

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-752

COMMONWEALTH

vs.

ELIEL FIGUEROA.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After his first trial ended in mistrial because the jury could not reach a unanimous verdict, a second Superior Court jury convicted the defendant of (1) trafficking in heroin in an amount more than 200 grams, and (2) possession with intent to distribute cocaine. Represented by new counsel, the defendant filed a motion for a new trial that was not supported by affidavits and alleged that the defendant received ineffective assistance from trial counsel. The defendant's appeal from the convictions was stayed while he filed a motion for a new trial. See Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). The same judge who presided over the trial denied the motion without holding an evidentiary hearing. The defendant's appeal from that order was consolidated with his direct appeal from the convictions. The defendant claims that the judge erred

in admitting certain testimony, by finding that trial counsel was not ineffective, and by denying the motion for a new trial. We affirm.

Background. In the fall of 2013, Everett Police Detective and Federal Drug Enforcement Agency task force member Kenneth Kelley was investigating a heroin distribution organization that consisted of the defendant, Luis Sosa, and two people whom Kelley was never able to identify. Malden Police Detective Renee Nusum and other members of the task force assisted Kelley in the investigation. Through physical surveillance, global positioning system (GPS) monitoring, review of cellular telephone records, and undercover purchases of heroin, Kelley came to believe that the organization used (1) a certain cellular telephone to arrange heroin purchases (target phone), (2) a Ford Escape and a Ford Explorer to deliver drugs, (3) a residence located at 258-B Blue Ledge Drive, Roslindale, as a "stash house," and (4) the defendant's residence, located at 10 Unity Way in Roslindale, as the organization's financial center. On November 6, 2013, Kelley applied for and obtained a warrant to search both residences and the defendant's person for evidence of drug crimes.

The warrant was executed on the following day. During the execution of the search warrant at the residence located at 258-B Blue Ledge Drive, officers seized over 400 grams of heroin, an

undetermined amount of cocaine, United States currency totaling \$120, a Massachusetts identification in Sosa's name, and equipment consistent with preparing and packing drugs for individual sale. During the search of the defendant's residence, 10 Unity Way, officers seized over \$12,000 in U.S. currency and legal documents in the names of the defendant and Sosa, among other items. The warrant authorizing a search of the defendant was executed while the defendant was operating the Ford Escape in front of 258-B Blue Ledge Drive, after officers observed Sosa leave the apartment and enter the Escape. Sosa "explode[d] from [the] passenger's seat" and attempted to flee on foot when officers approached the vehicle, but was soon apprehended and found to have on his person U.S. currency totaling \$176 and 118 individually wrapped packages of heroin. The defendant was removed from the Escape and discovered to have \$510 on his person. The target phone was in the Escape, near where the defendant had been seated.

Kelley testified that he was "confident" the defendant possessed the target phone days earlier, on November 1, because Kelley had instructed Nusum to call the phone while Kelley was physically observing the defendant. Nusum did so and told Kelley when the target phone was ringing. From a distance, Kelley watched the defendant take a cell phone-sized object out of his pocket, look at it, manipulate something, and then put it

back in his pocket. Kelley and other task force members testified about their observations of the defendant's and Sosa's behavior, and characterized that behavior as being consistent with drug dealing, based on their training and experience. In particular, the officers observed occupants of the Ford Explorer engage in "dead drops," which Kelley defined as a dealer "hid[ing] his stash in an area where no one will find it" so that, "[i]f they were pulled over by the police, they would only have a little bit of heroin on them as opposed to their whole load for the day." Kelley and Nusum also testified to the manner in which they conducted undercover buys.<sup>1</sup> The judge carefully monitored the presentation of this evidence to ensure that the probative value was not outweighed by the prejudicial effect, but declined the defendant's request for a "bad acts" instruction in the final charge. The judge reasoned that the instruction could prejudice the defendant because no one testified to seeing him engage in any other "bad acts."<sup>2</sup>

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<sup>1</sup> The defendant filed a motion in limine, which is not in the record, to exclude evidence relating to undercover buys. The judge denied the motion in limine after concluding that such evidence was admissible to show "the defendant's alleged manner of operation and course of conduct." However, the judge expressed her intention of giving "a limiting instruction in that regard." No limiting instruction was given during the course of the trial, nor did counsel request one.

<sup>2</sup> Nusum testified that she purchased heroin from Sosa, and Kelley could only identify Sosa in connection with the "dead drops."

