COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-91

COMMONWEALTH

vs.

KRIS PHILLIPS.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a jury trial, the defendant, Kris Phillips, was convicted of intimidation of a witness, by misleading a police officer, pursuant to G. L. c. 268, § 13B, and two counts of presenting a false insurance claim, pursuant to G. L. c. 266, § 111A. We affirm.

1. Background. We recite the facts of the case in the light most favorable to the Commonwealth. See Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979). On July 17, 2015, the defendant, a sergeant at the Hingham Police Department (department), was working a paid security detail at a shopping plaza. Shortly after 11:00 P.M., a witness observed the defendant standing behind a parked Jeep approximately three feet away from a beige car, which was parked with an individual seated in the driver's seat. As the operator of the beige car

began to reverse the car out of the parking space, the witness observed the defendant step into its path, strike the back of the car with an open hand, and yell, "Stop, stop." The operator of the beige car, upon exiting her car, observed the defendant standing behind the left corner of the car. The defendant then crouched down, put his left hand on the ground and rolled onto the right side of his body.

Following the incident, the defendant radioed a 911 dispatcher and reported that he had been stuck by a car (first statement). Officer James Foss, Officer Jeffrey Kilroy, and Sergeant Darren McAdams responded to the scene. Upon inquiry, the defendant informed Officer Foss that a car backed into him, throwing him four feet into the air (second statement). Shortly thereafter, the defendant informed Officer Kilroy that he was struck, on the left side of his body, by a car backing out of a parking space and was thrown three feet into the air, landing on his back (third statement). Officer Kilroy questioned the operator of the beige car regarding potential criminal charges, spoke with witnesses, and performed a visual inspection of the car. The defendant subsequently explained to Sergeant McAdams that a car had backed into him and not to "beat up" the operator because "we didn't see each other" (fourth statement). Similarly, the defendant informed Officer Foss that the operator

had done nothing wrong and that he did not want her to get into trouble (fifth statement).

The defendant was transported by ambulance to South Shore Hospital. On July 18, 2015, the defendant provided verbal consent to the hospital, as recorded in the hospital medical records, to authorize his insurer, Blue Cross and Blue Shield of Massachusetts, Inc. (Blue Cross), to pay benefits directly to the hospital. While in the hospital, the defendant informed Chief Glenn Olsson that his "neck and back hurt" and explained that he was struck by a car backing out of a parking spot while he was on patrol. The defendant explained that as he saw the car approaching him, he "put his hands out and he contacted the car and was knocked to the ground" (collectively, sixth statement).

Four days after the incident, the department received notice from South Shore Medical Center that the defendant would be out of work for four weeks. On the same day, the defendant sent a written report of the incident via e-mail to Chief Olsson and executed three "injured-on-duty" forms for the Gowrie Group, the insurance company responsible for managing the municipality's workers' compensation and injured-on-duty benefits. In his written statement, the defendant stated that around 11:15 P.M. he heard loud yelling originating from the other side of the lot. As he began walking toward the source of

the yelling, the defendant walked into the path of the reversing car, at which point, the defendant stated, he put both arms out to brace himself for impact and "went to the ground after losing [his] balance" (collectively, seventh statement). Officers from the department investigated the incident, during which they formally interviewed witnesses, the operator of the car, and the defendant.

On December 15, 2015, the defendant was charged with intimidation of a witness, by misleading a police officer, pursuant to G. L. c. 268, § 13B; two counts of presenting a false insurance claim, pursuant to G. L. c. 266, § 111A; and perjury, pursuant to G. L. c. 268, §§ 1, 1A.[1]

2. Discussion. a. Standard of review. At the close of the Commonwealth's case, the defendant moved for required findings of not guilty on the intimidation of a witness, by misleading a police officer charge and the fraudulent insurance charge with respect to Blue Cross, which the judge denied. The defendant did not move for a required finding of not guilty on the fraudulent insurance charge pertaining to the Gowrie Group. When reviewing the denial of a motion for a required finding of not guilty, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements

[1] At trial, the Commonwealth nolle prossed the perjury charge.

of the crime beyond a reasonable doubt" (emphasis omitted; quotation omitted). Latimore, 378 Mass. at 677. "To survive a motion for a required finding, it is not essential that the inferences drawn are necessary inferences. It is enough that from the evidence presented a jury could, within reason and without speculation, draw them." Commonwealth v. Gonzalez, 47 Mass. App. Ct. 255, 257 (1999). We review the fraudulent insurance claim pertaining to the Gowrie Group under the same standard. See Commonwealth v. Williams, 63 Mass. App. Ct. 615, 616-617 (2005) ("a verdict based on upon legally insufficient evidence is inherently serious enough to create a substantial risk of a miscarriage of justice, so we review such claims without regard to the defendant's procedural shortcomings").

b. Intimidation of a witness, by misleading a police officer. For a jury to find the defendant guilty under the G. L. c. 268, § 13B, the Commonwealth must prove that the defendant (1) willfully misled, "directly or indirectly, (2) a police officer (3) with the intent to impede, obstruct, delay, harm, punish, or otherwise interfere with (4) a criminal investigation."[2] See Commonwealth v. Paquette, 475 Mass. 793, 797 (2016). To mislead, is, among other things, "knowingly making a false statement. . . [or] intentionally omitting

[2] The defendant does not contest that the statements at issue in this case were made to a police officer.

information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement." Commonwealth v. Figueroa, 464 Mass. 365, 372 (2013), quoting 18 U.S.C. § 1515(a)(3) (2006).

