

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-1219

COMMONWEALTH

vs.

GENE A. JACKSON.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a jury trial, the defendant was convicted of breaking and entering in the nighttime with the intent to commit a felony.¹ On appeal, he claims the judge erred in denying his motion to suppress and that she abused her discretion by admitting in evidence a surveillance video recording. We affirm.

1. Motion to suppress. The defendant claims that the judge should have suppressed the showup identification where it was unnecessarily suggestive, and where the police did not follow department policy for conducting showups. We disagree.

"It is the defendant's burden to prove by a preponderance of the evidence that the showup was 'so unnecessarily suggestive

¹ The defendant was acquitted of assault by means of a dangerous weapon and assault and battery.

and conducive to irreparable mistaken identification as to deny [him] due process of law.'" Commonwealth v. Martin, 447 Mass. 274, 279-280 (2006), quoting Commonwealth v. Odware, 429 Mass. 231, 235 (1999). Whether an identification procedure employed in cases involving a showup is "unnecessarily or impermissibly suggestive turns, in large measure, on whether the police had good reason for using a one-on-one identification procedure." Commonwealth v. Wen Chao Ye, 52 Mass. App. Ct. 850, 855 (2001). See Commonwealth v. Austin, 421 Mass. 357, 361-362 (1995). "Factors relevant to this inquiry include 'the nature of the crime involved and corresponding concerns for public safety; the need for efficient police investigation in the immediate aftermath of a crime; and the usefulness of prompt confirmation of the accuracy of investigatory information, which if in error, will release the police quickly to follow another track.'" Commonwealth v. Dew, 478 Mass. 304, 307 (2017), quoting Austin, supra at 362. "'Good reason' exists where some combination of the factors collected in Austin is present." Commonwealth v. Carlson, 92 Mass. App. Ct. 710, 713 (2018). See Odware, supra (judge must examine "totality of the circumstances" to determine whether identification procedure was unnecessarily suggestive [citation omitted]).

Here, approximately five to eight minutes after the breaking and entering had been reported to the police, the

defendant was apprehended less than one-quarter of a mile from the victim's home. The Supreme Judicial Court

"has regularly conclude[d] that there is good reason for a showup identification where an eyewitness is shown a suspect promptly after the commission of the crime. . . . Not only is a prompt identification procedure more likely to be accurate, because the eyewitness's memory is fresh, but also, more importantly, it allows the police to learn quickly whether the suspect is the perpetrator of the crime so that, if he is not, the police can continue the investigation to find the actual perpetrator."

Commonwealth v. Figueroa, 468 Mass. 204, 217 (2014). Moreover, and contrary to the defendant's claim, the crime of breaking and entering does raise public safety concerns. Indeed, it is a felony that is punishable by up to twenty years in State prison. G. L. c. 266, § 16.

The defendant also claims the manner in which the showup was conducted rendered it unnecessarily suggestive. In particular, he claims the police did not follow department policy for conducting showups. As an initial matter, we note that the Supreme Judicial Court has held that showup witnesses are to be instructed prior to the procedure on several factors to reduce the risk of misidentification.² Commonwealth v.

² The instructions are as follows: "You are going to be asked to view a person; the alleged wrongdoer may or may not be the person you are about to view; it is just as important to clear an innocent person from suspicion as it is to identify the wrongdoer; regardless of whether you identify someone, we will continue to investigate; if you identify someone, I will ask you to state, in your own words, how certain you are." Commonwealth v. German, 483 Mass. 553, 564 (2019).

German, 483 Mass. 553, 564-565 (2019). Although the police department policy also requires a witness to sign and date the checklist of warnings, the Supreme Judicial Court has not mandated this additional step. More importantly, the judge expressly credited the officer's testimony that the German instructions were read to the witness, and the witness understood them.³ The motion to suppress was properly denied.⁴

2. Motion in limine. The defendant also claims that the judge abused her discretion by denying his motion in limine, which sought to exclude a video recording of the doorbell

³ Finally, that there were multiple officers present during the showup did not render the identification impermissibly suggestive. The officers were ten to fifteen feet from the defendant, and they were necessary for safety purposes as the defendant had been apprehended after fleeing from officers. See Commonwealth v. Meas, 467 Mass. 434, 442 (2014).