Similar to the apparently successful strategy in the first trial, trial counsel sought to create reasonable doubt in the minds of the jurors by (1) highlighting the absence of evidence tying the drugs to the defendant, and (2) discrediting the investigation as incomplete and biased because Kelley "had already targeted [the defendant]" and "had made up his mind about what this case was about." Pursuant to the first theory, the defendant stipulated to the composition and weight of all of the drugs seized in the case and elicited from each witness that the defendant was never seen with drugs. In furtherance of the second theory, defense counsel elicited from Kelley that Kelley did not investigate other individuals whose names had surfaced during the course of the investigation, and did not order that any items be tested for the presence of fingerprints or deoxyribonucleic acid (DNA), because "[w]e knew who our target was," "our primary target was Eliel Figueroa," and fingerprints and DNA were not required to identify him. Kelley also believed that none of the names referred to real people. Trial counsel echoed Kelley's words in his closing argument when he asked the jury not to credit the Commonwealth's evidence because Kelley acknowledged the defendant had been "targeted." Throughout the course of the trial, the judge characterized defense counsel as "a veteran attorney" and "very competent."

Discussion. 1. Evidentiary claims. The defendant claims that evidence of "dead drops" and undercover buys was more prejudicial than probative and should not have been admitted. He claims that the witnesses, and Kelley in particular, should not have been allowed to offer expert opinions (1) on the ultimate issue in the case, by testifying that the defendant was the leader of the organization and the target of the investigation, (2) that the defendant's and Sosa's actions while under surveillance were consistent with those of persons engaged in the illegal drug trade, and (3) that the defendant possessed the target phone on November 1. The defendant also alleges that Kelley's testimony that he was "investigating a heroin distribution organization . . . which went by the name of Tony a/k/a Eliel Figueroa" violated the defendant's confrontation rights because the name "Tony" was provided by nontestifying witnesses. The defendant claims that these errors, and trial counsel's failure to object to them, deprived the defendant of his right to the effective assistance of counsel and created a substantial risk of a miscarriage of justice. See Commonwealth v. Leary, 92 Mass. App. Ct. 332, 346 (2017) (trial errors couched in claim of ineffective assistance are reviewed for substantial risk of miscarriage of justice).

"An error creates a substantial risk of a miscarriage of justice unless we are persuaded that it did not 'materially

influence[]' the guilty verdict." Commonwealth v. Alphas, 430 Mass. 8, 13 (1999), quoting Commonwealth v. Freeman, 352 Mass. 556, 564 (1967). "In making this determination, '[w]e consider the strength of the Commonwealth's case, the nature of the error, the significance of the error in the context of the trial, and the possibility that the absence of an objection was the result of a reasonable tactical decision.'" Commonwealth v. McGann, 484 Mass. 312, 322 (2020), quoting Commonwealth v. Azar, 435 Mass. 675, 687 (2002), S.C., 444 Mass. 72 (2005). An attorney's tactical decision is ineffective only if it was "manifestly unreasonable" when made. Commonwealth v. Zagrodny, 443 Mass. 93, 98 (2004).

An attorney's performance is constitutionally ineffective where their behavior falls measurably below that expected from an ordinary, fallible lawyer, such that the defendant is deprived of an otherwise available, substantial ground of defense. Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). The defendant must establish both prongs to be entitled to a new trial. See Commonwealth v. Pike, 53 Mass. App. Ct. 757, 760 (2002). The judge concluded the defendant had not met his burden, and was not entitled to a new trial. We extend "special deference" to that decision because the judge had a first-hand view of trial counsel's performance. Commonwealth v. Grace, 397 Mass. 303, 307 (1988). We review the judge's decision only for

an error of law or abuse of discretion, id., which we will not find unless we conclude that the judge made a clear error of judgment in weighing the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives. See L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

The record does not support the defendant's claim that most witnesses began their testimony by stating that the defendant was the target of the investigation. Many officers identified the two Fords or the residences as the target of their attention, while one identified Sosa. We agree with the Commonwealth that Kelley's testimony that the defendant became the target of his investigation did not constitute an improper opinion on the ultimate issue in the case. The record supports an inference that counsel elicited the "target" testimony from Kelley, and did not object to it, because it supported one of his theories of defense. We discern nothing manifestly unreasonable in that.

The defendant's confrontation clause claim is unfounded if only because no testimonial statements from nontestifying witnesses were introduced, see Commonwealth v. Wardsworth, 482 Mass. 454, 464 (2019) (defining testimonial statements), and the defendant was not on trial for using the name "Tony." The defendant was on trial for activity that testifying witnesses

observed firsthand, and which the Commonwealth alleged amounted to trafficking in heroin and possession of cocaine with the intent to distribute. Testimony that Sosa sold drugs to Nusum while she was acting in an undercover capacity, or that Sosa engaged in "dead drops," could not have prejudiced the defendant even if we agreed with him that the judge abused her "wide discretion" by admitting it (which we do not). Alphas, 430 Mass. at 16. That evidence bolstered the defendant's theory that it was Sosa, and not the defendant, who was engaged in heroin trafficking and cocaine distribution.

