

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-1836

COMMONWEALTH

vs.

AARON BAILEY.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a jury trial in the Superior Court, the defendant, Aaron Bailey, was convicted of leaving the scene after causing injury to another vehicle or property in violation of G. L. c. 90, § 24 (2) (a).¹ On appeal, the defendant challenges the sufficiency of the evidence as to both of the motor vehicle accidents specified in the single indictment charging the offense, the trial judge's failure to give a specific unanimity instruction, and the admission of the full contents of a "turret tape," consisting of recordings of police

¹ The defendant raises no argument as to his other conviction of negligent operation of a motor vehicle, and we therefore affirm that judgment without further discussion. See G. L. c. 90, § 24 (2) (a). The defendant also was acquitted of unlawful possession of a firearm, subsequent offense, carrying a loaded firearm, and unlawful possession of ammunition arising out of the same incident.

radio transmissions on the night of the incident. Because we conclude that the jury heard insufficient evidence to support a conviction as to either accident, we reverse.

Background. a. Facts. We summarize the trial evidence in the light most favorable to the Commonwealth, reserving certain details for our later discussion.² See Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979). While on patrol at approximately 10:45 P.M. on November 11, 2018, two Boston police officers observed a Volvo with an expired registration sticker and, after running an inquiry of the license plate number, learned that the plate was registered to a different vehicle. The officers then effectuated a traffic stop by pulling behind the Volvo as it was stopped at a red light and activating the cruiser's lights and sirens. They observed that the Volvo had only one occupant, later identified as the defendant. As the officers stepped out of their vehicle and approached the Volvo, the Volvo took a right turn and abruptly sped off. A Boston police sergeant happened to be in the area and observed the incident. He activated the lights and sirens on his unmarked cruiser and pursued the Volvo. The other two officers returned to their vehicle and joined the pursuit.

² We do not discuss much of the evidence concerning the firearms-related charges of which the defendant was acquitted as it is irrelevant to our analysis.

A chase ensued for approximately three to five minutes, during which the officers followed the Volvo at a speed of fifty miles per hour, well over the twenty-five mile per hour speed limit. In addition to speeding, the Volvo weaved in and out of traffic, repeatedly crossed the marked lines into oncoming traffic, and ignored traffic signals. While traveling on Quincy Street near Bellevue Street, all three officers observed the Volvo strike the front bumper of a Honda Accord as it crossed into opposing traffic.³ The Volvo did not slow down, but instead sped away, swerving left and right to evade the police.

Thereafter, the officers lost sight of the Volvo for a few seconds as it took a turn onto Bowdoin Street. They continued to follow its path and discovered the Volvo stopped in the middle of the road in front of 15 Adams Street. By that time, the front fender of the Volvo was heavily damaged, one of the axles was destroyed, and the front end of the vehicle was "pretty much on the ground," rendering it inoperable. Debris from the bumper was on the street. The police later observed an Acura that was parked in front of 5 Adams Street, approximately three to four vehicles away from the Volvo. The Acura had damage to the left front fender and a headlight, as well as

³ Although not material to our analysis, testimony differed as to the direction that the Honda Accord was traveling at the time it was hit by the Volvo.

scratch marks. Given where the Acura was parked and the Volvo's direction of travel, the damage on the Volvo corresponded to the damage on the Acura.

As the officers approached the Volvo on foot, they observed the defendant inside. The defendant indicated that he could not open the driver's side door. The officers entered the Volvo through the passenger side door. At the same time, the sergeant reached through the partially open driver's side window and unlocked the driver's side door. Given the significant damage to the door, he was only able to open the door about twelve inches before it slammed shut. After exerting "a lot more force," the sergeant was able to open the door past the point where it was stuck.

Once inside the Volvo, the police gained control of the defendant's hands, removed him from the vehicle, handcuffed him, placed him under arrest, put him in one of the cruisers, and transported him from the scene. The officers then arranged for the Volvo to be towed. As the Volvo was being pulled on to the flatbed tow truck, the tow truck driver alerted the police to a firearm on the ground under the Volvo near the driver's side door.

b. Admission of turret tape. During the trial, defense counsel played for one of the officers, who was the Commonwealth's first witness, several segments of the turret

tape containing the officer's radio transmissions during the incident. The turret tape was then entered into evidence as an exhibit at the request of defense counsel and without objection from the prosecutor. The actual exhibit was a compact disc (CD) that contained approximately three hours of recordings.

After the prosecutor played different segments of the turret tape during redirect, it became evident that there was a miscommunication about the exhibit. The judge and the prosecutor understood that the entire CD was in evidence. However, defense counsel explained his intention was only to introduce the specific segments that he played during cross-examination such that he could still object if the prosecutor sought to use different segments.

