealth v. Arias, 84 Mass. App. Ct. 454, 469 (2013).[3]

Judgment affirmed.

All Citations

93 Mass.App.Ct. 1119, 107 N.E.3d 1255 (Table), 2018 WL 3421282

Footnotes

1 The panelists are listed in order of seniority.

2 The defendant was also found guilty of negligent operation of a motor vehicle, but a judgment notwithstanding the verdict was entered on that verdict without objection from the Commonwealth.

3 The defendant also claims that the judge's instruction on field sobriety tests, where no such tests were conducted, and his instruction on inconsistent statements, which he claims was "not an error," contributed to the substantial risk that justice miscarried. We disagree. First, both arguments are presented in a conclusory fashion without supporting authority and are, therefore, waived. See Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975). Second, even if not waived, we fail to see how either harmed the defendant, let alone created a substantial risk of a miscarriage of justice.

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92 Mass.App.Ct. 1117
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

COMMONWEALTH
v.
Alvin R. CAMPBELL.

16–P–1514

Entered: December 7, 2017

By the Court (Milkey, Hanlon & Shin, JJ.[1])

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** After a jury trial, the defendant was convicted of armed assault with intent to murder, assault and battery by means of a dangerous weapon, threatening to commit a crime, and assault by means of a dangerous weapon.[2] In April, 2016, his motion for new trial was denied. He now appeals from that denial, arguing that there was insufficient evidence to prove that he was a joint venturer in the charges alleging use of a weapon (a knife), and that the judge's instruction on joint venture was improper, creating a substantial risk of a miscarriage of justice. We affirm.

Background. The jury heard the following evidence. On March 9, 1999, the victim visited a cellular telephone store in Boston with two friends, and then walked to Downtown Crossing, a Massachusetts Bay Transportation Authority (MBTA) train station, to take the Ashmont train home. While walking to the train station, one of the victim's friends got into an argument with two individuals (later identified as the defendant and his brother, Andre[3]). After the argument, the victim and his friends continued into the train station and sat on the bottom steps of a stairwell that entered directly onto the Red Line platform. About five minutes after they arrived, the defendant and his brother entered the same platform from a different direction (through the Orange Line tunnel). It was rush hour and the station was crowded.

The defendant and Andre approached the group sitting on the stairs. When the two were approximately five to six feet away from the victim and his group, the victim stood up and the defendant said, "Let's take this upstairs, it'll just be a couple of niggers fighting," and then, "You know you're going to die tonight." Andre moved closer toward the victim, and, immediately before he did, the victim heard someone say, "Get him." Thereafter, he was "tussling" with Andre, until he started running up the stairs to get away and he saw a knife in Andre's hand. As he was running up the stairs, the victim felt Andre grabbing his leg so he "kicked back and still kept running." Both the defendant and his brother chased the victim up the stairs and Andre began stabbing the victim with his knife; at the same time, the defendant was yelling, "You're going to die tonight, you're going to die."

Lieutenant Nancy O'Loughlin, an MBTA plainclothes officer, and her team were patrolling the station and saw the incident. When O'Loughlin saw Andre with the knife, she and the other officers showed their badges. O'Loughlin then began "screaming at the top of her lungs, 'Police, stop. Police, stop.' " She tried to grab Andre's arm as he was swinging the knife; she saw him stab the victim three times before she could get control of him. In the end, the victim was stabbed in the leg, the head and the face before Andre was tackled to the ground and the police were able to retrieve the knife from his hand.[4] As the officers were trying to get control of Andre, the defendant, who was only two feet away, started kicking the victim (who was lying on the ground in a "fetal position") in the face and head with his "brown Timberlane boots."[5] The victim went to the hospital by ambulance.

***2** Discussion. a. Sufficiency of evidence. The defendant first argues that there was insufficient evidence to support his conviction on counts one, two and six (the charges involving a weapon) on the theory of joint venture. He claims there was no evidence showing a prearrangement between Andre and him establishing that he knew that his brother was carrying a knife. In fact, Andre testified at trial that his brother had no idea he was carrying the weapon; during the incident, Andre testified, his brother was standing on Andre's left, but the knife was in his right pocket and was not visible to the defendant when Andre took it out.

