COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1226

COMMONWEALTH

vs.

RENEE PEREZ.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant was convicted after a jury trial of trafficking in eighteen grams or more of heroin and trafficking in thirty-six grams or more of cocaine. On appeal he challenges the denial of his motion to suppress evidence seized from his person, the trial judge's decision to discharge a deliberating juror, the sufficiency of the evidence, and the admission of consciousness of guilt evidence. We conclude that the discharge of the juror was error because it was not based on reasons personal to the juror and that the error was prejudicial. Thus, while we see no merit to the defendant's remaining arguments, we vacate the convictions.

1. Motion to suppress. The motion judge made the following factual findings, none challenged by the defendant as clearly erroneous. On April 3, 2013, New Bedford Police

Detective Jonathan Lagoa applied for and secured a search warrant for an apartment located on Belleville Road in New Bedford. The next morning, officers conducting surveillance saw the defendant leave the target apartment on foot. Once he reached the end of Belleville Road, approximately a block and a half away from the apartment, the officers stopped him, brought him back to the apartment, and used keys in his possession to open the door. The officers then searched the defendant and found drugs in his jacket and pants. A search of the apartment uncovered more drugs, over $3,000 in cash, and paraphernalia consistent with drug distribution.

In his motion to suppress, the defendant claimed that the stop was unlawful under Commonwealth v. Charros, 443 Mass. 752, 764-765 (2005), because the police had no authority under the search warrant, or other justification, to detain him a block and a half from his home. And because the stop was unlawful, he argued, the items seized from his person had to be suppressed. While the judge agreed that the warrant did not allow the police to detain the defendant away from the apartment, she nonetheless found the stop to be justified on the ground that the information gathered in support of the warrant application provided probable cause to arrest the defendant. The judge did not separately address the lawfulness of the search of the defendant's person.

On appeal the defendant no longer presses any challenge to the stop, appearing to accept the judge's determination that the police had probable cause to arrest him. He argues instead that the judge erred by implicitly concluding that the ensuing search of his person was a valid search incident to arrest. We disagree with this characterization. The defendant's motion focused on the stop and did not independently challenge the search of his person. As a likely result, the judge did not conclude, expressly or implicitly, that the search was justified as incident to arrest. And because she made no findings on that issue, the record is inadequate for us to reach it. See Commonwealth v. Santos, 95 Mass. App. Ct. 791, 797-798 (2019).

In any event no such findings are necessary for us to uphold the validity of the search. This is because the warrant expressly authorized the police to search both the apartment and the defendant's person for drugs and other items, a fact brought to the judge's attention at one of the motion hearings. For this reason, and because the defendant has not challenged the warrant as unsupported by probable cause, his motion to suppress the drugs recovered from his person was correctly denied. See Commonwealth v. Washington, 449 Mass. 476, 483 (2007) ("We may affirm the denial of a motion to suppress on any ground supported by the record . . .").

2. Dismissal of juror. Background. After roughly four hours of deliberation, the jury sent the trial judge a note stating: "We have reached what we believe to be an insupportable impasse. We require direction." At defense counsel's suggestion, the judge gave a Tuey-Rodriguez charge[1] and returned the jury to deliberate.

Later the same afternoon, juror 5 sent the judge a note stating: "I . . . [have] been disrespected multiple times all because I feel different on the case." At sidebar the judge informed the parties that she had received, in addition to the note, "a report from the court officer that there was very loud yelling," resulting in juror 5 being separated from the other jurors. After conferring with the parties, the judge indicated that she would resolve the matter by instructing juror 5 to resume deliberations.

Immediately thereafter, however, the judge had an off-the-record discussion with an unidentified person outside the presence of the parties. Then, back on the record, the judge stated:

> "I failed to recall that . . . this juror who gave the note . . . had made threats and that the screaming was of a very loud nature, so I'm not inclined to send him back in. What I am inclined to do is have him [come back] out, and . . . tell him I do not want to know anything about his personal relationship or the reasons for his feelings or the status

[1] See Commonwealth v. Rodriguez, 364 Mass. 87, 101-102 (1973) (Appendix A); Commonwealth v. Tuey, 8 Cush. 1, 2-3 (1851).

> of deliberations and ask him does he believe he can continue deliberating. If his affect and demeanor are as I expect them to be based on the reports to me, then I will discharge him, and we will substitute. . . ."