Over the course of the next day, the judge encouraged the parties to reach an agreement on how to handle the exhibit and sought to pinpoint the basis of defense counsel's concern about admission of the other segments on the turret tape. The prosecutor requested that the judge simply instruct the jury that the relevant timeframe for the recordings spanned one hour, from the time of the first segment played by defense counsel until the last segment pertaining to the discovery of the gun. Defense counsel agreed that the one-hour timeframe was "the relevant portion," but also explained that some segments within that timeframe pertained to wholly unrelated incidents, some

segments contained hearsay that did not fall under any exception, and one segment involved a discussion with the officer about the vehicle struck near Bellevue Street. After the judge noted the evidence was uncontroverted that the Volvo struck two vehicles, defense counsel confirmed that he would not offer evidence to the contrary but did not "want to give anything extra to the Commonwealth."

Ultimately, the judge ruled that the exhibit was offered without objection and the CD was submitted to the jury with instructions on how to listen to it in the jury room. The instructions specified the one-hour timeframe, and indicated "the recording bars contained in that span . . . have been designated by the parties as in reference to this case."

Discussion. The defendant argues that his conviction must be reversed because the Commonwealth failed to present sufficient evidence that he committed the offense of leaving the scene after causing injury to another vehicle or property with respect to either the Bellevue Street or the Adams Street accident. He also argues that the admission of the full turret tape was error, and where the indictment charged the defendant with leaving the scene of both the Bellevue and the Adams Street accidents, the failure to give a specific unanimity instruction on the charge created a substantial risk of a miscarriage of justice that the jury did not reach an unanimous verdict.

Because we conclude that the Commonwealth failed to set forth sufficient evidence to prove all the elements of the offense with respect to either accident, we need not reach the defendant's remaining arguments.

We review the denial of a motion for a required finding of not guilty under the Latimore standard, "viewing the evidence in the light most favorable to the Commonwealth and ask[ing] whether the evidence and inferences reasonably drawn therefrom were 'sufficient to persuade a rational jury beyond a reasonable doubt of the existence of every element of the crime charged.'" Commonwealth v. DeJesus, 99 Mass. App. Ct. 275, 282 (2021), quoting Commonwealth v. Squires, 476 Mass. 703, 708 (2017).

"To prove the charge of leaving the scene of an accident, the Commonwealth must prove beyond a reasonable doubt that (1) the defendant operated a motor vehicle . . . ([2]) and collided with or caused injury in some other way to another vehicle or to property; ([3]) the defendant knew that he had collided with or caused injury in some other way to that other vehicle or property; and ([4]) after such collision or injury, the defendant did not stop and make known his name, address, and the registration number of his motor vehicle."

Commonwealth v. Platt, 440 Mass. 396, 400 n.5 (2003), abrogated by Commonwealth v. LeBlanc, 475 Mass. 820, 824-825 (2016) (no requirement that accident causing damage occurred on public way). To sustain a conviction for this offense, the Commonwealth must prove that the accident did, in fact, cause property damage. See Commonwealth v. Velasquez, 76 Mass. App.

Ct. 697, 701 (2010). We address the sufficiency as to each accident identified in the indictment in turn.

a. Bellevue Street accident. The officers testified that the defendant's vehicle "cut . . . off" or "swerved around" a Honda Accord and "struck" or "hit" the Honda's front bumper without stopping to exchange information with the driver. Based on this, a rational juror could find that the defendant's car came into contact with the Honda's bumper. However, none of the witnesses testified as to any damage sustained by the Honda, and no pictures of the vehicle were submitted in evidence. Thus, the case before us is similar to Velasquez, in which we concluded that the evidence that the defendant's car had damaged a telephone pole was insufficient, even though the car had crashed into the pole and its hood had been dented three to four inches. Velasquez, 76 Mass. App. Ct. at 701. The Commonwealth nonetheless argues that the jury could have inferred that the Honda suffered some damage based on the speed with which the defendant's car was travelling at the time. See id. ("It is of course conceivable that in some cases, the nature of the collision might alone suffice to support a rational inference that damage inevitably resulted, as perhaps . . . where the evidence of the collision itself reveals that it occurred at a high rate of speed"). The Commonwealth also points to some

statements on the turret tape that could be taken to suggest that the Honda suffered some damage.⁴

Even if we were to determine that there was sufficient evidence for the jury to conclude that the Honda had suffered some damage from the defendant's car, in light of the absence of evidence about the extent of any such damage, or of other circumstantial proof that the defendant saw, heard, or felt a collision, there still would have been insufficient evidence that the defendant was aware that he had collided with or damaged the Honda. Contrast Commonwealth v. Nutbrown, 81 Mass. App. Ct. 773, 774 n.2 (2012) (sufficient evidence of damage where witness heard "loud bang," saw vehicle against guardrail, and guardrail was pulled from base and out of ground). See generally Latimore, 378 Mass. at 677-678 ("it is not enough for the appellate court to find that there was some record evidence, however slight, to support each essential element of the offense; it must find that there was enough evidence that could