" 'A joint venture is established by proof that two or more individuals "knowingly participated in the commission of

the crime charged ... with the intent required for that offense." ' ... '[W]e view the evidence presented to support the existence of a joint venture "in the light most favorable to the Commonwealth," recognizing also that the venture "may be proved by circumstantial evidence." ' " Commonwealth v. Winquist, 474 Mass. 517, 521 (2016) (citation omitted). "[A]n anticipatory compact is not necessary for joint venture liability, as long as 'at the climactic moments the parties consciously acted together in carrying out the criminal endeavor.' " Commonwealth v. Allison, 434 Mass. 670, 676 (2001), quoting from Commonwealth v. Fidler, 23 Mass. App. Ct. 506, 513 (1987). We review a judge's determination about the existence and scope of a joint venture under the abuse of discretion standard. Winquist, supra.

Here, we are persuaded that the evidence was sufficient to support the guilty verdicts, including those for the crimes involving a weapon. The jury, after hearing the evidence, reasonably could have concluded that, when Andre pulled out the knife during the confrontation with the victim at the bottom of the stairs, the defendant, standing only a few feet away, saw the knife, and thereafter yelled at the victim that he was "going to die [that night]." What followed permitted an inference that the brothers shared the intent to murder and assault and batter the victim with the weapon—at least from the moment when Andre drew his knife and both brothers chased the victim up the stairs. Ibid. The defendant thereafter continued the assault (after O'Loughlin pulled Andre off the victim) by kicking the victim in the head and face multiple times with his booted foot. Here, there was ample evidence that, in the confrontation with the victim, the defendant was acting in concert with his coventurer brother in provoking and carrying out the fight.

b. Jury instruction. Although the defendant did not object to the instruction at trial, he now argues that the trial judge improperly instructed the jury on the law pertaining to joint venture in a crime involving a weapon. He contends that, by failing to instruct the jury that the Commonwealth must prove that the defendant knew his coventurer had a weapon in order to convict him of crimes alleging the use of a weapon, the judge relieved the Commonwealth of its burden to prove an essential element of the crime, thereby creating a substantial risk of a miscarriage of justice. We disagree.

It is true that the Commonwealth "bear[s] the burden of proving only that a joint venturer had knowledge that a member of the joint venture had a weapon where the conviction on a joint venture theory is for a crime that has use or possession of a weapon as an element." Commonwealth v. Britt, 465 Mass. 87, 100 (2013). In this case, the judge did not specifically instruct the jury on that principle and it would have been preferable if he had. Commonwealth v. Palmer, 59 Mass. App. Ct. 415, 424 (2003). However, the omission did not create a substantial risk of a miscarriage of justice on the facts of this case because "the words used by the judge conveyed the substance of that idea." Ibid. Compare Commonwealth v. Dosouto, 82 Mass. App. Ct. 474, 481 (2012), where we said, "[a]lthough the judge did not state specifically that proof includes the requirement that the defendant must know one of his companions is armed, when viewed as a whole, the instructions repeatedly emphasized not just that the defendant must share the intent of the assailants but also (1) that the defendant must 'knowingly participate[ ]' 'in the commission ... of the armed robbery, with the intent required to commit an armed robbery,' and (2) that the defendant's intent could be inferred 'from his knowledge of the circumstances and any subsequent participation in the crime.' "

***3** Armed assault with intent to murder and assault and battery by means of a dangerous weapon each contain an element requiring the possession of a weapon, and the jurors were so instructed. See G. L. c. 265, §§ 15A(b), 18(b). The jury also were instructed that, in order to convict the defendant under a joint venture theory, the Commonwealth first was required to prove beyond a reasonable doubt that Andre committed the crimes of assault and battery by means of a dangerous weapon and assault with intent to kill.[6] Finally, the jurors were told that the Commonwealth "has to prove that [the defendant] shared the mental state, and we'll be talking about intent in a moment, shared the mental state of Andre Campbell.... [I]t has to prove that [the defendant] was a participant.... [T]hat he was seeking in some way, as I've described it, to make the crime succeed."