The defendant contends that there was insufficient evidence to support a finding that the defendant intimidated a witness by misleading a police officer. Specifically, the defendant argues that, regardless of any other statements made by the defendant, the fourth and fifth statements would not have led the investigators to pursue a materially different course of investigation. We disagree. The jury could have reasonably found that in making both statements the defendant sought to lead the investigating officers astray by truncating the investigation. Additionally, even if the jury found that the fourth and fifth statements did not impede the investigation, there is still sufficient evidence to support a conviction pursuant to G. L. c. 268, § 13B, as the defendant need not have succeeded in misleading an investigation. See Figueroa, 464 Mass. at 373 ("Where the defendant attempted to mislead his parole officer with the intent to obstruct her investigation of his possible violation of parole, it does not matter that he failed to succeed in misleading her"). Rather, "whether a statement is 'mislead[ing]' for purposes of § 13B depends on

whether it reasonably could lead investigators to pursue a course of investigation materially different from the course they otherwise would have pursued" (emphasis added). Paquette, 475 Mass. at 801. Collectively, the defendant's statements to the investigating officers provide sufficient evidence from which the jury could have found that the defendant intentionally misled the officers and impeded, or reasonably could have impeded, the investigation.[3] See id. at 804 (finding that jury could have found that false statements regarding defendant's location during fight, which occurred while investigation was still in its early stages, misled police); Commonwealth v. Fortuna, 80 Mass. App. Ct. 45, 51 (2011) ("In light of the inconsistency between the defendant's account and expert testimony that he was shot at from a distance of no more than one and one-half feet away, the jury could have inferred that the defendant lied to the police and that he did so both intentionally and with the intent to mislead them"). Thus, the judge properly denied the defendant's motion for a required finding of not guilty.

[3] Given the ample evidence to support a finding that any number of the defendant's multiple statements were made with the intent of misleading the investigating officers in the course of their investigation, we need not address whether the defendant's first statement, which initiated the criminal investigation, impeded the investigation pursuant to G. L. c. 268, § 13B.

c. Fraudulent insurance claims. Section 111A of G. L. c. 266 is invoked when, "in connection with or in support of any claim under any policy of insurance issued by any company . . . and with intent to injure, defraud or deceive such company, [one] presents to it, or aids or abets in or procures the presentation to it of, any notice, statement, proof of loss, bill of lading, bill of parcels, invoice, schedule, account or other written document, . . . knowing that . . . [it] contains any false or fraudulent statement or representation of any fact or thing material to such claim."

On appeal, the defendant contends that there was insufficient evidence of (1) notice with respect to both Blue Cross and the Gowrie Group, and (2) intent to injure, defraud, or deceive with respect to the Gowrie Group.

i. Blue Cross. We discern no merit in the defendant's contention that he did not provide notice of his injuries to Blue Cross. The written record of the defendant's verbal consent to authorize Blue Cross to pay benefits directly to the hospital is sufficient to support a finding that the defendant "present[ed] . . ., abet[ted] in or procur[ed] the presentation" of "any notice . . . or other written document." See Williams, 63 Mass. App. Ct. at 617-618 (where interview with insurance company was recorded and then transcribed into written form, "there is no reason for treating recorded and written statements

by claimants differently"). Accordingly, the judge properly denied the motion for a required finding of not guilty.

ii. Gowrie Group. The defendant's argument that there was insufficient evidence that the defendant presented notice to the Gowrie Group is similarly unavailing. The defendant executed three "injured-on-duty" forms printed on the Gowrie Group letterhead, which were also of the type used to initiate a workers' compensation claim. Based on this evidence, the jury were warranted in finding that the defendant "present[ed]. . . , abet[ted] in or procur[ed] the presentation" of notice to the Gowrie Group. G. L. c. 266, § 111A.

As to the defendant's argument regarding the sufficiency of the evidence of intent to injure, defraud, or deceive, "[a] person's . . . intent is a matter of fact, which is often not susceptible of proof by direct evidence, so resort is frequently made to proof by inference from all the facts and circumstances developed at the trial." Commonwealth v. Charles, 428 Mass. 672, 682 (1999), quoting Commonwealth v. Stewart, 411 Mass. 345, 350 (1991). The Commonwealth's theory in this case was that the defendant staged a collision and intentionally lied about the circumstances of the incident and that he lied about suffering an injury in an effort to present a fraudulent insurance claim and collect workers' compensation benefits. We conclude that the evidence presented by the Commonwealth was sufficient to

allow the jury to reasonably draw such inferences. See id. ("The inferences drawn by the jury need only be reasonable and possible and need not be necessary or inescapable").

Judgments affirmed.

By the Court (Rubin, Henry & Wendlandt, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: May 13, 2019.

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