COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-926

COMMONWEALTH

vs.

QUEITO A. MIRANDA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A Superior Court jury convicted the defendant of trafficking in eighteen grams or more but less than thirty-six grams of heroin. See G. L. c. 94C, § 32E (c). The case was tried on a theory of joint venture. On appeal the defendant argues that the Commonwealth presented insufficient evidence that he knowingly participated in the transaction with the shared intent to distribute the heroin, and that the admission of cocaine evidence created a substantial risk of a miscarriage of justice. We affirm.

Background. We summarize the evidence, and the reasonable inferences therefrom, in the light most favorable to the Commonwealth. See Commonwealth v. Latimore, 378 Mass. 671, 677-678 (1979). On August 6, 2015, Detective Matthew Graham, who was working undercover for the Brockton Police Department

narcotics unit, arranged by telephone and text messages to buy thirty-five grams of heroin from Vaughn Mitchell, a drug dealer. Mitchell told Graham to meet him at a Walgreens in Brockton. Police surveillance vehicles followed Graham's car as he drove to the Walgreens and parked in the middle of the parking lot.

Shortly thereafter, Graham saw a Chevrolet Suburban with tinted windows drive through the parking lot. Graham called Mitchell and confirmed that he was driving the Suburban. Mitchell then told Graham, in a "regular" tone of voice, to follow him. While they were en route, Mitchell called Graham and told him to go to Rangeley Avenue.

When Graham arrived at Rangeley Avenue, he positioned his car next to the Suburban so that the driver's side windows were aligned. The driver's side window of the Suburban was open, but the other windows were not. Graham noticed that there was another man, later identified as the defendant, in the front passenger seat. The defendant was staring "intent[ly]" at Graham and "looking around" but did not appear to be confused or worried.

After Mitchell produced the heroin and Graham produced the money, there was a "weird standoff" because "neither [man] wanted to get robbed." While Graham was focused on Mitchell, he heard the defendant yell something along the lines of "fuck, cops, let's get the fuck outta here." Graham then noticed that

several unmarked State Police vehicles had pulled up near them. The defendant was pointing at the vehicles and yelling.

Mitchell took the heroin and attempted to escape, keeping both hands on the steering wheel in the process. After a pursuit the police apprehended Mitchell, removed him and the defendant from the Suburban, and arrested and searched each of them.[1] The defendant, who was unemployed, had a sizeable amount of cash on him, determined to total $1,102. The police also found a large bag of heroin on the ground outside the Suburban's front passenger side door, about ten feet away, and a smaller bag of cocaine on the floor underneath the front passenger seat.

Discussion. 1. Sufficiency of the evidence. The defendant argues that the evidence was insufficient to support his conviction under a theory of joint venture. In particular, he argues that the Commonwealth did not prove that he knowingly participated with Mitchell in the heroin transaction with the shared intent to distribute. See Commonwealth v. Zanetti, 454 Mass. 449, 470 (2009) (Appendix); Commonwealth v. Ortega, 441 Mass. 170, 174 n.7 (2004). In considering this argument, we "view the evidence presented at trial, together with reasonable inferences therefrom, in the light most favorable to the Commonwealth to determine whether any rational jury could have

[1] A third person, the defendant's fourteen year old cousin, was seated in the backseat of the Suburban.

found [the challenged] element[s] of the offense beyond a reasonable doubt." Commonwealth v. Robinson, 482 Mass. 741, 744 (2019).

Here, the defendant's presence during the crime, combined with various "plus factors," Commonwealth v. Lara, 58 Mass. App. Ct. 915, 916 (2003), were sufficient to establish his knowledge and shared intent to commit the crime. The jury could have found that the defendant overheard Mitchell's instructions to Graham to follow him from the parking lot and then to Rangeley Avenue. The jury could also have found that the defendant's actions during the transaction itself -- staring at Graham "intent[ly]" with no confusion or worry, "looking around," warning Mitchell about the police, and urging him to flee -- were consistent with those of a lookout. See Commonwealth v. Mendes, 46 Mass. App. Ct. 581, 588-589 (1999).