From those instructions, in finding the defendant guilty, the jury likely inferred that the defendant knew that Andre had a knife at least at the "climactic moment" when they both chased the victim up the stairs, with Andre holding a knife in his hand and the defendant yelling, "You're going to die tonight." See Allison, 434 Mass. at 676. Reviewing, as we must, the final charge in its entirety, we are persuaded that the judge's omission did not materially influence the guilty verdicts and, thus, did not result in a substantial risk of a miscarriage of justice. Palmer, supra at 426.

Order denying motion for new trial affirmed.

All Citations

92 Mass.App.Ct. 1117, 95 N.E.3d 299 (Table), 2017 WL

6044195

Footnotes

1 The panelists are listed in order of seniority.

2 The defendant did not file a direct appeal from the convictions. He was acquitted of a second charge of assault and battery by means of a dangerous weapon (count three), and assault and battery on a police officer (count five).

3 Because the defendant and his brother share the same last name, we refer to his brother by his first name to avoid confusion.

4 Andre's knife sliced the victim's pant leg, as well as his hooded sweatshirt and the hat that he was wearing. Andre also slashed O'Loughlin's coat while she was trying to get him into custody.

5 O'Loughlin testified that the defendant began kicking the victim approximately two minutes after she saw Andre initially pull out the knife; the entire incident lasted about five minutes.

6 For the charge of assault and battery by means of a dangerous weapon, the judge instructed the jurors that the Commonwealth had to prove that Andre intentionally and without justification touched the victim, without the victim's consent, with the knife (admitted as exhibit 7); as to assault with intent to kill, the jurors were told that the Commonwealth had to prove that Andre "intentionally threatened [the victim] with the knife, and that he specifically intended to kill him."

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95 Mass.App.Ct. 1115
Unpublished Disposition

Appeals Court of Massachusetts.

COMMONWEALTH
v.
Rayiam DURAN.

18-P-1053

Entered: May 24, 2019.

By the Court (Wolohojian, Kinder & Hand, JJ.[1]),

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

**1 After a jury trial, the defendant was convicted of possession of a class B substance with the intent to distribute and operating a motor vehicle with a suspended license. On appeal, he challenges (1) the denial of his motion to suppress all evidence obtained following the stop of his motor vehicle, (2) the denial of his motion for a required finding of not guilty, and (3) the adequacy of the jury instructions. For the reasons below, we affirm both the denial of the motion to suppress and the defendant's convictions.

1. Motion to suppress. The defendant first argues his motion to suppress should have been allowed because the police did not have probable cause to believe he had committed or was committing an offense. On review, we accept the motion judge's findings of fact unless clearly erroneous, see Commonwealth v. Cawthron, 479 Mass. 612, 616 (2018), supplementing them with uncontroverted facts adduced at the hearing that were explicitly or implicitly credited by the judge, in order to complete the sequence of the events. See Commonwealth v. Isaiah I., 448 Mass. 334, 337-338 (2007). We conduct an independent review of the judge's application of the law. Commonwealth v. Clarke, 461 Mass. 336, 340 (2012).

