COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-151

COMMONWEALTH

vs.

TERRANCE J. JOHNSON.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury trial, the defendant was convicted of assault with intent to murder, possession of a firearm without a license, possession of ammunition without a firearm identification card, and possession of a loaded firearm without a license.[1] He challenges the denial of his motion to suppress and raises several trial issues, specifically, sufficiency of the evidence, exclusion of third-party culprit evidence, and prosecutorial misconduct in closing argument. Discerning no merit to any of his arguments, we affirm.

1. Motion to suppress. We recite the facts as found by the motion judge, supplemented by undisputed testimony that he explicitly or implicitly credited. See Commonwealth v. Jones-

[1] No party has raised the issue whether any of these convictions are duplicative, and we do not consider the issue.

Pannell, 472 Mass. 429, 431 (2015). Around 4 P.M. on June 8, 2015, Brockton Police Detective Sergeant Michael Dennehy responded to a call of shots fired near 18 Grove Street, a three-family home. Once there, Dennehy observed shell casings and blood on the sidewalk and bullet holes in the siding of the building. Based on reports from bystanders, officers sought a male suspect who they believed may have fled toward the back of the building. With the permission of the first-floor tenants, officers searched their apartment, finding no one. Eventually, the officers made their way to the third-floor landing, where they encountered the defendant, standing in the hallway and sweating heavily. The defendant stated that he did not live there, but that he had run inside because he was frightened by the gunshots. The officers then handcuffed and pat frisked the defendant and advised him of his Miranda rights. Subsequent statements made by the defendant led to incriminating evidence, which he sought unsuccessfully to suppress.

On appeal the defendant challenges the denial of his motion on two grounds. He first argues that the officers effected an arrest by placing him in handcuffs and did so without probable cause.[2] In determining whether an encounter was an investigatory

[2] Contrary to the Commonwealth's assertion, the defendant did not waive this argument as he raised it both in his written motion and at the suppression hearing.

stop or an arrest, we consider "the length of the encounter, the nature of the inquiry, the possibility of flight, and, most important, the danger to the safety of the officers or the public or both" (citations omitted). Commonwealth v. Willis, 415 Mass. 814, 820 (1993). "It is not dispositive that the defendant was handcuffed." Commonwealth v. Williams, 422 Mass. 111, 118 (1996).

Here, the officers responded to a shooting that had just taken place and discovered the defendant inside the building to which the at-large suspect may have fled. The defendant acknowledged that he did not live there and was sweating heavily, consistent with someone who was fleeing. In those circumstances it was reasonable for the officers to believe that the defendant was a person of interest to the ongoing response and investigation, and may have posed flight and safety risks. The handcuffing was a proportional response to those risks and did not transform the investigatory stop into an arrest. See Commonwealth v. Sinforoso, 434 Mass. 320, 325 (2001); Williams, 422 Mass. at 118-119. Probable cause was thus not required.

The defendant argues in the alternative that, even if the encounter was an investigatory stop, it was unlawful because the officers did not have reasonable suspicion that he committed a crime. There is no dispute that the defendant was seized for constitutional purposes when the officers handcuffed him. See

Commonwealth v. Barros, 435 Mass. 171, 173-174 (2001). The seizure was justified, however, by specific and articulable facts rising to the level of reasonable suspicion. The police corroborated through their own observations that a shooting had occurred; the defendant was located in close physical and temporal proximity to the shooting; he was in an area where the suspect might reasonably have been expected to be found; and he was sweating heavily, as though he recently fled. These factors support reasonable suspicion that the defendant was involved in the shooting, justifying the investigatory stop. See Commonwealth v. Campbell, 69 Mass. App. Ct. 212, 216-217 (2007); Commonwealth v. Doocey, 56 Mass. App. Ct. 550, 554-556 (2002).

2. Sufficiency of the evidence. The defendant next contends that the trial evidence was insufficient to establish that he was the shooter and therefore none of his convictions can stand. We disagree.

