

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

20-P-79

COMMONWEALTH

vs.

EDUARDO RAMIREZ.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a jury trial in the District Court, the defendant was convicted of assault and battery on a police officer, in violation of G. L. c. 265, § 13D, and resisting arrest, in violation of G. L. c. 268, § 32B. He was acquitted of disturbing the peace (G. L. c. 272, § 53). On appeal, the defendant argues that the judge abused her discretion in allowing the defendant's prior conviction of operating a motor vehicle after a suspended license (OAS), subsequent offense, to be admitted in evidence for impeachment purposes. He further argues that the prosecutor exacerbated the error by referring to the prior conviction during her closing argument. We affirm.

Background. The jury could have found the following facts. At approximately 3 A.M. on July 24, 2017, State Trooper Devon Surian was on Green Street in Lynn on an unrelated matter when

he heard the defendant shouting at a woman. Surian ordered the defendant to stop shouting, to which the defendant responded: "Really? You going to do me like that?" The defendant then continued shouting and began to approach Surian. Surian reminded the defendant of the time and again told him to stop yelling. The defendant said: "Why do you have to be such a fucking dickhead?" and kept on walking toward Surian. Surian told the defendant to step back and put his hand out to push the defendant backwards. The defendant then struck Surian in the chest with both hands. Surian drew a canister of pepper spray from his belt and attempted to use it on the defendant, but the canister failed to discharge. At this point, the defendant began to walk away. Surian drew his Taser, ordered the defendant to stop, and placed him under arrest. The defendant was compliant while Surian placed him in handcuffs, but he began to pull away as Surian escorted him to the cruiser. He then resisted getting into the car and, as Surian was trying to place his legs inside, began to kick Surian. Ultimately, Surian subdued the defendant with a blast of pepper spray.

The defendant testified to a different version of the incident. He claimed that he was walking home from a restaurant, where he had been drinking, and saw Surian speaking to a man in handcuffs. Surian asked the defendant what he was looking at, and the defendant made a "sarcastic" remark. Surian

was annoyed and "screamed" at the defendant. The defendant then attempted to use his telephone camera when Surian pushed him, causing him to drop his telephone. Surian told the defendant to "get out of here," and the defendant walked away, crossing the street. The defendant asserted that Surian then released the person in handcuffs, followed the defendant, and placed him under arrest. The defendant claimed he was compliant throughout the incident. He acknowledged that he kicked the door of the cruiser but claimed he did so because Surian closed the door on his legs.

Prior to trial, the defendant filed a motion in limine to exclude his prior convictions of (1) OAS, subsequent offense, (2) possession of a class B substance, and (3) resisting arrest. The judge reserved ruling on the motion until such time as the defendant chose to testify. At that time, the judge made a ruling as to which prior convictions would be admissible to impeach the defendant's credibility. The judge excluded two convictions, possession of a class B substance and resisting arrest, and approved of the admission of the conviction of OAS, subsequent offense.

Discussion. The defendant argues that the judge abused her discretion by permitting the prosecutor to impeach him with his prior conviction. We disagree.

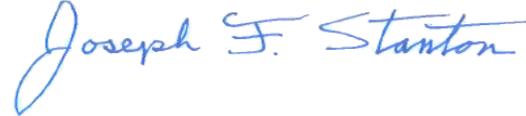
First, the conviction at issue is not similar to the charged offense. Our cases have noted that "[i]t is at least difficult, if not impossible, to show an abuse of discretion in the absence of a 'substantial similarity' between the offenses being tried and the prior convictions." Commonwealth v. Brown, 451 Mass. 200, 203 (2008), quoting Commonwealth v. Drumgold, 423 Mass. 230, 250 (1996). Second, the judge here recognized her discretion and exercised it, excluding two convictions, one of which was for the same crime as one of those charged. See Brown, supra. Lastly, although the defendant's conviction of OAS did not involve untruthfulness, the use of prior convictions to impeach the credibility of a defendant is not limited to convictions for crimes involving dishonesty, false statements, or moral turpitude. See Commonwealth v. Carter, 429 Mass. 266, 268-269 (1999) (declining to adopt rule allowing impeachment only with prior convictions of crimes involving dishonesty, false statements, or moral turpitude). In addition, the judge gave an appropriate limiting instruction in her final charge, reminding the jury of the restricted purpose for which the evidence could be used. See Brown, supra.

Because the defendant's prior conviction of OAS, subsequent offense, was properly admitted in evidence, it was also proper

for the prosecutor to comment on it during her closing argument.  
See Commonwealth v. Cruzado, 480 Mass. 275, 279 n.3 (2018).

Judgments affirmed.

By the Court (Vuono, Meade &  
Blake, JJ.<sup>1</sup>),



Clerk

Entered: November 20, 2020.

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<sup>1</sup> The panelists are listed in order of seniority.