

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-238

COMMONWEALTH

vs.

MODESTO RIVERA.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a jury trial, the defendant was found guilty of distribution of heroin in violation of G. L. c. 94C, § 32 (a). On appeal, the defendant claims: (1) there was insufficient evidence to support his conviction for distribution of heroin, and (2) the judge committed prejudicial error by allowing the prosecution to recall its witness. We affirm.

1. Sufficiency of the evidence. "When analyzing whether the record evidence is sufficient to support a conviction, an appellate court is not required to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' . . . Rather, the relevant 'question is 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.'

Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)." Commonwealth v. Rocheteau, 74 Mass. App. Ct. 17, 19 (2009). Sufficiency of the evidence must be reviewed with specific reference to the substantive elements of the offense. See Jackson, supra at 324 n.16; Latimore, supra at 677-678. In order to convict the defendant of distribution of a Class A substance, the Commonwealth must prove that the defendant knowingly or intentionally distributed a controlled substance listed in Class A of G. L. c. 94C, § 31. See G. L. c. 94C, § 32 (a).¹

The defendant does not challenge whether the evidence was sufficient to demonstrate the substance recovered by Officer O'Brien was actually heroin.² He only challenges the sufficiency of the evidence for the element of distribution of such controlled substance, more specifically, that the Commonwealth lacked sufficient evidence of an actual hand-to-hand drug transaction involving the defendant. We disagree.

In the light most favorable to the Commonwealth, the defendant was standing on a street corner in Dorchester section of the city of Boston where he made some brief phone calls,

¹ Heroin is defined as a controlled Class A substance. See G. L. c. 94C, § 31 (b) (10).

² The Commonwealth presented expert testimony from a forensic scientist that the substance found in the bag recovered by Officer O'Brien was in fact heroin.

while looking up and down the street. According to the Commonwealth's expert witness, Sergeant Dineen, such scanning the surroundings is indicative of a person awaiting a drug transaction. A car containing two unkempt, and "sickly" occupants, one of whom anxiously looked towards the sidewalk, pulled up past the defendant. The defendant directly approached the car, leaned toward the vehicle's driver window, and after a brief conversation, turned and walked back toward the area where the officers first observed him standing. The defendant's entire encounter with the vehicle lasted only about thirty seconds, which was also consistent with a drug transaction.³ See Commonwealth v. Dancy, 75 Mass. App. Ct. 175, 178 (2009).

Moreover, immediately following the defendant's encounter with the vehicle, Officer Lopez arrested the defendant and searched him, which led to the discovery of three twenty-dollar bills in the defendant's front pocket. The bills were found separated from twenty-six dollars located in the defendant's wallet. According to the Commonwealth's expert, the sixty-dollars was consistent with the value of the "street-level" bag

³ Sergeant Dineen testified that street-level drug transactions in public are often very brief to avoid raising suspicions.

of heroin seized by Officer O'Brien from the driver of the vehicle.⁴

Contrary to the defendant's arguments, the fact that the defendant's conviction of distribution of heroin is based primarily on circumstantial evidence does not render the evidence against him insufficient as matter of law. See Commonwealth v. Alvarado, 93 Mass. App. Ct. 469, 471 (2018). We need not exclude every hypothesis as to why the defendant's behavior would not support his conviction. See id. See also Dancy, 75 Mass. App. Ct. at 179, quoting Commonwealth v. Soto, 45 Mass. App. Ct. 109, 112 (1998) ("The inference that the defendant sold the drugs 'need not be inescapable so long as it is reasonable and possible"). Although no witness specifically testified to observing a hand-to-hand transfer of heroin between the defendant and the driver of the vehicle, the circumstantial evidence presented through the testimony of both Officer O'Brien and Officer Lopez, in concert with the expert testimony of Sergeant Dineen, undoubtedly rendered the evidence sufficient for a jury to rationally conclude that the defendant distributed heroin. See Dancy, 75 Mass. App. Ct. at 178-179. See also Soto, 45 Mass. App. Ct. at 111-112 (sufficient evidence of drug

⁴ Sergeant Dineen estimated that the bag of heroin that was seized from the driver of the vehicle would cost approximately thirty to eighty dollars.

transaction despite lack of hand-to-hand exchange).