⁴ To the extent the defendant relies on Commonwealth v. Warren, 475 Mass. 530 (2016), to call into question the showup identification, that reliance is misplaced. In Warren, relative to the question of whether reasonable suspicion to justify a stop had been established, the court noted that a Black man's flight from the police in the city of Boston did not by itself support an inference of consciousness of guilt. Id. at 538-540. Here, the showup occurred in the city of Newton, and the defendant's flight from the police played no role in his identification. Similarly, the defendant's oblique reference to his counsel providing ineffective assistance for not developing "a clearer more factual description of how" the defendant came to be held for the showup, is not necessarily relevant to the validity of the showup itself. Furthermore, this claim is being raised for the first time on appeal, without findings from the judge, and it is improperly based on trial testimony. See Commonwealth v. Zinser, 446 Mass. 807, 810-811 (2006); Commonwealth v. Grandison, 433 Mass. 135, 137 (2001). In this posture, we decline to review the claim.

surveillance camera of the victim's neighbor.⁵ The defendant claims the video was neither dated or time stamped nor relevant, and that it constituted prior bad act evidence. We disagree.

We review the judge's ruling on the defendant's motion in limine for an abuse of discretion. See Commonwealth v. Spencer, 465 Mass. 32, 48 (2013) ("Whether proffered evidence is relevant and whether its probative value is substantially outweighed by its prejudicial effect are matters entrusted to the trial judge's broad discretion and are not disturbed absent palpable error" [quotation and citation omitted]). Prior to trial, the defendant moved in limine to exclude the video because it was propensity evidence with no probative value. Although the defendant's counsel admitted that the video would be relevant to identify the defendant as the suspect outside the victim's house, counsel stated that this was not a mistaken identification case, and conceded the defendant had been in an altercation with the victim.

At trial, the terrain of the motion in limine was slightly altered. Counsel continued to maintain that this was not a

⁵ The surveillance video was recorded at approximately 7:00 P.M. on the night of the burglary, from the rear door camera of a house situated near the victim's home. The video depicts a person vaguely matching the defendant's description looking into the witness's house. The male is wearing a black knit hat and orange gloves. A black knit hat and an orange and white gardening glove were later recovered from the victim's driveway where the altercation with the victim took place.

mistaken identification case.⁶ Indeed, the defense at trial was that the defendant acted in self-defense in his altercation with the victim prior to his flight. The judge agreed to exclude the video on the condition that the defendant stipulate to identity. However, the defendant refused to sign the stipulation and judge admitted the video in evidence over the defendant's objection.

"The relevance threshold for the admission of evidence is low" (citation omitted). Commonwealth v. Gerhardt, 477 Mass. 775, 782 (2017). Evidence is generally relevant where "(a) it has any tendency to make a fact more or less probable than it would be without the evidence and (b) the fact is of consequence in determining the action." Mass. G. Evid. § 401 (2021). That is, "it is not necessary that the evidence be conclusive of the issue It is sufficient if the evidence constitutes a link in the chain of proof." Commonwealth v. Lopez, 91 Mass. App. Ct. 572, 576 (2017), quoting Mass. G. Evid. § 401, at 37.

As defense counsel at trial properly conceded, the video was relevant to establishing the defendant's identity. It depicted a man, who was wearing two items of garb which were later found in the victim's driveway, peering into window of a

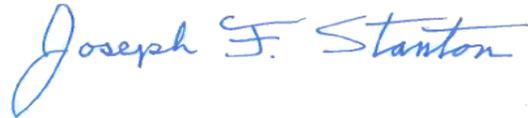
⁶ Despite this, on appeal, the defendant disputes that this is not a misidentification case. See Commonwealth v. Montgomery, 52 Mass. App. Ct. 831, 833 (2001) (theory on which a case is "tried cannot be disregarded when the case comes before an appellate court for review" [citation omitted]).

house, near the site of, and close in time to, the break-in.⁷

This video provided a link in the chain of proof that identified the defendant as the burglar.⁸

Judgment affirmed.

By the Court (Meade, Shin & Walsh, JJ.⁹),



Clerk

Entered: October 18, 2021.

⁷ The lack of a time or date stamp on the video did not render it inadmissible where homeowner testified as to the date and approximate time of the video.

⁸ The defendant's claim that the video revealed a prior bad act is also without merit. Although a prior bad act may be introduced to establish identity, see Commonwealth v. Facella, 478 Mass. 393, 406-407 (2017), the video did not depict a prior bad act. Rather, the video was relevant and contemporaneous corroboration of the defendant's burglary. The defendant claims the evidence was prejudicial, but "[b]y design, all evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided" (citation omitted). Commonwealth v. Kindell, 84 Mass. App. Ct. 183, 188 (2013). Any prejudice caused by the admission of this evidence "flowed directly from [its] properly probative effect to illustrate" the defendant's contemporaneous involvement in the crime. Commonwealth v. Gilman, 89 Mass. App. Ct. 752, 758 (2016). "The prejudice, in other words, was not unfair." Id.

⁹ The panelists are listed in order of seniority.