

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

19-P-653

COMMONWEALTH

vs.

TYNIGEL BELGRAVE.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a jury trial in the Superior Court the defendant was convicted of illegal possession of a firearm, G. L. c. 269, § 10 (a), and illegal possession of a loaded firearm, G. L. c. 269, § 10 (a).¹ On appeal, he claims that the evidence was insufficient to prove his guilt beyond a reasonable doubt; the trial judge abused her discretion in admitting a photographic array from which the defendant was identified; and the indictments should have been dismissed because the Commonwealth's presentation of evidence to the grand jury impaired the integrity of the grand jury proceedings. We affirm.

¹ The jury acquitted the defendant on an indictment charging assault and battery with a firearm. Five days after the verdict was returned, the defendant pleaded guilty to an armed career criminal sentence enhancement and was sentenced to four and one-half to six years in State prison.

1. Sufficiency. We review the defendant's sufficiency challenge to 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).

To prove the unlawful possession of a firearm, the Commonwealth had to prove that the defendant knowingly possessed either a loaded or unloaded firearm without a license. See Commonwealth v. Williams, 422 Mass. 111, 120 (1996). A firearm is a weapon capable of discharging a shot or bullet and with a barrel less than sixteen inches long. Commonwealth v. Nieves, 43 Mass. App. Ct. 1, 2 (1997), citing G. L. c. 140, § 121. The Commonwealth's burden in proving that a weapon is a firearm "is not a heavy one." Nieves, supra. The Commonwealth may rely on witness testimony, even where "there was no gun found, no casings or bullets recovered, no ballistics evidence, and no expert testimony." Commonwealth v. Housewright, 470 Mass. 665, 680 (2015). "[T]he necessary element of operability may be proved by witness testimony and related circumstantial and corroborative evidence." Commonwealth v. Drapaniotis, 89 Mass. App. Ct. 267, 271 (2016).

Here, a witness testified at trial that she heard two gunshots outside her residence. She then saw the defendant, whom she knew, holding a pocket-sized handgun and standing over a person lying on the ground (the victim). The victim got up, walked to the witness's porch, and collapsed. Evidence gathered by the police confirmed that the victim had been shot three times. Two empty bullet casings, which had been fired from a single gun, were found on the street and sidewalk where the defendant's car had been parked. A blood trail led from inside the defendant's car to the stairs and the witness's porch. The trail of blood came from the same source as the blood found inside the defendant's car.

A second witness testified that after hearing a "pop" outside her window, she observed two men wrestling inside a car. She heard two more "pops" and saw the victim run toward a residence and the second man (the defendant) holding a small black firearm. The same witness saw the second man give the gun to a third party who left the area on foot. The witness testified that she observed that second man drive away.²

² The third party, Charles Powell, was tried together with the defendant. Powell was acquitted on the indictment alleging illegal possession of a firearm, but convicted on the indictment alleging illegal possession of ammunition based on evidence of ammunition found at his residence.

Both eyewitnesses described the handgun as "small" and one eyewitness testified that the gun held by the defendant could fit in one's pocket. Based on this testimony the jury could have reasonably inferred beyond a reasonable doubt that the barrel of the handgun was shorter than sixteen inches. See Commonwealth v. Evans, 439 Mass. 184, 198 (2003) (testimony that defendant took gun "out of his pocket" sufficient to prove barrel length less than sixteen inches).

All of this evidence, considered together and in the light most favorable to the prosecution, was sufficient to establish the elements of the indicted offenses. Simply put, even though the victim did not testify and the firearm was never recovered, there was ample circumstantial evidence from which the jury could have inferred beyond a reasonable doubt that the defendant possessed a loaded and operable firearm with a barrel length of less than sixteen inches.

2. Photographic array. Two days after the shooting, the eyewitness who knew the defendant identified him in an array of eight photographs prepared by the police. At trial, the judge admitted the photographic array in evidence over the defendant's objection. On appeal, the defendant claims that admission of the photographic array was an abuse of discretion. We disagree.

"The admission of photographs that form the basis of out-of-court identification is 'relatively routine'" and

"[d]ecisions about the admissibility of photographic evidence are 'left to the discretion of the trial judge'" (citations omitted). Commonwealth v. Cruz, 445 Mass. 589, 592 (2005). Photographic arrays which use "mugshots" may be admitted in evidence "if the following criteria are satisfied: (1) the prosecution must show some need for their introduction; (2) the photographs should be offered in a form that does not imply a prior criminal record; and (3) the manner of their introduction should not call attention to their source." Id., citing Commonwealth v. McAfee, 430 Mass. 483, 493 (1999).

