

NOTICE: Summary decisions issued by the Appeals Court pursuant to its 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 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

18-P-491

COMMONWEALTH

vs.

THERESA FINCH.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury trial, the defendant, Theresa Finch, was found guilty of both operating a motor vehicle while under the influence of alcohol (OUI), G. L. c. 90, § 24 (1) (a) (1),<sup>1</sup> and negligent operation of a motor vehicle, in violation of G. L. c. 90, § 24 (2) (a).<sup>2</sup> She appeals, arguing that evidence relating to her blood serum tests was improperly admitted. We affirm.

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<sup>1</sup> The complaint alleged both the theory of impaired operation and the per se alternative of driving with a blood alcohol level of .08 percent or greater. The jury found the defendant not guilty of the per se theory. The Commonwealth contends that the jury's verdict of not guilty on the charge of OUI on the basis of a blood alcohol level of .08 percent or greater renders the defendant's appellate issues on the accuracy of the blood testing moot; it does not. See Commonwealth v. Colturi, 448 Mass. 809, 815 (2007). The complaint also alleged a marked lanes violation, on which the judge entered a finding of not responsible.

<sup>2</sup> The defendant has raised no separate argument concerning her conviction of negligent operation.

Background. On December 17, 2015, at 10:30 P.M., the Hanson Police Department dispatched Officer Mark Vigneau to a reported motor vehicle accident on West Washington Street. When he arrived, Vigneau observed a brown minivan on the side of the road with front-end damage. It appeared that the minivan had collided with several trees; the driver, later identified as the defendant, was bleeding from her nose and head. Vigneau asked her whether she was all right, and she responded with speech that was "labored and slurred." Vigneau testified he could smell an odor of alcohol in the vehicle and that the defendant's eyes were bloodshot.

Subsequently, firefighters and other emergency services personnel arrived on the scene to remove the defendant from the vehicle and to transport her via ambulance to a local hospital. Vigneau smelled a "strong odor" of alcohol from the defendant when she was placed in the ambulance. He then searched the defendant's minivan and found two Budweiser beer cans in the front passenger compartment. He did not attempt field sobriety tests "[d]ue to the possibility of injury, the nature of the crash."

A Hanson firefighter, Christopher Harris, also responded to the accident. Harris noted the defendant had shoulder and head injuries but was conscious and answering questions. Harris, who removed the defendant from her automobile, testified he also

could smell alcohol emanating from her. The defendant was transported to South Shore Hospital, where she was provided medical treatment. While she was being treated, the defendant stated that had she consumed a "few beers." A blood serum test also was conducted.

During trial, the prosecutor presented an expert, police laboratory clinical scientist Justin Kaliszewski, who explained the method by which the defendant's blood serum alcohol reading from blood drawn at South Shore Hospital was converted to a blood alcohol content (BAC) reading. Kaliszewski stated that the conversion from the blood serum alcohol reading would result in a BAC of between .089 and .094.

The defendant also presented an expert, Patrick Demers, who testified that the preeminent alcohol testing method is a "gas chromatograph," although he acknowledged that other methods were used in clinical laboratories. Demers testified that he used different conversion factors than Kaliszewski, and stated with ninety-five percent confidence that the defendant's BAC would be anywhere from .07 to .11. Demers also testified that it was his belief that the South Shore Hospital machine to determine BAC in the serum was calibrated only once per day and that this was not consistent with industry standards.

Discussion. 1. Admissibility of blood serum test. The defendant moved in limine to exclude the results of the blood

serum test, arguing the test was not taken for medical purposes, and therefore was not admissible under G. L. c. 233, § 79.

During a hearing on the motion, a nurse testified to the trauma protocols followed at South Shore Hospital where the defendant was taken after the automobile accident. The nurse said that decisions about what tests to perform were made by an attending doctor or according to hospital protocol and that, "Usually, if it's a trauma, it's called from the field, which means EMS brought them in, so it's alerted prior to them arriving, so usually we have all the nurses come in, and in our protocol, the labs are always ordered . . . . I don't remember all of the labs but there's like six different tubes we draw that are in the protocol." In response to the question, "So lab work is part of the protocol," she answered, "Yes." The motion in limine was denied. The defendant now argues that "emergency room blood serum tests that merely screen for alcohol are equivalent to field tests that screen for drugs and are insufficiently reliable to constitute evidence at a criminal trial."

We review "a judge's evidentiary rulings on a motion in limine for abuse of discretion." Commonwealth v. Rosa, 468 Mass. 231, 237 (2014). After the hearing, the motion judge, who was also the trial judge, concluded that the medical records were admissible and reliable because "the testing was conducted

by medical providers, [and] the results of the testing were used to make decisions regarding the defendant's medical treatment by said providers; the Court [found] that the test results were reliable. Further, the Court [found] that serum conversion has a long history of admissibility and reliability in the Commonwealth." After an evidentiary hearing on the protocol for blood testing, the judge further found that the blood was drawn pursuant to South Shore Hospital's trauma protocol and was not taken to obtain evidence for a criminal prosecution. He again denied the motion.

