COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1010

COMMONWEALTH

vs.

ANGEL ROHENA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A jury in the Superior Court convicted the defendant, Angel Rohena, of (1) armed assault with intent to murder, pursuant to G. L. c. 265, § 18 (b); (2) assault and battery by means of a dangerous weapon, pursuant to G. L. c. 265, § 15A (b); (3) carrying a firearm without a license, pursuant to G. L. c. 269, § 10 (a); and (4) possession of a large capacity firearm without a license, pursuant to G. L. c. 269, § 10 (m).[1] The charges stem from the shooting of Anthony Guerra, the defendant's ex-girlfriend's then-current boyfriend, outside of the Haverhill pizza parlor where the ex-girlfriend worked. On appeal, the defendant argues that (1) the admission of a videotape and

[1] The defendant was also convicted of possession of ammunition without a firearm identification card, pursuant to G. L. c. 269, § 10 (h) (1), and two counts of violating an abuse prevention order, pursuant to G. L. c. 209A, § 7. On appeal, the defendant makes no arguments about these convictions.

transcript of his interrogation by police officers created a substantial risk of a miscarriage of justice, and (2) the judge committed prejudicial error by instructing the jury on joint venture where there was insufficient evidence to support the theory. We affirm.

Discussion. 1. Police interrogation. At trial, a redacted videotape and transcript of the defendant's interrogation following his arrest was admitted. The defendant agreed to the redactions and did not object to the admission of this evidence. On appeal, he contends that the admission of portions of the interrogation created a substantial risk of a miscarriage of justice. See Commonwealth v. Amirault, 424 Mass. 618, 646 (1997).

a. First aggressor. During the interrogation, a police officer relayed witness statements that the defendant had been the first aggressor in an exchange outside the pizza parlor.[2] The defendant denied that he initiated any aggression. "Extrajudicial accusatory statements made in the presence of a defendant, which he has unequivocally denied, are hearsay and inadmissible as evidence of guilt in the Commonwealth's case-in-chief." Commonwealth v. Womack, 457 Mass. 268, 272 (2010).

[2] The statement read: "You know that's what they told us, that they, they were outside smoking and [you're] coming over and start[ing]. Okay? Like you're starting the fighting. You're the aggressive one."

Here, however, the admission of the interrogation, including in particular the defendant's denials, was a tactical decision. See Commonwealth v. Pytou Heang, 458 Mass. 827, 852 (2011) ("Where inadmissible evidence is admitted because of a defendant's reasonable tactical decision, there is no substantial likelihood of a miscarriage of justice"). "The jury were able to hear evidence of his prompt, clear, and emphatic denials without his having to testify, something generally of great value to defendants." Womack, supra at 276. Indeed, trial counsel relied on the interrogation videotape, the defendant's cooperation during the entirety of the lengthy interrogation, his admissions regarding his possession of ammunition and violation of the c. 209A order, and the defendant's unequivocal denials in closing argument to boost the defendant's credibility. See Pytou Heang, supra at 853. On this record, there was not a substantial risk of a miscarriage of justice.

b. Disposing of gun in New York. The defendant also challenges the admission of the officer's statement that she thought the defendant "might have driven to New York to get rid of a gun." Here, rather than denying driving to New York to dispose of a gun, the defendant's response was evasive, stating, "I came down with you guys to New York if you want me to." The general rule against admissibility of a defendant's denial of an

accusation of guilt does not apply when the defendant replies in an "equivocal, evasive or irresponsive way inconsistent with his innocence." Commonwealth v. Dupont, 75 Mass. App. Ct. 605, 612 (2009), quoting Commonwealth v. Cancel, 394 Mass. 567, 571 (1985).

c. Gang affiliation. As the interrogation ended, the defendant asked whether officers were going to "pin" other shootings on him. In response, the officer asked the defendant whether he knew "a couple of people involved in something else. . . . On Nichols Street." The defendant stated that he knew the victim. In response, the officer stated, "They're Haverhill gang members." The defendant denied that his acquaintance was a gang member. The defendant maintains the exchange was prejudicial insofar as it portrayed the defendant as someone associated with gang members. The brief exchange, occurring at the end of the nearly ninety-minute interrogation, did not create a substantial risk of a miscarriage of justice. The prosecutor made no references to a gang or any gang affiliation during opening statements, the testimony, or closing arguments. See Commonwealth v. Wallace, 460 Mass. 118, 124 (2011).

2. Joint venture instruction. For the armed assault with intent to murder and assault and battery by means of a dangerous weapon indictments, the Commonwealth proceeded on two theories: the defendant was either the principal shooter or a joint

venturer with the other occupant of the car from which the shots were fired at Guerra. The defendant does not challenge the sufficiency of the evidence of the first theory, but maintains there was insufficient evidence that he knew the coventurer possessed a firearm.

"To prove that a defendant committed a crime as part of a joint venture, the Commonwealth must prove beyond a reasonable doubt that the defendant 'knowingly participated in the commission of the crime charged, alone or with others, with the intent required for that offense.'" Commonwealth v. Silva, 471 Mass. 610, 621 (2015), quoting Commonwealth v. Zanetti, 454 Mass. 449, 466 (2009). Where an element of the predicate offense is use or possession of a dangerous weapon, the Commonwealth must prove that the defendant had knowledge that the joint venturer possessed a weapon. See Commonwealth v. Britt, 465 Mass. 87, 99 (2013).

In the light most favorable to the Commonwealth, see Commonwealth v. Plunkett, 422 Mass. 634, 636 (1996), the following facts could have been found by the jury with respect to a joint venture theory. The defendant and Guerra had an animated verbal altercation concerning the defendant's ex-girlfriend in the parking lot of a multistore plaza. The defendant drove away with his coventurer in the passenger's seat. Together, they waited for Guerra at a gas station,

located across the street from the plaza. When they saw Guerra, the defendant drove the car toward Guerra. The coventurer, still in the passenger seat, fired at Guerra causing a "dry fire." The defendant pulled the car closer to Guerra, as the coventurer pointed a firearm at Guerra and fired five shots. The defendant then drove off with the shooter. Four .40 caliber shell casings were found at the scene; they bore the same markings ("Hornady 40 S&W") as eleven loose .40 caliber ammunition rounds found during a search of the defendant's effects at his mother's home. Together this was sufficient evidence to support a reasonable finding that the defendant knew the coventurer was armed. See, e.g., Commonwealth v. Gomes, 475 Mass. 775, 781-782 (2016) (joint venture evidence sufficient where defendant had motive and was driver of vehicle that stopped directly parallel to where shooting occurred, shots came from passenger side, and defendant sped off when shooting ceased). See Commonwealth v. Blake, 428 Mass. 57, 64 (1998) (sufficient evidence of joint venture where defendant stood in close proximity to other shooters, fled with others, and police recovered cartridges); Commonwealth v. McCray, 93 Mass. App. Ct. 835, 843 (2018), quoting Commonwealth v. Sexton, 425 Mass. 146, 152 (1997) ("[T]here is no need to prove an anticipatory compact between the parties to establish joint venture . . . if, at the

climactic moment the parties consciously acted together in carrying out the criminal endeavor"). There was no error.

Judgments affirmed.

By the Court (Blake, Neyman & Wendlandt, JJ.[3]),

Joseph F. Stanton

Clerk

Entered: May 22, 2020.

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