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

19-P-169

COMMONWEALTH

vs.

NATALIO J. MIRANDA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury trial the defendant was convicted of possession with intent to distribute cocaine, and possession with intent to distribute fentanyl. The defendant was the front seat passenger in a pick-up truck that the police observed driving in a Brockton neighborhood, engaging in activity consistent with the drug trade. The police thereafter attempted to pull the truck over for traffic violations. After the truck came to rest in a snowbank, the drugs in question were found in the snowbank outside the truck's passenger side, and on the driver's person. No drugs were found on the person of the defendant. The defendant appeals the convictions, arguing (1) that the drugs should have been suppressed because there was no reasonable basis for the traffic stop, (2) that the judge erred in allowing testimony from the Commonwealth's expert on street

level drug transactions, and (3) that in his closing the prosecutor prejudicially misrepresented and speculated regarding the evidence. We affirm.

Background.[1] On February 4, 2015, the Brockton police received a call from a confidential informant who said that a young Cape Verdean male was selling drugs from a white Nissan pick-up truck, in the area of Tiffany Drive. The informant had not previously supplied information to the police.

Brockton Police Detectives Ernest Bell and Timothy Donahue went to investigate, in plain clothes and separate vehicles. It being February of 2015, the roads that day were covered with snow, with snow banks three feet high on both sides.

As Detective Donahue traveled north on Van Clift Avenue near Tiffany Drive, he was passed by a white Nissan pick-up truck. The Nissan was also traveling north, and drove into the southbound lane to pass Donahue. The Nissan's license plate was obscured by snow, although Donahue could tell that it had an out-of-State plate. As to the Nissan's speed, Donahue testified that the Nissan was traveling, "[f]or the road conditions that day, a little too fast."

A few minutes later, Donahue saw the white Nissan traveling the same route it had previously traveled. This time, a red

[1] The facts are taken from the judge's findings in his order denying the motion to suppress, or from portions of the record not subject to dispute.

vehicle was following the Nissan. Both the Nissan and the red vehicle turned right onto Gladwood Street. Donahue followed, and when he caught up he observed that the Nissan had stopped behind the red vehicle on the side of the road, and the Nissan was then in the process of pulling back onto the road. Donahue observed a white female walking from the direction of the Nissan to the driver's side of the parked red vehicle. The Nissan traveled on, and turned left onto Pearl Street. Donahue then called the police dispatcher and requested that a marked cruiser stop the Nissan. Officer Michael Minnock responded. Donahue asked Minnock to perform the stop based upon the observed traffic violations -- traveling at an excessive speed, improper passing, and operating with an obscured license plate.

Shortly thereafter, Minnock drove up behind the Nissan on Tilton Avenue and activated his lights. The Nissan accelerated away, but lost control on the snowy road and crashed into a snowbank. The Nissan had two occupants, the driver and the defendant. The defendant was in the front passenger seat. The police directed both occupants to exit the vehicle. The police had to assist the defendant out through the window, because the passenger-side door was buried in a snow bank.

A witness told the police that she saw the Nissan crash, and that the passenger then made motions as if throwing something through the vehicle window. The police looked in the

snowbank and found a bag of narcotics (cocaine) a few feet from the passenger window. The police also found a firearm under the Nissan. When the police searched the driver, they found bags containing substances later shown to be cocaine, fentanyl, and heroin.

The defendant was indicted for drug and firearm offenses. He moved to suppress all items seized as a result of the traffic stop, on the grounds, among others, that the traffic stop was effected without reasonable suspicion. The motion was denied after an evidentiary hearing.

The case was tried in April and May of 2018. At trial the Commonwealth presented evidence from a police officer expert, who testified to the characteristics of street level drug transactions. The prosecutor then argued, in closing, that the police had witnessed a street level drug transaction between the occupants of the white Nissan and the red car, as the evidence of those events matched the officer's description. The prosecutor used this evidence as confirmation that the defendant was engaged in drug distribution from the Nissan. The prosecution presented two theories of criminal responsibility: (1) that the defendant was in constructive possession of the drugs, and (2) that the defendant was in a joint venture with the driver. The defendant was convicted on two counts --

possession of cocaine with intent to distribute, and possession of fentanyl with intent to distribute. This appeal followed.

