COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1293

COMMONWEALTH

vs.

ADRIEL NUNEZ.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury trial, the defendant, Adriel Nunez, was convicted of possession of fentanyl and possession of heroin with intent to distribute. See G. L. c. 94C, §§ 31, 34. On appeal, the defendant contends that: (1) the trial judge abused his discretion by allowing the Commonwealth to use a peremptory challenge to strike a Hispanic juror; (2) the motion judge erred in denying the defendant's motion to suppress; and (3) the Commonwealth failed to prove constructive possession or the intent to distribute beyond a reasonable doubt. We affirm.

Discussion. 1. Preemptory challenge. The defendant contends that the trial judge erred in allowing a peremptory challenge to juror number (no.) thirty-seven because juror no. thirty-seven was the only Hispanic man in the venire, the reasons given by the prosecutor were not adequate or genuine,

and the trial judge failed to make sufficient findings on the record regarding the adequacy and genuineness of the prosecutor's race-neutral reasons.

Article 12 of the Massachusetts Declaration of Rights "proscribes 'the use of peremptory challenges to exclude prospective jurors solely by virtue of their membership in, or affiliation with, particular, defined groupings in the community.'" Commonwealth v. Robertson, 480 Mass. 383, 390 (2018), quoting Commonwealth v. Soares, 377 Mass. 461, 486 cert. denied, 444 U.S. 881 (1979). See Batson v. Kentucky, 476 U.S. 79, 85-86 (1986). "A judge's evaluation of a Batson-Soares objection follows a three-step process." Robertson, supra. "First, the burden is on the objecting party to make a prima facie showing of impropriety that overcomes the presumption of regularity afforded to peremptory challenges" (quotation omitted). Id. at 390-391. Second, "if the judge finds that the objecting party has established a prima facie case, the party attempting to exercise a peremptory challenge bears the burden of providing a group-neutral reason for the challenge" (quotation and citation omitted). Id. at 391. Third, "the judge then evaluates whether the proffered reason is 'adequate' and 'genuine.'" Id., quoting Commonwealth v. Maldonado, 439 Mass. 460, 464 (2003).

Recently, however, the Supreme Judicial Court has emphasized that the burden of establishing a prima facie case is very low, and that "judges have 'broad discretion' to seek explanations for peremptory challenges 'without having to make the determination that a pattern of improper exclusion exists.'" Robertson, supra at 396 n.10, quoting Commonwealth v. Lopes, 478 Mass. 593, 598 (2018). In this case, the judge did just that. Juror no. thirty-seven told the judge at sidebar that he had been arrested by the Boston Police Department on a trespass charge. The case resulted in pretrial diversion. When asked, the juror said he could be fair and impartial and that he had been treated fairly. The Commonwealth exercised a peremptory challenge. The defendant objected on the grounds that "he's the only Latino gentleman of a man in his 20s that's the same age as my client, that looks like my client."[1] The following exchange occurred.

> Judge: "Just a second. Do you want to put a reason on it?"
>
> Prosecutor: "Yes, I do. The [juror] indicated that he had been arrested . . . less than five years ago. His facial expression suggested to me that when he responded, he was somewhat ambivalent about the seriousness of what had happened, and I'm concerned he would take it out on the police."
>
> Judge: "I understand that's the reason that's on it. You understand the concerns that [defense counsel] has which I share as a general practice."

[1] The judge stated that the venire consisted of forty people.

Prosecutor: "As well as I."

Judge: "And nothing intended, so [sic] negative inferences. So first juror is excused to go back to the jury room."[2]

We review the trial judge's decision regarding the peremptory challenge for an abuse of discretion. See Commonwealth v. Ortega, 480 Mass. 603, 606-607 (2018). We assume without deciding that the defendant made out a prima facie case by establishing a pattern of one.[3] Id. at 606. We agree with the defendant that the judge's findings should have been more complete. See Maldonado, 439 Mass. at 466 ("it is imperative that the record explicitly contain the judge's separate findings as to both adequacy and genuineness and, if necessary, an explanation of those findings"); Commonwealth v. Douglas, 75 Mass. App. Ct. 643, 650 (2009) ("The governing standard is demanding"). However, we cannot say, on this record, that the judge abused his discretion in allowing the

[2] Although the transcript reads "so negative inferences," both parties agree on appeal that the trial judge said "no negative inferences."

[3] The judge made no findings on the record on this question, and defense counsel's reference to age leaves the record muddled as to whether juror no. thirty-seven was the only Hispanic juror or the only Hispanic juror in his twenties. Age is not a protected classification under Soares. See Lopes, 478 Mass. at 597; Commonwealth v. Sudler, 94 Mass. App. Ct. 150, 158 (2018). Defense counsel later referred to juror no. thirty-seven as the only Hispanic juror, without reference to age.

peremptory challenge, or that a de novo review would produce a different result.

