COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-125

COMMONWEALTH

vs.

LUIS MEDINA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury trial in the Superior Court, the defendant was convicted of trafficking in cocaine with a net weight of thirty-six grams or more but less than one hundred grams, in violation of G. L. c. 94C, § 32E (b).[1] On appeal, he challenges the denial of his motion to suppress evidence found in the car he was driving and on a cell phone; the trial judge's admission of the substance of a text message found on the same cell phone; and improper statements the prosecutor made during his closing argument. For the reasons below, we affirm.

1. Motion to suppress. a. Search of the car. "In reviewing a decision on a motion to suppress, 'we accept the judge's subsidiary findings absent clear error "but conduct an

[1] He was acquitted of trafficking in cocaine in or near a public park. See G. L. c. 94C, § 32J.

independent review of [the] ultimate findings and conclusions of law."'" Commonwealth v. Jones-Pannell, 472 Mass. 429, 431 (2015), quoting Commonwealth v. Ramos, 470 Mass. 740, 742 (2015). We recite the facts as the judge found them, supplementing with undisputed testimony that the judge credited implicitly or explicitly, and reserving certain facts for later discussion. See Jones-Pannell, supra.

The police stopped a car driven by the defendant after seeing it speeding and committing a marked lanes violation.[2] Once the car was stopped, the officer saw the defendant move around in the car's driver's seat, then lean to the left, and reach "far down into the back seat." The defendant, who appeared nervous, identified himself to the police using a false name and provided the police with an expired Rhode Island driver's license. At that point, for reasons including concern for his own safety, the officer ordered the defendant out of the car. The exit order was proper on these facts. See Commonwealth v. Gonsalves, 429 Mass. 658, 661-663 (1999).

With the defendant out of the car, the officer saw a small amount of white powder on the driver's seat in the area in which the defendant had been seated, as well as a "twisty" bag consistent with packaging for illicit drugs near the car's door.

[2] The defendant concedes the constitutionality of the stop.

These observations, along with the defendant's speeding, his reaching from the front seat into the rear seat of the car, and his nervousness, established probable cause to believe that there were illegal drugs in the car, and so justified the warrantless search of the car under the automobile exception to the usual warrant requirement. See Commonwealth v. Rosario-Santiago, 96 Mass. App. Ct. 166, 178 (2019).

Searching the vehicle, the police found two separate bundles of folded currency in the driver's side door handle. The defendant told the police that he had an open criminal case; checking the defendant's record, the police learned that the defendant had been charged with trafficking in cocaine. The police called in a drug-sniffing dog to assist with the search of the interior of the car. The decision to summon the dog was reasonable in light of the evidence pointing to the presence of drugs in the car. See Commonwealth v. Feyenord, 445 Mass. 72, 78-80 (2005). Because the police already had probable cause to arrest the defendant, the defendant's argument that an unreasonable delay in the dog's arrival invalidated the dog-assisted investigation inside the car is unpersuasive.[3]

[3] Even assuming, as the defendant argues, that the dog did not arrive on scene for an hour or more after the call was made, the delay was of no consequence; the situation had by that time progressed well beyond a "routine traffic stop." See Feyenord, 445 Mass. at 78-79.

b. Search of the cell phone. The police took a cell phone from the defendant at some point between stopping him and taking him to the police station. At the police station, a text message appeared on the screen of that phone; the police were able to read it without manipulating the phone. The police officer's action in reading the message was not a search of the phone, and there was no error in denying the defendant's motion to suppress based on an allegedly illegal search. See Commonwealth v. Alvarez, 480 Mass. 1017, 1018 (2018).

2. Trial motions. a. Text as inadmissible hearsay. At trial, a police officer was permitted, over the defendant's objection, to testify to the substance of the text message that he saw on the phone taken from the defendant.[4] There was no error in this ruling; the statement was not offered for its truth, but to show that the cell phone was used in furtherance of the drug trafficking with which the defendant was charged, and so was not hearsay. See Commonwealth v. DePina, 75 Mass. App. Ct. 842, 850 (2009); Commonwealth v. Washington, 39 Mass. App. Ct. 195, 199-201 (1995). Given our conclusion that the statement was not hearsay, we find no merit in the defendant's argument that the statement was admitted in violation of the confrontation clause. See Commonwealth v. Pelletier, 71 Mass.

[4] The message stated, "[D]on't bother calling me, and call my other guy. He was here in five minutes."

App. Ct. 67, 71 (2008), quoting Crawford v. Washington, 541 U.S. 36, 59-60 n.9 (2004).

b. Destruction of the cell phone. At trial, the Commonwealth conceded that the cell phone had been destroyed before trial, apparently based on a mistaken belief that it would not be needed as evidence.[5] The defendant argued for exclusion of evidence of the text based on the missing phone.