General Laws c. 233, § 79, "permits the admission in evidence, in the judge's discretion, of certified hospital records 'so far as such records relate to the treatment and medical history' of the patient." Commonwealth v. Ackerman, 476 Mass. 1033, 1033-1034 (2017), quoting Commonwealth v. Dube, 413 Mass. 570, 573 (1992). "Thus, a 'record which relates directly and mainly to the treatment and medical history of the patient, should be admitted, even though incidentally the facts recorded may have some bearing on the question of liability.'" Commonwealth v. Dargon, 457 Mass. 387, 394 (2010), quoting Commonwealth v. DiMonte, 427 Mass. 233, 242 (1998). Such records are presumed reliable because they are made by medical professionals "charged with the responsibility of making accurate entries . . . relied on in the course of treating

patients." Commonwealth v. Cole, 473 Mass. 317, 322 (2015), quoting Bouchie v. Murray, 376 Mass. 524, 527-528 (1978). We conclude the judge did not abuse his discretion by admitting the blood serum test results. Rosa, 468 Mass. at 237.

2. Foundation for Commonwealth's expert. The defendant next argues that there was an inadequate foundation laid to permit Kaliszewski, the Commonwealth's expert, to testify to the defendant's BAC. After the prosecutor laid a foundation for Kaliszewski to qualify as an expert witness by asking him questions concerning his education, experience, employment as a forensic scientist with the State Police, and other qualifications, the prosecutor requested that the judge allow Kaliszewski to testify as an expert witness. There was no objection.<sup>3</sup> We therefore review any error for a substantial risk of a miscarriage of justice. See Commonwealth v. Smith, 92 Mass. App. Ct. 417, 421 (2017), and cases cited.

"A trial judge has wide discretion to qualify an expert witness and to decide whether the witness's testimony should be admitted." Commonwealth v. Scesny, 472 Mass. 185, 194-195 (2015), quoting Commonwealth v. Frangipane, 433 Mass. 527, 533 (2001). "In qualifying an expert witness, the question for

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<sup>3</sup> Kaliszewski's qualifications were not the subject of the defendant's motion in limine. Even if they had been, we would not conclude that the admission of his testimony constituted error, let alone prejudicial error.

judicial decision is whether the witness has sufficient skill, knowledge, and experience in the area of his training to aid a jury." Scesny, 472 Mass. at 195, quoting Commonwealth v. Mahoney, 406 Mass. 843, 852 (1990). With regard to the adequacy of the methodology supporting expert testimony, a "party seeking to introduce scientific evidence may lay an adequate foundation either by establishing general acceptance in the scientific community or by showing that the evidence is reliable or valid through an alternate means." Reckis v. Johnson & Johnson, 471 Mass. 272, 292 (2015), quoting Canavan's Case, 432 Mass. 304, 310 (2000). "[W]e will reverse a judge's decision to admit expert testimony 'only where it constitutes an abuse of discretion or other error of law.'" Reckis, supra, quoting Frangipane, supra.

Kaliszewski testified that he had been employed as a forensic scientist at the office of alcohol testing at the Massachusetts State Police crime laboratory since 2014. See Scesny, 472 Mass. at 195 (sufficient experience is prerequisite in assessing adequate qualification of expert). He had received both a bachelor of science degree and a master of science degree in forensic science. See id. He also had received specialized training -- for which he received a certificate of completion -- in alcohol and highway safety. See id. In addition to other relevant experience, Kaliszewski testified that he had conducted

approximately twenty serum conversions, and testified to serum conversions on two other separate occasions.

The trial judge's discretion in qualifying an expert is wide, and we will not interfere unless there is "an abuse of discretion or other error of law." Reckis, 471 Mass. at 292, quoting Frangipane, 433 Mass. at 533. The defendant challenges Kaliszewski's opinion testimony on the basis of his inability to explain at trial the science behind the serum conversion test. However, Kaliszewski's inability to discuss the underlying science does not disqualify him as an expert. We are persuaded that, on these facts, the defendant's challenges to Kaliszewski's testimony go to the weight of the evidence rather than to its admissibility. Commonwealth v. Baxter, 94 Mass. App. Ct. 587, 592 (2018). "The weakness of the expert's opinion may be explored by cross-examination." Commonwealth v. Amaral, 389 Mass. 184, 192 (1983). Here, defense counsel did, in fact, cross-examine Kaliszewski extensively and also presented her own expert witness who challenged Kaliszewski's conclusions. In addition, although the jury found the defendant guilty of OUI, the jury did not find the defendant guilty of operating with a BAC of .08 percent or greater.

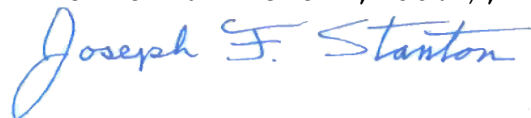
Moreover, there was considerable additional evidence supporting the jury's conclusion that the defendant was operating while under the influence of alcohol, including the



testimony of the responding police officer and the firefighter, the beer cans in the car, as well as the nature of the accident itself. We see no error and certainly no substantial risk of a miscarriage of justice in the admission of the expert's testimony.

Judgments affirmed.

By the Court (Wolohojian,  
Hanlon & Ditkoff, JJ.<sup>4</sup>),



Clerk

Entered: July 19, 2019.

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<sup>4</sup> The panelists are listed in order of seniority.