COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1766

COMMONWEALTH

vs.

PABLO A. FIGUEROA.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant, Pablo A. Figueroa, was convicted of operating a motor vehicle while under the influence of alcohol, second offense. On appeal, the defendant asserts that statements he characterizes as refusal evidence were erroneously admitted, and that the evidence of his being under the influence of alcohol was insufficient. We affirm.

Background. On December 21, 2016, at approximately 1:20 A.M., Officer Christopher Atchue observed a vehicle pulled over on Route 9 in Westborough, parked partially in an active travel lane and partially in the breakdown lane. Atchue parked behind the vehicle, which was still running but appeared disabled. When Atchue approached the driver's side window, the defendant was asleep, slumped partially over the center console. Atchue knocked on the window and yelled to the defendant for about a

minute before the defendant awoke. Upon waking, the defendant appeared confused, and his eyes were very glassy and bloodshot. Atchue asked the defendant to lower the window, but he was unable to do so after multiple attempts. He missed the window controls on the door, fiddled with the air vents on the dash, and at one point used his hands to try to push down the window. Atchue opened the car door out of fear that the defendant would inadvertently shift the car into gear; he immediately detected a strong odor of alcohol. When Atchue asked the defendant what he was doing on the side of the road, he replied, "Window." He was unable to identify what city he was in and his speech was slurred. He admitted that he had consumed two or three alcoholic beverages.

After agreeing to participate in field sobriety testing, the defendant exited the car, using the driver's door to pull himself to his feet. He steadied himself on the vehicle as he moved to the rear for the testing. Atchue began the instructions for the first test, the nine-point walk and turn test (WAT), by telling the defendant "to place his right foot in front of his left foot and remain in that position until further instruction." The defendant was unable to maintain the instructional position and stated that "he could not do this exercise sober." Atchue moved on to the alphabet test. When asked to recite the alphabet from A to Z, the defendant stated

that "there was no oral test for him to be able to drive a motor vehicle." Atchue determined that the defendant was intoxicated and arrested him. The defendant was placed inside the police cruiser to be transported to the police station. The odor of alcohol was present in the cruiser during transport.

Discussion. 1. Refusal evidence. Evidence of an individual's refusal to submit to field sobriety testing is inadmissible. See Commonwealth v. McGrail, 419 Mass. 774, 779-780 (1995). The purpose of this rule is to safeguard an individual's privilege against self-incrimination as "refusal evidence is both compelled and furnishes evidence against oneself . . . [and] would violate the privilege against self-incrimination of art. 12 [of the Massachusetts Declaration of Rights]." Opinion of the Justices, 412 Mass. 1201, 1211 (1992). See Commonwealth v. Curley, 78 Mass. App. Ct. 163, 167 (2010) ("The underlying rationale for this holding is that a defendant's refusal is the equivalent of his statement, 'I have had so much to drink that I know or at least suspect that I am unable to pass the test'" [quotation and citation omitted]).

While statements of refusal to perform field sobriety testing are inadmissible, "statements of a person's difficulty or inability to perform a field sobriety test . . . are not the product of compulsion within the meaning of art. 12 and thus are available for use against the individual at trial."

Commonwealth v. Brown, 83 Mass. App. Ct. 772, 773 (2013). After consent to testing, an individual's actions and statements are not compelled. See id. at 778. However, if a defendant first consents to field sobriety testing, and, after attempting testing, then refuses, the subsequent refusal is also inadmissible. See Commonwealth v. Grenier, 45 Mass. App. Ct. 58, 60-61 (1998) (defendant's statement that "he could not do the [one-legged stand balance] test," having already attempted alphabet held to be inadmissible refusal evidence).

The defendant contends that the statements he made during the field sobriety tests were "tantamount to refusing," and as such were erroneously admitted.[1] Because the defendant did not object at trial, "we review to determine whether there was error, and if so, whether such error created a substantial risk of a miscarriage of justice." Commonwealth v. Beaulieu, 79 Mass. App. Ct. 100, 103 (2011).

The defendant's argument is premised on the proposition that the instructions of a field sobriety test are not part of

[1] The defendant also argues that the prosecutor compounded this error by repeating the statements and by mischaracterizing the evidence in closing. In particular, the defendant challenges the prosecutor's descriptions of the odor of alcohol perceived by the arresting officer, the defendant's balance, and the defendant's apparent lethargy. The prosecutor's arguments were not improper as they were based on the evidence or reasonable inferences drawn therefrom. See Commonwealth v. Coren, 437 Mass. 723, 730 (2002).

the test itself.[2] However, the WAT, which is a standard field sobriety test, requires the officer administering the test to consider an individual's response to the test's instructions. See Commonwealth v. Gerhardt, 477 Mass. 775, 780 (2017) ("An officer administering the WAT looks for eight specific indicators of impairment [including] losing balance while listening to the instructions").[3] Atchue testified that, during the WAT instructions, the defendant was "unsteady on his feet" and "unable to maintain the instructional position." After Atchue completed the instructions, the defendant offered that "he could not do this exercise sober." Although the defendant did not attempt the physical portion of the WAT, the testing began when the officer gave the instructions.

