COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-608

COMMONWEALTH

vs.

TRUONGTAM VO.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant was in the back seat of a Toyota Camry when police officers, believing they had witnessed a drug sale between the defendant and the person in the driver's seat, approached and identified themselves. After the officers removed the defendant from the vehicle, they located 9.22 grams of fentanyl in a crease in the back seat, exactly where the officers saw the defendant tucking his hands just before they intervened. A Superior Court jury convicted the defendant of a single count of possession of fentanyl with intent to distribute, in violation of G. L. c. 94C, § 32A (b). In this appeal, the defendant argues that: (1) the trial judge erred in admitting certain of the defendant's text messages from the period preceding the incident; and (2) there was insufficient evidence to support the conviction. We affirm.

Prior bad acts. At trial the defendant moved in limine to exclude evidence of calls or text messages from cellular telephones found in his possession at the time of his arrest. The judge denied the motion, but limited the timeframe for such evidence to the two months preceding the incident; the Commonwealth subsequently introduced a number of text messages from that period. Some messages were between the defendant and his counterparty to the drug deal at issue; others were between the defendant and third parties; all, according to the Commonwealth, demonstrated the defendant's intent to engage in an ongoing scheme of drug distribution.

The decision to admit evidence of prior bad acts is "committed to the sound discretion of the trial judge and will not be disturbed by a reviewing court absent 'palpable error.'" Commonwealth v. McCowen, 458 Mass. 461, 478 (2010), quoting Commonwealth v. Fordham, 417 Mass. 10, 23 (1994). In general, "[e]vidence of a defendant's prior or subsequent bad acts is inadmissible for the purpose of demonstrating the defendant's bad character or propensity to commit the crimes charged." Commonwealth v. Crayton, 470 Mass. 228, 249 (2014). Such evidence may nevertheless be admissible to show "'motive, opportunity, intent, preparation, plan, knowledge, identity, or pattern of operation' . . . [provided that the] probative value is [not] outweighed by the risk of unfair prejudice to the

defendant" (emphasis added). Id., quoting Commonwealth v. Walker, 460 Mass. 590, 613 (2011).

The context and content of the text messages reveal a pattern of drug transactions, and they were properly admitted to show the defendant's intent to distribute the fentanyl. All were close in time to the defendant's arrest. See Commonwealth v. Gollman, 436 Mass. 111, 115 (2002) (evidence of drug sales from six and ten weeks prior admissible to show intent). As explained by the Commonwealth's expert witness, many of the messages involve customers requesting to meet with the defendant to purchase drugs, discussing payment, or inquiring about availability.[1] A number refer to "brown" or "coffee," which, according to the expert, refers to a brown drug like fentanyl. "The similarities between the circumstances of the defendant's prior conduct of drug dealing and the circumstances at the time of his arrest were significant and tended to evince his intent to distribute the [drugs] in his possession at that time, and also to rebut the inference that the defendant possessed the

[1] The defendant concedes that police officers may provide expert testimony in drug cases, see Gollman, 436 Mass. at 115, but argues that here the expert's testimony should not have been admitted inasmuch as it pertained to improperly admitted bad acts evidence. As we find that the text messages were properly admitted, it was not error to also admit the expert's testimony, which was within his area of expertise, probative of the question of the defendant's intent to distribute, and properly placed in context by jury instructions.

[drugs] for his own personal use." Id. at 114. The great probative value of the text messages outweighed any possible prejudice, particularly given the specific jury instructions on the limited use of the evidence.[2] There was no error in admitting them. See id. at 115.

Sufficiency of the evidence. The defendant also contends that there was insufficient evidence before the jury to establish either his possession of the fentanyl or his intent to distribute it. See Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). As to intent, when viewed in the light most favorable to the Commonwealth, the properly admitted text messages provided ample evidence for the jury to have permissibly concluded that the defendant intended to distribute the drugs, especially given the expert testimony that the amount of fentanyl recovered was more consistent with distribution than personal use. See Commonwealth v. Little, 453 Mass. 766, 769 (2009); Commonwealth v. Roman, 414 Mass. 642, 645 (1993).

As to possession, the defendant's principal argument is that the evidence allowed for the possibility that he had not yet completed his purchase. The argument fails for two reasons.

[2] The judge instructed the jury that they were not to consider the text messages as propensity evidence, only as evidence of the defendant's intent to distribute. She gave such instructions both immediately before the evidence was shown to the jury and again in the final charge.

First, it does not view the evidence in the light most favorable to the Commonwealth. See Latimore, 378 Mass. at 677. Second, even if we accepted the defendant's assertion that he had not completed his purchase of the drugs (because he had not paid for them), that fact would be immaterial; viewed in the light most favorable to the Commonwealth, a rational jury could conclude that the defendant had actual possession of the drugs. See Commonwealth v. Fernandez, 48 Mass. App. Ct. 530, 533 (2000) (finding sufficient evidence of possession of drugs notwithstanding interrupted transaction). The officers saw the defendant tucking his hands into the back seat of the car. Moments later the officers discovered 9.22 grams of fentanyl in that same location. Viewed in the light most favorable to the Commonwealth, a rational jury could infer that the defendant's movement tucking something into the back seat, observed by the officers, was his placement of the drugs in that location and that, accordingly, he had actual physical possession of the drugs at that time. See Commonwealth v. Sann Than, 442 Mass. 748, 751 (2004) (evidence of possession of gun found under passenger seat sufficient when officers witnessed defendant move hands toward that area immediately beforehand). When viewed in

the light most favorable to the Commonwealth, the record readily permitted the jury to conclude that the defendant had actual possession of the fentanyl.

Judgment affirmed.

By the Court (Green, C.J., Vuono & Henry, JJ.[3]),

Joseph F. Stanton

Clerk

Entered: May 3, 2021.

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