The defendant, who has made no affirmative showing of what the phone, if available, would show, has failed to demonstrate a reasonable possibility that the phone contained or could provide exculpatory evidence. See Commonwealth v. Sanford, 460 Mass. 441, 447 (2011), citing Commonwealth v. Neal, 392 Mass. 1, 12 (1984). Neither has he demonstrated that the destruction of the evidence was due to the bad faith or reckless acts of the Commonwealth. See Commonwealth v. Williams, 455 Mass. 706, 718 (2010). Reviewing the judge's denial of the defendant's motion for abuse of discretion or error of law, we perceive none. See Sanford, supra at 445, quoting Commonwealth v. Carney, 458 Mass. 418, 425 (2010).

3. Prosecutor's closing argument. The defendant argues that several of the statements made by the prosecutor in his

[5] The phone was destroyed after the original charges against the defendant were nol prossed and before the superseding indictments on which the defendant was tried were returned.

closing argument amounted to reversible error, either as improper vouching for a witness's credibility or because they referred to facts not in evidence. In assessing the defendant's challenge, we consider the prosecutor's words "in the context of the entire argument, the testimony, and the judge's instruction to the jury." Commonwealth v. Hrabak, 440 Mass. 650, 654 (2004). We take into account "(1) whether the defendant seasonably objected; (2) whether the error was limited to collateral issues or went to the heart of the case; (3) what specific or general instructions the judge gave the jury which may have mitigated the mistake; and (4) whether the error, in the circumstances, possibly made a difference in the jury's conclusions." Commonwealth v. Diaz, 478 Mass. 481, 487 (2017), quoting Commonwealth v. Kater, 432 Mass. 404, 422-423 (2000).

a. Vouching. In making a closing argument, a prosecutor may "state logical reasons why a witness's testimony should be believed," see Commonwealth v. Sanders, 451 Mass. 290, 297 (2008); however, it is improper for an attorney to "express[] a personal belief in the credibility of a witness, or indicate[] that he or she has knowledge independent of the evidence before the jury." Commonwealth v. Sanchez, 96 Mass. App. Ct. 1, 10 (2019), quoting Commonwealth v. Wilson, 427 Mass. 336, 352 (1998). The statements that the defendant challenges here do not require reversal.

In summarizing the testimony of one of the Commonwealth's police witnesses, the prosecutor argued that "[the witness is] telling you exactly what he saw, what he saw the defendant doing and how he carried out his investigation. He's being credible with you. He's being candid with you." In context, the prosecutor was arguing that if the witness had, as the defendant contended, been lying about what he saw, then the witness would have concocted a more compelling set of observations than those to which he testified. The prosecutor's later argument about the same witness -- "Listen to Officer Perez. He told you what he saw. He's a credible officer, 19 years" -- was likewise an effort to rebut the defendant's claim that the officer had lied about his observations, and urged the jury to consider the evidence of the officer's experience as they determined his credibility. While the prosecutor might better have refrained from commenting directly on the witness's credibility, given its importance in this case, the defendant did not object to the statements, and the judge instructed the jury clearly on their role in determining credibility and on the distinction between evidence and argument. See Diaz, 478 Mass. at 487. We conclude that their admission did not create any substantial risk of a miscarriage of justice. See Commonwealth v. Loguidice, 420 Mass. 453, 455-456 (1995), and cases cited.

b. Facts not in evidence. The prosecutor's statements to the effect that the defendant was selling drugs from the car in public places described a scenario for which there was no evidentiary support. The defendant preserved his objection to these latter statements, and we thus review for prejudicial error. See Commonwealth v. Garcia, 75 Mass. App. Ct. 901 (2009). It was error for the prosecutor to argue that people were coming up to the defendant's car to buy drugs; the fact that the Commonwealth's expert testified that drugs were sometimes sold by "delivery service" to a public place was not evidence of the defendant's having done so. That said, the Commonwealth's case, including the defendant's driving a car containing a sophisticated drug "hide" containing a large amount of drugs packaged for sale, the presence of an empty bag of a type used for packaging drugs for street sale, the presence of hundreds of dollars folded into the car's door handle, and the activity the police observed involving the defendant's cell phone, was strong. Additionally, the judge's final instructions to the jury were clear that the closing arguments were not evidence, and that the jury were not to decide the case based on their personal feelings about it. Ultimately, while we agree with the defendant that at least some of the prosecutor's argument was based on facts not in evidence, we discern no prejudicial error in the jury's hearing it. See Commonwealth v.

Correia, 65 Mass. App. Ct. 27, 35-36 (2005) (no prejudicial error derives from prosecutor's improper closing argument where "in light of the entire record, the Commonwealth's case is strong and the trial judge's instructions have mitigated or cured any error that could have deprived the defendant of a fair trial").

Judgment affirmed.

By the Court (Milkey, Singh & Hand, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: January 24, 2020.

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