On September 19, 2016, the police stopped and arrested the defendant after they saw him engage in what they believed was drug-related activity with William Hannigan. The police acted permissibly in arresting the defendant. "[P]robable cause exists where, at the moment of arrest, the facts and circumstances within the knowledge of the police are enough to warrant a prudent person in believing that the individual arrested has committed or was committing an offense." Commonwealth v. Storey, 378 Mass. 312, 321 (1979), cert. denied, 446 U.S. 955 (1980). At the time the officers stopped the defendant on September 19, the police had probable cause to arrest the defendant for two crimes that had occurred ten to fourteen days earlier: (1) the sale of crack cocaine to a confidential informant during a controlled buy, and (2) operating with a suspended or revoked license, which the police observed at the time of the controlled buy, when the registry of motor vehicles records showed that the defendant's license was suspended.[2] The fact that the police continued their investigation for ten to fourteen days before arresting the defendant did not render the arrest improper: "Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction." Commonwealth v. Piso, 5 Mass. App. Ct. 537, 541 (1977), quoting United States v. Hoffa, 385 U.S. 293, 310 (1966). See Commonwealth v. Walker, 370 Mass. 548, 560 (1976), quoting United States v. Watson, 423 U.S. 411, 449 (1976) (Marshall, J., dissenting) ("Unlike probable cause to search, probable cause to arrest, once formed will continue to exist for the indefinite future, at least if no intervening exculpatory facts come to light"). Moreover, that the defendant was ultimately indicted for offenses occurring on September 19 is immaterial since "[t]he subjective beliefs of the police officers are not conclusive on this issue."[3] Commonwealth v. Hason, 387 Mass. 169, 175 (1982) ("The inquiry into probable cause is an objective one, requiring ... a determination whether the facts would warrant a 'reasonable' person in believing

the action taken to be appropriate").

**2 We likewise conclude that the police acted properly in their search of the defendant's vehicle, a Ford Flex, and the seizure of the drugs found inside. Under the "automobile exception" to the warrant requirements under both the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights, the police may conduct a warrantless search of an automobile where the vehicle is stopped in a public place and the police have probable cause to believe that it contains contraband or evidence of a crime. See Commonwealth v. Eggleston, 453 Mass. 554, 554 (2009); Commonwealth v. Raspberry, 93 Mass. App. Ct. 633, 642-643 (2018). Like the motion judge, we conclude that the information known to the police at the time they stopped the defendant, including the defendant's sale of drugs to the confidential informant ten to fourteen days earlier; their observations of the defendant's brief drive with Hannigan, consistent with drug-related activity; the defendant's reaching for or placing something on the vehicle floor before exiting the vehicle; and the defendant's implausible story suggesting that Hannigan's trip was a "gypsy cab" fare, cumulatively established probable cause to believe that the defendant was engaged in illegal activity. See Commonwealth v. Kennedy, 426 Mass. 703, 709 (1998) (police officer's opinion, based on training and experience, that behavior was consistent with drug deal relevant to probable cause determination); Commonwealth v. Motta, 424 Mass. 117, 121-122 (1997) (prior controlled buys of drugs provided probable cause to search vehicle); Commonwealth v. Concepcion, 10 Mass. App. Ct. 613, 616 n.2 (1980) (furtive gesture relevant in probable cause determination). There was no error in the denial of the defendant's motion to suppress.

2. Required finding of not guilty. The defendant argues that the trial judge erred in denying his motion for a required finding of not guilty based on the insufficiency of the evidence of both the defendant's constructive possession of the cocaine found in the Flex, and his intent to distribute it. We review the denial of a motion for a required finding of not guilty under the familiar Latimore standard, resolving issues of witness credibility in favor of the Commonwealth, Commonwealth v. Dilone, 385 Mass. 281, 286 (1982), and asking "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979). "The relevant question is whether the evidence would permit a jury to find guilt, not whether the evidence requires such a finding." Commonwealth v. Fickling, 434 Mass. 9, 14 (2001), quoting from Commonwealth v. Lydon, 413 Mass. 309, 312 (1992).

"In order to prove that a defendant constructively possessed contraband, the evidence must be sufficient to permit the jury to infer that the defendant had knowledge of the contraband, as well as the ability and intention to exercise dominion and control over it." Commonwealth v. Proia, 92 Mass. App. Ct. 824, 830 (2018). The Commonwealth may rely on circumstantial evidence to prove possession, see Commonwealth v. Garcia, 409 Mass. 675, 686 (1991), and while mere presence in an area where contraband is found is not sufficient to show the "requisite knowledge, power, or intention to exercise control over the [contraband], presence, supplemented by other incriminating evidence, will serve to tip the scale in favor of sufficiency." Commonwealth v. Brzezinski, 405 Mass. 401, 409-410 (1989), quoting Commonwealth v. Albano, 373 Mass. 132, 134 (1977).