⁴ For example, on one portion of the tape, an unidentified officer stated, "Okay, . . . that Bellevue Street car, that's going to be related to this. The suspect's vehicle did damage that other car So, it's the suspect's vehicle, and we're going to have one other damaged vehicle here." As noted, the defendant argues that the turret tape should not have been admitted. However, in analyzing the sufficiency of the evidence, we consider all the evidence that was admitted, "without regard to the propriety of [its] admission." Commonwealth v. Sepheus, 468 Mass. 160, 164 (2014), quoting Commonwealth v. Farnsworth, 76 Mass. App. Ct. 87, 98 (2010).

have satisfied a rational trier of fact of each such element beyond a reasonable doubt"). Cf. Instruction 5.180 of the Criminal Model Jury Instructions for Use in the District Court (2017) ("The extent of the damage is not relevant except to the extent that it may be circumstantial evidence of whether or not the defendant knew that there had been a collision").

b. Adams Street accident. Based on the evidence at trial, a reasonable inference could be drawn that the defendant struck and damaged the Acura parked on Adams Street. We consider then the Commonwealth's evidence to prove that after the collision, "the defendant did not stop and make known his name, address, and the registration number of his motor vehicle." Platt, 440 Mass. at 400 n.5.

Here, insufficient evidence was presented to support a rational inference that the defendant did not stop and that he did not provide the required information. The defendant's vehicle stopped on the same block as the Acura, "three or four cars away." When the police gained sight of the defendant's vehicle a few seconds after the accident, the defendant was still inside and, other than stating that the door to the vehicle was stuck, no evidence was presented that he attempted to get out of the vehicle or otherwise flee. The police promptly approached the vehicle and removed the defendant from it close in time to the accident and in close in proximity to

the Acura. When the defendant did eventually leave the accident scene, it was not by his own volition as he was placed under arrest and escorted from the scene in a cruiser. Moreover, three citations for various motor vehicle and traffic infractions written by one of the officers involved in the chase that same evening indicated the defendant's name, residence, and the vehicle registration number.⁵ Given that the defendant hit a parked vehicle and no evidence was presented that the owner of the vehicle was nearby, the defendant's statutory obligation was satisfied where this information was made known to the police at the scene.⁶ See Commonwealth v. Porro, 74 Mass. App. Ct. 676, 680 (2009), S.C. 458 Mass. 526 (2010), quoting Commonwealth v. Horsfall, 213 Mass. 232, 236 (1913) ("information must be provided to the victim, someone acting on the victim's behalf, a public officer, or another appropriate person 'at or near the place and time of injury'"). Cf. Commonwealth v. Donohue, 41 Mass. App. Ct. 91, 94 (1996) (where victim is dead or unconscious as result of accident, statute satisfied if

⁵ Testimony was presented that the Volvo was not registered and the defendant was cited for, among other things, operating an unregistered motor vehicle. However, a vehicle registration number is listed on the citations.

⁶ While the statute "is not satisfied by . . . a mere passive willingness to answer inquiries," no evidence was presented that the defendant failed to meet his affirmative obligation to provide the requisite information to the police at the scene of the Adams Street accident. Commonwealth v. Horsfall, 213 Mass. 232, 236 (1913).

defendant "stayed at the scene and provided the necessary information to any motorist or police officer who subsequently arrived at the scene or if she left to find a telephone and immediately called the police and gave the necessary information").

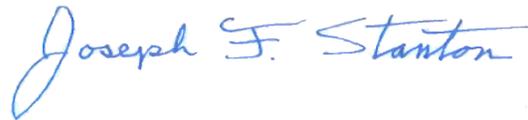
In reaching this conclusion, we reject the Commonwealth's argument that the defendant's prior flight from the police, coupled with the Volvo's short distance from the Acura and the impossibility of further flight due to the damage to the defendant's vehicle, is sufficient evidence of his failure to stop. At most, the evidence merely invites speculation that the defendant may have fled the scene if his vehicle was not damaged, but is insufficient to persuade a rational jury beyond a reasonable doubt of the existence of this element of the offense. Contrast Commonwealth v. Henderson, 89 Mass. App. Ct. 205, 206 (2016) (defendant left scene of accident when he "got out of the car, stumbled, . . . tried to run across the street[, and] ran for approximately twenty feet before he was apprehended by police"); Porro, 74 Mass. App. Ct. at 680 (jury to decide whether defendant left scene of accident when he did not stop at or near place and time of collision "after he heard 'incredibly loud, short crack' and then drove less than a mile away").

Conclusion. On the charge of negligent operation of a motor vehicle, the judgment is affirmed. On the charge of

leaving the scene after causing injury to another vehicle or property, the judgment is reversed, the verdict is set aside, and judgment shall enter for the defendant.

So ordered.

By the Court (Milkey,
Lemire & Singh, JJ.⁷),



Clerk

Entered: July 19, 2021.

⁷ The panelists are listed in order of seniority.