Discussion. 1. Motion to suppress. The defendant first challenges the denial of his motion to suppress, arguing that there was no reasonable basis for the traffic stop. As noted, the Commonwealth relies on three grounds for the stop -- driving at excessive speed for the conditions, improper passing, and driving with an obscured license plate.[2] As to the first two grounds, we agree that there is a serious issue as to their validity. We need not address those grounds, however, because the traffic stop was justified where the defendant was driving with an obscured license plate.

"Where the police have observed a traffic violation, they are warranted in stopping a vehicle." Commonwealth v. Bacon, 381 Mass. 642, 644 (1980). Pursuant to G. L. c. 90, § 6, "[e]very motor vehicle . . . registered under this chapter" shall display its "number plates," which "shall be kept clean with the numbers legible." The reason for the requirement is readily apparent; the number plate allows persons, including the authorities, to identity a vehicle in the event such is

[2] The Commonwealth argues that the defendant did not raise the illegality of the traffic stop as a basis for suppression in the Superior Court, and that the argument is accordingly waived. Whether or not the Commonwealth is correct, the judge addressed the issue, ruling that the stop was valid. We accordingly address the issue. See Commonwealth v. Vargas, 475 Mass. 338, 343 n.7 (2016).

necessary -- for example, because it was involved in an accident or other traffic violation.

Here both Officer Minnock and Detective Donahue testified that the defendant's rear plate was obscured by snow, such that the numbers could not be read. The judge so found, and the defendant does not challenge that finding on appeal. Rather, the defendant argues that c. 90, § 6, does not apply to vehicles with out-of-State plates; he contends that § 6 by its language only applies to vehicles registered in Massachusetts.

The defendant's rather implausible argument -- that there is no law prohibiting out-of-State vehicles from driving on Massachusetts roads with obscured plates -- is incorrect. While § 6 speaks to vehicles registered in Massachusetts, c. 90, § 3, applies the same requirements of § 6 to out-of-State vehicles. Section 3 addresses motor vehicles of nonresidents, and states that "[e]very such vehicle so operated shall have displayed upon it number plates, substantially as provided in section six." G. L. c. 90, § 3. The officers observed the defendant violating this law, and the traffic stop was therefore appropriate. Moreover, the subsequent seizures of the drugs and gun were also proper. After Minnock activated his lights, the Nissan accelerated away, at a speed unsafe for the conditions. The subsequent arrests and searches were lawful, in light of the driver's actions in failing to stop and crashing the Nissan.

2. The police officer expert. Police Officer Telford testified at trial as an expert in the characteristics of street level drug transactions. He testified, over objection, to several characteristics of what he called a "delivery service" type of transaction. Telford testified that in such a transaction, a customer and a drug dealer will arrange a meeting, usually at a public location. He testified, among other things, that drug dealers will often arrive at the meeting in a vehicle not registered to them and then scan the area in advance by, for example, "rid[ing] the block," and then conduct the transaction without leaving their vehicle. Defense counsel objected to this testimony, arguing that it was improper because it "exactly mirrors this case."

On appeal the defendant presses the objection, but now his reasoning is different; relying on Commonwealth v. Dayes, 49 Mass. App. Ct. 419, 422-423 (2000), the defendant asserts that Telford's testimony was "irrelevant," because the characteristics to which Telford testified did not match the actual conduct to which the officers' testified, and thus Telford's testimony was not helpful to the jury. The Commonwealth responds that Telford clearly had the expertise to testify as he did, and that his testimony was helpful because a lay jury otherwise would not have knowledge of the potential significance of the facts that had been adduced.

