

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-1541

COMMONWEALTH

vs.

BRANDOL DELEON.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant, Brandol Deleon, was convicted of operating under the influence of intoxicating liquor (OUI), second offense, in violation of G. L. c. 90, § 24 (1) (a) (1). Prior to trial, the defendant moved to suppress statements, observations, and physical evidence arising from an exit order, contending that the exit order was unlawful. His motion was denied. On appeal, the defendant contends that (1) the motion judge erred in denying his motion to suppress, and (2) the trial judge erroneously instructed the jury creating a substantial risk of a miscarriage of justice. We affirm.

Background. We summarize the facts as found by the motion judge, supplemented by the uncontested facts in the record that are consistent with her findings. Commonwealth v. Jones-Pannell, 472 Mass. 429, 430-431 (2015). On October 21, 2017, at

approximately 10:30 P.M., Officer Matthew Chambers of the Wakefield Police Department observed a motor vehicle turn right at a red light where a sign was displayed "no right on red." Officer Chambers activated his emergency lights and conducted a stop of the vehicle. Once the vehicle was pulled over, Officer Chambers approached the driver, who was later identified as the defendant, and requested his driver's license and the motor vehicle's registration. Instead of handing the officer his license, the defendant gave Officer Chambers his wallet. Officer Chambers again requested only the defendant's license, and the defendant fumbled with his wallet, dropping some money, and eventually produced the license. The defendant also initially failed to produce the vehicle's registration, instead handing Officer Chambers the title to the car. However, when Officer Chambers requested the registration again, the defendant provided it to him without incident.

During this interaction, Officer Chambers observed that the defendant's eyes were bloodshot and glassy, and that his speech was slurred. He further observed a glass jar in the cup holder of the vehicle that contained a substance that the officer believed to be marijuana. Officer Chambers asked the defendant if he had been drinking alcohol that evening, but the defendant responded that he had not. Officer Chambers then returned to his vehicle to check the defendant's information in the Registry

of Motor Vehicles database. While at his vehicle, Officer Chambers realized that he could no longer see the defendant. He approached the defendant's vehicle to investigate, and found the defendant fully reclined, lying flat in the driver's seat. Officer Chambers asked the defendant what he was doing, and when he could not hear the defendant's answer, he leaned inside the vehicle's window and asked again. At this point, Officer Chambers detected a moderate odor of alcohol. In response, Officer Chambers requested the defendant to exit the vehicle but the defendant initially refused. Officer Chambers then reached inside the vehicle, unlocked the door, and the defendant exited.

After the defendant was out of the vehicle, Officer Chambers conducted a series of field sobriety tests. The defendant was inattentive to Officer Chambers's instructions, and, even when reinstructed on the tests, failed to complete them successfully. Officer Chambers formed the opinion that the defendant was under the influence of alcohol, and placed him under arrest for OUI. As noted supra, prior to the defendant's trial, he moved to suppress statements, evidence, and observations made during the field sobriety tests, arguing that Officer Chambers's exit order was unlawful. After the denial of his motion, a jury trial was held on January 3, 2019. The jury convicted the defendant of OUI, and, after waiving his right to

a jury trial on the second offense portion of the charge, the judge found him guilty. This appeal followed.

Discussion. 1. Motion to suppress. "In reviewing a ruling on a motion to suppress, 'we adopt the motion judge's subsidiary findings of fact absent clear error, but we independently determine the correctness of the judge's application of constitutional principles to the facts as found.'" Commonwealth v. Larose, 483 Mass. 323, 326 (2019), quoting Commonwealth v. Buckley, 478 Mass. 861, 864 (2018). The defendant argues that his motion to suppress should have been granted because Officer Chambers unlawfully ordered him to exit his vehicle. He, however, concedes that he was properly stopped.

An exit order issued to a driver or a passenger of a validly stopped vehicle is justified if "(1) police are warranted in the belief that the safety of the officers or others is threatened; (2) police have reasonable suspicion of criminal activity; or (3) police are conducting a search of the vehicle on other grounds." Commonwealth v. Barreto, 483 Mass. 716, 722 (2019). The Commonwealth contends, and the motion judge found, that Officer Chambers possessed reasonable suspicion, based on specific and articulable facts, that the defendant was involved in criminal activity, more specifically,

that he was operating his vehicle while under the influence of alcohol. We agree.