Juror 5 was subsequently brought before the court for a colloquy. When the judge asked whether he could continue deliberating fairly and impartially, juror 5 replied, "Oh, with them, no way. They've been disrespecting me since our opinions were different. . . . I mean, if we do go in there, it's just going to stay the same way it is." The judge instructed juror 5 to step back, at which point the prosecutor requested that he be discharged based on "his demeanor and what has been reported." Defense counsel objected and requested further inquiry, noting that juror 5 "ha[d] not indicated that he intend[ed] to threaten anybody." This led to the following additional colloquy:

> The judge: "It was at least reported to me, sir, that when you came out of the jury room you made some statements that might have indicated more than extreme frustration perhaps at things may have come to a physical altercation if you were to go back in. Did you make those statements, sir?"
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> Juror 5: "Me?"
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> The judge: "Yes."
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> Juror 5: "No."
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> The judge: "Do you believe that you can -- again, I don't want to know anything about the status of the deliberations -- but that you can go back in and quietly and calmly resume these deliberations."
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> Juror 5: "I've been quiet and calm all the time. It's just once they start saying, you know, about disrespectful things --"

> The judge: "I don't want to hear about -- so you believe that you can go back in and continue to deliberate this case?"
>
> Juror 5: "Yeah, I don't have a problem with anyone except a couple of their stupid comments."

After the judge again instructed juror 5 to step back, the prosecutor asked for clarification about "what [juror 5] was alleged to have said." The judge replied, "[W]hat was reported to me is that he would crack heads if he went back in there." At this point the judge took a recess and, when she returned, stated that she "ha[d] confirmed to [her] satisfaction . . . that [juror 5] made direct violent threatening statements in the presence of the other jurors." Over the defendant's objection, the judge then discharged juror 5 and instructed the remaining jurors to resume deliberations anew with the alternate juror after the weekend.

The following Monday morning, the judge put on the record further reasoning for her decision to discharge juror 5. After acknowledging the "weighty concerns" relating to the discharge of a deliberating juror, the judge stated:

> "I am familiar with Commonwealth v. Tiscione, 482 Mass. 485 [2019], but I believe it does not apply to threats of violence by a deliberating juror that may in part have stemmed from the deliberations.
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> "To be clear, I conclude that the making of the threat showed an inability to perform the functions of a juror that was personal to that juror who I believe was in a

> personal crisis, and which was far in excess of what is or should be acceptable.
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> "For the record and for any appellate review, on Friday after the voir dire of the individual juror who was discharged, I took a recess and confirmed again with the court officer that the juror had in the other jurors' presence and after the officer had entered the jury room in response to the light, so in front of the officer, made an explicit threat of violence against the jurors. I fully credit the court officer which resulted in my concluding that the juror who had denied making the threat was not candid with the court.
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> "Had that juror apologized and/or expressed remorse, I would've considered alternate options such as a cooling off period. But the lack of candor gave me . . . grave concerns about that juror's specific intent.
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> "Because of that conclusion that the juror made a threat of violence and was not truthful with the Court, I believe it is incumbent on me to conduct an individual voir dire of all of the deliberating jurors to ensure that they can continue to deliberate fairly and impartially."

Once the jurors each confirmed that they could start anew and consider the evidence fairly and impartially, the judge sent them to deliberate. At around 10:30 A.M. that day, the jury found the defendant guilty of both charges.

Discussion. "The discharge of a deliberating juror is a sensitive undertaking and is fraught with potential for error. It is to be done only in special circumstances and with special precautions." Commonwealth v. Connor, 392 Mass. 838, 843 (1984). Accord Commonwealth v. Williams, 486 Mass. 646, 651 (2021); Commonwealth v. Tiscione, 482 Mass. 485, 489 (2019). Among other requirements, before discharging a deliberating

juror, the judge must "hold a hearing adequate to determine whether there is good cause to" do so. Connor, supra at 844. "'Good cause' includes only reasons personal to a juror, having nothing whatever to do with the issues of the case or with the juror's relationship with his fellow jurors." Id. at 844-845.[2]

In determining whether good cause exists, a judge may consider "whether a juror exhibits abnormal idiosyncratic behavior or extreme emotional distress such that the juror cannot fulfil his or her duty." Williams, 486 Mass. at 652. "In some cases, extreme emotional distress, even if in part due to deliberations, may be considered a personal problem if it exceeds the level of distress that typically accompanies deliberations." Id. "Similarly, if a juror's conduct has roots in interactions with other jurors during the course of deliberations but the juror's response is idiosyncratic, such behavior may constitute a reason for dismissal that is personal to that juror." Id.