Kelley's belief that the defendant possessed the target phone on November 1 was based on his observations, and, as such, did not amount to an expert opinion as the defendant claims. See Commonwealth v. Carty, 466 Mass. 535, 541 (2013), quoting Mass. G. Evid. § 701 (2019) (lay opinion is one rationally based on perception of witness and not on scientific, technical, or specialized knowledge). The fact that Kelley was an experienced narcotics officer did not transform the opinion into an expert one. The testimony did not create a substantial risk of a miscarriage of justice in any event, where the judge instructed the jury that (1) specialized training in his or her field "does not put [a particular] witness on a higher level than any other witness," and (2) "[i]n the last analysis, an expert witness is like any other witness in the sense that you alone make the

judgment about how much credibility and weight you give to the expert's testimony and what conclusions you draw from that testimony." We presume the jury followed the judge's instructions. See Commonwealth v. Hoose, 467 Mass. 395, 413 (2014).<sup>3</sup>

The defendant next argues that Kelley's testimony that the defendant was the leader of the organization constituted an improper opinion on the ultimate issue in the case. See Commonwealth v. Fernandez, 48 Mass. App. Ct. 530, 532 (2000) (essential elements of possession "are knowledge plus ability and intention to control"). Assuming without deciding that admission of this testimony was error and counsel was ineffective for failing to object to it, the testimony did not create a substantial risk of a miscarriage of justice. The jury, who were specifically instructed that they alone decide what evidence to credit and what inferences to draw from that evidence, could have drawn the same inference from the strong circumstantial evidence presented by the Commonwealth.<sup>4</sup> Thus, we

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<sup>3</sup> For this reason, testimony by other officers that the defendant's and Sosa's behavior while under surveillance was consistent with illegal drug activity did not create a substantial risk of a miscarriage of justice.

<sup>4</sup> To the extent the defendant argues otherwise, we note the evidence is viewed in the light most favorable to the Commonwealth. Commonwealth v. Latimore, 378 Mass. 671, 677-678 (1979).

are satisfied that the defendant's guilt has been fairly adjudicated. See Azar, 435 Mass. at 687.

2. Motion to suppress. The defendant claims that trial counsel was ineffective because he neglected to file a motion to suppress the evidence seized on November 7.<sup>5</sup> Counsel stated at trial that he had not done so because he believed the defendant "had no standing." This was an incorrect understanding of the law; the defendant had automatic standing to challenge the November 7 searches because he was charged with possessing the drugs seized that day. See Commonwealth v. Mubdi, 456 Mass. 385, 390 (2010). To be entitled to relief for counsel's error, the defendant must show that a motion to suppress was likely to succeed. See Commonwealth v. Comita, 441 Mass. 86, 91 (2004).

The defendant argues that such a motion would have succeeded because Kelley's affidavit in support of the search warrant did not establish a nexus between suspected drug activity and the two residences. The judge found that

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<sup>5</sup> Trial counsel did file a motion to suppress GPS evidence seized pursuant to a different warrant, as well as (1) two motions to dismiss, and (2) a motion in limine to exclude a witness's identification of the defendant, which the judge treated as a motion to suppress. None of the motions are in the record. The judge conducted an evidentiary hearing on the motion in limine, at which Kelley was the only witness. The judge credited Kelley's testimony, made findings of fact on the record, and denied the motion. At trial, the witness identified the defendant as the resident of 258-B Blue Ledge Drive, a man whom he knew as Samuel Carrasquillo.

independent police corroboration of information provided by confidential informants established the requisite nexus when combined with officers' observations of the defendant's and Sosa's movements, GPS information for the two Fords, and location and call log information for the target phone, all as set forth in the affidavit. On our de novo review, Commonwealth v. Foster, 471 Mass. 236, 242 (2015), there is no error in this conclusion. The affidavit did not reflect "a mere hunch that evidence of drug activity would be found in" the two residences associated with the defendant. Commonwealth v. Moore, 473 Mass. 481, 494-495 (2016) (Hines, J., dissenting). It contained "particularized information based on police surveillance or otherwise, that would permit a reasonable inference that the defendant likely kept a supply of drugs in [one or both of] his apartment[s]." Commonwealth v. Pina, 453 Mass. 438, 442 (2009).

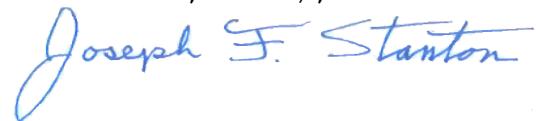
Conclusion. The judge neither abused her discretion nor committed an error of law when she concluded that the defendant was not deprived of the effective assistance of counsel or a

fair trial.

Judgments affirmed.

Order denying motion for new  
trial affirmed.

By the Court (Vuono, Milkey &  
Desmond, JJ.<sup>6</sup>),

  
Clerk

Entered: July 31, 2020.

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<sup>6</sup> The panelists are listed in order of seniority.