

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-76

COMMONWEALTH

vs.

JERRY I. ANITUS.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a jury trial in the Superior Court, the defendant, Jerry I. Anitus, was convicted of carjacking and assault and battery upon an elderly person causing bodily injury.¹ He appeals, claiming that (1) it was error to admit certain evidence, (2) the evidence was insufficient to support the carjacking conviction, and (3) cumulative trial errors created prejudice requiring reversal of the convictions. We affirm.

Background. The jury could have found the following facts. On September 6, 2013, an armed robbery occurred at Previte's

¹ The defendant was found not guilty of assault on a person sixty years or older by means of a dangerous weapon. In pretrial proceedings, the judge dismissed an indictment for assault and battery by means of a dangerous weapon on a person sixty years or older.

Market in Weymouth near the Hingham town line.² Thereafter, between 3:30 P.M. and 4 P.M., the victim, S.L., age eighty-five, returned to her apartment at Linden Pond in Hingham, driving a Lincoln town car. She parked her car, shut the engine off, and opened the driver's side door. As she started to get out of the car, the passenger side door swung open. A man, whose face was covered in blood, jumped into the car and demanded that S.L. give him her "keys right now." She refused, and a struggle ensued. The defendant threatened S.L., telling her "I'll hurt you if you don't get out." He kicked the driver's side door open, lifted S.L. up, and threw her out of the car where she landed on the hardtop. In order to avoid being run over, S.L. rolled away from the car as the defendant backed her car out of the spot and drove away. S.L. had visible injuries, was in pain, and was very upset.

S.L.'s car was found later that day in Quincy. The car was running; it was not in a parking spot and appeared to be parked "hastily." The driver's side door was open; there was a dent above the right front wheel, and blood on the steering wheel and car seat. A swab was taken from the steering wheel of S.L.'s car and analyzed by the Massachusetts State Police Crime Laboratory. A single source male deoxyribonucleic acid (DNA)

² Weymouth is in Norfolk County; Hingham is in Plymouth County.

profile was obtained that matched the defendant's DNA profile. Additionally, in an apartment complex near Linden Pond and Previte's Market, the defendant's identification card and other possessions bearing his name were found in a car parked in the lot.

Six days later, on September 12, 2013, at approximately 1 P.M., a police officer in Smithfield, Rhode Island saw a grey Toyota Corolla fleeing from several police cruisers that had their lights and sirens on. The driver of the Corolla was speeding; he crossed over three lanes of traffic, went in to the median, jumped a ditch, and reversed directions on the highway. The police were forced to shut down the highway in an effort to stop the Corolla. The defendant struck a police cruiser twice, and then crashed into another cruiser before losing control of the Corolla, which came to rest on its side. The defendant, who was alone in the car, was arrested. He had scabbing and marks on his face, hands, chest, and upper body.

Discussion. 1. Bad act evidence. a. The armed robbery. The defendant contends that the judge failed to properly limit evidence of the defendant's possible involvement in the armed robbery at Previte's Market, resulting in a "trial-within-a-

trial."³ Prior to trial, the defendant filed a motion in limine seeking to exclude this evidence. He also renewed his objection at trial. Accordingly, we review to determine whether admission of the evidence of the armed robbery was error and, if so, whether the error was prejudicial. Commonwealth v. Tavares, 482 Mass. 694, 712 (2019). In so doing, we consider whether the judge committed an error of law, see Commonwealth v. Dung Van Tran, 463 Mass. 8, 14-15 (2012), or an abuse of discretion. See L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). As to the defendant's claim of inadequate jury instructions on this issue, because he did not request limiting instructions and did not object to the instructions that were given, we review to determine whether any error created a substantial risk of a miscarriage of justice. Commonwealth v. Pfeiffer, 482 Mass. 110, 128 (2019).

The Commonwealth "may not introduce evidence that a defendant previously has misbehaved, indictably or not, for the purposes of showing his bad character or propensity to commit the crime charged, but such evidence may be admissible if relevant for some other purpose." Commonwealth v. Bryant, 482 Mass. 731, 734 (2019), quoting Commonwealth v. Helfant, 398

³ The Commonwealth called six witnesses that testified to varying extents about the armed robbery, the police investigation, and the forensic investigation and analysis.

Mass. 214, 224 (1986). This evidence may be admitted to show, as relevant here, intent, motive, the defendant's state of mind, and identity. See Helfant, supra; Mass. G. Evid. § 404(b) (2019). Moreover, when this evidence is "inextricably intertwined" with the description of the events of the charged crime, the Commonwealth is permitted to present to the jury probative evidence of the events surrounding the crime. Commonwealth v. Keown, 478 Mass. 232, 244 (2017), quoting Commonwealth v. Marrero, 427 Mass. 65, 67 (1998). See Commonwealth v. Phim, 462 Mass. 470, 477 (2012), quoting Commonwealth v. Weeks, 77 Mass. App. Ct. 1, 10 (2010) ("The prosecutor is entitled to present as full a picture as possible of the events surrounding the incident itself").