In addition, the jury could have inferred that the defendant threw the heroin out of the car as Mitchell tried to flee, based on the evidence that the defendant was seated in the front passenger seat, the heroin was found ten feet from the front passenger door, the front passenger window was closed earlier during the transaction, and Mitchell had two hands on the steering wheel during his attempted escape. This evidence was bolstered by Detective Thomas Keating's expert testimony that drug delivery services usually are conducted by two people:

one person drives and the other holds the drugs so that, if they encounter the police, the driver can try to escape while the person holding the drugs can dispose of them. See Commonwealth v. Miranda, 441 Mass. 783, 794 (2004).[2]

The large amount of cash ($1,102) found on the defendant, combined with Keating's expert testimony that it is typical for the person other than the driver to hold the money, also supported the jury's finding that the defendant had knowledge and shared intent. See Pena v. Commonwealth, 426 Mass. 1015, 1018 (1998); Commonwealth v. Gonzales, 33 Mass. App. Ct. 728, 731 (1992). In arguing that the money was not drug proceeds, the defendant points to the absence of evidence about denominations and whether the cash was in different folds, and further notes that the police did not recover pagers, cell phones, or other accoutrements of the drug trade. But where, as here, a defendant has a large quantity of cash, that alone "is probative of an intent to distribute," especially because "the defendant was unemployed and thus unlikely legitimately to have

[2] Although the defendant contends that Mitchell was the one who disposed of the heroin by throwing it past the defendant and out the passenger window, the jury were free to disbelieve Mitchell's testimony to that effect. See Zanetti, 454 Mass. at 457.

that amount of cash." Commonwealth v. Sepheus, 468 Mass. 160, 166 (2014). See Gonzales, supra at 731.[3,4]

Contrary to the defendant's assertion, the evidence in this case is demonstrably stronger than that in Commonwealth v. Saez, 21 Mass. App. Ct. 408 (1986). In Saez the only evidence of joint venture was "that the defendant associated himself with an individual whom the defendant may have known to be in possession of heroin" and "looked up and down the street" during the transaction and later while his purported joint venturer hid the drugs. Id. at 413. While still viewing the issue as a "close one," the court held that in those circumstances the jury could not have convicted the defendant without engaging in "conjecture or surmise." Id.

Here, in contrast, the evidence did more than "merely place[] the defendant at the scene of the crime and show[] him to be in association with the principal[]." Id. at 411. Rather, as discussed above, the evidence established circumstantially that the defendant acted as a lookout, disposed

[3] The jury were free to disbelieve Mitchell's testimony that the defendant had been working all day and was paid under the table. See Zanetti, 454 Mass. at 457.

[4] To the extent the defendant argues otherwise, there was sufficient evidence to support an inference of intent to distribute. Specifically, Keating testified that the weight of the heroin (32.3 grams), the packaging, and the absence of any paraphernalia with which to consume the heroin were consistent with distribution and not personal use.

of the heroin, and possessed proceeds from illegal drug sales. This evidence would have allowed a reasonable jury to find that the defendant was engaged in a joint venture with Mitchell.

2. Admission of cocaine evidence. An evidence bag containing the bag of heroin was admitted at trial as an exhibit with no objection. Also contained in the evidence bag was the smaller bag of cocaine recovered from underneath the front passenger seat. After the close of evidence, defense counsel requested that the judge "[r]emove [the cocaine] from the evidence," expressing concern that it would confuse the jury. When the judge observed that he could not "remove [the cocaine] from the evidence at this point," counsel requested that the judge give a curative instruction. The judge then included the requested instruction as part of his final charge,[5] and counsel stated he was content.

[5] The curative instruction stated in part:

"The defendant is only charged in this case with trafficking in heroin. He is not charged with anything with respect to cocaine. So to the extent that you may credit, or that there was evidence, that there was some cocaine involved in this case, you may consider that in the overall picture, of course. But remember, insofar as determining . . . any of the elements of trafficking, the defendant possessed a controlled substance, that he had the specific intent to distribute it, that it had a particular weight, any of those things, the smaller bag is irrelevant for those purposes. Your focus should be on the larger bag."

The defendant argues that the cocaine evidence was erroneously admitted because it was not sufficiently authenticated and had no probative value. Because the issue was not preserved, our review is limited to determining whether any error resulted in a substantial risk of a miscarriage of justice. See Commonwealth v. Jones, 464 Mass. 16, 18 (2012). Assuming, without deciding, that the evidence should not have been admitted, we discern no substantial risk of a miscarriage of justice. The Commonwealth did not mention the cocaine in its opening statement or in summation. Furthermore, as the judge noted, he could not simply remove the exhibit from the evidence, see Commonwealth v. Perryman, 55 Mass. App. Ct. 187, 192 (2002), but he addressed defense counsel's concern about jury confusion by giving a curative instruction. The judge clearly conveyed to the jury that the defendant had been charged only with trafficking in heroin and that the smaller bag of cocaine was irrelevant to the jury's determination of whether the

Commonwealth proved the elements of that charge. We presume that the jury followed the judge's instruction. See Commonwealth v. Watkins, 425 Mass. 830, 840 (1997).

Judgment affirmed.

By the Court (Hanlon, Lemire & Shin, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: January 15, 2020.

[6] The panelists are listed in order of seniority.