We understand the trial judge's abbreviated reference to "no negative inferences" to mean that he took the reason given to be genuine, and that it was adequate. The case involved an arrest made by the Boston Police Department. The prospective juror had been arrested by the Boston Police Department within the last five years. While the judge was not required to allow a peremptory challenge on this basis, it was not an abuse of discretion to take this fact into account in assessing the adequacy and genuineness of the reason given. Recent experiences with the law may provide "a sufficient and obvious basis for the prosecutor's peremptory challenge." Lopes, 478 Mass. at 601. See Commonwealth v. Rodriguez, 457 Mass. 461, 473 (2010) (juror's and juror's family's prior experience with criminal justice system properly considered).

This case is therefore unlike Commonwealth v. Issa, 466 Mass. 1, 11 & n.13 (2013), where the Supreme Judicial Court declined to include in its analysis a thirteen year old out-of-State arrest of an African-American prospective juror where the prosecutor did not challenge white prospective jurors with similar criminal experiences. Here the arrest was relatively recent and was made by the same police department. There is no argument on appeal that the peremptory challenge based on a

recent arrest record was applied inconsistently. See Maldonado, 439 Mass. at 467.[4]

Alternatively, even if we decided that the reasons given by the trial judge were insufficient, our task would be to conduct a de novo review of the record. See Rodriguez, 457 Mass. at 473, quoting Commonwealth v. Calderon, 431 Mass. 21, 27 (2000) ("Procedural mistakes in the allowance of a peremptory challenge by the Commonwealth . . . do not constitute a per se basis for reversal"). We have independently examined the record. Two other prospective jurors had arrest records. One African-American male juror who had an arrest record told the judge that "this was not a case that he wanted to be on," as the judge related, and was excused. Another juror who had a 1991 arrest for domestic assault and battery was seated. Given the one juror's stated desire to be released, and the remoteness of the other juror's arrest, no inconsistency appears on the record.

The defendant also maintains that the prosecutor's reference to juror no. thirty-seven's facial expression was improper. The judge did not make detailed findings regarding his own assessment of the prospective juror's demeanor, or the

[4] Nor was there any claim at trial or on appeal that use of arrest as a criterion would have an unlawful disproportionate impact on Hispanic jurors. See generally Johnson, Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson, 34 Yale L. & Pol'y Rev. 387 (2016).

prior arrest. However, we must view the reasons given and the judge's ruling in context. We interpret the judge's overall finding to mean that he considered the prosecutor's concern regarding the prospective juror's ambivalence about his arrest (at the hands of the same police department involved in the pending case) to be an adequate and genuine reason for the exercise of the challenge. Although wholly subjective assessments of demeanor "should rarely be accepted as adequate because such explanations can easily be used as pretexts for discrimination," Maldonado, 439 Mass. at 465, here the comment on demeanor was tied to otherwise objective concerns about the prospective juror's arrest and prosecution. On the record before us, we cannot say that the judge erred in allowing the peremptory challenge.

2. Motion to suppress. The defendant also contends that the search warrant was not supported by probable cause because the warrant affidavit did not contain a "substantial basis" to find that drugs or contraband would be found in the defendant's apartment. "When the place to be searched is a residence, there must be specific information in the affidavit, and reasonable inferences a magistrate may draw, to provide a sufficient nexus between the defendant's drug-selling activity and [the] residence to establish probable cause to search the residence" (quotations and citation omitted). Commonwealth v. Tapia, 463

Mass. 721, 725-726 (2012). "To satisfy this 'nexus' requirement, and thus the probable cause standard, the affidavit 'must provide a substantial basis for concluding that evidence connected to the crime will be found on the specified premises.'" Id. at 726, quoting Commonwealth v. Donahue, 430 Mass. 710, 712 (2000). "Because this is a question of law, 'we review the motion judge's probable cause determination de novo.'" Tapia, supra at 725, quoting Commonwealth v. Long, 454 Mass. 542, 555 (2009).

The affidavit in support of the search warrant contained the following facts. A confidential informant reported that "an unnamed tall, thin Hispanic male in his early twenties with long black hair (usually in a ponytail)" was selling heroin out of 15 Copeland Street, Apartment 211.[5] The informant saw the man look out of a second-floor apartment window on the Copeland Street side of the building before coming out to conduct a sale on several occasions. The informant reported that he had purchased drugs from the man on numerous occasions, and that he made the sales near or in a white Honda automobile parked near the apartment building.

[5] Also known as 2 Waverly Street. Apartment 211 is a second-floor apartment and the nearest street entrance is 15 Copeland Street.

The informant conducted three controlled buys. Based on their observations during the controlled buys, and further conversations with the informant, the police officers determined that the man in the apartment building was the defendant.

The informant called and ordered drugs from the same telephone number for each buy. A woman answered the telephone calls and instructed the informant to meet a man at a specific location near the apartment building. On the first occasion, the defendant left 15 Copeland Street and got into a white Honda Civic. He was joined by the informant, to whom he sold drugs.[6] On the second occasion, the defendant got out of a U-Haul truck, went into 15 Copeland Street, came out, and made a hand-to-hand sale with the informant. On the third occasion, the defendant left 15 Copeland Street and got into the passenger's seat of the white Honda parked on the street near the apartment building. The informant purchased drugs from the defendant through the passenger's window.[7]

The police officers had a substantial basis for concluding that evidence of drug sales would be found in the apartment.

