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-447

COMMONWEALTH

vs.

RENAULD CASIMIR.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A District Court jury convicted the defendant of operating a motor vehicle while under the influence of intoxicating liquor (OUI), following a one-day trial at which Massachusetts State Police Trooper Stan Ungechauer and the defendant were the only witnesses. Ungechauer testified on direct examination that the defendant "failed" field sobriety tests, "was operating under the influence of alcoholic beverage," and was advised of his right to take a "breath test." There was no objection to any of this testimony, although the defendant did not have a chance to object to Ungechauer's statement that he advised the defendant of his right to take a breathalyzer test because the prosecutor immediately asked the judge to strike it. The judge called the attorneys to sidebar, where the defendant moved for a mistrial. The judge declined to declare a mistrial and offered to give a

curative instruction. He did not do so at the defendant's specific request ("I'm not asking for the jury instruction -- I do not want that").

On appeal from his conviction, the defendant claims error in (1) the denial of his motion for a mistrial, and (2) the admission of Ungechauer's opinion that the defendant "failed" the field sobriety tests. We agree that Ungechauer should not have volunteered during his testimony that he advised the defendant of his right to take a breathalyzer test. See Commonwealth v. Conroy, 396 Mass. 266, 269 (1985). See also G. L. c. 90, § 24 (1) (e). We conclude, however, that the error was harmless beyond a reasonable doubt, see Commonwealth v. Morales, 76 Mass. App. Ct. 663, 665 (2010). Nor should Ungechauer have testified to his opinion on the ultimate issue whether the defendant was operating while under the influence of alcohol. See Commonwealth v. Gallagher, 91 Mass. App. Ct. 385, 388-389 (2017). However, the defendant did not object to this latter testimony, and we conclude that its admission did not create a substantial risk of a miscarriage of justice. Accordingly, we affirm.

Background. Ungechauer testified that he was traveling northbound on Route 24 at 5:09 A.M. on August 21, 2016, when he observed a vehicle on the southbound side that was stopped in the middle of the left, high-speed travel lane. Route 24 is a

six-lane highway that is divided by a cement median. The posted speed limit is sixty-five miles per hour. Other traffic was using the middle and right travel lanes to go around the stopped but running vehicle. Ungechauer did a U-turn, activated his emergency lights, parked behind the car, and approached the driver's side.

Ungechauer saw the operator, later identified as the defendant, slouched over with his head against the driver's side window. The defendant's foot was on the brake pedal. Concerned that the defendant might be having a medical emergency, Ungechauer knocked on the window twice, but received no response. Ungechauer then "banged" on the window with his flash light, causing the defendant to "jump up" and begin fumbling to open the window. Ungechauer opened the door and asked the defendant what he was doing and if he was "okay." The defendant "shrugged" and seemed not to understand the questions. He stated that he was headed home to "Roxbury" and stopped in the left travel lane because he "didn't like the flashing lights and didn't think it was safe to pull over to the right." Ungechauer noted that he had not pulled the defendant over and that the defendant was driving away from Roxbury. Again, the defendant shrugged. Ungechauer observed that the defendant's eyes were glassy and bloodshot and that there was a strong odor of alcohol

emanating from him. The defendant stated that he had consumed one beer.

Thereafter, Ungechauer administered the "nine step walk and turn test," which the defendant "failed." The defendant fell, was unable to stay on the white line, did not put his feet heel-to-toe as instructed, and raised his arms for balance. The defendant also "failed" the "one leg stand" test by "continually swaying, raising his arms, and putting his foot down." "Based on the totality of the situation," Ungechauer "determined that [the defendant] was operating under the influence of alcoholic beverage and . . . placed him in custody." Ungechauer brought the defendant to the State Police barracks where, among other things, Ungechauer "read [the defendant] the statutory rights and consent form, with his right to perform a breath test."

The defendant testified in his own defense and denied being intoxicated. He stated that he stopped in the left travel lane because Ungechauer was pulling him over, and he did not think it was safe to pull to the right. The parties stipulated before trial that the defendant was "operating" on a "public way," thus, as the judge told the jury before opening statements, "the issue in this case is impairment, or [the defendant's] ability to drive safely." The judge instructed the jury that they were free to accept or to reject Ungechauer's opinion on the subject, and that they should come to their own conclusion whether

evidence regarding the defendant's performance on field sobriety tests "demonstrate[s] the defendant's ability to operate a motor vehicle was diminished." In a separate instruction, the judge told the jury not to consider the absence of evidence regarding a breathalyzer test "in any way during your deliberations."

Discussion. 1. Mistrial. We review the denial of a motion for a mistrial for abuse of discretion, Commonwealth v. Silva, 93 Mass. App. Ct. 609, 614 (2018), bearing in mind that the trial judge is in the best position to determine whether an error warrants the "extreme measure" of mistrial. Commonwealth v. Amran, 471 Mass. 354, 360 (2015). We will not find an abuse of discretion unless we conclude that 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. L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