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[2] Connor also requires that the judge "preliminarily inform [the juror] that he cannot be discharged unless he has a personal problem, unrelated to his relationship to his fellow jurors or his views on the case. Unless the juror indicates a belief that he has such a problem, all questioning should cease" (Footnote omitted). Connor, 392 Mass. at 845. The Supreme Judicial Court reiterated this requirement in Williams, 486 Mass. at 656, which was issued after the trial in this case. Although the judge here did not give the preliminary advisement required by Connor, we need not decide whether this alone should result in reversal, as the defendant argues.

We do not doubt that there may be a case where a judge would be warranted in finding, after an appropriate hearing and process, that a real, credible threat by a juror toward other jurors constitutes such idiosyncratic behavior that the juror cannot fulfill his duty. See Williams, 486 Mass. at 652. See also Commonwealth v. Leftwich, 430 Mass. 865, 874 (2000) ("We do not . . . require jurors to serve at their peril"). The record and the judge's findings in this case, however, are inadequate to establish that juror 5's conduct rose to that level, justifying his dismissal. The only information as to what juror 5 actually said to the other jurors -- "that he would crack heads if he went back in there" -- was derived from the judge's off-the-record discussions with the court officer. This contravened the requirement that all "personnel with relevant information should be heard by the court and counsel before the juror is formally discharged." Commonwealth v. Haywood, 377 Mass. 755, 769-770 (1979). And as a result, there are no facts in the record concerning juror 5's intent in making the statement, whether he meant the statement literally, or whether it compromised his ability to continue deliberations. See Connor, 392 Mass. at 846-847, quoting People v. Collins, 17 Cal. 3d 687, 696 (1976), cert. denied, 429 U.S. 1077 (1977) (judge "has at most a limited discretion to determine that the facts

show an inability to perform the functions of a juror, and that inability must appear in the record as a demonstrable reality").

In Commonwealth v. Gonzalez, 28 Mass. App. Ct. 10, 14 (1989), we concluded in analogous circumstances that the judge erred by dismissing a juror based on her own investigations into the juror's background, as this "caused information to reach the judge which had not been subjected to cross-examination by any counsel and without the presence of the defendant." Likewise here, the judge should not have discharged juror 5 based solely on information she received outside the presence of the parties. Instead, the judge should have explored the issue at a hearing by inquiring of juror 5, the court officer, or, as suggested by defense counsel, the other jurors. The judge could then have considered options short of discharge, such as the "cooling off period" she mentioned when explaining the basis for her decision. See Tiscione, 482 Mass. at 491-492 ("[i]f, as in this case, it appears that emotions in the jury room are heated, a judge might direct the jury to take a break to allow for a cooling off period" or "a judge might even suspend deliberations until the following business day").

We appreciate that the judge was in a difficult situation and was justifiably concerned about the jurors' safety. But a juror's inability to fulfill his duty must appear on the record as a "demonstrable reality," and here it does not. Tiscione,

482 Mass. at 492, quoting Connor, 392 Mass. at 846-847. To the contrary, juror 5 stated that he could continue deliberating, and there is nothing in the record to indicate that his presence would have compromised the other jurors' ability to perform their respective duties. Discharging juror 5 was error in these circumstances. See Williams, 486 Mass. at 652-653 (error to discharge juror who stated he could continue to be fair and impartial despite conflict with other jurors); Tiscione, supra at 491 (error to discharge juror where judge made "no finding that the juror was incapacitated by 'extreme emotional distress'" and "juror did not tell the judge that she could not be fair"); Commonwealth v. Garcia, 84 Mass. App. Ct. 760, 768 (2014) (error to discharge juror where record was "wholly inadequate to support the conclusion that he was suffering from severe emotional or mental distress -- beyond the level that often accompanies deliberations"). Cf. Commonwealth v. Swafford, 441 Mass. 329, 337 (2004) (proper to discharge juror who "told the judge four times that she could no longer be fair and impartial" and whose "reclusive and abdicatory behavior was . . . not in any normal sense the product of her relationship to her fellow jurors"); Leftwich, 430 Mass. at 873 (proper to discharge juror who "was clearly under extraordinary stress" and "stated that she could not continue to deliberate in a fair manner").

We turn to the question of prejudice. Because the defendant preserved an objection, we review the error, which is of constitutional dimension, to determine whether it was harmless beyond a reasonable doubt. See Williams, 486 Mass. at 657; Tiscione, 482 Mass. at 493. We conclude that it was not. The jury had sent a note to the judge stating that they were at an impasse. Juror 5's subsequent note and his statements during the colloquy that the other jurors were "disrespecting" him because his opinion was "different" suggest that he was the dissenting juror. And the same morning that the jury started their deliberations anew with the alternate, they returned guilty verdicts. Given these facts, the Commonwealth cannot meet its burden of showing that the error in removing juror 5 was harmless beyond a reasonable doubt. See Williams, supra at 658 (error not harmless where jury had deliberated for some time and record showed that dismissed juror "disagreed with at least some of the [other] jurors"); Tiscione, supra (error not harmless where jury sent note indicating they were deadlocked, dismissed juror stated during colloquy "that people were arguing and that it upset her," and, approximately ninety minutes after she was replaced, jury returned guilty verdicts). Indeed, the Commonwealth does not argue otherwise.