Furthermore, the defendant's statement here is more akin to an admissible expression of failure than to an inadmissible refusal. See Brown, 83 Mass. App. Ct. at 778 ("Once the defendant agrees to take the test and attempts it, his

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[2] In fact, the defendant states if we were to find that his statements were not evidence of refusal, it "would be the first time the Appeals Court has held that the instructional part of a sobriety test is part of the test itself."

[3] The National Highway Traffic Safety Administration, which provides training materials for police officers and others qualified to conduct standard field sobriety tests, observes that, "[l]ike all divided attention tests, Walk and Turn has two stages . . . [an] Instructions stage [and a] Walking stage." DWI Detection and Standardized Field Sobriety Testing (SFST) Refresher, Instructor Guide, Session 3 at 37 (Feb. 2018).

expressions of difficulty or inability to perform or to complete it, such as 'I can't do this,' 'I give up,' or 'I've had too much to drink,' are not the products of compulsion and thus are admissible"). The admission of the defendant's first statement was not error.

Nor was the defendant's comment about the alphabet test the equivalent of refusal evidence. After the defendant confirmed that English was his first language, Atchue instructed him to recite the alphabet from A to Z. The defendant's response that "there was no oral test for him to be able to drive a motor vehicle" was not an admission that he was so drunk he could not recite the alphabet. See Grenier, 45 Mass. App. Ct. at 61-62.

The defendant finds further support for his claim by pointing to Atchue's testimony on cross-examination that he took the defendant's statements "as a refusal to participate." At trial, however, defense counsel took the position that the defendant agreed to perform the field sobriety tests, but that Atchue terminated them -- suggesting that the defendant may have passed the tests if Atchue had permitted him to continue. Indeed, defense counsel challenged Atchue's characterization of the defendant's statements as evidence of refusal, asking, "Well, he voluntarily got out of his car when you asked him to; correct?"

"Having elected to pursue this approach at trial, the defendant cannot change tactics on appeal based on the fact that he did not achieve the desired result." Commonwealth v. Shruhan, 89 Mass. App. Ct. 320, 324 (2016). See Commonwealth v. Lazarovich, 410 Mass. 466, 476 (1991), quoting Commonwealth v. Johnson, 374 Mass. 453, 465 (1978) ("Counsel may not try a case on one theory of law, and then obtain appellate review on another theory which was not advanced at trial. . . . Appellate review should not be the occasion to convert the 'consequences of unsuccessful trial tactics and strategy into alleged errors by the judge'"). See also Beaulieu, 79 Mass. App. Ct. at 104 ("defendant opened the door to the admission of refusal evidence by raising the issue during his cross-examination of the arresting officer"). We discern no error, much less a substantial risk of a miscarriage of justice.

2. Sufficiency of the evidence. To prove that the defendant was operating a motor vehicle under the influence of liquor, under G. L. c. 90, § 24, the Commonwealth must show "that the defendant (1) operated a vehicle, (2) on a public way, (3) while under the influence of alcohol." Commonwealth v. Quinn, 61 Mass. App. Ct. 332, 334 (2004). "The Commonwealth need not prove that the defendant actually drove in an unsafe or erratic manner, but it must prove a diminished capacity to operate safely." Commonwealth v. Rarick, 87 Mass. App. Ct. 349,

352 (2015), quoting Commonwealth v. Connolly, 394 Mass. 169, 173 (1985).

On appeal, the defendant disputes only the third element, asserting that the Commonwealth failed to produce sufficient evidence that he was under the influence. He posits that the evidence merely showed that he may have been "tired, pulling over for safety, and playing it safe."

We review the evidence in the light most favorable to the Commonwealth to determine whether "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). The evidence adequately supports the jury's finding that the defendant was under the influence. He was found asleep at the wheel of his car -- which was stopped along the side of a major roadway, partially in the traffic lane and partially in the breakdown lane, still running -- and was unresponsive to the officer's efforts to get his attention. He was unable to lower his window. He had bloodshot and glassy eyes, his speech was slurred, he admitted to consuming two or three alcoholic beverages, and he was unsteady on his feet. The odor of alcohol emanated from his car and was still apparent when the defendant was placed in the police cruiser after his arrest. And by his own admission, he was not sober. See Commonwealth v. Gallagher,

91 Mass. App. Ct. 385, 392-393 (2017) (evidence of "classic symptoms of alcohol intoxication," including slurred speech, bloodshot and glassy eyes, odor of alcohol emanating from one's person, admission to consuming alcohol, and not being able to stand straight while being instructed on field sobriety test, sufficient to support conviction for operating under influence). The video recording of the defendant's booking, which he argues shows that he "had no apparent deficits" and "casts doubt" on whether his capacity to drive was impaired when Atchue arrested him, offers "nothing compelling . . . which caused the prosecution's case to deteriorate." Commonwealth v. Walker, 401 Mass. 338, 343-344 (1987).

Judgment affirmed.

By the Court (Massing, Singh & Grant, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: November 20, 2020.

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