There was no error in the admission of Telford's testimony. The testimony was clearly relevant to the jury, as several of the characteristics that Telford identified were, in fact, applicable to the facts of this case. These included that the Nissan was a rental, that the Nissan was being driven around the block, and that when the occupants pulled over, they did not leave their vehicle. Dayes is accordingly inapposite. It was appropriate to present this expert testimony to the jury, to help it to evaluate that evidence before it. See Commonwealth v. Miranda, 441 Mass. 783, 792 (2004) ("expert testimony describing street-level methods of heroin distribution" assisted jury). And Telford was plainly qualified, by experience, to provide the testimony. Id. at 793-794.[3]

3. Prosecutor's closing argument. Finally, the defendant urges that during his closing the prosecutor prejudicially misrepresented facts, or argued speculative and unwarranted

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[3] The Commonwealth argues in its brief -- as if it were a virtue -- that during his testimony "Telford's attention was never drawn to the case at hand." To the extent the Commonwealth is suggesting that Officer Telford needed to avoid discussing the facts of the case as a basis for his expert testimony, such is incorrect. Although it is not appropriate for a police officer expert witness to opine on the ultimate issue -- e.g., based upon the observed facts, that a drug transaction "had taken place," Commonwealth v. Tanner, 45 Mass. App. Ct. 576, 580 (1998) -- a police officer expert witness may refer to facts in evidence, to help provide context for the jury to see the relevance of his or her testimony. As we said in Tanner, "as with any witness, the Commonwealth is entitled -- indeed expected -- to focus the expert's testimony on the facts at hand." Id. at 579.

inferences. "Prosecutors must limit the scope of their arguments to facts in evidence and inferences that may be reasonably drawn from the evidence." Commonwealth v. Beaudry, 445 Mass. 577, 580 (2005), quoting Commonwealth v. Coren, 437 Mass. 723, 730 (2002). Here the defendant points us to several statements in the prosecutor's closing. None of those statements was objected to at trial. We accordingly review only to determine if the prosecutor's arguments were improper, and if so, whether they caused a substantial risk of a miscarriage of justice. See Commonwealth v. Randolph, 438 Mass. 290, 296 (2002). In addition we note, as we have before, that "we consider the fact that the defendant did not object to the statements at trial as some indication . . . [that] the now challenged aspects of the prosecutor's argument were not unfairly prejudicial" (quotation omitted). Commonwealth v. Degro, 432 Mass. 319, 326 (2000).

We perceive no risk that justice miscarried as a result of the prosecutor's closing here. True, there is one statement that gives us concern: after defense counsel had argued in closing that the evidence as to the involvement of the defendant was not strong (because he was neither driving the Nissan nor in possession of drugs), the prosecutor argued:

> "You're in a public area, number of cellphones in the car, 78 bags in one area, three bags on Mr. Pires [the driver]. They got in that car with the intention to deal drugs.

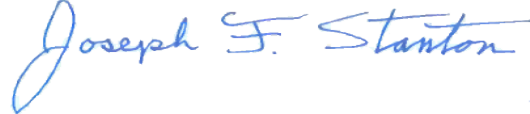
> Maybe they intended to deal drugs together. Maybe [the defendant] had Mr. Pires drive him to a drug deal. Maybe [the defendant] provided Mr. Pires with the three bags of drugs he had on him in exchange for the ride. I don't know."

The last few sentences of this argument were impermissible speculation. There was no evidence that the defendant was directing the driver (Pires), or that the defendant had provided the drugs to the driver. The argument should not have been made. Nevertheless, in the context of all the evidence we cannot say that reversal is required. See Randolph, 438 Mass. at 297 ("under the substantial risk standard, we review the evidence and the case as a whole" [quotation omitted]). The evidence of the defendant's involvement in the drug transactions was substantial. The jury could reasonably infer that the defendant was in the white Nissan when the apparent drug transaction occurred with the red car. After the crash, a disinterested witness observed the defendant throwing something out his passenger window, and the drugs were found in a snowbank in that area. In evaluating whether there is a substantial risk of miscarriage of justice here, we consider whether the error prejudiced the defendant, and whether, in the context of the entire trial, the error materially influenced the verdict.

Randolph, 438 Mass. at 298. Here the evidence pointed strongly to a joint venture to distribute drugs.[4]

Judgments affirmed.

By the Court (Maldonado, Singh & Englander, JJ.[5]),



Clerk

Entered: April 13, 2020.

[4] To the extent we have not explicitly discussed them, we have carefully considered the defendant's remaining arguments, and we find them to be without merit.

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