

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-910

COMMONWEALTH

vs.

JACOB W. ALLABY.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a jury trial, the defendant was convicted of one count of possession of child pornography. G. L. c. 272, § 29C. As pertinent here, the defendant argues that (1) that the judge erred in failing to allow the defendant to waive his right to a jury trial and (2) the Commonwealth presented insufficient evidence to support the charge of child pornography. We reverse the conviction due to the judge's denial of the defendant's request to waive his right to a trial, and concluding that the evidence was sufficient, we remand for further proceedings consistent with this decision.

Background. Viewed in the light most favorable to the Commonwealth, the jury could have found the following facts. On September 28, 2017, Matthew Finnegan was preparing to open his restaurant, "Finnegan's Pub," when he discovered a cell phone

next to one of the cash registers. As an owner of a bar, it was not unusual to find credit cards, phones, and licenses left behind from the night before. His general practice was to try to identify the person so that the item could be returned. In this case, Finnegan attempted to find the owner of the phone by opening it up. The phone opened up to the picture gallery and to a picture of a young child, he believed to be ten to twelve years old, with male genitalia near the child's face. Finnegan then opened the Facebook application on the phone and saw that the profile belonged to the defendant, Jacob Allaby.

Finnegan contacted the authorities, and the phone was delivered to the Hudson police, who obtained a search warrant for the contents of the cell phone. An extraction of the cell phone revealed that the email addresses linked to the phone were in the defendant's name. The contacts in the cell phone included defendant's mother, father, and a number connected to the defendant's employer. The call and text log included numerous texts and phone calls to the defendant's mother, father, and place of employment around the same time frame the cell phone extraction reports show the downloading of images of child pornography.

Police called the defendant and told him that they had his phone in their possession. The defendant admitted the phone was his, told police that he had already purchased a replacement,

and asked if they could simply donate his old one. When police told him they could not donate the phone, the defendant agreed to come retrieve it at the station. On the day the defendant was supposed to show up at the police station to retrieve his phone, he told police that he was called into work. Police went to his place of employment and learned that he was not working. They subsequently went to his home and placed him under arrest.¹

Discussion. 1. Jury waiver. The defendant challenges the trial judge's denial of his request for a bench trial. On the day of trial, the defendant attempted to waive his right to a jury trial, but the judge denied this request citing the fact that the case was scheduled for a jury trial and jurors were present in the courthouse. The Commonwealth conceded at oral argument that the judge's failure to provide a "good and sufficient reason" for denying the defendant's waiver requires reversal. See Mass. R. Crim. P. 19 (a), 378 Mass. 888 (1979) ("The judge may refuse to approve [a defendant's waiver of a jury trial] for any good and sufficient reason provided that such refusal is given in open court and on the record"). We agree. See Commonwealth v. Gebo, 99 Mass. App. Ct. 809, 812-815 (2021) (avoiding appearance of judge shopping was not a good and

¹ The defendant was interviewed and acknowledged that the cell phone was his and that he did use his cell phone to view pornography. He was not asked about child pornography.

sufficient reason where there was no evidence in record suggesting an attempt at judge shopping).

2. Sufficiency of the evidence. The defendant first challenges the sufficiency of the evidence. We consider the record evidence in the light most favorable to the Commonwealth and determine whether "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, 318-319 (1979). Inferences from the evidence "need not be necessary or inescapable" only "reasonable and possible." Commonwealth v. Woods, 466 Mass. 707, 713 (2014), quoting Commonwealth v. Merola, 405 Mass. 529, 533 (1989).

The defendant claims the Commonwealth failed to present sufficient evidence that he knowingly possessed child pornography. Here, he cites his "general carelessness" with the phone and the fact that it was not password protected, potentially allowing others to access it, as factors negating his awareness of the illicit material.² Contrary to the

² He also points to his behavior when interacting with police officers, including admitting the phone belonged to him and his initial failure to show up to the police station as further evidence suggesting his lack of knowledge. According to the defendant, "[h]ad he been conscious that the phone contained images of child pornography, he likely would have been eager to retrieve it from police possession, rather than indifferent to its whereabouts."

defendant's claim, the record was sufficient to permit a rational trier of fact to find, beyond a reasonable doubt, that the defendant possessed the material with knowledge of its content. See Latimore, supra at 676-677. The Commonwealth employed a theory of constructive possession. See Commonwealth v. Brzezinski, 405 Mass. 401, 409 (1989). The defendant admitted ownership of the cell phone in which the photographs containing child pornography were discovered. The defendant's email and contacts were on the phone and the call log and text message history showed that the defendant regularly used his phone to communicate with his parents and his employer. He used the cell phone at times in close proximity to downloads of, and searches for, illegal content. Finally, his behavior in evading the police when contacted to go to the police station and pick up the cell phone, and lying to the police about his whereabouts, could be construed, in the light most favorable to the Commonwealth, as consciousness of guilt.

While the jury were free to consider and accept the defendant's explanation that he was careless with his cell phone and that on at least one occasion someone else had accessed his phone and posted on Facebook, they were equally free to reject it. See Commonwealth v. Merry, 453 Mass. 653, 662 (2009). In the light most favorable to the Commonwealth, the jury could have used their common sense and life experience to find that a

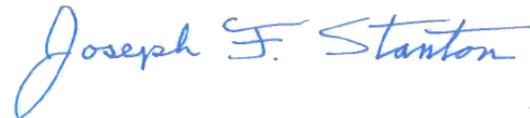
person's cell phone is generally in their possession and that the defendant was the one to download these images given the abundance of evidence noted above.

Given our remand for a new trial, we need not address the defendant's remaining challenges.

Judgment vacated.

Verdict set aside.

By the Court (Meade,
Sullivan, & Walsh, JJ.³),



Clerk

Entered: January 13, 2022.

³ The panelists are listed in order of seniority.