

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-1523

COMMONWEALTH

vs.

DEVANTE R. ROGERS, JR.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant, Devante R. Rogers, Jr., appeals from his conviction after a District Court jury trial of unlawful possession of ammunition, G. L. c. 269, § 10 (h) (1). Concluding that the judge acted within his discretion in admitting surveillance video footage and denying the defendant's motion for a mistrial, we affirm.

1. Authentication of parking lot videos. "The requirement of authentication calls for the trial judge to make a threshold determination that 'there is evidence sufficient, if believed, to convince the jury by a preponderance of the evidence that the item in question is what the proponent claims it to be.'" Commonwealth v. Connolly, 91 Mass. App. Ct. 580, 586 (2017), quoting Commonwealth v. Purdy, 459 Mass. 442, 447 (2011). Accord Mass. G. Evid. § 901 (2021). "If so, the evidence should

be admitted, if it is otherwise admissible." Commonwealth v. Chin, 97 Mass. App. Ct. 188, 202 (2020), quoting Purdy, supra. This requirement is "a condition precedent to admissibility." Chin, supra, quoting Purdy, supra. "Authenticity can be established through 'testimony of a witness either "(1) that the thing is what its proponent represents it to be, or (2) that circumstances exist which imply that the thing is what its proponent represents it to be.'" Connolly, supra, quoting Commonwealth v. Williams, 456 Mass. 857, 868 (2010).

In the case of a video recording, authentication would "typically be done through one of two means -- having an eyewitness testify that the video is a fair and accurate representation of what he saw on the day in question, or having someone testify about the surveillance procedures and the methods used to store and reproduce the video material." Connolly, 91 Mass. App. Ct. at 586. "In addition, '[e]vidence may be authenticated by circumstantial evidence alone, including its "[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics.'" Commonwealth v. Davis, 487 Mass. 448, 466 (2021), quoting Commonwealth v. Siny Van Tran, 460 Mass. 535, 546 (2011). See Mass. G. Evid. § 901(b)(4). Here, the parking lot videos were properly authenticated by circumstantial evidence.

The owner of the parking lot and building where the incident took place testified that he had knowledge of the surveillance cameras next door, he identified the locations that the videos depicted, and he stated that he knew the videos were taken from those surveillance cameras because "the only place you could put this camera and get this view is right next door." Moreover, circumstantial evidence established that the parking lot videos were recorded on January 21, 2018, around the time the incident took place. Two videos from a nearby school (the authenticity of which is not challenged), which were date and time stamped, showed the defendant and other individuals at the school on the date of the incident from approximately 2:00 P.M., inside of the school, to about 2:35 P.M., walking away from the school and towards the location of the reported shots fired. In the school videos, the defendant can be seen wearing a black sweatshirt with a white Nike logo on it, black pants, and black and white shoes. In the parking lot videos, the defendant and the other individuals who were also with him in the school video can be seen, significantly, wearing what appears to be the same clothing that they were wearing in the school video. The school is approximately one hundred to one hundred fifty yards away from where the incident took place, less than a five minute walk away. The reported dispatch of shots fired was at approximately 2:49 P.M. In one of the parking lot videos, the defendant can

be seen bending down to pick something up in the area where the live rounds were discovered. "Thus, the circumstantial evidence was sufficient to enable a reasonable jury to find that the video was what it purported to be." Davis, 487 Mass. at 467.<sup>1</sup> See Commonwealth v. Rogers, 459 Mass. 249, 268, cert. denied, 565 U.S. 1080 (2011) (digital video recording comprised of still photographs properly admitted where authenticated by officer who created it and judge conducted voir dire before making her decision to admit video); Chin, 97 Mass. App. Ct. at 202-204, nn.12, 13 (where maintenance director of property testified that recording of property accurately depicted areas as he knew them to be, sergeant detective confirmed that time and date stamps were accurate on property video, detective testified that footage from nearby businesses fairly and accurately represented what could have been seen from various cameras, despite some time stamps on cameras being off, and defendant's distinctive car was visible in videos heading in direction that it "would have to have traveled" on relevant date, no abuse of discretion in admission of compilation video). The judge acted within his discretion in admitting the parking lot videos.

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<sup>1</sup> "[G]iven the substantial other circumstantial evidence, a time stamp was not necessary to authenticate the [parking lot] video[s]." Davis, 487 Mass. at 467 n.23.

2. Motion for mistrial. "The denial of a motion for mistrial is reviewed for abuse of discretion." Commonwealth v. Santana, 477 Mass. 610, 625 (2017).

"A trial judge retains broad discretion in deciding whether to declare a mistrial, and this court should defer to that judge's determination of whether [there was] prejudicial error, how much any such error infected the trial, and whether it was possible to correct that error through instruction to the jury."