Here, the photographic array was "relevant to explain how the accusing finger came to be pointed at the defendant" and to corroborate the witness's in-court identification of the defendant (quotation and citation omitted). McAfee, 430 Mass. at 493. See Commonwealth v. Hour, 446 Mass. 35, 40 (2005). And the photographs in the array "bore no indication that they were mugshots; no identifying marks or height charts were visible." Cruz, 445 Mass. at 594. For these reasons the judge did not abuse her discretion in admitting the photographic array as an exhibit. However, we agree with the defendant that the detective who described the array should not have been permitted to testify that the police had an image of the person of interest "available in our booking system." That testimony unnecessarily suggested the possibility of a prior arrest of the

defendant. Although this statement should not have been admitted, we see no prejudice where the comment was brief and not repeated, the evidence against the defendant was strong, and the judge gave three forceful limiting instructions regarding the photographic array.³

3. Motion to dismiss. Dismissal of an indictment based on impairment of the grand jury proceedings requires the defendant to prove three elements: "(1) the Commonwealth knowingly or recklessly presented false or deceptive evidence to the grand jury; (2) the evidence was presented for the purpose of obtaining an indictment; and (3) the evidence probably influenced the grand jury's decision to indict." Commonwealth v. Silva, 455 Mass. 503, 509 (2009), citing Commonwealth v. Mayfield, 398 Mass. 615, 620-622 (1986). "[T]he defendant bears a heavy burden to show impairment of the grand jury proceeding." Commonwealth v. LaVelle, 414 Mass. 146, 150 (1993), citing Commonwealth v. Shea, 401 Mass. 731, 734 (1988). We agree with the motion judge that the defendant failed to meet that burden here.

The defendant's first argument is that one of the witnesses repeated reference to the defendant as "the shooter" in her

³ In summary, the judge instructed the jury that the police obtain photographs of citizens from many different sources and that no negative inference should be drawn from the fact that the police had access to the defendant's photograph.

grand jury testimony was misleading and prejudicial. We disagree. The witness explained that she referred to one man as the shooter and the other man as the victim after witnessing a struggle between the two men in the car and hearing gunshots. She explained to the grand jury that after she learned that the victim, who remained at the scene, had been shot, she concluded that the man who drove away in the car "must have been the shooter." This was a reasonable inference based on the witness's personal observations, and the jury would not have been misled by testimony that did not disguise that the witness was making an assumption. We see nothing knowingly or recklessly false or deceptive in that testimony.

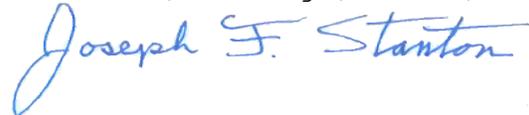
Finally, we are not persuaded by the defendant's argument that the integrity of the grand jury proceedings was impaired by the Commonwealth's failure to present evidence of the victim's prior crimes of violence. While prior acts of violence by a victim may be introduced as part of an affirmative defense of self-defense at trial, "[t]he Commonwealth is not required to present evidence of so-called defenses or otherwise disprove such matters before the grand jury." Silva, 455 Mass. at 511.

Even were we to consider such evidence exculpatory, "[g]enerally, 'the mere withholding of exculpatory evidence [from a grand jury] is not a proper ground for the dismissal of an indictment.'" Commonwealth v. Rakes, 478 Mass. 22, 30

(2017), quoting Commonwealth v. Pina, 406 Mass. 540, 549, cert. denied, 498 U.S. 832 (1990). There are exceptions to this general rule if the exculpatory evidence is withheld in a manner that distorts the evidence presented, or if the exculpatory evidence is so powerful that it undermines the credibility of a key witness or would have led the grand jury not to indict. Rakes, supra. Where, as in this case, the victim's prior bad acts were unrelated to the defendant or any of the grand jury witnesses, we discern no error in the motion judge's conclusion that "the absence of this testimony did not undermine the credibility of the additional evidence presented that was sufficient to establish probable cause that the defendant committed the charged offenses."

Judgments affirmed.

By the Court (Sullivan,
Kinder, & Singh, JJ.⁴),



Clerk

Entered: May 21, 2020.

⁴ The panelists are listed in order of seniority.