Here, the evidence that the defendant possessed the drugs found in the car was not limited to his being the driver of that car; it also included his turning in the driver's seat toward the center console of the car while reaching back with his right hand, a gesture one experienced member of the police department's drug control unit believed to have been the defendant's placing something behind the driver's seat, as well as the "meaningless ride" with Hannigan, conduct consistent with the purchase and sale of drugs. The "incriminating evidence" supplementing that of the defendant's presence in the same vehicle in which the drugs were found was sufficient under Latimore to show possession of those drugs. See, e.g., Commonwealth v. Crapps, 84 Mass. App. Ct. 442, 444 (2013); Commonwealth v. Cotto, 69 Mass. App. Ct. 589, 592-593 (2007); Commonwealth v. Sadberry, 44 Mass. App. Ct. 934, 936 (1998).

**3 Viewed under the Latimore standard, the evidence of distribution was also sufficient to overcome the defendant's motion for a required finding of not guilty. "The two basic elements for conviction of possession with the intent to distribute cocaine are (1) knowingly possessing the drug and (2) intending to transfer it physically to another person." Commonwealth v. Tavernier, 76 Mass. App. Ct. 351, 355 (2010) (intent to sell may be inferred from evidence of sale). "[I]n certain situations, an illegal drug transaction may be inferred from other circumstances even if what is transferred is not actually seen." Commonwealth v. Soto, 45 Mass. App. Ct. 109, 112 (1998). On this point, in addition to the evidence outlined above in support of possession, a reasonable fact finder could consider the defendant's implausible explanation of the "meaningless ride" with Hannigan; the

police's subsequent discovery of money but few drugs in the defendant's possession, and drugs but little money in Hannigan's possession; the absence of any paraphernalia associated with drug use on the defendant or in the Flex; and the evidence that the Flex was a rental car, along with testimony that drug sellers often use rental cars in order to make deliveries while protecting their identities. Taken together, this evidence was sufficient to allow a rational fact finder to find that the defendant had the intent to distribute the contraband found in the Flex. See Commonwealth v. Alvarado, 93 Mass. App. Ct. 469, 471 (2018) (sufficient evidence of distribution included defendant's participation in "ride to nowhere," brevity of interaction between defendant and vehicle's driver, and money recovered from defendant's person and recovery of drugs from vehicle's driver). The judge did not err in denying the motion for a required finding of not guilty.

3. Jury instructions. The defendant's final argument is that the trial judge erred by failing to instruct the jury on the element of intent. "We evaluate jury instructions as a whole and interpret them as would a reasonable juror." Commonwealth v. Kelly, 470 Mass. 682, 697 (2015), citing Commonwealth v. Trapp, 423 Mass. 356, 361, cert. denied, 519 U.S. 1045 (1996). In instructing the jury, "[w]e do not require that judges use particular words, but only that they convey the relevant legal concepts properly." Id. As the defendant did not object to the instructions as they were given, we determine whether any error created a substantial risk of a miscarriage of justice. See Commonwealth v. Arias, 84 Mass. App. Ct. 454, 464 (2013). "An error creates a substantial risk of a miscarriage of justice unless [the reviewing court is] persuaded that it did not 'materially influence' the guilty verdict. In making that determination, we consider [1] the strength of the Commonwealth's case against the defendant, [2] the nature of the error, [3] whether the error is 'sufficiently significant in the context of the trial to make plausible an inference that the jury's result might have been otherwise but for the error,' and [4] whether it can be inferred 'from the record that counsel's failure to object was not simply a reasonable tactical decision.' " Commonwealth v. Eberle, 81 Mass. App. Ct. 235, 240-241 (2012), quoting Commonwealth v. Palmer, 59 Mass. App. Ct. 415, 425 (2003).