3. Sufficiency. During the search of the apartment, the police found bags of heroin and cocaine in a crawlspace above a

bedroom closet and additional bags of heroin in a hole accessible through a kitchen cabinet. The defendant argues that the Commonwealth failed to prove that he constructively possessed these items. We disagree and conclude that the evidence was sufficient, permitting a retrial. See Commonwealth v. Villagran, 477 Mass. 711, 727 (2017).

To prove constructive possession, the Commonwealth must offer evidence "sufficient to permit the jury to infer that the defendant had knowledge of the contraband, as well as the ability and intention to exercise dominion and control over it." Commonwealth v. Proia, 92 Mass. App. Ct. 824, 830 (2018). Here, the Commonwealth's evidence established the following facts, among others. The defendant had keys to the apartment, and the police found two rental receipts for the apartment in his name. One of the receipts, along with $985 in cash, was in a coat hanging in the bedroom closet underneath the crawlspace. Another $925 in cash was in the pocket of a shirt hanging in the same closet. Also in the bedroom was luggage containing the defendant's birth certificate, his social security card, and $455 and $135 in folded cash. In the kitchen was a bottle of inositol powder, two boxes of plastic sandwich bags, and a digital scale, which was located in the same hidden space as the bags of heroin. The defendant also had eleven bags of heroin and twenty-five bags of cocaine on his person.

This evidence, viewed in the light most favorable to the Commonwealth, see Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979), was sufficient to prove constructive possession. The evidence gave rise to a reasonable inference that the defendant was the sole, or at least primary, occupant of the apartment. When this is coupled with the evidence of the drugs on the defendant's person, the large amounts of cash intermingled with his personal effects, and the drug distribution supplies and equipment in the kitchen, reasonable jurors could have found that the defendant had knowledge of the drugs in the apartment and the ability and intent to exercise control over them. See Commonwealth v. Hamilton, 83 Mass. App. Ct. 406, 412 (2013) (that "defendant was the primary occupant of the apartment" was "significant" to conclusion of constructive possession); Commonwealth v. Alcantara, 53 Mass. App. Ct. 591, 597 (2002) (evidence sufficient to prove that defendant constructively possessed crack cocaine hidden under bathroom sink, where prescription pill bottle bearing his name and also containing crack cocaine was found elsewhere in bathroom).

4. Consciousness of guilt. Because the issue is likely to recur at a retrial, we address whether the judge erred by admitting evidence used by the Commonwealth to argue

consciousness of guilt.[3] In brief, the evidence was as follows. The defendant's trial was originally set to begin on December 10, 2014. The defendant appeared with his attorney on that date, but, after the trial was continued to the next day, he failed to reappear. The defendant then could not be located for several years until Detective Lagoa, while conducting an unrelated investigation, encountered the defendant in February 2019 and placed him under arrest.

The defendant contends that the judge should not have admitted this evidence because the Commonwealth did not prove that the new trial date was announced in open court or that the defendant was otherwise notified of the new date. In support, the defendant relies on Commonwealth v. Addy, 79 Mass. App. Ct. 835, 841 (2011), which holds that "a default that is entered because a defendant fails to appear on a scheduled trial date may be properly considered as consciousness of guilt only if the defendant received notice of the trial date." But here, the defendant was present in court on December 10, 2014, and plainly would have known that the case was not resolved on that date. Yet he failed to reappear and went missing until Detective Lagoa

[3] We do not reach the defendant's related arguments that the judge erred by admitting testimony concerning the defendant's global positioning system device and by restricting him from offering rebuttal evidence. These issues are not likely to recur or recur in the same context at a retrial.

found him over four years later. On these facts the judge was within her discretion to allow the jury to decide whether the defendant's actions resulted from consciousness of guilt. See Commonwealth v. Morris, 465 Mass. 733, 738-739 (2013).

Conclusion. The order denying the defendant's motion to suppress is affirmed. The judgments are vacated and the verdicts are set aside.

So ordered.

By the Court (Shin, Englander & Hand, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: January 14, 2022.

[4] The panelists are listed in order of seniority.