

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

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-894

COMMONWEALTH

vs.

SCOTT CARNEY.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a trial in the District Court, a jury found the defendant guilty of operating a motor vehicle while under the influence of narcotic drugs (OUI charge). The defendant appeals, arguing primarily that (1) the Commonwealth did not meet its burden of proving that he was under the influence of heroin, and (2) the judge erred by admitting certain testimony from a nurse who treated the defendant. We affirm.

Background. At trial, two police officers testified that on December 22, 2017, they observed the defendant speeding around a corner in his vehicle, causing his tires to squeal. The officers stopped the car, and the defendant provided his license and registration without speaking. The officers went to their vehicle to fill out a citation and when they returned approximately ten minutes later, the defendant was unresponsive

and slumped over in the driver's seat. The defendant looked pale, his lips were blue, and he did not respond to verbal cues or a sternum rub.

The officers turned off the defendant's car, administered a dose of Narcan to the defendant, and removed the defendant from the vehicle. The defendant did not regain consciousness. An officer tried to assist the defendant's breathing with a bag valve mask, and administered a second dose of Narcan, but the defendant could not be revived. When the ambulance arrived, the emergency medical service (EMS) personnel administered a third dose of Narcan. Following the third dose of Narcan, the defendant awoke and was transported to Brockton Hospital. Both officers testified at trial to what they observed, and also testified that they concluded that the defendant had experienced an opioid overdose.

Steve Workman, a registered nurse, observed the defendant for nearly seven hours at Brockton Hospital while the defendant received medical treatment. Workman testified that the defendant was drowsy, but would wake up and respond when Workman spoke to him. Workman further testified that he asked the defendant why he came to the emergency room and that the defendant "admitted to drinking alcohol and snorting heroin for his first time."

Prior to trial, the defendant filed a motion in limine arguing, among other things, that Workman's testimony should be excluded because the Commonwealth had not provided notice that Workman would be offered as an expert. After the Commonwealth made a statement to the effect that Workman would "be testifying to his observations made of the defendant and the statements [the defendant] made during . . . treatment," the judge ruled that Workman could "testify about anything he said to him, his statements for the purpose of diagnosis and treatment."

Discussion. 1. Sufficiency of evidence as to heroin use. The defendant challenges the sufficiency of the evidence as to the OUI charge; specifically, he argues that there was insufficient evidence that he was under the influence of a narcotic. We disagree.

When considering whether there is sufficient evidence to support a conviction, "we consider the evidence introduced at trial in the light most favorable to the Commonwealth, and determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Bouley, 93 Mass. App. Ct. 709, 711 (2018), quoting Commonwealth v. Faherty, 93 Mass. App. Ct. 129, 133 (2018). The defendant appears to argue that when evaluating the sufficiency of the evidence, we should ignore the defendant's

admission of narcotic use because it was not reliable.¹ However, we cannot selectively ignore evidence presented at trial when conducting a sufficiency review. Rather, "the sufficiency of the evidence is to be measured upon that which was admitted in evidence without regard to the propriety of the admission" (quotation and citation omitted). Commonwealth v. Lehan, 100 Mass. App. Ct. 246, 251 n.5 (2021).

"To prove the crime of operating a motor vehicle while under the influence of a narcotic drug under G. L. c. 90, § 24 (1) (a) (1), the Commonwealth was required to establish that the defendant (1) physically operated a vehicle; (2) on a public way; (3) while under the influence of a narcotic drug." Bouley, 93 Mass. App. Ct. at 712. Here, the evidence at trial was more than sufficient. The defendant challenges the sufficiency of the evidence as to the third element, which "is established by showing that the use of a narcotic drug resulted in the impairment, to any degree, of an individual's ability to safely perform the activity in question" (quotation and citation omitted). Id. Impairment by narcotics may be inferred from the

¹ To the extent that the defendant argues that the defendant's admission should not have been admitted because he was incoherent and therefore his statement was unreliable, we note that the defendant did not object on this ground at trial. In any event, the argument is not supported by the record; there was no evidence that the defendant was otherwise incoherent when he told Workman that he had consumed heroin.

defendant's conduct at the scene of the incident. See Commonwealth v. Reynolds, 67 Mass. App. Ct. 215, 219 (2006).

