COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-1549

COMMONWEALTH

vs.

ALFRED GIANNINI, JR.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a jury trial, the defendant, Alfred Giannini, Jr., was convicted of manslaughter, pursuant to G. L. c. 265, § 13, and breaking and entering in the daytime with intent to commit a felony, pursuant to G. L. c. 266, § 18, stemming from a stabbing in Brockton.[1] On appeal, the defendant contends that certain evidentiary rulings by the judge were erroneous, asserts that he was prejudiced by the timing of the Commonwealth's disclosure of information, maintains that the jury instruction on the breaking and entering charge was erroneous, and

[1] The defendant was also convicted of larceny in a building, pursuant to G. L. c. 266, § 20; larceny of a motor vehicle, pursuant to G. L. c. 266, § 28 (a); failure to stop for police, pursuant to G. L. c. 90, § 25; and resisting arrest, pursuant to G. L. c. 268, § 32B. In a bench trial that followed the jury verdict, he was convicted of several habitual criminal penalty enhancements, pursuant to G. L. c. 279, § 25.

challenges the sufficiency of the evidence on that same charge. We affirm.

Background. Viewed in the light most favorable to the Commonwealth, Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979), the evidence was as follows. In August 2013, the defendant sold a truck to the victim; subsequently, the defendant took the truck back, thereby upsetting the victim who had promised the truck to his drug dealer. The defendant testified that, after learning of the victim's reaction and the involvement of the drug dealer, the defendant went to the victim's home to resolve the dispute.

A confrontation ensued, and the defendant stabbed and killed the victim. The defendant fled the scene and broke into his cousin's home, which was nearby. There, he removed his blood-stained garments and took clothing, shoes, the keys to his cousin's truck, and the truck itself. The defendant was apprehended by police later that day.

1. Prior convictions. Following the defendant's direct testimony,[2] and over objection, the judge permitted the prosecutor to cross-examine the defendant regarding some of the defendant's prior convictions. On appeal, the defendant contends that this was error.

[2] The defense at trial was that the defendant stabbed the victim in self-defense.

We review the judge's evidentiary decision for abuse of discretion. Commonwealth v. Paulding, 438 Mass. 1, 12 (2002). In exercising discretion to determine whether to admit evidence of a prior conviction, a trial judge must determine whether the danger of unfair prejudice to the defendant outweighs the probative value of the evidence for purposes of impeachment. Commonwealth v. Maguire, 392 Mass. 466, 470 (1984). Here, the judge properly engaged in the required balancing test. The judge limited the prior convictions to only those occurring within the last fifteen years and reasoned that "[w]hile the [defendant's prior] larceny convictions . . . have some similarity to some of the charges against him, they are not precisely the same, are crimes involving dishonesty, and have the virtue of not being crimes of violence where by far the most serious charge confronting the defendant is the charge of homicide."

Allowing inquiry into these past convictions was not an abuse of discretion. See, e.g., Commonwealth v. Crouse, 447 Mass. 558, 565-566 (2006) (admission of prior conviction for aggravated rape not abuse of discretion despite similarity to uncharged conduct forming basis of felony-murder charge); Commonwealth v. Whitman, 416 Mass. 90, 94-95 (1993) (admission of assault with intent to rape conviction not abuse of discretion despite similarity to prosecution's theory that

charged crime -- homicide -- occurred following attempted sexual assault on victim where defendant's credibility was in question); Commonwealth v. Walker, 401 Mass. 338, 345-346 (1987) (no abuse of discretion where judge allowed defendant's past convictions of larceny, robbery, and assault by means of dangerous weapon where defendant was charged with, among others, armed robbery and murder). "Importantly, too, the prosecutor refrained from mentioning the prior conviction[s] in his closing argument, and the trial judge gave the jury an appropriate limiting instruction when the evidence was admitted and again in his final instructions." Whitman, 416 Mass. at 95.

2. Van theft. The defendant next argues that the judge improperly allowed the admission of evidence that, several hours prior to the stabbing of the victim, the defendant stole a van.[3] This was not an abuse of discretion. See Commonwealth v. Perez, 390 Mass. 308, 316-318 (1983). The defendant opened the door to the admission of the van theft when he testified that he went to the victim's home to resolve the outstanding truck matter. See Commonwealth v. McCowen, 458 Mass. 461, 479 (2010). The Commonwealth sought to impeach this testimony by showing that the defendant went to the victim's home to evade the police who

[3] Defense counsel and the Commonwealth agreed to sever this charge of larceny of a motor vehicle, pursuant to G. L. c. 266, § 28 (a), from the trial.

were pursuing him because he had stolen the van, which he abandoned near the victim's home. See id. Further, the judge minimized the potential for unfair prejudice by providing a limiting instruction, noting that the jury could consider evidence of the van theft solely "in evaluating the defendant's intent and state of mind in going to the" victim's home. See id. at 478-479.

3. Late discovery disclosure. The defendant also asserts that he was prejudiced because, according to the defendant, the prosecutor violated Mass. R. Crim. P. 14 (a) (1) (A), as amended, 444 Mass. 1501 (2005), by the purportedly tardy disclosure of information. Evidence subject to mandatory discovery under rule 14 must have been in the "possession, custody, or control of the prosecutor." Commonwealth v. Torres, 479 Mass. 641, 647 (2018), quoting Commonwealth v. Wanis, 426 Mass. 639, 643 (1998). Here, the evidence was not in the prosecutor's possession, custody, or control until its discovery during a trial preparation meeting. Once the prosecutor discovered the information, the prosecutor promptly informed defense counsel of it. Accordingly, there was no violation of rule 14.

4. Breaking and entering charge. The defendant contends that, with respect to the charge for breaking and entering with intent to commit a felony (larceny over $250), the judge failed

to instruct on the lesser included offense of breaking and entering with intent to commit a misdemeanor (larceny under $250). The defendant did not raise this objection at trial, and accordingly our review is limited to determining whether the error, if any, created a substantial risk of a miscarriage of justice.[4] Commonwealth v. Marinho, 464 Mass. 115, 122 (2013). Here, the evidence was that the defendant broke into his cousin's home with the intent to steal and then, as the defendant admitted, proceeded to steal clothing, shoes, and keys to a truck, which he also stole. On this record, there is no substantial risk of a miscarriage of justice. See Commonwealth v. Carter, 306 Mass. 141, 149 (1940) ("In many cases, as in the familiar instance of a charge of breaking and entering with intent to steal, proof of the actual commission of the larceny is decisive proof of the intent with which the entry was made. The overt act leaves no room for doubt as to the felonious

[4] The defendant objected to the jury instructions on the breaking and entering charge and the larceny in a building charge as "inconsistent" with each other and "confusing"; however, he did not raise the objection he presses on appeal.

purpose with which the previous criminal act was perpetrated").[5]

Judgments affirmed.

By the Court (Green, C.J.,
Milkey & Wendlandt, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: October 28, 2019.

[5] The defendant also argues that the evidence was insufficient to convict him on the breaking and entering charge in the absence of evidence of the value of the property he actually stole or his intent to commit a felony. We disagree. See Commonwealth v. Hill, 57 Mass. App. Ct. 240, 247 (2003) ("it was not necessary for the Commonwealth to present evidence of the value of any property actually stolen, or, in fact, that any property was actually stolen"). The evidence that the defendant stole clothing, shoes, and keys to a truck from his cousin's home was sufficient evidence of his intent to commit a felony and, accordingly, the judge did not err in denying the defendant's motion for a required finding. See Carter, 306 Mass. at 149; Commonwealth v. Lauzier, 53 Mass. App. Ct. 626, 629 (2002).

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