COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-449

COMMONWEALTH

vs.

JOHN KAN.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant was driving a car in Brockton when a State trooper pulled him over. The trooper had learned from running the car's license plate that its registration had been revoked for lack of insurance. On his person, the defendant had a spring-loaded knife, and while inventorying the car's contents prior to its being towed, the trooper discovered on the driver's seat a jacket that contained a loaded firearm. The defendant admitted that the jacket and firearm were his. A Superior Court jury convicted the defendant of: unlawfully carrying a firearm, unlawful possession of a loaded firearm, unlawful possession of a dangerous weapon (the knife), operating an unregistered motor vehicle, and operating an uninsured motor vehicle.

On appeal, the defendant argues that the judge erred in denying his motion to suppress the gun. For the reasons that

follow, we disagree. We also are unpersuaded by the defendant's argument that the evidence was insufficient to prove beyond a reasonable doubt that he knew the gun was loaded (a necessary element of unlawful possession of a loaded firearm). See G. L. c. 269, § 10 (n). However, we reverse the defendant's conviction for unlawfully possessing a loaded firearm, because the jury were not instructed that such knowledge is an element of the offense. We otherwise affirm.

1. Motion to suppress. The grounds on which the defendant challenges the denial of his motion to suppress are narrow. The defendant does not argue that the stop of his car was unlawful. Nor does he challenge the exit order, or the decisions by the police to have the unregistered car towed and inventoried. He argues only that prior to conducting the inventory search, the police should have given the jacket to one of the passengers. He relies on Commonwealth v. Abdallah, 475 Mass. 47 (2016), and Commonwealth v. Nicoleau, 90 Mass. App. Ct. 518 (2016), but, as discussed below, those cases involved different situations.[1]

[1] We assume arguendo that the defendant properly preserved the issue even though that is far from clear. As the defendant acknowledged at oral argument, he did not argue in the trial court that his motion to suppress should have been allowed on the ground that the trooper should have turned the jacket over to the car's other occupants before conducting an inventory search. We recognize that the motion to suppress was filed and argued prior to the issuance of Abdallah and Nicoleau. However, that fact alone does not excuse any failure to raise the issue. Contrast Commonwealth v. Vasquez, 456 Mass. 350, 356-357 (2010)

In Abdallah, the defendant was arrested at a hotel. 475 Mass. at 48-49. The police informed him that he could leave various personal items at the hotel and pick them up later. Id. at 49. However, the police seized the backpack the defendant had been wearing at the time of his arrest and later conducted what they considered an inventory search of it. Id. at 49-50. The court held that the seizure of the backpack was not warranted where there was a third party ready and willing to safeguard the defendant's possessions, and no safety concerns were implicated. Id. at 52. In Nicoleau, the defendant was apprehended in his unregistered and uninsured car after he had driven it to his grandmother's house. 90 Mass. App. Ct. at 519. The police, after deciding to impound the car, gave at least one personal item found in the car -- a music player -- to the grandmother for safekeeping, but searched a backpack found during an inventorying of the car's contents. Id. at 519. We held that this was improper, because "[h]aving made the decision to give the music player to the defendant's grandmother, the police did not have the discretion to decide to seize and inventory the defendant's backpack, which also could have been turned over to the grandmother." Id. at 523. In so holding, we

(failure to object excused where defendant entitled to rely on definitive statement of law by Supreme Judicial Court indicating that objection would have been futile).

emphasized that "as in Abdallah, there was no evidence prior to the search that the defendant's backpack or its contents presented a danger to anyone." Id.

Returning to the facts of this case,[2] when the trooper was initiating an inventory search of the car that needed to be towed, he picked up the jacket from the driver's seat and immediately noticed that it was "unusually heavy." The trooper therefore conducted a patfrisk of the jacket, through which he discerned that the jacket contained the gun. Assuming arguendo that the defendant is correct that the trooper should have inquired whether he wanted the passengers to take possession of the jacket before inventorying the car's contents, the trooper still would have had to pick up the jacket to give it to them.[3] Had the trooper done so, there is no reason to think that he would have proceeded any differently than he did. We agree with the judge that the manner through which the officer proceeded once he discovered the "unusually heavy" jacket was appropriate in light of the long-recognized principle that "[t]he police are not required to gamble with their personal safety and are entitled to take reasonable precautions for their protection"

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[2] We base our recitation of the relevant facts on the motion judge's findings, none of which has been shown to be clearly erroneous.

[3] At the point the trooper began what he considered to be an inventory search of the contents of the car, the defendant was detained in one cruiser and the passengers in another.