The defendant claims that the judge abused his discretion when he denied the motion for a mistrial based on Ungechauer's testimony that he offered the defendant a breathalyzer test because evidence of the defendant's intoxication was not so overwhelming that it could overcome the prejudicial effect of the testimony. We disagree. Ungechauer testified that the defendant "bore many of the classic indicia of impairment." Commonwealth v. Jewett, 471 Mass. 624, 636 (2015). The

defendant was unsteady on his feet, had glassy eyes, smelled of alcohol, and slurred his words. See id.; Commonwealth v. Sudderth, 37 Mass. App. Ct. 317, 321 (1994). He also performed poorly on tests designed to "measure a person's sense of balance, coordination, and acuity of mind in understanding and following simple instructions." Commonwealth v. Sands, 424 Mass. 184, 188 (1997). Where the jury apparently credited Ungechauer's version of events, that the defendant was asleep at the wheel of a vehicle that was stopped in the high-speed lane of a sixty-five-mile-per-hour highway, Ungechauer's testimony "provided overwhelming evidence that [the defendant's] ability to operate was impaired by [his] alcohol consumption." Gallagher, 91 Mass. App. Ct. at 391. See Commonwealth v. Garuti, 454 Mass. 48, 55 (2009) (jury must resolve conflicts in testimony and "determine where the truth lies" [citation omitted]).

As in Conroy, it appears that Ungechauer's testimony that he advised the defendant of his right to take a breathalyzer was inadvertent.[1] Additionally, "there was no further mention of [a] breathalyzer examination during the remainder of the trial."

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[1] The testimony clearly was not "the result of a tactical maneuver by the Commonwealth or its witness to circumvent the mandate of G. L. c. 90, § 24 (1) (e)," Conroy, 396 Mass. at 270, where the prosecutor moved to strike the testimony before the defendant even had a chance to object.

Conroy, 396 Mass. at 270. Contrast Commonwealth v. Seymour, 39 Mass. App. Ct. 672, 677-678 (1996) (prosecutor referred to breathalyzer evidence in closing). The testimony was not underscored by a curative instruction, see Commonwealth v. Madigan, 38 Mass. App. Ct. 965, 966 (1995); instead, the judge separately instructed the jury to put any reference to a breathalyzer test "completely out of your mind." "Presumably, the jury understood and followed this instruction." Commonwealth v. Gallagher, 408 Mass. 510, 518 (1990). In these circumstances, it was not an abuse of discretion by the judge to decline to declare a mistrial.

2. Ungechauer's opinion testimony. Citing to Commonwealth v. Canty, 466 Mass. 535, 543-544 (2013), and Commonwealth v. Gerhardt, 477 Mass. 775, 776-777 (2017), the latter of which issued on the same day as the defendant's trial, the defendant claims that Ungechauer should not have been allowed to testify that the defendant failed field sobriety tests because it constituted an impermissible opinion on the ultimate issue in the case. There was no error in admitting Ungechauer's lay opinion that the defendant failed the tests. See Sands, 424 Mass. at 188 ("ordinary field sobriety tests" do not require expert opinion). The opinion was based on Ungechauer's personal observations, see Mass. G. Evid. § 701 (2019), and was not precluded by the holding in Gerhardt. Gerhardt dealt with the

effects of marijuana on a person's ability to operate a motor vehicle, and not the effects of alcohol. Nothing in that decision bars the admission of an officer's lay opinion that a defendant who has acknowledged consuming alcohol failed certain field sobriety tests, based on the officer's observations that the defendant was swaying, unsteady on his feet, and unable to follow instructions. "A lay juror understands that intoxication leads to diminished balance, coordination, and mental acuity from common experience and knowledge." Sands, supra.

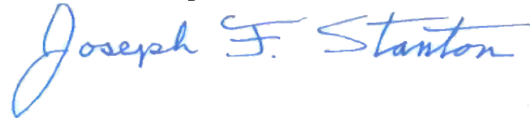
Ungechauer's opinion that the defendant "was operating under the influence of alcoholic beverage" is "the type of evidence that was prohibited in Canty, [466 Mass.] at 544." Gallagher, 91 Mass. App. Ct. at 389. "This type of testimony comes close to an opinion on the ultimate issue of guilt or innocence, and presents a danger of unfair prejudice." Id. The defendant did not object to this testimony at trial and does not claim on appeal that its admission was error. However, the gravamen of his claim is that Ungechauer's testimony invaded the province of the jury by conveying Ungechauer's opinion on the ultimate issue in the case. Although we agree that Ungechauer should not have volunteered this opinion, the error does not require that we vacate the conviction because it did not create a substantial risk of a miscarriage of justice. See Commonwealth v. Alphas, 430 Mass. 8, 13 (1999).

First, it was "obvious to the jury" that Ungechauer "believed the defendant's ability to operate [his] car was impaired by alcohol consumption" because he placed the defendant under arrest. Gallagher, 91 Mass. App. Ct. at 389-390. Second, the judge instructed that the jurors were not required to credit Ungechauer's opinion, and that it was for the jury alone to decide whether and to what extent the defendant's performance on field sobriety tests indicated a diminished capacity to operate. Finally, as we have stated, evidence that the defendant was impaired was overwhelming. See Alphas, 430 Mass. at 15 (error could not have created substantial risk of miscarriage of justice where evidence of guilt was overwhelming). Thus, we are not persuaded that the erroneously admitted opinion testimony was "sufficiently significant in the context of the trial to make plausible an inference that the [jury's] result might have

been otherwise but for the error" (citation omitted). Id. at 13.

Judgment affirmed.

By the Court (Desmond, Wendlandt & McDonough, JJ.[2]),



Clerk

Entered: May 15, 2020.

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