We discern no error in the judge's instructions. The judge's final instructions on the offense at issue were taken from the Criminal Model Jury Instructions for Use in the District Court § 7.800 (2009 ed.) (Distribution of a Controlled Substance). The instruction, both as written and as read by the judge to the jury, identified intent as an element of the offense: "the second element the Commonwealth must prove is possession with intent to distribute." While the model instruction included a subsidiary section, which the judge did not read, providing the jury with guidance in determining whether any drugs that the Commonwealth proved were in the defendant's possession were for personal use or for distribution, the omission of the subsidiary instruction did not result in a failure to instruct on the required elements of the charge. Cf. Commonwealth v. McCray, 93 Mass. App. Ct. 835, 845 (2018) (joint venture instruction inadequate where requisite intent for accomplice omitted "dangerous weapon" aspect of assault and battery charge). The instruction as the judge gave it was adequate on the issue of intent. See Commonwealth v. Wood, 90 Mass. App. Ct. 271, 285 (2016); Commonwealth v. DeJesus, 71 Mass. App. Ct. 799, 808 (2008). Even had the failure to instruct more comprehensively on intent been error, viewing the instructions as a whole, including the fact that during the trial and before final instructions, the jurors were twice instructed specifically on intent,[4] we are not persuaded that the error would have materially influenced the verdict. See Eberle, 81 Mass. App. Ct. at 240-241.

**4 *802 Judgments affirmed.

All Citations

95 Mass.App.Ct. 1115, 125 N.E.3d 801 (Table), 2019 WL 2246179

Footnotes

1 The panelists are listed in order of seniority.

2 The Commonwealth argues that based on their awareness that the defendant's driver's license had been suspended at the time of the controlled buy ten to fourteen days before the September 19 stop, the police had probable cause to believe that he was again operating with a suspended license on September 19. The defendant argues that by the time of the stop, the information about the defendant's license suspension was too stale to provide probable cause. In light of our conclusion that the police had probable cause to arrest the defendant on other grounds, we do not decide this issue.

3 Officer O'Brien stated at the motion to suppress hearing that the defendant was placed under arrest at that point for "operating after suspension." However, Detective Duran stated that the reason "for stopping him was I believed he had just engaged in a drug transaction," and "the probable cause for this arrest report is from what I saw between Mr. Hannigan and [the defendant] and also [the defendant]'s revoked driver's license." The officers were authorized to arrest the defendant for operating with a suspended license under G. L. c. 90, § 21. Moreover, even if probable cause to arrest for distribution of controlled substances was not established at the time of the initial arrest, an issue we do not decide here, it certainly existed once the police received a report from the officers who had apprehended Hannigan after he left the defendant's car that Hannigan possessed cocaine. See Commonwealth v. Sanders, 90 Mass. App. Ct. 660, 665-666 (2016) (probable cause to arrest where known drug dealer engaged in conduct experienced officers believed to be drug exchange in area known for drug dealing).

4 The instructions that the judge read to the jury at earlier points in the trial included as an element "[t]hat the defendant had the specific intent to distribute, manufacture or dispense the controlled substance."

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83 N.E.3d 201

91 Mass.App.Ct. 1119
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

COMMONWEALTH
v.
Kristen LANGATHIANOS.

16-P-516
|
April 28, 2017

By the Court (Trainor, Blake & Shin, JJ.[1])

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** The defendant appeals her convictions of assault and battery and resisting arrest, arguing that the trial judge gave an erroneous jury instruction on witness credibility and abused his discretion by not accepting her guilty plea. We affirm.

Background. The jury could have found the following facts. In December of 2014, police officer Steven Beland was dispatched to a residence in Lowell, where he saw the defendant standing outside, looking "upset and angry." Officer Beland went inside the house and told the defendant to remain outside. Despite his instruction, the defendant pushed open the front door and "r[an] up the stairs towards the second floor." As the officer "started making [his] way upstairs, [he] could hear yelling and screaming, and two female voices from the top of the staircase." When he arrived on the second floor, he observed the defendant "pulling [the] hair" of another woman, later identified as Ashley Holt, and "striking" her. The father of the defendant's child stepped between the two women and "tried to break it up" but "start[ed] to get hit as well in the struggle between the two of them."

