

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-696

COMMONWEALTH

vs.

MARK A. SILVA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury trial, the defendant was convicted of breaking and entering in the nighttime, larceny from a building, and possession of burglarious instruments.¹ On appeal, he claims there was insufficient evidence to support one of his convictions, certain identification testimony should not have been permitted, and that improperly admitted prior bad act evidence was not cured by the judge's jury instruction. We affirm.

1. Sufficient evidence. The defendant claims there was insufficient evidence to support his conviction for possession of burglarious instruments. We disagree.

When evaluating sufficiency, the evidence must be viewed in the light most favorable to the Commonwealth with specific

¹ The defendant was acquitted of malicious destruction of property valued at more than \$250.

reference to the substantive elements of the offense. See Jackson v. Virginia, 443 U.S. 307, 324 n.16 (1979); Commonwealth v. Latimore, 378 Mass. 671, 677-678 (1979). In this case, to establish the defendant's guilt under G. L. c. 266, § 49, as appearing in St. 1966, c. 269, § 1, the Commonwealth was obliged to prove: (1) possession of "an engine, machine, tool or implement"; (2) "adapted and designed for cutting through, forcing or breaking open a building"; (3) "in order to steal therefrom money or other property, or to commit any other crime"; (4) "knowing [that the tool was] adapted and designed for [this] purpose"; and (5) "with intent to use or employ or allow [the tool] to be used or employed for such purpose." Id. See Commonwealth v. Squires, 476 Mass. 703, 708 (2017).

Ordinary tools may be characterized as burglarious instruments if the Commonwealth can prove that the defendant intended to use them for burglarious purposes. See Commonwealth v. Dellinger, 10 Mass. App. Ct. 549, 561 (1980). The intent "must appear clearly from the circumstances in which they are found." Id.

Here, the screwdrivers, knife, and tire iron found in the defendant's car were not by their nature burglarious tools, but each may be used for a forced entry of a door, which is how entry was gained to the store in this case. See Commonwealth v. Jones, 355 Mass. 170, 176-177 (1969). Along with these items, the police also found a ski mask, a flashlight, gloves, and a

receipt and bank bag from the store, along with a plastic display case and cigarette packs that appeared to have been stolen from the store. On the surveillance video of the break-in, one of the burglars is seen wearing gloves and holding a tire iron and a screwdriver in one hand, and a flashlight in the other hand. The video also depicted one burglar wearing a ski mask and gloves. When all these circumstances are viewed together, and taken in the light most favorable to the Commonwealth, it was both reasonable and rational for the jury to have concluded that the defendant possessed the items in question for burglarious purposes.

2. Identification testimony. Prior to trial, the judge denied the defendant's motion in limine to exclude any non-expert identification testimony relative to a gas station surveillance video. The defendant claims the judge abused his discretion by permitting a police officer to identify the defendant from that video. We disagree.

"A lay witness is permitted to identify an individual depicted in a video or photograph if that testimony would assist the jurors in making their own independent identification." Commonwealth v. Pina, 481 Mass. 413, 429 (2019). See Mass. G. Evid. § 701 (2019). "The general rule is that a witness's opinion concerning the identity of a person depicted in a surveillance photograph is admissible if there is some basis for

concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." Id. at 429-430, quoting Commonwealth v. Vacher, 469 Mass. 425, 441 (2014). "Put another way, such testimony is admissible . . . when the witness possesses sufficient relevant familiarity with the defendant that the jury cannot also possess" (quotation omitted). Id. at 430.

Prior to permitting the officer to testify, the judge conducted a voir dire outside the presence of the jury. As a result, the judge could find that both the officer and the defendant were from Carver, the officer had known the defendant and his family for ten years, that knowledge was not solely the product of police work, the officer had been to the defendant's house, and that the still photograph taken from the surveillance video was poor in quality. Based on these facts, the judge found that the officer was more likely to correctly identify the defendant from the photograph than was the jury. See Pina, 481 Mass. at 429-430.

Although the officer's acquaintanceship with the defendant was, in part, based on his duties as a police officer, the judge appropriately limited the scope of the officer's testimony regarding his relationship with the defendant to those interactions that were unrelated to the defendant's encounters with law enforcement. See Commonwealth v. Pleas, 49 Mass. App.

Ct. 321, 327-328 (2000). Also, as the trial judge understood, the officer was not testifying as an eye witness to the defendant's commission of the burglary, but only to the defendant's appearance at a gas station. Finally, although the Commonwealth had two police witnesses who were able to identify the defendant on the still photo, the judge limited the identification to one such witness to avoid any unnecessary prejudice to the defendant. There was no abuse of discretion.

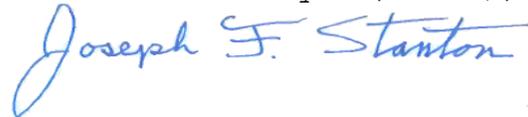
3. Bad act evidence. During the prosecutor's direct examination of a police detective, he asked the detective, once he "had secured the footage from both stores, what was your next step?" The detective responded, the "[n]ext step was we reached out to -- I was contacted by the Mattapoissett Police Department, . . . in reference to some ongoing investigations that they had had. And the registration that we had received from the vehicle." The defendant objected, the parties met at side bar, and with the defendant's approval the judge instructed the jury to "disregard any remarks regarding any other investigation. This case is solely focused on the allegations in this matter." Now, for the first time on appeal, the defendant claims this instruction was inadequate. We disagree.

"Trial judges have considerable discretion in framing jury instructions, both in determining the precise phraseology used and the appropriate degree of elaboration" (quotation omitted).

Commonwealth v. Kelly, 470 Mass. 682, 688 (2015). Despite this, the defendant claims that the judge should have been more "forceful" and should have instructed the jury not to speculate as to the defendant's involvement in other crimes. However, given the fleeting nature of the detective's misstatement, the judge's use of the more general terms protected against focusing the jurors on the defendant's unrelated criminal conduct. Since jurors are presumed to follow jury instructions, Commonwealth v. Silva, 482 Mass. 275, 290 (2019), and thus that they disregarded the improper comment, there was neither an abuse of discretion nor a risk that justice miscarried.

Judgments affirmed.

By the Court (Meade,
Sullivan & Neyman, JJ.²),



Clerk

Entered: February 11, 2020.

² The panelists are listed in order of seniority.