(quotation and citations omitted). Commonwealth v. Cabrera, 76 Mass. App. Ct. 341, 350 (2010).[4] Thus, even if the trooper should have made the inquiry that the defendant claims was required, the gun still would have been discovered. See Commonwealth v. Pearson, 87 Mass. App. Ct. 720, 726 & n.12 (2015) (upholding denial of motion to suppress evidence found during investigatory search where it inevitably would have been found during permissible inventory search). Nothing in Abdallah or Nicoleau is to the contrary. Simply put, those cases do not stand for the proposition that police must turn over a defendant's personal items to a third party before addressing any reasonable safety concerns that may be raised.

2. Sufficiency of evidence that defendant knew gun was loaded. At trial, the Commonwealth took the position that to sustain a conviction for unlawful possession of a loaded firearm, it did not have to prove that the defendant knew that the gun was loaded. Subsequent to the trial, the Supreme Judicial Court held that the Commonwealth did have to prove such knowledge as an element of the crime. See Commonwealth v.

[4] The circumstances here presented specific heightened concerns for officer safety, in addition to the risks that police generally face during traffic stops. At the point the trooper picked up the jacket, he knew that both passengers had extensive criminal records, including for firearm violations. Moreover, the defendant already had been found to be in possession of an illegal knife.

Brown, 479 Mass. 600, 601 (2018). The question we face is whether the Commonwealth nevertheless introduced sufficient evidence based on which the jury could find such knowledge beyond a reasonable doubt. In answering that question, we view the evidence -- including all reasonable inferences therefrom -- in the light most favorable to the Commonwealth. Commonwealth v. Latimore, 378 Mass. 671, 677-678 (1979).

Based on the Commonwealth's evidence, the jury readily could have concluded that a week before his car was stopped, the defendant had found the loaded gun on a park bench, and that when the car was stopped, he was carrying it on his person.[5] Under these circumstances, a rational juror reasonably could infer that it was extremely likely that at some point during the week the defendant would have checked to see whether the gun in his possession was loaded. Indeed, we have held that where a defendant was found with a loaded firearm on his person, the jury may draw "[a] commonsense inference" that he would have checked to see if the gun was loaded "from that fact alone." Commonwealth v. Resende, 94 Mass. App. Ct. 194, 200 (2018).[6] In

[5] Because the jacket was in the defendant's immediate possession -- indeed, the jury could infer that he had been sitting on it -- we consider the fact that he was not wearing it at the moment the car was stopped to be of no moment.

[6] To be sure, we also have held that the mere fact that a defendant possessed a loaded firearm on his person, and the drawing of a reasonable inference based on that fact alone, cannot provide proof beyond a reasonable doubt that he knew the

sum, although the evidence that the defendant knew his gun was loaded was far from overwhelming, we nevertheless conclude that there was sufficient evidence to leave it to a jury to resolve whether the Commonwealth had proven beyond a reasonable doubt that the defendant knew the gun was loaded.

3. Jury instructions. The defendant separately argues that his conviction for unlawful possession of a loaded firearm should be reversed because the jury were never instructed that the Commonwealth had to prove that he knew that the gun was loaded. We agree. As we recently observed, "[e]rroneous instructions that allow the jury to convict without finding an essential element of an offense create a substantial risk of a miscarriage of justice unless either the element at issue can be 'ineluctably inferred' from the evidence such that the jury were 'required to find' it, or the jury's verdicts on the other counts on which the defendant was convicted compel the conclusion they 'necessarily found' the element on which they were not instructed" (citations omitted). Commonwealth v. Mitchell, 95 Mass. App. Ct. 406, 412 (2019).[7] This is not a case

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gun was loaded. See Commonwealth v. Grayson, 96 Mass. App. Ct. 748, 753-755 (2019). See also Commonwealth v. Galarza, 93 Mass. App. Ct. 740, 748 (2018). Here, however, there was more evidence than the mere discovery of a loaded gun on the defendant's person.

[7] In Mitchell, as here, the jury were not instructed that the Commonwealth had to prove that the defendant knew that a firearm he possessed was loaded.

that fits either exception.[8] Contrast Commonwealth v. Silvelo, 96 Mass. App. Ct. 85, 94 (2019) (element of knowledge could be ineluctably inferred where bullets clearly visible in cylinder). In addition, we note that the jury here specifically asked, "[D]oes the Defendant need to know the gun was loaded." Although the judge did not specifically answer the jury's question, she reread her earlier instructions with regard to possession of a loaded firearm, which did not include as an element of the offense knowledge that the firearm was loaded. Thus, we know that the jury was misinstructed on a point of law on which they had placed at least some focus.

Conclusion. On the unlawful possession of a loaded firearm charge, the judgment is reversed and that verdict is set aside. The remaining judgments are affirmed.

So ordered.

By the Court (Vuono, Milkey & Englander, JJ.[9]),

Joseph F. Stanton

Clerk

Entered: January 17, 2020.

[8] There is no merit to the Commonwealth's position that the absence of an instruction can be excused because the defendant's knowledge that the gun was loaded was not a "live" issue. The defendant did not concede such knowledge and it was the Commonwealth's burden to prove it.

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