COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-976

COMMONWEALTH

vs.

JAHIRA FLORES.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A Superior Court jury found the defendant guilty of three counts of unarmed robbery, G. L. c. 265, § 19 (b), based on her participation in a bank robbery on April 2, 2016, in which three bank employees were victims. On appeal, she argues that (1) the Commonwealth did not present sufficient evidence that she meaningfully participated in the bank robbery, and (2) the prosecutor improperly argued that a witness's cooperation agreement gave the witness a motive to tell the truth. We affirm.

Background. Viewing the evidence in the light most favorable to the Commonwealth, the jury could have found the following facts. On March 31, 2016, the defendant and two associates had a plan to rob the bank in question. Each person had a particular role in the plan: driver, robber, and

reconnaissance. The defendant's role was "to scope out the bank." On March 31, the defendant went inside the bank to do so, then returned to a car where her two associates were waiting. She relayed her information, "explaining the bank and how it was . . . explaining what she saw inside, like how many people and stuff like that." The plan was to rob the bank at that moment, but the driver saw a police car in the area and decided they would not go through with the robbery "that day."

Less than forty-eight hours later, the two associates robbed that same bank. After the robbery, they returned to the defendant's apartment, laid out the stolen money on the bed, and the robber distributed the proceeds. Later that day, the trio went on a shopping spree in which the defendant purchased an iPhone (paid for in cash), four tablet computers, a DVD player, and other personal items. They then rented a hotel room for three nights, in the defendant's name, at a total cost of $420. When police searched the hotel room, they found multiple sums of money in the defendant's pocketbook, including thirty-eight of the forty five-dollar bills that were part of the bank's "bait money" (a packet of bills with serial numbers prerecorded by the bank), two fifty-dollar bills, and $849 in additional cash, for

a total of $1,139.[1] When the police found a roll of bills that included bait money, the defendant said, "That's my tax money."

Discussion. 1. Sufficiency of the evidence. a. Duration of the joint venture. The case was tried on a theory of joint venture, now subsumed in aiding and abetting, which consists of "intentionally participat[ing] in some meaningful way in the commission of the offense, with the intent required to commit the offense."[2] Commonwealth v. Zanetti, 454 Mass. 449, 470 (2009). The defendant concedes there was sufficient evidence of her participation in a joint venture on March 31, but argues there was insufficient evidence that the joint venture continued after that date. She contends that there was no evidence that the robbery had merely been postponed; thus, she asserts, the April 2 robbery constituted a wholly different crime.

The defendant overlooks the testimony that, once the driver saw a police car in the area on March 31, the driver decided they would not go through with the robbery "that day." Moreover, no evidence was presented that the defendant withdrew

[1] The total amount taken from the bank during the robbery was approximately $6,100.

[2] The judge properly instructed the jury that such participation can take many forms, including personally committing the offense, aiding and assisting another in the offense, asking or encouraging another person to commit the offense, helping to plan the commission of the offense, agreeing to act as a look out, or agreeing to provide aid or assistance in committing the offense or in escaping after the fact.

from the plan.[3] The driver considered the defendant to have been "involved" with the April 2 robbery. Although the defendant's argument that joint ventures do not necessarily continue indefinitely has some force, the defendant cites no case suggesting that a joint venture must be considered terminated or abandoned merely because two days have passed since the first attempt at the crime. The jury could reasonably have inferred that the robbery plan had not been abandoned, but rather delayed until a future date.

Also, the jury, in considering whether the defendant's participation in the joint venture leading to the April 2 robbery continued, could have relied on the evidence that the defendant was found with robbery proceeds in her possession. Cf. Commonwealth v. Burden, 15 Mass. App. Ct. 666, 681-682 (1983), S.C., 48 Mass. App. Ct. 232 (1999) ("The judge's instruction that the jury 'may take into consideration whether

[3] "In order to support a theory of withdrawal or abandonment of a joint venture, 'there must be at least an appreciable interval between the alleged termination and [the commission of the crime], a detachment from the enterprise before the [crime] has become so probable that it cannot reasonably be stayed, and such notice or definite act of detachment that other principals in the attempted crime have opportunity also to abandon it'" (citation omitted). Commonwealth v. Miranda, 458 Mass. 100, 118 (2010), cert. denied, 565 U.S. 1013 (2011), S.C., 474 Mass. 1008 (2016). Had the evidence warranted an instruction on abandonment, the Commonwealth would have been required to prove the absence of abandonment beyond a reasonable doubt. Commonwealth v. Fickett, 403 Mass. 194, 201 n.7 (1988). Here, no such instruction was requested, nor would one have been warranted.

or not [the defendant] participated in the proceeds of the robbery' in determining whether he withdrew from a joint venture, was also correct"). Sharing in proceeds can also be considered as evidence of intentional participation required for a joint venture. See Commonwealth v. Blow, 370 Mass. 401, 408 (1976); Commonwealth v. Sim, 39 Mass. App. Ct. 212, 218 (1995). Finally, the defendant's false statement to the police about her "tax money" is evidence the jury could consider as consciousness of guilt. See Commonwealth v. Vick, 454 Mass. 418, 424 (2009). Under the familiar standard of Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), the evidence was sufficient that the defendant remained a participant in the joint venture leading to the April 2 robbery.

b. Meaningful participation. The defendant's second argument is that even if the joint venture was not terminated after March 31, her reconnaissance of the bank on that day was not sufficient evidence of "meaningful participation" in the April 2 robbery. We are not persuaded. The defendant's information regarding the bank could still be viewed as meaningful to a robbery carried out two days later. The fact that the driver reconnoitered the bank in a similar fashion on April 2 does not make the defendant's initial reconnaissance meaningless. The jury could reasonably have inferred that the information from both days of reconnaissance allowed the robber

to compare the reports and confirm that the robbery (in the robber's view) remained feasible. Under Latimore, 378 Mass. at 677, the evidence was sufficient that the defendant intentionally participated in a meaningful way in the April 2 robbery.

2. Prosecutor's closing argument. The defendant asserts that the prosecutor, in her closing argument, improperly argued that the driver's cooperation agreement with the Commonwealth gave the driver a motive to tell the truth. But what the prosecutor actually argued was that the agreement did not give the driver "a motive to lie." The defendant argues that this misstated the law regarding cooperation, but she does not cite any case stating that such an argument is legally erroneous. Cf. Commonwealth v. Ciampa, 406 Mass. 257, 265 (1989) ("[A] prosecutor may properly point out that an agreement seeking only the truthful cooperation of the witness does not give the witness any special incentive to lie"). Because the defendant did not object at trial, we review to determine whether any error created a substantial risk of a miscarriage of justice. See Commonwealth v. Kozec, 399 Mass. 514, 518 n.8 (1987). Here, we see no error.

Moreover, the prosecutor's statement was made in response to the defendant's closing argument in which she attacked the cooperating witness's credibility. See Commonwealth v. Senior,

454 Mass. 12, 17 (2009). The prosecutor's argument constituted a justified rebuttal. See Kozec, 399 Mass. at 519.

Judgments affirmed.

By the Court (Kinder, Sacks & Shin, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: November 8, 2019.

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