

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).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1283

COMMONWEALTH

vs.

NILES J. MELLO.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Viewing the evidence in the light most favorable to the Commonwealth, the trial judge could have found the following facts. At around 9 P.M. on November 16, 2017, detectives from the New Bedford Police Department were executing a search warrant for a black Kia Optima (Optima) in the area of 116 State Street in New Bedford. A detective had observed the Optima pull over on the east side of State Street behind a white vehicle, and officers were dispatched to the location. The officers parked one unmarked police vehicle behind the Optima and another parallel to the Optima's driver's side in an attempt to box in the vehicle. The defendant was in the driver's seat of the Optima.

Detective Jarod Lizotte exited one of the unmarked police vehicles and approached the Optima's driver's side window. He

was not in uniform, but was wearing a blue sweatshirt with the word "police" written across both sleeves and a New Bedford Police detective badge seal on the left side of the chest area. He had a gold detective badge hanging in front of him.

Detective Lizotte verbally identified himself as a police officer, although the windows of the Optima were closed, and he ordered the defendant to unlock and open the door. The detective observed the defendant lean over to the right passenger side floor board. Apparently fearing that the defendant was either reaching for a weapon or destroying evidence, the detective broke the driver's side window with his flashlight and attempted to reach inside to open the vehicle's door. This all took place within a matter of seconds.

The defendant placed the Optima in reverse and backed into the unmarked police vehicle parked behind him, striking Detective Lizotte in the forehead with part of the door. He then placed his vehicle in drive with the detective's arm still halfway inside the vehicle and accelerated forward striking the detective in the arm with the door pillar of the vehicle. The defendant struck the white vehicle parked in front of him. The driver of the white vehicle moved his vehicle forward, creating enough space for the defendant to drive away.

Detective Jonathan Lagoa, driving one of the unmarked police vehicles, pursued the defendant, activating his blue

lights. The defendant drove away extremely fast and erratically, and didn't stop at two or three stop signs. After about four blocks, the defendant pulled over and exited the Optima, got on his knees with his hands behind his back, and began screaming for his mother.

After a bench trial the defendant was found guilty of failure to stop for police in violation of G. L. c. 90, § 25, negligent operation of a motor vehicle in violation of G. L. c. 90, § 24 (2) (a), leaving the scene of personal injury in violation of G. L. c. 90, § 24 (2) (a 1/2) (1), and one count of leaving the scene of property damage in violation of G. L. c. 90, § 24 (2) (a). He now appeals.

The defendant argues first that he was entitled to a required finding of not guilty on the charge of failure to stop for a police officer because there was insufficient evidence to establish that he knew that he was being ordered to stop by police officers, who were not in uniform and were acting stealthily and in a manner designed to surprise him. We must view the evidence in the light most favorable to the Commonwealth. Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979).

Detective Lagoa testified that he turned on the blue lights of his unmarked police vehicle "[a]fter the acceleration." The only acceleration referenced in Detective Lagoa's testimony

prior to that point was when he spoke about the "accelerat[ion]" of the Optima forward, when it made contact with the white vehicle in front of it. Viewed in the required light, we think this evidence indicates that the blue lights were turned on, at the latest, contemporaneously with the police vehicle pulling out to follow the defendant's departing Optima. Whatever the exact point, it was certainly not several blocks away, where the defendant ultimately pulled over. This evidence suffices to support the finding of knowledge that the defendant was being ordered to stop by police officers. See Commonwealth v. Ross, 73 Mass. App. Ct. 181, 183-184 (2008). Consequently we need not and do not express any opinion as to whether the police officer's mode of dress, manner of approach, and mode of wearing a badge were in fact sufficient in this case to put the defendant on notice that the people approaching his vehicle and breaking his window were police officers, such that the fact finder could infer beyond a reasonable doubt based on that alone that the defendant had the knowledge necessary for a conviction.

The defendant also argues that there was insufficient evidence to disprove that his negligent operation of a motor vehicle was a matter of necessity. See Commonwealth v. Hood, 389 Mass. 581, 590-591 (1983) (explaining defense of necessity). Having found that there was sufficient evidence to demonstrate the defendant's knowledge that he was being ordered to stop by

police officers, we also conclude that, as a consequence, there was sufficient evidence to disprove necessity beyond a reasonable doubt.

The defendant argues that on the charge of leaving the scene of an accident causing injury to a person there was insufficient evidence to prove that he knew that he collided with a person. There was, however, evidence that Detective Lizotte's arm was inside the Optima when the defendant drove forward. The trial judge could have found beyond a reasonable doubt that the defendant was therefore aware that he had collided with the arm of the detective.

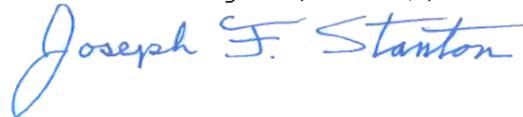
Finally, the defendant argues that there was insufficient evidence to support the charge of leaving the scene of property damage because there was no evidence that his collisions with either the police vehicle behind him or the white vehicle in front of him caused property damage. There was no evidence in the record of any damage done to either vehicle, of any repairs made to either vehicle, or of sounds that could warrant a finding beyond a reasonable doubt of damage to either vehicle, for example, the sound of metal crunching. This, therefore, is not a circumstance in which "the nature of the collision might alone suffice to support a rational inference that damage inevitably resulted," Commonwealth v. Velasquez, 76 Mass. App. Ct. 697, 701 (2010), and the bare bones evidence in the trial

record does not suffice to support a finding beyond a reasonable doubt that property damage occurred. See id. at 698-700.

Consequently, on the charge of leaving the scene of property damage, the judgment is reversed, the finding is set aside, and judgment shall enter for the defendant. The remaining judgments are affirmed.

So ordered.

By the Court (Green, C.J.,
Rubin & Agnes, JJ.¹),



Clerk

Entered: November 6, 2019.

¹ The panelists are listed in order of seniority.