Officer Beland grabbed the defendant's arms and told her that she was under arrest. He tried to pull the defendant backwards, but she continued to "maintain[ ] her hold on Ms. Holt and was pulling Ms. Holt as well." The officer then attempted "a knee strike to [the defendant's] thigh area ..., trying to get her to release Ms. Holt." This caused both the officer and the defendant to fall backwards on the floor. When the defendant "continu[ed] to lash out, trying to punch at Ms. Holt," Officer Beland "kicked her in the thigh trying to get her lying back down." At this point another officer arrived on the scene and helped to "try[ ] to maintain control over [the defendant,]" who "continu[ed] to kick and struggle." Eventually, the officers pulled the defendant down the stairs and were able to subdue her.

The defendant testified to her own version of the incident at trial. She conceded that she got into an "altercation" with Holt but denied "swing[ing]" at her, stating that they were merely "holding on to each other." The defendant also testified that she told the officer that she was "not resisting" and attempted to comply with his orders.

Discussion. 1. Jury instruction. The defendant argues that the judge erred in giving the following instruction on witness

credibility:

> "You have heard from a number of witnesses, you must decide which witnesses to believe, and how much weight to give their testimony. If some testimony conflicts with other testimony, you must figure out which testimony, if any, is true. You may believe everything that a witness says, some of it, or none of it. For example, if the witness said the car ran the red light travelling 40 miles per hour, you might believe that the car ran the red light, but you might not believe that it was traveling 40 miles per hour. When you don't believe someone's testimony, you have to find some evidence about the issue that you do believe" (emphasis supplied).

***2** According to the defendant, by telling the jury that they "have to find" evidence that they do believe, the judge invaded the jury's factfinding function and impermissibly shifted the burden to the defendant to disprove her guilt. Because the defendant did not preserve this issue for appeal, we review to determine whether there was any error and, if so, whether it resulted in a substantial risk of a miscarriage of justice. See Commonwealth v. St. Louis, 473 Mass. 350, 359 (2015).

We observe at the outset that the judge's instruction did not substantially differ from the model jury instruction, which reads in relevant part: "When you disbelieve a witness, it just means that you have to look elsewhere for credible evidence about that issue." Instruction 2.260 of the Criminal Model Jury Instructions for Use in the District Court (2009). The Supreme Judicial Court has upheld the validity of this instruction, concluding that it does not impermissibly shift the burden of proof to the defendant. See Commonwealth v. Thomas, 439 Mass. 362, 367 (2003); Commonwealth v. Walker, 443 Mass. 213, 223 (2005).

Nonetheless, the defendant contends that the judge's use of "have to find" (versus "have to look elsewhere") materially changed the meaning of the instruction by leaving no room for the jury to disbelieve all of the evidence. As her argument goes, a reasonable jury would have understood the instruction to mean that, if they disbelieved the defendant's testimony, they would "have to" believe Officer Beland, who provided the only other testimony about the defendant's altercation with Holt. But the instruction, when read in light of the entire charge, is not reasonably susceptible to the defendant's interpretation. When reviewing an instruction, we refrain from "scrutinizing bits and pieces removed from their context." Commonwealth v. Cundriff, 382 Mass. 137, 153 (1980). Instead, "we evaluate the instruction as a whole, looking for the interpretation a reasonable juror would place on the judge's words." Commonwealth v. Glacken, 451 Mass. 163, 168-169 (2008), quoting from Commonwealth v. Niemic, 427 Mass. 718, 720 (1998).