Commonwealth v. Amran, 471 Mass. 354, 359 (2015), quoting Commonwealth v. Thomas, 429 Mass. 146, 157 (1999). "A trial judge is in the best position to determine whether a mistrial, an extreme measure available to a trial judge to address error, is necessary, or whether a less drastic measure, such as a curative instruction, is adequate." Amran, supra at 360. "When a jury have been exposed to inadmissible evidence, the judge may rely on a curative instruction to 'correct any error and to remedy any prejudice.'" Commonwealth v. Durand, 475 Mass. 657, 668 (2016), cert. denied, 138 S. Ct. 259 (2017), quoting Commonwealth v. Kilburn, 426 Mass. 31, 38 (1997), S.C., 438 Mass. 356 (2003). "As long as the judge's instructions are prompt and the jury do not again hear the inadmissible evidence . . . a mistrial is unnecessary." Durand, supra, quoting Commonwealth v. Garrey, 436 Mass. 422, 435 (2002).

Here, placed on a photograph taken by the detective depicting a bullet found at the crime scene, was a sticky note

that stated, "Devante Rogers bullet!"<sup>2</sup> When defense counsel noticed the sticky note, some time after the photographs were published to the jury without objection, she brought it to the judge's attention and moved for a mistrial. After determining that five of the six jurors had seen the sticky note, the trial judge gave a curative instruction to the jurors:

"Okay. This goes to all the jurors. I am going to inform you that during the trial you all viewed a stack of photos that depicted what is alleged to have been either spent casings or what is alleged to be bullets connected to this case.

"I am instructing you that on one of the photos there was a yellow sticky. You are to totally disregard that sticky. You are not to discuss it or . . . use it in your deliberations or discuss it at all during deliberations. That was inadvertently left. It may have been left on there just to identify this particular case and this particular file. It was mistakenly left on. It should have been removed.

"I am instructing you not to even discuss that or use that in your deliberations whatsoever. It has nothing to do with whether or not the Defendant is guilty or innocent of these charges. You alone are the judges of the facts. You are going to have to decide based on all the testimony and exhibits you have whether or not the District Attorney's office has met their burden. . . .

"And I am going to remind you again that the Defendant is presumed innocent and you must now presume the Defendant innocent of all charges. He doesn't have to say anything, do anything, present any evidence whatsoever for the burden of proof is on the District Attorney's office . . . . I just wanted to inform you at this stage that the sticky that was on the photographs are to be totally disregarded at this stage. Does everyone understand that? They appear to be saying yes."

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<sup>2</sup> This photograph was published to the jury along with thirty-seven other photographs taken by the detective during the investigation.

It was, as the Commonwealth properly concedes, error to publish the photograph to the jury with the sticky note on it. Despite the error, the trial judge acted within his discretion in determining that the prejudice could be cured by his instructions. The jury were fully aware that the Commonwealth's position was that this was the defendant's bullet -- he was charged with unlawful possession of ammunition in the complaint and the prosecutor stated as much in his opening.<sup>3</sup> The judge's instructions were forceful and specific.<sup>4</sup> "We shall not assume that jurors will slight strong and precise instructions of the trial judge to disregard the matters which have been withdrawn from their consideration." Commonwealth v. Thad T., 59 Mass. App. Ct. 497, 508 (2003), quoting Commonwealth v. Gordon, 356 Mass. 598, 604 (1970). "Where the judge promptly struck the improper [evidence] and gave a highly specific curative instruction, the judge acted appropriately and within [his]

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<sup>3</sup> The prosecutor stated, "The person who held that gun, who fired that gun . . . is in the room with us today. He is sitting right there. That's your shooter." The prosecutor also stated,

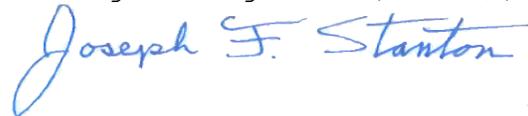
"[Y]ou'll learn that the exact or general location where the Defendant picked up that ammo clip is precisely where the police found the two live rounds of ammunition. You'll see that no one else in the video goes to that location, . . . no one else in the video has anything in their hands."

<sup>4</sup> The judge also instructed the jury, "Some things that occurred during this trial are not evidence and you may not consider them as evidence in deciding the facts of this case."

discretion." Amran, 471 Mass. at 360 (where medical examiner improperly testified that cause of death of victim was "homicidal violence," and judge gave precise instruction to disregard and struck improper testimony, "no reason to conclude" jury did not follow instruction).

Judgment affirmed.

By the Court (Ditkoff,  
Singh & Englander, JJ.<sup>5</sup>),



Clerk

Entered: June 10, 2021.

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<sup>5</sup> The panelists are listed in order of seniority.