

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as 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 23.0 or 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-379

COMMONWEALTH

vs.

SCOTT B. KING.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a five-day trial, the defendant was found guilty of failing to register as a sex offender in violation of G. L. c. 6, § 178H. On appeal, the defendant argues that there was insufficient evidence to support the conviction and that the judge erred in instructing the jury. We affirm.

Background. Viewed in the light most favorable to the Commonwealth, see Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979), the evidence at trial established the following facts. The defendant was convicted of a sex offense in 1998. As a result of that conviction, he is required to register annually with the Sex Offender Registry Board and the local police department in the town where he resides. See G. L. c. 6, § 178F 1/2. Between November 2011 and July 2013, the defendant filled out and filed registration forms indicating various

primary addresses. From September 2013 through September 2015, registration forms listed the defendant as homeless in Greenfield. On a September 2013 form, the defendant listed a secondary address in Lanesboro. On all of the defendant's forms from August 2014 through September 2015, he registered as being homeless in Greenfield and did not list a secondary address.

In August or September 2014, the defendant began spending time at a friend's apartment in Montague. The defendant introduced himself to the person who lived in the adjoining house next to his friend's apartment as his new neighbor. When the neighbor's girlfriend moved into the apartment building, the defendant welcomed her and suggested that her children play with his friend's daughter. Over the course of the next year, the neighbor, his girlfriend, and another neighbor frequently saw the defendant in the apartment and around the apartment building. For a period of time, the neighbor could hear the defendant in the apartment seven days a week. The neighbor saw the defendant at the apartment building almost every day during September 2015. The neighbor's girlfriend and the other neighbor saw men's clothing and toiletry items in the apartment when they visited, and they observed the defendant performing household tasks such as laundry and cooking.

In late July or early August 2015, after learning of the defendant's status as a sex offender, the neighbor's girlfriend

reported to police that the defendant had been living at the apartment building. Shortly thereafter, the defendant was charged with failing to register as a sex offender in violation of G. L. c. 6, § 178H (a) (1).¹

Discussion. 1. Sufficiency of the evidence. The defendant claims there was insufficient evidence to support his conviction, and thus his motion for a required finding of not guilty should have been granted. At the outset, the defendant argues that because the Commonwealth presented three separate theories under which the defendant could have been found guilty, and it is impossible to tell on which theory the jury relied, the verdict must be set aside unless the evidence was sufficient to support the conviction on all three theories. See Commonwealth v. Matchett, 386 Mass. 492, 511 (1982). The defendant's motion for a required finding, however, did not alert the judge that he was seeking a required finding on a specific theory. See Commonwealth v. Berry, 431 Mass. 326, 331 (2000).² Moreover, the defendant did not argue, in support of his motion or otherwise, that there was insufficient evidence to

¹ The defendant was found not guilty on an additional indictment charging him with intimidation of a witness.

² "[A] generally phrased motion for [a required finding] does not preserve for review the denial of the motion on a specific theory of liability when there was sufficient evidence to withstand the motion on an alternative theory." Berry, 431 Mass. at 331.

find the defendant guilty on the basis that he failed to register the Montague apartment as a secondary address or register Montague as a new town in which he resided as homeless. He disputed only whether there was enough evidence to prove that he "actually lived" at the Montague apartment, i.e., whether the apartment constituted a "home address" that triggered registration requirements. See G. L. c. 6, § 178E (h), (l). Nevertheless, the Commonwealth has submitted sufficient evidence on all three theories, thus we need not determine which of the defendant's arguments are preserved.

The standard for reviewing the motion's denial is "whether the Commonwealth produced enough evidence, taken in the light most favorable to the Commonwealth, to satisfy any rational trier of fact beyond a reasonable doubt that each element of the crime was present." Commonwealth v. Hilton, 398 Mass. 63, 64 (1986). The parties stipulated to the fact that the defendant was previously convicted of a sex offense, and the defendant does not dispute that he knew of his obligation to register a home address with the police. Therefore, the question before us is whether the Commonwealth presented sufficient evidence to prove that the Montague apartment qualified as a home address pursuant to G. L. c. 6, § 178E (h) and (l), such that the defendant was required to register the address with the Sex Offender Registry Board and the local police.

While the statute does not define "home address," see G. L. c. 6, § 178C, this court has defined it as "an offender's primary place of residence." Commonwealth v. Bolling, 72 Mass. App. Ct. 618, 625 (2008). "Residence" is defined as "the place where one actually lives . . . as distinguished from one's . . . domicile [or] a place of temporary sojourn." Id. at 623, quoting Webster's Third New International Dictionary 1082, 1931 (2002). "[A]n offender's 'home address' denotes some greater degree of permanence, and a greater frequency of residence, than the transitory (albeit 'routine') level of occupancy at a location for four or fewer nights in a month." Bolling, supra at 624.

