

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

21-P-432

COMMONWEALTH

vs.

ARNALDO T. ROMERO.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant was charged with new offenses while on probation. After a final hearing on probation revocation, a judge of the District Court found that the defendant had violated his probation and imposed the extant one-year suspended sentence. On appeal, the defendant contends that the Commonwealth's evidence was insufficient to prove the violation by a preponderance of the evidence, certain hearsay evidence was unreliable, and the judge abused his discretion by relying on a police officer's description of a now lost videotape. We affirm.

Background. On July 11, 2019, the defendant pleaded guilty to one count of assault and battery with a dangerous weapon, received a one-year suspended sentence, and was placed on probation until July 10, 2020. On July 18, 2019, a notice of

probation violation and hearing issued alleging the defendant violated his probation by committing three new offenses: assault and battery with a dangerous weapon, armed robbery, and armed assault with intent to rob.

We summarize the evidence presented at the probation revocation hearing. On July 14, 2019, Detective Matthew Longo of the Springfield police department responded to a report of a "possible crime scene" at the corner of School and Temple Streets. There, he "located a large amount of blood on the sidewalk, street area." In the early morning hours of the same day, other police officers had responded to a reported stabbing. According to the police report summarized by Detective Longo, an individual (whom we shall refer to as J.T.) went to a local hospital seeking treatment for a stab wound to his left arm and hand and stated that a man stabbed him at a South End gasoline station located at 675 Main Street. After reviewing video surveillance footage of the gas station, officers determined that J.T. had not been there.

Three days later, on July 17, Detective Selenia Cruz was on patrol in the area of Spring Street when she noticed a man, later identified as the defendant, yelling, screaming, and pacing back and forth in the middle of the street. While she waited for an ambulance, she asked the defendant why he was crying and what was wrong, and the defendant stated that he

"didn't mean to stab the man," "that it was a mistake, it was an accident, that he didn't mean to, that he swears." He also stated that he did not want to go to jail. The defendant removed several items from his pockets, including a knife, and put them in a bush. As Detective Cruz tried to calm the defendant, he screamed and ran up the street.

Officer James Burgos responded to Detective Cruz's call for assistance. The defendant told Officer Burgos that he stabbed somebody two days before on Spring Street. The defendant was then placed under arrest.

Also on July 14, Detective Longo reviewed video surveillance footage captured on city of Springfield pole cameras in the area of School Street and Temple Street. The video depicted a confrontation between two men. One of the people in the video was the stabbing victim, J.T., who was known to Detective Longo. The second man, later identified by Longo as the defendant,¹ approached the victim. J.T. ran from the man and retrieved a chain from his moped, but was knocked to the ground. The video next showed what appeared to be a stabbing, although no knife could be seen. After he made stabbing

¹ Detective Longo described the attacker in the video footage as a "taller, darker skinned male with unshaven facial hair, longer hair kind of pulled back behind his head, dark hair." After the defendant was arrested, Detective Longo said he looked like the man in the video.

motions, the second man took J.T.'s chain, hit J.T. with the chain, and left the scene. The video footage was downloaded and saved; however, at the time of the probation revocation hearing the video had been deleted.

After he reviewed the video footage, Detective Longo and his partner, Detective Jose Canini, spoke to the victim, who said he went to the hospital without calling the police because he was scared and did not want to be a "snitch." Detective Longo stated that the victim told the detectives that he was "stabbed, assaulted at the corner of School and Temple Street and that occurred about 4:50, 5:00 A.M.," and that the person who attacked him took a chain. The victim could not identify his attacker.

At the conclusion of the hearing, the judge found that the defendant's admission to a stabbing, along with Detective Longo's testimony about the video footage, were sufficient to find by a preponderance of the evidence that the defendant violated his probation. This appeal followed.

Discussion. "A determination whether a violation of probation has occurred lies within the discretion of the hearing judge." Commonwealth v. Bukin, 467 Mass. 516, 519-520 (2014). "Any conduct by a person on probation which constitutes a violation of any of the conditions of his probation may form the basis for the revocation of that probation" (citation omitted).

Commonwealth v. Durling, 407 Mass. 108, 112 (1990). "The Commonwealth must prove a violation of probation by a preponderance of the evidence." Bukin, supra at 520. We review an order revoking probation to determine "whether the record discloses sufficient reliable evidence to warrant the findings by the judge that [the probationer] had violated the specified conditions of his probation." Commonwealth v. Morse, 50 Mass. App. Ct. 582, 594 (2000).

A finding that the defendant committed any of the three offenses charged would support the revocation of probation. Durling, 407 Mass. at 112 ("Any conduct by a person on probation which constitutes a violation of any of the conditions of his probation may form the basis for the revocation of that probation" [citation omitted]). The defendant contends that the judge erred in revoking his probation because the Commonwealth presented insufficient evidence to prove he committed a new criminal offense, and because some of the evidence constitutes unreliable hearsay and the video should not have been considered.

