COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-565

COMMONWEALTH

vs.

SOBEIDA PEREZ.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a jury-waived trial, the defendant was found guilty of operating a vehicle while under the influence of intoxicating liquor in violation of G. L. c. 90, § 24 (1) (a) (1). On appeal, she claims that there was insufficient evidence to support her conviction, and accordingly, the judge erred in denying her motion for a required finding of not guilty. We affirm.

Discussion. "When analyzing whether the record evidence is sufficient to support a conviction, an appellate court is not required to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' . . . Rather, the relevant question 'is whether, after viewing the evidence in the light most favorable to the prosecution, 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, 319 (1979)." Commonwealth v. Gallagher, 91 Mass. App. Ct. 385, 392 (2017). When evaluating sufficiency, the evidence must be reviewed with specific reference to the substantive elements of the offense. See Jackson, supra at 324 n.16; Latimore, supra at 677-678. In order to convict the defendant of operating under the influence of intoxicating liquor in violation of G. L. c. 90, § 24 (1) (a) (1), the Commonwealth must "prove that the defendant: (1) operated a vehicle, (2) on a public way, and (3) while under the influence of alcohol." Gallagher, supra. See Commonwealth v. O'Connor, 420 Mass. 630, 631 (1995). The defendant challenges only the first element, claiming that the Commonwealth presented insufficient evidence that she operated the vehicle.[1] We disagree.

A person operates a motor vehicle when she "intentionally does any act or makes use of any mechanical or electrical agency which alone or in sequence will set in motion the motive power of that vehicle." Commonwealth v. McGillivary, 78 Mass. App. Ct. 644, 646 (2011), quoting Commonwealth v. Uski, 263 Mass. 22,

[1] The defendant does not contest the sufficiency of the evidence as to public way, which was conceded at trial, nor does she contest her impairment.

24 (1928). Proof of operation may "rest entirely on circumstantial evidence." Commonwealth v. Cromwell, 56 Mass. App. Ct. 436, 438 (2002). Also, an inference drawn from circumstantial evidence "need only be reasonable and possible; it need not be necessary or inescapable." Commonwealth v. Beckett, 373 Mass. 329, 341 (1977).

Here, while no witness testified directly to the defendant's operation of the vehicle, the circumstantial evidence presented was sufficient to establish the element of operation. See Beckett, 373 Mass. at 341. The Commonwealth provided evidence of the following: (1) the vehicle was in motion when it was involved in a three-car collision; (2) police officers responded within ten to fifteen minutes of the collision and observed the scene; (3) the defendant was inside the vehicle when police arrived; (4) no other individuals were observed in the vehicle; (5) the defendant required assistance from emergency personnel to exit the vehicle because the driver's side was damaged; and (6) the defendant produced her driver's license upon police request. Given this testimony, it was reasonable for the fact finder to infer that the defendant was in fact the operator of the vehicle, as no one other than the defendant was observed inside the car, and emergency personnel assisted a single occupant, the defendant, in exiting the vehicle. See Commonwealth v. Petersen, 67 Mass. App. Ct.

49, 52-53 (2006). See also Cromwell, 56 Mass. App. Ct. at 439-440 (proof that defendant had exclusive opportunity to operate vehicle unnecessary when circumstantial evidence could establish defendant's operation).

The defendant also claims that a potential second occupant could have fled the scene and, in support, relies on cases that involved vehicles with multiple passengers. See Commonwealth v. Shea, 324 Mass. 710, 712 (1949); Commonwealth v. Mullen, 3 Mass. App. Ct. 25, 27 (1975). That the presence of a second individual may give rise to reasonable doubt in some cases does not help the defendant in this case, where all of the evidence suggests she was the sole occupant extricated from the vehicle. See Cromwell, 56 Mass. App. Ct. at 439 (lack of evidence to suggest other driver). Further, whether a person other than the defendant could have committed the crime goes to the weight of the evidence, not its sufficiency. See, e.g., Pinney v. Commonwealth, 479 Mass. 1001, 1004 (2018). In any event, the defendant's claims fail to view the evidence in the light most favorable to the Commonwealth as we are required to do. See Latimore, 378 Mass. at 676-677.

Finally, the defendant points to the absence of specific testimony; namely, any discussion in the record of whether she possessed the keys to the vehicle, and the absence of any evidence of attempted flight, evasiveness, or consciousness of

guilt. However, neither the presence nor absence of such facts is dispositive. See, e.g., Commonwealth v. Beltrandi, 89 Mass. App. Ct. 196, 201-202 (2016) (holding evidence of operation sufficient with no reference to keys, evasiveness, or flight). Therefore, there was sufficient evidence of operation and the judge properly denied the motion for a required finding of not guilty.

Judgment affirmed.

By the Court (Meade, Milkey & Neyman, JJ.[2]),

Joseph F. Stanton

Clerk

Entered: January 27, 2021.

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