

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-532

COMMONWEALTH

vs.

FRANK J. CADEAU.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant was convicted of operating a motor vehicle while under the influence of intoxicating liquor in violation of G. L. c. 90, § 24 (1) (a) (1). He now appeals.

The defendant argues first that the evidence was insufficient to support his conviction. In particular, he argues that the evidence was insufficient to support a finding beyond a reasonable doubt that while operating his vehicle on a public way he "was impaired by the influence of intoxicating liquor." Commonwealth v. AdonSoto, 475 Mass. 497, 509 (2016). In evaluating this claim we utilize the well-known Latimore standard, see Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), determining whether, viewing the evidence in the light most favorable to the Commonwealth and drawing all reasonable

inferences therefrom in favor of the Commonwealth, the evidence was sufficient to support the finding of guilt.

That standard is easily met in this case. The defendant was observed taking a wide turn and crossing over double yellow lines. As he continued to drive, he crossed over the double yellow lines to the point where both driver's side tires were across those lines. When pulled over by the police, rather than pulling any portion of his vehicle off the road, he stopped in the travel lane. When the defendant rolled down his window, the arresting officer smelled an odor of alcohol, and observed that the defendant had glassy, bloodshot eyes and slurred speech. The defendant said that he spoke English well, having lived in the United States for over thirty years. But he was unable to recite the alphabet completely, saying the letter S twice and then saying "Q, R, S, T, U, P," before stopping entirely.

Although the defendant puts forward alternative explanations for the evidence, under our standard of review we must draw every inference in favor of the Commonwealth. This evidence and the inferences that could be drawn therefrom adequately support the jury's finding of guilt.

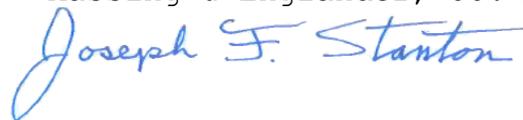
The defendant argues next that the judge erred in allowing testimony regarding the "alphabet test" without either requiring the prosecutor to lay a foundation for expert opinion, or instructing the jury sua sponte that the police officer's

testimony was lay testimony, rather than expert testimony. No objection was raised, and therefore we review to determine whether there was a substantial risk of a miscarriage of justice. See Commonwealth v. Jones, 464 Mass. 16, 18 (2012).

The Commonwealth is not required to establish an expert foundation for evidence of a defendant's inability to recite the alphabet in a prosecution for operation of a motor vehicle under the influence of intoxicating liquor. See Commonwealth v. Brown, 83 Mass. App. Ct. 772, 774 n.1 (2013). Nor is it an abuse of discretion for a judge to fail sua sponte to instruct the jury that testimony regarding recitation of the alphabet is "lay testimony."<sup>1</sup>

Judgment affirmed.

By the Court (Rubin,  
Massing & Englander, JJ.<sup>2</sup>),



Clerk

Entered: November 12, 2019.

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<sup>1</sup> We note that Commonwealth v. Gerhardt, 477 Mass. 775, 783 (2017), cited by the defendant, deals with the validity of failed sobriety tests with respect to "marijuana use or impairment." It has no bearing on this case involving an allegation of impairment by intoxicating liquor.

<sup>2</sup> The panelists are listed in order of seniority.