

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-965

COMMONWEALTH

vs.

THOMAS ANDRADE, JR.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury trial, the defendant, Thomas Andrade, Jr., was convicted of resisting arrest and unlawful possession of a firearm. See G. L. c. 268, § 32B; G. L. c. 269, § 10 (a). On appeal, the defendant contends that (1) there was insufficient evidence that he used or threatened to use physical force or violence or created a substantial risk of causing bodily injury to evade arrest; and (2) the trial judge abused his discretion when he admitted a State trooper's in-court identification of the defendant as the person he witnessed committing the charged offenses.

Background. For purposes of determining the sufficiency of the evidence, "[w]e review the evidence in the light most favorable to the Commonwealth to determine whether 'any rational trier of fact could have found the essential elements of the

crime beyond a reasonable doubt.'" Commonwealth v. Montoya, 457 Mass. 102, 105 (2010), quoting Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). We address other additional facts relevant to the discussion of the other issues on appeal as necessary.

On May 8, 2014, the defendant was driving when Trooper Keith Ledin pulled him over and into a residential driveway. During the five-to-ten minute stop, Trooper Ledin learned that the defendant's license was suspended, and gave him a verbal warning advising him not to drive with a suspended license. The defendant was driving a BMW registered to his father, with a Massachusetts license plate.<sup>1</sup>

A couple hours later, Trooper Ledin again saw the defendant driving the same BMW with the same license plate. He recognized the defendant as the driver when the defendant looked through his open window directly at the trooper. Trooper Ledin pulled his cruiser out to stop the defendant and turned on his lights, but he quickly lost sight of the BMW after it "eluded and . . . took off."

While patrolling in his cruiser the following day, May 9, 2014, Trooper Ledin saw a BMW with the same license plate a

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<sup>1</sup> Registry of motor vehicles records and the trooper's initial reports indicated that the BMW was blue; but at trial he testified it was green. Defense counsel used this discrepancy at trial to impeach the trooper's credibility.

third time, but once more lost the car after trying to pursue it with his cruiser lights on. Again, he recognized the defendant as the driver; the driver's window was partially open.

During the late evening of May 9, 2014, and the early morning of May 10, 2014, Trooper Ledin saw a BMW with the same license plate a fourth time, parked at a convenience store. Again, he recognized the defendant, who got into the driver's seat of the BMW and drove away. Because Trooper Ledin was assigned to secure a crime scene at the time, he did not pursue the defendant.

Later the same day, May 10, 2014, at approximately 11:30 P.M., Trooper Ledin saw the BMW driven by the defendant a fifth time. When Trooper Ledin stopped his cruiser at a red light, he found himself facing the BMW, which was traveling in the opposite direction. Again, he recognized the driver as the defendant. When the light turned green, Trooper Ledin made a U-turn and followed. The defendant pulled into a gas station, and Trooper Ledin followed. Both the defendant and the trooper stopped and got out of their cars. The defendant began walking away from Trooper Ledin and toward the gas station convenience store.

The trooper called to the defendant by name. The defendant turned in response and returned to the car. The defendant faced the BMW and placed his hands on it. The trooper "went to grab

each wrist, put his hands behind his back to place him in handcuffs. And right as [the trooper] started placing them," the defendant broke loose, spun around, and ran about fifteen feet before tripping on his own feet. When the defendant tripped, a handgun fell from his waistband and hit the pavement.<sup>2</sup> A passenger in the BMW got out of the car and approached the handgun until the trooper "drew [his own] gun to make sure [the passenger] wasn't going to run and grab it." The trooper then picked up the handgun and began chasing the defendant.

The trooper chased the defendant through the gas station parking lot until he lost sight of him in a dimly lit and wooded area behind another business. The trooper stopped the chase out of concerns for his own safety.

At trial, Trooper Ledin was the sole witness for the Commonwealth. He testified to the facts set forth above and, over the defendant's objection, identified the defendant as the person he had stopped at the gas station on May 10, 2014.

Discussion. 1. Resisting arrest. General Laws c. 268, § 32B (a), provides that:

"A person commits the crime of resisting arrest if he knowingly prevents or attempts to prevent a police officer, acting under color of his official authority, from effecting an arrest of the actor or another, by: (1) using

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<sup>2</sup> The parties stipulated that this handgun met the legal definition of a "firearm" under G. L. c. 140, § 121. The parties also stipulated that the firearm was functional and contained a loaded magazine.

or threatening to use physical force or violence against the police officer or another; or (2) using any other means which creates a substantial risk of causing bodily injury to such police officer or another."