"The standard for reasonable suspicion is an objective one." Commonwealth v. Eckert, 431 Mass. 591, 599 (2000). "[T]he question is whether a reasonable person in the [officer's] position would be justified by some objective manifestation to suspect that the defendant was, or was about to be, engaged in criminal activity." Id., quoting Commonwealth v. King, 389 Mass. 233, 243 (1983). Here, when the defendant was initially stopped, he "bore many of the classic indicia of impairment." Commonwealth v. Jewett, 471 Mass. 624, 636 (2015). His eyes were bloodshot and glassy, his speech was slurred, and he was unable comply with simple requests for his license and registration. Nevertheless, Officer Chambers did not immediately order him out of the vehicle. It was not until Officer Chambers observed the defendant fully reclined in the driver's seat and smelled a moderate odor of alcohol emanating from the defendant that he issued the exit order. Taken together, the defendant's actions, appearance, and odor sufficiently provided Officer Chambers with reasonable suspicion to believe that the defendant was operating his vehicle under the influence of alcohol prior to being stopped. See, e.g., Commonwealth v. Bazinet, 76 Mass. App. Ct. 908, 908-909 (2010) (mere odor of alcohol sufficient reasonable suspicion to detain

operator for investigation at sobriety checkpoint). Because the exit order was justified in these circumstances, the motion to suppress was properly denied.

2. Jury instructions. The defendant next argues that certain statements made by the judge during his preliminary instructions to the jury were erroneous. The defendant did not object to the jury instructions as given, and our review is limited to whether the error, if any, created a substantial risk of a miscarriage of justice. See Commonwealth v. Russell, 439 Mass. 340, 345 (2003). We are confident that there was no such risk.

While instructing the jury about what may be considered as evidence, the judge stated that "any information that is brought before you as a jury has been approved and is relevant to this case. Any information you have . . . has been approved evidence for you to make a decision in this matter." The defendant contends that these statements were erroneous and likely confused the jury because opening statements, closing arguments, and the judge's instructions are all provided to the jury but are not to be treated as evidence. However, the judge's statements must not be viewed in isolation. To determine if the judge's instructions were erroneous, we consider them "as a whole, and not by scrutinizing bits and pieces removed from their context." Commonwealth v. Roy, 464 Mass. 818, 836 (2013),

quoting Commonwealth v. Cundriff, 382 Mass. 137, 153 (1980), cert. denied, 451 U.S. 973 (1981).

In context, the judge made these particular statements after instructing the jurors that, throughout the trial, the attorneys may object to the admission of certain evidence, and when that occurs, sidebar discussions will be held to determine the evidence's admissibility. He cautioned the jury that they were not to attempt to listen to the sidebar discussions and were not to speculate about the content. Furthermore, he stated that, if any objections were sustained or statements stricken, the jury were not to consider that information. Though the language used by the judge does not track with precision the model jury instructions, see Instructions 2.120 & 2.220 of the Criminal Model Jury Instructions For Use in the District Court (2009), a "judge need not use any particular words in instructing the jury as long as the legal concepts are properly described." Commonwealth v. Alleyne, 474 Mass. 771, 785 (2016), quoting Commonwealth v. Robinson, 449 Mass. 1, 8 (2007).

Here, contrary to the defendant's claim, the judge properly instructed the jury, both during the preliminary and final instructions, that opening statements and closing arguments are not evidence. The statements challenged by the defendant were brief and were not repeated during the final charge.

Commonwealth v. Cintron, 438 Mass. 779, 786 (2003) (preliminary

instructions "will be considered along with the judge's final instructions in deciding whether the instructions were correct"). Viewing the instructions in their entirety, we see no error or risk of confusion. Moreover, we have no "serious doubts" that the results of the trial would have been different if these statements were left unsaid. See Commonwealth v. Randolph, 438 Mass. 290, 297 (2002).

Judgment affirmed.

By the Court (Blake,
Desmond & Hand, JJ.¹),



Clerk

Entered: February 22, 2021.

¹ The panelists are listed in order of seniority.