Here, the charge as a whole would have made clear to a reasonable jury that disbelief of the defendant's testimony did not require them to believe Officer Beland's testimony but, rather, that they were entitled to believe or disbelieve evidence as they saw fit. Indeed, immediately before the "have to find" language, the judge informed the jury that "[i]f some testimony conflicts with other testimony, you must figure out which testimony, if any, is true. You may believe everything that a witness says, some of it, or none of it." The judge also stated several times that the jury were the "sole and exclusive" finders of fact and that it was up to them to determine whether to believe a witness and how much importance to give a witness's testimony. In addition, the judge made clear that the Commonwealth had the burden to prove guilt beyond a reasonable doubt and that "[t]he defendant is not required to call any witnesses or produce any evidence, since she is presumed to be innocent." Finally, the judge advised the jury that they were to "consider all of [his] instructions as a whole" and should not "give special attention to any one instruction." In light of these instructions, the disputed language would not have led a reasonable jury to believe that they were required to credit Officer Beland's testimony if they did not credit the defendant's testimony. We are satisfied in these circumstances that the judge's minor deviation from the model jury instruction did not create a substantial risk of a miscarriage of justice. See Thomas, 439 Mass. at 367.

***3** 2. Rejection of guilty plea. The defendant next argues that the judge abused his discretion by rejecting her guilty plea because he "did so for the improper purpose of saving time." The defendant initially withdrew her plea after the judge informed her that his sentence would exceed the terms that she had requested. But once the judge instructed the clerk to "get the jury," defense counsel stated, "she is signing, Your Honor." The judge replied that he would "not allow [her] to sign if she feels compelled." When defense counsel then stated that "she doesn't feel compelled," the judge conducted the following colloquy:

> THE COURT: "All right, Ms. Langathianos are you going to accept the dispositions of the court when it calls?"
>
> THE DEFENDANT: "Yes, Your Honor."
>
> THE COURT: "Yes or no?"
>
> THE DEFENDANT: "Yes, Your Honor."
>
> THE COURT: "All right. Ms. Langathianos you read the facts the Commonwealth recited, are those facts true?"
>
> THE DEFENDANT: "No, Your Honor."
>
> THE COURT: "Thank you, get the jury. We are not waiting any more. Get the jury."

"A judge is afforded wide discretion in determining whether to accept a guilty plea." Commonwealth v. Gendraw, 55 Mass. App. Ct. 677, 684 (2002). Here, the judge was within his discretion to reject the defendant's plea, given that she refused to admit that the facts recited by the Commonwealth were true. Although she argues (for the first time on appeal) that the judge could have accepted her plea as an Alford [2] plea, "there is no constitutional right to have [a] plea accepted. The matter is wholly discretionary with the judge." Commonwealth v. Dilone, 385 Mass. 281, 285 (1982). Even where a "judge ha[s] a practice of not accepting an Alford plea," rejection of a plea pursuant to that practice does not create an "appellate issue." Ibid. Accord Commonwealth v. Lawrence, 404 Mass. 378, 389 (1989); Gendraw, 55 Mass. App. Ct. at 684. Accordingly, the judge here would have had no obligation to accept an Alford plea, had the defendant tried to tender one.

Judgments affirmed.

All Citations

91 Mass.App.Ct. 1119, 83 N.E.3d 201 (Table), 2017 WL 1534871

Footnotes

1 The panelists are listed in order of seniority.

2 North Carolina v. Alford, 400 U.S. 25, 37 (1970).

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CERTIFICATE OF COMPLIANCE

I the undersigned, counsel to the petitioner herein, hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to Mass.R.A.P. 16(a)(requirements for brief of appellant), 16(e) (references to the record), 16(f) (reproduction of statutes, rules, regulations), 16(h) (length of briefs), 18 (appendix to the briefs), and 20 (typesize, margins, and form of briefs, appendices, and other papers).

CERTIFICATE OF SERVICE

Pursuant to Mass. R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on September 4, 2019, I have made service of this Brief and Appendix by first class mail on:

Katherine E. McMahon
Office of the District Attorney/Hampden
Hall of Justice/Tower Square
50 State Street
Springfield, MA 01102

Deirdre A. Gleason
Gleason Law Firm, LLC
377 Main St., Ste. 9
Greenfield, MA 01301
BBO# 681099
(413) 774-3165
gleasonlawfirm@gmail.com