The jury could have found the following facts. Surveillance video footage showed the defendant wearing a red sweatshirt two hours before the shooting, and several witnesses saw a man in a red shirt at the crime scene. One witness, after hearing gunshots, saw a man in a red shirt trying to climb the fence into the yard of 18 Grove Street; later that night, she identified the defendant in a showup procedure as the man in the red shirt. Another witness saw a man in a red sweatshirt walk

down the driveway and into 18 Grove Street just after the gunshots. A third witness saw a man in a red sweatshirt pull a gun out of his waistband and start shooting.

Furthermore, after detaining the defendant inside 18 Grove Street, officers discovered a firearm and a red sweatshirt in the basement laundry room. A ballistics expert testified that the discharged cartridge cases found on the sidewalk were likely fired from the recovered firearm, and the defendant's hands tested positive for gunshot residue. Additionally, the defendant was found with his girlfriend's cell phone, which contained what could be interpreted as threatening text messages to the victim arranging to meet minutes before the shooting.

Based on this evidence, a rational jury could have found that the defendant was the shooter. While the defendant emphasizes inconsistencies in the eyewitnesses' testimony, those inconsistencies do not render the evidence insufficient. See Commonwealth v. Peters, 429 Mass. 22, 24 (1999). "A conviction may rest exclusively on circumstantial evidence, and, in evaluating that evidence, we draw all reasonable inferences in favor of the Commonwealth." Commonwealth v. Javier, 481 Mass. 268, 279 (2019), quoting Commonwealth v. Jones, 477 Mass. 307, 316 (2017). The evidence here, though circumstantial, was sufficient to support the defendant's convictions.

3. Third-party culprit evidence. The defendant argues that the judge erroneously excluded, on relevancy grounds, evidence showing that a third party, Torrey Dunn, could have committed the crime. Specifically, the defendant challenges the exclusion of proffered testimony from an officer that Dunn, who was caught on video at the scene of the shooting, later denied that he was there or that he knew anything about the incident.

Hearsay to show a third party may have committed the crime is admissible, in the judge's discretion, if it "is otherwise relevant, will not tend to prejudice or confuse the jury, and there are other 'substantial connecting links' to the crime." Commonwealth v. Rice, 441 Mass. 291, 305 (2004), quoting Commonwealth v. O'Brien, 432 Mass. 578, 588 (2000). The evidence must not "be too remote or speculative." Commonwealth v. Rosa, 422 Mass. 18, 22 (1996). See Commonwealth v. Silva-Santiago, 453 Mass. 782, 801 (2009) ("the admission of feeble third-party culprit evidence" risks "unfair prejudice to the Commonwealth" in that it "inevitably diverts jurors' attention away from the defendant"). Here, the judge properly excluded the proffered evidence. Dunn's denials of involvement in the crime do not show that he was the perpetrator of the crime. Moreover, even assuming that the evidence was minimally relevant, the defendant was not prejudiced by its exclusion

because he was allowed to present evidence that Dunn was present at the scene of the shooting.[3,4]

4. Prosecutorial misconduct. We reject the defendant's challenges to the prosecutor's closing argument, none of which was preserved at trial. The prosecutor's statement that "every" witness saw the shooter as wearing a red shirt was excusable hyperbole, as she went on to qualify the statement by carefully marshalling the evidence as to what each witness saw. See Commonwealth v. Johnson, 429 Mass. 745, 750-751 (1999). The prosecutor's minor misstatement that one witness identified the defendant at trial (when she in fact identified him in a showup) did not create a substantial risk of a miscarriage of justice. Finally, the prosecutor's statements concerning the defendant's

[3] The tenuous nature of the third-party culprit theory was highlighted by the surveillance video, which depicted the victim running together with Dunn after the shooting.

[4] For similar reasons we reject the defendant's arguments, made for the first time on appeal, that the proffered testimony was admissible as statements against penal interest or in support of a Bowden defense. See Commonwealth v. Bowden, 379 Mass. 472, 486 (1980). Even assuming the evidence was minimally relevant on either of those grounds, the defendant has failed to show a substantial risk of a miscarriage of justice.

anger at the victim and possession of a handgun were fair inferences from the evidence.

Judgments affirmed.

By the Court (Hanlon, Desmond & Shin, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: July 23, 2019.

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