The defendant contends that there was insufficient evidence of use of force or risk of bodily injury, such that his conviction for resisting arrest must be vacated.<sup>3</sup>

The evidence was sufficient under both prongs of the statute. The act of breaking loose as the trooper was placing handcuffs on the defendant constituted the use of physical force against the trooper, satisfying the first prong of the statute. See G. L. c. 268, § 32B (a) (1). The use of force, such as stiffening the arms and pulling away "'in opposition' to the arresting officer constitute[s] resisting arrest under § 32B (a) (1)." Commonwealth v. Maylott, 65 Mass. App. Ct. 466, 469 (2006), quoting Commonwealth v. Katykhin, 59 Mass. App. Ct. 261, 263 (2003).<sup>4</sup> In addition, the evidence was sufficient under the

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<sup>3</sup> The evidence was sufficient to permit a jury to conclude that the trooper was "effecting . . . an arrest." Commonwealth v. Grant, 71 Mass. App. Ct. 205, 208 (2008), quoting Commonwealth v. Grandison, 433 Mass. 135, 145 (2001). The defendant does not contend otherwise.

<sup>4</sup> The defendant's assertion that the evidence was insufficient to show that he used or threatened to use physical force to avoid arrest is unavailing. Viewed in the light most favorable to the Commonwealth, Commonwealth v. Powell, 459 Mass. 572, 579 (2011), citing Latimore, 378 Mass. at 677, the trooper's testimony that he had started to handcuff the defendant would permit a rational jury to conclude that there was physical contact between the trooper and the defendant, and that the defendant broke from the trooper's grasp for the purpose of evading arrest. See Maylott, 65 Mass. App. Ct. at 469. The defendant's reliance on

second prong of the statute. See G. L. c. 268, § 32B (a) (2). The defendant created a substantial risk of bodily harm to both the trooper and his passenger when he broke away from the trooper, ran, and dropped the firearm on the pavement. The scene was unsecured, and the passenger stood near the gun. The trooper had to draw his gun in order to secure the dropped firearm. The defendant fled into a dark wooded area. Each of these actions created a substantial risk of injury. See Montoya, 457 Mass. at 106 (defendant jumped into canal, creating substantial risk of bodily injury for pursuing officers); Commonwealth v. Grandison, 433 Mass. 135, 144-145 (2001) (stiffening arms; four officers required to handcuff defendant); Commonwealth v. Sylvia, 87 Mass. App. Ct. 340, 342-343 (2015) (chasing defendant over roadbed under construction); Maylott, supra, at 469-470 (defendant opposed officers' attempts to handcuff him; two officers required to consummate arrest).

2. In-court identification. The defendant contends that Trooper Ledin's in-court identification was inadmissible because the trooper had not made a prior out-of-court identification and there was not "good reason" to admit the in-court

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Commonwealth v. Vieira, 483 Mass. 417, 423 (2019), is inapt, as that case involved the analysis of a purely elements based approach to the definition of force under G. L. c. 276, § 58A (1).

identification. Commonwealth v. Crayton, 470 Mass. 228, 241-242 (2014). See Mass. G. Evid. § 1112(c)(2)(A) (2019). We review the judge's decision for an abuse of discretion.<sup>5</sup> See Commonwealth v. Collins, 92 Mass. App. Ct. 395, 397 & n.2 (2017), citing Commonwealth v. Bly, 448 Mass. 473, 495 (2007), and Crayton, supra at 245.

An in-court identification may be unnecessarily suggestive where "the Commonwealth failed earlier to conduct a less suggestive out-of-court identification procedure, and the in-court identification is therefore the only identification of the defendant made by an eyewitness." Crayton, 470 Mass. at 241. However, "there may be 'good reason' [to admit an in-court identification] where the eyewitness was familiar with the defendant before the commission of the crime." Id. at 242.

The in-court identification was not unnecessarily suggestive. The trooper was an eyewitness with prior knowledge of the defendant. Trooper Ledin spoke to the defendant for five to ten minutes during a traffic stop only two days earlier, and had seen him in the same BMW three additional times in the intervening days. Trooper Ledin recognized the defendant, and

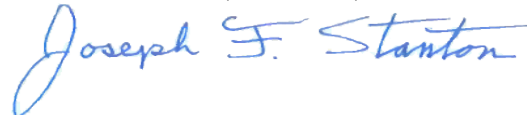
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<sup>5</sup> An abuse of discretion exists where the judge "made a clear error of judgment in weighing the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives." Commonwealth v. Collins, 92 Mass. App. Ct. 395, 397 (2017), quoting L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

the defendant responded when the trooper called him by name at the gas station. This is, therefore, a case "where the eyewitness was familiar with the defendant before the commission of the crime." Crayton, 470 Mass. at 242. See Commonwealth v. Crayton, 93 Mass. App. Ct. 251, 257 (2018) (good reason to admit in-court identification where witness was familiar with defendant before commission of crime). The judge did not abuse his discretion in permitting Trooper Ledin to make an in-court identification of the defendant.

Judgments affirmed.

By the Court (Sullivan,  
Maldonado &  
Wendlandt, JJ.<sup>6</sup>),



Clerk

Entered: January 17, 2020.

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<sup>6</sup> The panelists are listed in order of seniority.