As applied to the facts of this case, we conclude that the evidence at trial was sufficient for a rational trier of fact to find that the defendant had changed his home address to the Montague apartment. There was significant evidence suggesting that the defendant was making his friend's apartment his primary place of residence. First, the evidence showed that the defendant was present at the apartment almost continuously from August 2014 through September 2015. Next, there was a variety of evidence of the type that tends to show that, beyond being present, the defendant conducted his domestic, social, and civil affairs from within the apartment. For example, the apartment was where the defendant performed household tasks such as

laundry, cooking, and taking care of his friend's child; kept his clothes and toiletries; spent nights; socialized with neighbors; and spent time with his friend. This evidence, taken together, indicated that the defendant lived at the apartment to a degree that was more than transitory.³ See Bolling, 72 Mass. App. Ct. at 624. Furthermore, while his friend and her brother testified that the defendant did not live at the apartment, the jury were not required to credit their testimony, especially given the level of detail and corroboration in the testimony of the neighbors.⁴

Likewise, the Commonwealth put forth sufficient evidence for a juror to find beyond a reasonable doubt that even if the defendant considered some other address his primary residence,

³ The defendant would have us ascribe elements of "domicile" to the definition of primary residence. Specifically, he contends that, like a change in domicile, a change in primary residence should entail the intention to stay permanently at that new address. This court, however, has rejected equating a home address to a domicile in the sex offender registration context. See Commonwealth v. Becker, 71 Mass. App. Ct. 81, 93, cert. denied, 555 U.S. 933 (2008). Moreover, the version of the form that the defendant signed when registering in the past asks for an offender's "Current Residence Address." See Bolling, 72 Mass. App. Ct. at 624 ("the manner in which the form requests information about the offender's home address illuminates to some extent the interpretation of the statute by the administrative agency charged with its enforcement"). We thus decline to adopt such a definition.

⁴ Contrary to the defendant's argument, the Commonwealth was not required to show that the defendant registered the Montague address with outside sources in order to prove that the address constituted a primary address.

he nevertheless failed to register the apartment as a "secondary address." See G. L. c. 6, § 178C. "Secondary addresses" are defined as "the addresses of all places where a sex offender lives, abides, lodges, or resides for a period of 14 or more days in the aggregate during any calendar year and which is not a sex offender's primary address; or a place where a sex offender routinely lives, abides, lodges, or resides for a period of 4 or more consecutive or nonconsecutive days in any month and which is not a sex offender's permanent address, including any out-of-state address." Id. The Commonwealth elicited specific testimony from each of the three neighbors that the defendant, from around August 2014 through October 2015, was present at the apartment for more than four days in many of those months and more than fourteen days in each calendar year. The neighbors also testified that they saw and heard the defendant at the apartment late at night and early in the morning, indicating that he was sleeping there. See Commonwealth v. Arce, 467 Mass. 329, 333 (2014) (defining "lodge" as staying overnight). We therefore cannot say that the evidence was insufficient under this theory.⁵

⁵ Contrary to the defendant's contention, the Commonwealth put forth ample evidence to prove that, in addition to the apartment constituting a secondary address, the defendant knew of his duty to register secondary addresses. There was evidence that, in the past, the defendant signed acknowledgements of his duty to

Finally, a juror could also have found that the defendant failed to register as homeless in Montague. The sex offender registration statute requires homeless sex offenders to verify with local police every thirty days that their registration data is accurate. G. L. c. 6, § 178F 1/2. While the evidence showed that the defendant was frequently present at the apartment, it also showed stretches of time when the defendant would be away. The Commonwealth also introduced evidence that from September 2013 through September 2015, registration forms listed the defendant as homeless in Greenfield. A juror could have inferred from the defendant's comings and goings, as well as his history of homelessness, that rather than intending to live at the apartment permanently, he was homeless in Montague.

2. Jury instructions. The defendant also argues that the judge erred in instructing the jury on the definitions of primary residence and secondary address. Because the defendant did not object to the instructions at trial, we review the alleged error for a substantial risk of a miscarriage of justice. See Commonwealth v. Alphas, 430 Mass. 8, 13 (1999).

a. Primary address. The defendant argues that the judge failed to instruct the jury on all the essential elements of the crime of failing to register a new primary address.

report secondary addresses, and even once registered a secondary address in Lanesboro.

Specifically, he argues that the judge should have included in the instruction the requirement that the Commonwealth prove that the defendant intended to establish the Montague apartment as his new permanent address. We disagree.

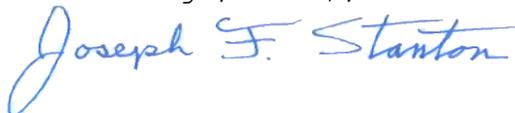
As neither the statute nor case law required the Commonwealth to prove such an element as part of its case, see G. L. c. 6, §§ 178C, 178H; Bolling, 72 Mass. App. Ct. at 623-624, the judge was not required to instruct the jury in such a manner.⁶ The judge gave an instruction that followed precisely the language of the District Court model instruction, and it adequately conveyed to the jurors that, in order to convict the defendant, the Commonwealth was required to prove beyond a reasonable doubt that the defendant resided in Massachusetts and that he knowingly failed to register the address of his primary residence. See Instruction 7.240 of the Criminal Model Jury Instructions for Use in the District Court (2009). In defining "residence," the judge noted that "a person may have only one permanent home, referred to as a domicile, but may have many residences." See Commonwealth v. Becker, 71 Mass. App. Ct. 81, 93, cert. denied, 555 U.S. 933 (2008). The instructions contained no error, much less a substantial risk of a miscarriage of justice.

⁶ See note 3, supra.

b. Response to jury question. The defendant also argues that the judge failed to adequately respond to a question from the jury asking for clarification on the meaning of "secondary address." Specifically, the defendant argues that the judge failed to provide the jury with all the law available related to the term. The additional language that the defendant cites as being withheld by the judge, however, was included in the judge's initial instruction, and was provided to the jury in writing. And, in response to the jury's question, the judge asked the jurors to use their "common sense" "in applying [those] terms," and referred them to the written instructions in which the terms had been defined. As the initial instructions correctly and adequately conveyed the meaning of "secondary address," no further substantive clarification by the judge was required. We thus discern no error in the judge's response to the question.

Judgment affirmed.

By the Court (Vuono, Lemire &
McDonough, JJ.⁷),



Clerk

Entered: July 31, 2020.

⁷ The panelists are listed in order of seniority.