

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-1455

COMMONWEALTH

VS.

MARCO J. SYLVESTER.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury trial, Marco J. Sylvester was convicted of operating a motor vehicle while under the influence of intoxicating liquor. On appeal, Sylvester argues that the judge erred in denying his motion for a required finding and in allowing testimony that he had used marijuana on the night of the offense. We affirm.

Background. On April 8, 2017, at approximately 2 A.M., Massachusetts State Police Trooper Doug Michaud responded to a report of a disabled car in the right travel lane of Route 93 South. Michaud located the car, and observed it to have two flat tires. Sylvester was in the driver's seat and a female was in the passenger's seat. Sylvester was the registered owner of the car. Sylvester told the trooper that he "must have hit some

debris." Sylvester also told Michaud that "he had three beers and smoked marijuana at some point during the night."

Discussion. 1. Sufficiency of the evidence. Sylvester contends that the judge erred in denying his motion for a required finding of not guilty, arguing that the evidence offered by the Commonwealth at trial was insufficient to establish that he operated the car. When reviewing the denial of a motion for a required finding of not guilty we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), quoting Jackson v. Virginia, 443 U.S. 307, 318-319 (1979).

In support of his argument, Sylvester claims his statement that he "must have hit some debris" was insufficient to prove he was the operator since there was no corroborating evidence. See Commonwealth v. Leonard, 401 Mass. 470, 473 (1988) (defendant's uncorroborated statements were insufficient to sustain conviction for operating under influence). Sylvester further maintains that because the car was not running and no one saw him operating the car, and because Michaud did not determine whether the female passenger was operating the car, there was insufficient evidence to prove that he was the operator and his

motion for a required finding should therefore have been allowed. See Commonwealth v. Mullen, 3 Mass. App. Ct. 25, 26-27 (1975) (evidence was insufficient to permit inference that defendant was driving where he was not witnessed operating vehicle).

Sylvester's reliance on Leonard and Mullen is misplaced. In addition to Sylvester's admission, the Commonwealth presented testimony through Michaud that the disabled car was located in the right travel lane of Route 93, two tires were flat, Sylvester was in the driver's seat, and Sylvester was the registered owner. The Commonwealth's evidence provided ample corroboration of Sylvester's statement with respect to operation. Likewise, Sylvester's contention that the presence of a second person in the car renders the inference that he was the operator unreasonable is unsupported by the evidence. This is not a case in which the evidence required the jury to choose between two "equal inferences." Mullen, 3 Mass. App. Ct. at 27. In the present case, unlike in Leonard and Mullen, there was no evidence suggesting that anyone other than Sylvester was the operator.

Accordingly, there was no error in the denial of the motion for a required finding since there was sufficient evidence, in the light most favorable to the Commonwealth, from which a

rational trier of fact might infer that Sylvester was the operator of the car.

2. Marijuana testimony. Next, Sylvester claims that the judge erred by allowing in evidence his statement to Michaud that he had smoked marijuana at some point that evening. Sylvester maintains that since he was charged solely with operating under the influence of intoxicating liquor, the reference to his marijuana use was not relevant but instead was unduly prejudicial and lacked probative value.

In ruling on the admissibility of evidence, the trial judge is given great latitude and discretion in weighing its probative value versus its prejudicial effect, and we uphold a judge's decision unless it is palpably wrong. See Commonwealth v. Rosa, 468 Mass. 231, 241 (2014); Mass. G. Evid. § 403 (2019).

We discern no abuse of discretion on the part of the judge in admitting the evidence of marijuana use by Sylvester. The statement was offered as evidence of Sylvester's state of mind. "Although 'evidence of other criminal behavior may not be admitted to prove the propensity of the accused to commit the indicted offense . . . it is admissible for other relevant probative purposes.'" Commonwealth v. Wilson, 427 Mass. 336, 349 (1998), quoting Commonwealth v. Martino, 412 Mass. 267, 280 (1992). "These other purposes include showing the defendant's motive or state of mind." Id. We can infer from the judge's

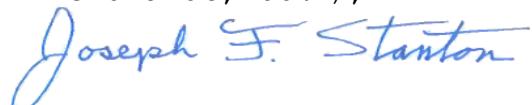
admission of the statement in evidence that the judge found the statement more probative than prejudicial. See Commonwealth v. Ortiz-Soto, 49 Mass. App. Ct. 645, 649 (2000). Admitting the evidence allowed the prosecutor to present the full picture of what occurred. It bore on Sylvester's state of mind and assisted the jury in understanding his behavior. See Commonwealth v. Harris, 376 Mass. 201, 207 (1978).

Further, any risk of prejudice was ameliorated by the judge's clear instruction to the jury that they had to determine if Sylvester was under the influence of alcohol.<sup>1</sup> See Commonwealth v. Amran, 471 Mass. 354, 360 (2015) (jury are presumed to follow judge's instruction).

There was no abuse of discretion by the judge here.

Judgment affirmed.

By the Court (Lemire, Singh & Wendlandt, JJ.<sup>2</sup>),

  
Joseph F. Stanton  
Clerk

Entered: November 12, 2019.

---

<sup>1</sup> See Commonwealth v. Leonardi, 413 Mass. 757, 764 (1992) (judge not required to give limiting jury instructions regarding the purpose for which evidence is offered unless so requested by the defendant).

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