Here, the defendant turned a corner at a high rate of speed, squealing his tires on the pavement. Within a few minutes thereafter, he was slumped over in the driver's seat, was unresponsive, and had pale skin and blue lips. It took three doses of Narcan to resuscitate the defendant, and thereafter, he admitted that he had consumed heroin that day. A jury could reasonably infer that a defendant who collapsed immediately after being pulled over for speeding, required three doses of Narcan to revive, and admitted that he consumed heroin was impaired due to heroin use. See Bouley, 93 Mass. App. Ct. at 712-713.

2. Admission of nurse's testimony. The defendant also argues that Workman improperly offered expert testimony regarding (1) the defendant's guilt, and (2) the appropriate uses of Narcan. We disagree.

It is true that a witness in a criminal trial "may not offer an opinion as to whether the defendant's intoxication impaired his ability to operate a motor vehicle." Commonwealth v. Canty, 466 Mass. 535, 536 (2013). A witness may, however, offer an opinion that the defendant was intoxicated or under the influence of a narcotic, provided the proper foundation is laid. See id.; Bouley, 93 Mass. App. Ct. at 714. This case, however,

presents neither of these two scenarios. Workman did not even provide testimony that the defendant was impaired, let alone that the defendant's impairment impacted his ability to operate a motor vehicle. Indeed, the defendant concedes that "Workman did not explicitly state that [the defendant] was under the influence of heroin." Rather, Workman merely recounted the defendant's prior statement, to the effect that the defendant had "snort[ed] heroin" that day. As the judge noted in response to the defendant's motion in limine, Workman was entitled to "testify about anything . . . said to him . . . [by the defendant]." Commonwealth v. Mendes, 441 Mass. 459, 467 (2004) (statements of party opponents are admissible).²

As to Workman's testimony regarding Narcan, the question on appeal is whether the judge abused his discretion in allowing the testimony, where, as to this portion, Workman was testifying as an expert witness and not as a lay witness. See Commonwealth v. Camblin, 478 Mass. 469, 475 (2017). In brief, Workman testified that Narcan is naloxone, that it is used to inactivate

² The defendant also argues that Workman's testimony improperly embraced the ultimate question before the jury by stating, "My documentation reflects that he admitted to using heroin. . . . If he was unsure of what he took, he would not have said that, and I wouldn't have documented it." Such testimony did not embrace the ultimate issue of the defendant's impairment while operating a vehicle.

opioids if medical personnel suspect an overdose had occurred, and that some patients may require more than one dose.

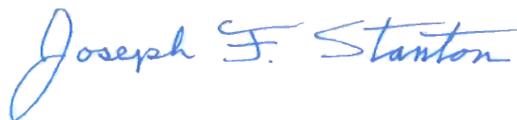
"A judge has broad discretion regarding the admission of expert testimony." Commonwealth v. Robinson, 449 Mass. 1, 5 (2007). Medical personnel such as EMS employees are frequently qualified as experts and are permitted to offer testimony based upon their training and experience, subject to the gatekeeping role of the judge. See Reckis v. Johnson & Johnson, 471 Mass. 272, 292 (2015); Commonwealth v. Ruiz, 442 Mass. 826, 834 (2004); Bouley, 93 Mass. App. Ct. at 714. Here, Workman testified regarding his education, his thirteen years of nursing experience, and his training regarding the use of Narcan. These qualifications supported the judge's decision to allow Workman's testimony.³ Workman's training, experience, and education also provided sufficient foundation to support his testimony, during

³ Defense counsel objected when Workman began testifying to the general uses of Narcan, and the judge heard the parties at sidebar. Unfortunately, the sidebar was inaudible and not transcribed, but one might assume that defense counsel again objected to Workman testifying as an expert. At the conclusion of the sidebar, the judge overruled the objection. That decision was within the judge's sound discretion. See Robinson, 449 Mass. at 5.

cross-examination, that Narcan is only used to counteract the effect of opioid intake.^{4,5}

Judgment affirmed.

By the Court (Vuono, Blake & Englander, JJ.⁶),



Clerk

Entered: October 28, 2021.

⁴ Not only was there no objection at trial to this testimony, but defense counsel elicited this testimony and made no motion to strike. There was no substantial risk of a miscarriage of justice in this circumstance. See Commonwealth v. Dumas, 83 Mass. App. Ct. 536, 540-541 (2013).

⁵ To the extent the defendant makes additional arguments that we have not explicitly addressed, these arguments have "not been overlooked. We find nothing in them that requires discussion." Commonwealth v. Brown, 479 Mass. 163, 168 n.3 (2018), quoting Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).

⁶ The panelists are listed in order of seniority.