We conclude that there was sufficient evidence to prove that the defendant committed an assault and battery by means of a dangerous weapon.² The defendant had a knife and admitted that

² The evidence established the elements of assault and battery by means of a dangerous weapon under G. L. c. 265, § 15A, namely

he stabbed someone two days prior on Spring Street, close in time to when the victim reported he was stabbed on School and Temple Streets.³ The officers involved testified to the defendant's admissions. These admissions were statements against penal interest and are not hearsay. See Commonwealth v. Simon, 57 Mass. App. Ct. 80, 90-92 (2003). The officer who found blood on School and Temple Streets testified to his firsthand observations. The victim was treated at the hospital. Photographs of the stabbing injuries were admitted in evidence. Even without the victim's statements, the other, nonhearsay evidence corroborates that a stabbing in fact took place. Id. Cf. Commonwealth v. Forde, 392 Mass. 453, 458 (1984).

The defendant contends that Detective Longo's testimony summarizing police reports, the victim's statements, and the effort to determine if any crime took place at the gas station,

"that there be a touching, however slight, that that touching be by means of the weapon, and that the battery be accomplished by use of an inherently dangerous weapon" (citation omitted). Commonwealth v. Cruzado, 73 Mass. App. Ct. 803, 807 (2009). "Dangerous weapons are defined as either being dangerous per se, that is, designed and constructed to produce death or great bodily harm and for the purpose of bodily assault or defense, or being dangerous as used" (quotations and citation omitted). Commonwealth v. Gebo, 489 Mass. 757, 773 (2022).

³ We have not considered the map appended to the Commonwealth's brief on appeal because it was not offered or admitted at the probation revocation hearing and is not part of the record on appeal. See Mass. R. A. P. 16, as appearing in 481 Mass. 1628 (2019); Mass. R. A. P. 18, as appearing in 481 Mass. 1637 (2019).

constituted unreliable hearsay. "[H]earsay evidence may be relied upon in a probation violation hearing where it has substantial indicia of reliability." Commonwealth v. Hartfield, 474 Mass. 474, 484 (2016). See Commonwealth v. Patton, 458 Mass. 119, 133 (2010).

The judge acted within his discretion in concluding that the hearsay evidence was reliable. Detective Longo testified from firsthand knowledge regarding the victim's statements and the blood at School and Temple Streets, and those observations were recorded in a timely manner. See Hartfield, 474 Mass. at 484 (among the criteria used to judge the reliability of hearsay is whether evidence "is based on personal knowledge or direct observation[, and] whether the evidence, if based on direct observation, was recorded close in time to the events in question"). The defendant admitted to a stabbing, albeit at a different location. The victim corroborated that he had been stabbed. Detective Longo observed the victim's condition and stated that the photographs of the victim's condition were accurate. After reviewing the gasoline station surveillance video footage, other officers determined the victim was never at the location that night. While this evidence was hearsay, it was also corroborated by other evidence that there was no sign of a stabbing at the gas station, and there was copious blood at School and Temple Streets. Id. (corroboration as factor in

determining reliability). It is true that the victim altered his story, and the defendant's admission and the victim's account were not perfectly consistent as to time and place. But neither account was so deficient or lacking in a factual basis as to render the hearsay evidence unreliable. Contrast Grant G. v. Commonwealth, 96 Mass. App. Ct. 721, 726-727 (2021).

Detective Longo's testimony was admissible in full.

Finally, the defendant maintains that the judge improperly relied on testimony about the lost surveillance video footage without establishing the video's reliability.⁴ "The requirement of authentication calls for the trial judge to make a threshold determination that there is evidence sufficient, if believed, to convince the jury by a preponderance of the evidence that the item in question is what the proponent claims it to be"

(quotation and citation omitted). Commonwealth v. Connolly, 91 Mass. App. Ct. 580, 586 (2017). The Commonwealth concedes that the video was not preserved or authenticated. However, as the defendant acknowledges, the rules of evidence do not strictly apply to authentication at probation revocation hearings.

Commonwealth v. Sargent, 98 Mass. App. Ct. 27, 30 (2020). "The 'preeminent concern with respect to the evidence presented and

⁴ Since "[r]evocation hearings are not part of a criminal prosecution . . . [,] a probationer need not be provided with the full panoply of constitutional protections applicable at a criminal trial." Durling, 407 Mass. at 112.

considered at revocation proceedings is its reliability.'" Id., quoting Commonwealth v. Thissell, 457 Mass. 191, 196 (2010).

The video footage bore sufficient indicia of reliability to permit the judge to rely on it. See Thissell, 457 Mass. at 196. Detective Longo testified that he found a large amount of blood at the corner of School Street and Temple Street, the location of the camera. The stabbing victim ultimately acknowledged that the incident occurred at that location. Detective Longo indicated the assailant in the missing video matched the defendant's description. There were inconsistencies within the victim's statements (and between the victim's statements and the defendant's) as to time and place. However, the dates were close, and coupled with Detective Longo's first-person observations of blood at the scene, formed a strong basis for the judge's finding that the surveillance video was what the Commonwealth claimed it to be, and that Detective Longo's description of it was reliable. The judge did not abuse his

discretion in finding that the defendant had violated his probation.

Order revoking probation and imposing sentence affirmed.

By the Court (Vuono,
Sullivan & Lemire, JJ.⁵),



Clerk

Entered: August 5, 2022.

⁵ The panelists are listed in order of seniority.