---

[6] The officers also saw the defendant "engage in three more apparent drug transactions" in or around the white Honda shortly after the first controlled buy.

[7] The officers determined the apartment by purporting to respond to a ruse 911 call. They knocked on the door of apartment 211, and the defendant answered. The police also confirmed that the defendant's sister, who also lived in apartment 211, owned the Honda.

The defendant was identified as the seller and was seen in the apartment. In all three instances, the defendant went into or was in 15 Copeland Street before the sale. During the second buy, the sale was made hand-to-hand immediately after the defendant came out of the building. The nexus between the apartment and the sales was established by the police's direct observation and the three controlled buys. See Tapia, 463 Mass. at 724. This pattern of sales activity constituted "particularized information . . . that would permit a reasonable inference that the defendant likely kept a supply of drugs in the home" (quotation and citation omitted). Commonwealth v. Escalera, 462 Mass. 636, 643 (2012). In addition, although some sales were made from the car, the car was in close proximity to the apartment, and the police would have had a reasonable basis to believe that cash or drug paraphernalia would be found in the house, even if the drugs were in the car. See Commonwealth v. Luthy, 69 Mass. App. Ct. 102, 103-104 (2007). Contrast Commonwealth v. Perkins, 478 Mass. 97, 109 (2017).

The defendant submits that since the first of the controlled buys was three weeks before the warrant was sought, and the last of the controlled buys was seventy-two hours before the warrant was sought, the affidavit was stale. The affidavit detailed a total of six buys over the three-week period and the informant indicated that the defendant had been in the business

of selling narcotics for some time. The affidavit established "continuous activity" such that it was probable that the activity was ongoing and current, and that drugs, cash, or paraphernalia would be found in the apartment. Commonwealth v. Matias, 440 Mass. 787, 793 (2004).

3. Sufficiency of the evidence. The defendant contends that the evidence of constructive possession and intent to distribute was insufficient. We analyze these claims under the now-familiar Latimore standard. See Commonwealth v. Latimore, 378 Mass. 671, 677 (1979); Commonwealth v. Santos, 95 Mass. App. Ct. 791, 798 (2019).

a. Constructive possession. "A person who is not in actual possession of contraband can nonetheless be found in constructive possession, and therefore guilty of a possession crime." Commonwealth v. Santana, 95 Mass. App. Ct. 265, 268 (2019). "To show constructive possession, the Commonwealth must show that the defendant knew of the existence of the item and had the ability and intent to exercise dominion and control over it." Id., citing Commonwealth v. Brzezinski, 405 Mass. 401, 409 (1989). "These elements can be shown by circumstantial evidence and by the reasonable inferences from such evidence." Santana, supra. See Commonwealth v. Proia, 92 Mass. App. Ct. 824, 830 (2018). "As the cases recognize, a sufficiency of the evidence evaluation for constructive possession is necessarily fact-

specific, and turns on the totality of the evidence." Santana, supra.

Here, the jury heard testimony that officers observed the defendant make what appeared to be three drug transactions with unknown purchasers while sitting in the Honda during the weeks before his arrest. They also observed three controlled buys. The defendant was the only person in the car on those occasions when drugs were sold from the car. See Commonwealth v. Daley, 423 Mass. 747, 752 (1996). Contrast Commonwealth v. Romero, 464 Mass. 648, 656-657 (2013). On the day of his arrest, the police saw the defendant open the passenger's side door and reach into the Honda, although the car door prevented them from observing what the defendant had in his hands. The police found a plastic bag of drugs in a map pouch behind the passenger's seat and a clear plastic bag containing eight smaller plastic bags of drugs in a space near the passenger's side floor mat. There was also evidence affirmatively linking the defendant to drug sales in the car. See generally Commonwealth v. Gonzalez, 452 Mass. 142, 147-149 (2008). A jury could infer that the defendant had the knowledge and the intent to exercise dominion and control over the drugs found in the car.

b. Intent to distribute. The defendant also contends that the Commonwealth failed to prove intent to distribute. "A person's . . . intent . . . is a matter of fact, which may not

be susceptible of proof by direct evidence." Commonwealth v. Richardson, 479 Mass. 344, 360 (2018), quoting Commonwealth v. Ellis, 356 Mass. 574, 578-579 (1970). Viewed in the light most favorable to the Commonwealth, the record is replete with evidence of drug sales, including drugs in the car, drug paraphernalia in the home, and three hand-to-hand controlled buys. In addition, "[p]ackaging materials and drug paraphernalia are relevant to show the defendant's predisposition toward distribution." Commonwealth v. LaPerle, 19 Mass. App. Ct. 424, 427 (1985). From this evidence a jury could infer that the defendant possessed the intent to distribute drugs. See Richardson, supra.

Judgments affirmed.

By the Court (Agnes, Sullivan & Blake, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: January 14, 2020.

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