Here, evidence of the armed robbery was admissible for a multitude of reasons, and the defendant does not contend otherwise. Instead, he claims that the judge failed to curtail the "volume and substance" of the evidence and therefore did not minimize the prejudicial effect of the evidence. We disagree. Evidence of the armed robbery was relevant to the defendant's motive in carjacking S.L.'s car, which allowed him to make a quick getaway. See Commonwealth v. Bly, 448 Mass. 473, 498 (2007). Furthermore, the armed robbery was also proximate in time and place to the carjacking; the DNA evidence recovered from the steering wheel linked the defendant to both crimes and

proved his identity.⁴ See Tavares, 482 Mass. at 712-713.

Finally, the evidence permitted the Commonwealth to present a full picture of the events surrounding the crime. See Commonwealth v. Chartier, 43 Mass. App. Ct. 758, 760-761 (1997).

Moreover, at the outset of this testimony, the judge instructed the jury regarding the limited use of this evidence, which minimized any prejudicial effect. See Commonwealth v. Forte, 469 Mass. 469, 480 (2014). The instructions, which were not requested by the defendant, nor objected to, were clear, timely, and strong, and directed the jury to "not take [robbery] evidence as a substitute for proof that the defendant committed the crimes for which he is charged in this case." The jury are presumed to understand and follow the judge's instructions. Commonwealth v. Proia, 92 Mass. App. Ct. 824, 829 (2018). Moreover, the jury acquitted the defendant of one indictment, suggesting that the jury carefully considered the evidence and the judge's instructions. See Commonwealth v. Ramos, 63 Mass. App. Ct. 379, 382 (2005). There was no error.

b. The defendant's flight. The defendant filed a motion in limine seeking to preclude evidence of his flight and objected to the admission of this evidence at trial. We review to determine whether the judge abused his discretion in

⁴ The defense at trial was identification.

admitting this evidence. Commonwealth v. Sawyer, 389 Mass. 686, 700-701 (1983). The defendant concedes that flight is admissible as evidence of a defendant's consciousness of guilt. See Commonwealth v. Carrion, 407 Mass. 263, 277 (1990) ("Flight is perhaps the classic evidence of consciousness of guilt"). However, he claims that this evidence was not relevant to the crimes for which he was indicted and was highly prejudicial. See Commonwealth v. Villafuerte, 72 Mass. App. Ct. 908, 908 (2008). We disagree. The judge properly admitted the evidence as consciousness of guilt evidence, see Commonwealth v. Toney, 385 Mass. 575, 583-584 (1982), and to establish the circumstances of the defendant's arrest and his physical appearance six days after the carjacking.⁵ See Commonwealth v. Reyes, 483 Mass. 65, 72 (2019). Cf. Commonwealth v. Burke, 414 Mass. 252, 260 (1993). And, without the defendant's request or objection, the judge instructed the jury on the limited use of this evidence as it may have related to the defendant's state of mind, as discussed supra. There was no error.

2. Sufficiency of the evidence. The defendant contends that the evidence was insufficient to convict him of carjacking because the Commonwealth did not prove the defendant intended to

⁵ The scabs on the defendant's face corroborated S.L.'s testimony that the defendant's face was covered in blood when he carjacked her.

permanently deprive S.L. of her car.⁶ The defendant took S.L.'s car by threat and force while attempting to hurriedly flee the area; the car was found abandoned, with damage, and the keys in the ignition. Viewing the evidence in the light most favorable to the Commonwealth, Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), the jury could reasonably infer that the defendant drove the car to escape from the armed robbery, did not intend to return it, and that he was not going for a "joyride." See Commonwealth v. Souza, 428 Mass. 478, 490 (1998). That S.L.'s car was found shortly after it was stolen is of no moment. Id.⁷ And, the defendant's reliance on Commonwealth v. Olivera, 48 Mass. App. Ct. 907, 908 (1999), is not to the contrary. In Olivera, we held that the evidence of an armed robbery of a motor vehicle was sufficient where the Commonwealth proved "that the defendant lacked any concern as to whether [the victim] recovered his [car]." Id. As is the case here, "[o]ne who takes property without the authority of the owner and so uses or

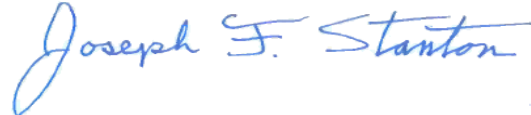
⁶ The elements of carjacking are that the defendant (1) intended to steal a motor vehicle, and (2) that he assaulted, confined, maimed, or put the victim in fear for the purpose of stealing the motor vehicle. G. L. c. 265, § 21A. To satisfy the first element, the Commonwealth must prove that the defendant intended to permanently deprive the owner of the motor vehicle. Commonwealth v. Furr, 454 Mass. 101, 108 (2009). Only the first element is at issue here.

⁷ Because we reject the defendant's claims, no discussion is required on his claim of cumulative errors. Cf. Commonwealth v. Gonzalez, 28 Mass. App. Ct. 906, 908 (1989).

disposes of it as to show indifference whether the owner recovers possession may be found to intend to deprive the owner of it permanently." Id., quoting Commonwealth v. Salerno, 356 Mass. 642, 648 (1970). Accordingly, the evidence was sufficient for the jury to find, beyond a reasonable doubt, that the defendant intended to deprive S.L. of her car indefinitely. See Commonwealth v. Gallett, 481 Mass. 662, 673-674 (2019) (car abandoned in church parking lot).

Judgments affirmed.

By the Court (Green, C.J.,
Maldonado & Blake, JJ.⁸),



Clerk

Entered: July 1, 2020.

⁸ The panelists are listed in order of seniority.