Accordingly, the evidence of distribution of heroin was sufficient.

2. Commonwealth's recall of Officer O'Brien. The defendant claims that the judge abused his discretion in permitting the Commonwealth, who had not yet rested, to recall Officer O'Brien to testify that he was the officer who actually recovered the heroin during the encounter. We disagree.

Whether a witness may be recalled in a criminal case is left to the sound discretion of the judge. See Commonwealth v. Forte, 469 Mass. 469, 488 (2014) (abuse of discretion standard for appellate review of trial judge's decision to recall witness). Because the defendant objected to the Commonwealth's recall of Officer O'Brien, we review under a prejudicial error standard. See Commonwealth v. Wardsworth, 482 Mass. 454, 458 (2019). Accordingly, "we review to determine whether there was error and, if so, whether there is a reasonable possibility that the error might have contributed to the jury's verdict, or whether we can be assured that the evidence did not influence the jury or had but very slight effect" (citation and quotation omitted). Id.

The defendant relies upon Commonwealth v. Zavala, 52 Mass. App. Ct. 770, 778-779 (2001), to claim that the judge committed prejudicial error in allowing the Commonwealth to recall Officer

O'Brien, in order to introduce evidence of an essential element of the charged offense. However, the defendant's reliance is misplaced. In Zavala, both parties had rested, and the defendant had made a motion for a required finding of not guilty, prior to the judge allowing the Commonwealth to reopen its case to present additional evidence of guilt. See id. at 777-779. The Commonwealth sought to reopen its case because, at the time of the motion for required finding of not guilty, the evidence was insufficient as matter of law to identify Zavala as the same person who had been previously convicted of narcotic offenses, an essential element of the charged offense. See id. at 778-779. The court held that the judge's decision constituted prejudicial error because allowing the Commonwealth to "repair its case after both sides had rested," would render a defendant's right to file a motion for a required finding of not guilty, pursuant to Mass. R. Crim. P. 25(a), as amended, 420 Mass. 1502 (1995), a nullity. See id. at 779.

Here, unlike in Zavala, the Commonwealth had not yet rested prior to its request to recall Officer O'Brien. Cf. id. at 777-779. Rather, the Commonwealth was still in the process of presenting its case-in-chief. More specifically, the Commonwealth was conducting the direct examination of Officer Lopez, who like Officer O'Brien, observed the drug transaction, and sought to testify to the identification and recovery of the

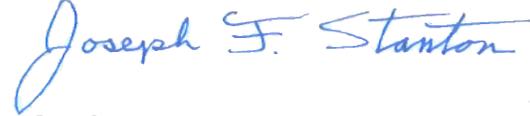
heroin. It was only after a sidebar conversation with the judge though, that it became apparent to the Commonwealth that while the recovery of the heroin was characterized as a "joint effort," it would be more proper to recall Officer O'Brien to testify to the identification and recovery of the drugs, because he was the officer who actually seized the heroin.

Where the Commonwealth had not yet rested, and the defendant had not yet begun his defense, the judge did not abuse his discretion in permitting the Commonwealth to recall Officer O'Brien to testify to the identification and recovery of the heroin. See Commonwealth v. Burke, 20 Mass. App. Ct. 489, 512 (1985) (Commonwealth permitted to reopen case where it had not fully rested and "[i]n any event, a judge may permit 'the prosecution to reopen its case before the defendant begins its defense . . .'" [citation omitted]). Furthermore, contrary to the defendant's argument, the mere fact that the witness was recalled for the purpose of admitting evidence material to the defendant's guilt does not mean the judge abandoned his proper judicial role or abused his discretion. See Commonwealth v. Shine, 398 Mass. 641, 656 (1986). At bottom, the judge's

decision to allow the Commonwealth to recall Officer O'Brien did not constitute an abuse of discretion.

Judgment affirmed.

By the Court (Meade, Shin & Walsh, JJ.⁵),



Clerk

Entered: October 19, 2021.

⁵ The panelists are listed in order of seniority.