

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

20-P-666

COMMONWEALTH

vs.

EDWARD DELOSSANTOS.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant, Edward Delossantos, appeals from his conviction by a jury of possession of cocaine with intent to distribute.¹ See G. L. c. 94C, § 32A (c). The defendant contends that there was insufficient evidence of his intent to distribute the drugs and that improper profile and opinion evidence, given by the Commonwealth's expert witness, created a substantial risk of a miscarriage of justice. We affirm.

Background. On the night in question, a Northeastern University police officer was driving home from work when he heard "four to six distinct gunshots" from behind him. Looking in the direction of the gunshots, he saw two men running. Once

¹ The defendant was acquitted of various firearm-related charges that stemmed from the same incident that gave rise to the drug charge.

they passed his vehicle, the officer followed. After turning onto a side street, the officer got out of his vehicle and saw the men standing nearby. One of the men, later identified as the defendant, "appeared like he was in pain" and told the officer that "[t]hey shot my nuts off." The defendant was transported to Boston Medical Center for treatment, where, during an initial examination in the emergency room, "a bag of white rocks" fell from his groin area. The bag contained thirteen smaller bags, each knotted in the corner; a chemist later analyzed the contents of four of the thirteen bags and determined that they contained cocaine.

Discussion. 1. Sufficiency of the evidence. The defendant claims that there was insufficient evidence of his intent to distribute, as opposed to his possession for personal use. On appeal, we ask "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" (citation omitted). Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). "A defendant's intent to distribute a controlled substance is a matter of fact, which may not be susceptible of proof by direct evidence" (quotations and citation omitted). Commonwealth v. Sepheus, 468 Mass. 160, 164 (2014). In reviewing the sufficiency of the evidence, we bear in mind that guilt may be established by circumstantial evidence

"and that the inferences a jury may draw from the evidence 'need only be reasonable and possible and need not be necessary or inescapable.'" Commonwealth v. Linton, 456 Mass. 534, 544 (2010), quoting Commonwealth v. Lao, 443 Mass. 770, 779 (2005).

The thrust of the defendant's argument is that the evidence of his possession of less than three grams of cocaine was insufficient to satisfy the Commonwealth's burden of proving that he possessed the cocaine with the intent to distribute it. See Commonwealth v. Acosta, 81 Mass. App. Ct. 836, 841 (2012) (evidence such as drug paraphernalia, currency, or distinctive packaging, for example, may indicate intent to distribute). This position takes too narrow a view of the evidence. See Commonwealth v. Gonzales, 33 Mass. App. Ct. 728, 731 (1992) ("The fact that the amount of drugs seized was small does not, by itself, require a finding of not guilty to so much of the indictment as states 'intent to distribute'").

The uncontroverted evidence was that the defendant possessed thirteen individual bags of cocaine of different sizes, packaged together in one larger bag and hidden in his groin area. See Commonwealth v. Lobo, 82 Mass. App. Ct. 803, 806, 811 (2012) (hiding cocaine in "crotch area" more consistent with distribution than with personal use). The four bags analyzed by the chemist contained relatively small amounts of

cocaine.² Expert testimony, from a Boston police detective and member of the drug control unit, was that drug dealers often package "crack" cocaine "in as small as \$5 bags, but primarily [in] \$10 bags, \$20 bags, [and] \$50 bags." When the prosecutor asked whether the expert had seen drug dealers carry quantities of narcotics in the range of that carried by the defendant, the expert said, "Yes, I have," and that dealers "carry a number of different quantities." See Acosta, 81 Mass. App. Ct. at 842, quoting Commonwealth v. MacDonald, 459 Mass. 148, 162 (2011) ("A qualified narcotics expert is permitted to offer an opinion based upon a hypothetical 'grounded in facts in evidence'"). Coupled with the expert's assertion that he had never seen a drug user buy that many individual bags of "crack" cocaine, which the jury were entitled to credit, see Commonwealth v. Miranda, 458 Mass. 100, 113 (2010), this testimony provided sufficient evidence to support the inference that the defendant possessed the drugs with the intent to distribute.

2. Improper expert testimony. The defendant argues that certain portions of the expert's testimony constituted impermissible profile evidence. "Profile evidence focuses on the characteristics of criminals, while proper expert testimony focuses on the characteristics of crimes." Commonwealth v.

² For example, three of the bags contained .05, .21, and .42 grams, respectively.

Barrett, 97 Mass. App. Ct. 437, 444 (2020). Profile evidence is inadmissible because it "is an attempt to convince the jury to determine a defendant's guilt by comparing him or her to stereotypes rather than by individualized adjudication." Id., quoting Commonwealth v. Horne, 476 Mass. 222, 228 (2017).

The now-challenged testimony described what quantity of drugs carried on a person and what nature of packaging would be indicative of an intent to distribute. The expert (who had not been involved in the investigation) explained that, in his experience, a person selling illegal drugs might carry multiple bags of varying weights, in order to be able to "access [the amount requested] real quick." This testimony, provided to explain the nature of street-level drug sales, was "beyond the ken of the jurors and appropriately explanatory." Commonwealth v. Smith, 92 Mass. App. Ct. 417, 424 (2017), quoting Commonwealth v. Bienvenu, 63 Mass. App. Ct. 632, 636-637 (2005). The expert also explained that, conversely, drug users typically purchase only a single "dosage unit" at a time. This testimony was not the sort of evidence that presents physical or character traits, stereotypical of drug users, in order to show that the defendant did or did not fit that profile.³ Compare Smith, supra at 420, 423 (testimony that buyers purchase in "bulk" when

³ Deciding as we do, it follows that no error resulted from the mention of this testimony in the prosecutor's closing argument.

seeking larger quantities properly described how drug transaction occur), with Commonwealth v. Johnson, 76 Mass. App. Ct. 80, 85 (2010), S.C., 461 Mass. 1012 (2012) (testimony that drug users spend all their funds on their "need to get high" impermissibly went to expected characteristics of addicts). Rather, the testimony was about the characteristics of the crime the defendant was plainly committing (possession of cocaine), and whether it included an intent to distribute -- not the characteristics of the defendant himself. See Barrett, 97 Mass. App. Ct. at 444.

The defendant further contends that the expert, in response to a hypothetical question posed by the prosecutor, directly expressed his view on the defendant's guilt. Although the testimony did not use the "talismatic 'consistent with' locution," we perceive no error. Commonwealth v. Tanner, 45 Mass. App. Ct. 576, 580 (1998). Indeed, the expert's answer essentially repeated his prior testimony that he believed possession of thirteen individual bags of cocaine, portioned out in various different weights and concealed in the groin area, to be indicative of an intent to distribute. See Commonwealth v. Madera, 76 Mass. App. Ct. 154, 163 (2010) ("[W]hile not in approved form and improper in isolation, [the response] merely built upon and summarized the expert's preceding opinion"). Particularly given the judge's instructions to the jury on their

role in evaluating expert testimony, there was no error. Moreover, even if there had been error in the prosecutor's use of the expert's testimony in closing, it did not create a substantial risk of a miscarriage of justice.

Judgment affirmed.

By the Court (Henry, Sacks, & Singh, JJ.⁴),



Clerk

Entered: September 1, 2021.

⁴ The panelists are listed in order of seniority.