

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-508

COMMONWEALTH

vs.

JOSE BARROS.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Jose Barros, appeals from his conviction, after a jury-waived trial, of breaking and entering a vehicle at night with the intent to commit a misdemeanor. G. L. c. 266, § 16A. He claims that the judge abused his discretion in allowing a first-time, in-court identification of the defendant. See Commonwealth v. Crayton, 470 Mass. 228, 241 (2014). We affirm.

Background. Late one night in 2018, Michael Lincoln, alerted by his security system, found two men sitting in his car, which was parked in his driveway. One of the individuals was wearing camouflage pants and a "grey sweatshirt with a black V" design around the neck area. At trial, Lincoln identified this individual, over objection, as the defendant. Lincoln testified that the defendant had apologized and said that he had

children. Lincoln told the defendant to get off his property and watched him ride off on a bicycle. He then called police and reported this information to the responding officer, Officer Leonard Graf.

Later that night, Officer Graf responded to an alarm at another location and observed three individuals, one of whom "was wearing a hooded sweatshirt with a distinct V logo on the neck area, and . . . camouflage pants." Officer Graf identified this individual in court as the defendant. When Officer Graf asked the defendant if he had been in Lincoln's car earlier that night, the defendant said yes. The defendant also told Officer Graf that he had spoken with Lincoln and told Lincoln that he had children.

At trial, the defendant made several admissions that he had been in Lincoln's car that night. He confirmed that he had been wearing a shirt with a V design around the neck area, and testified that he had been riding his bicycle. In his closing argument, defense counsel conceded that the defendant had been in Lincoln's car and instead focused on the claim that "the Commonwealth has not met its burden beyond a reasonable doubt that he had a felonious intent, or even a misdemeanor intent when he went into that vehicle."

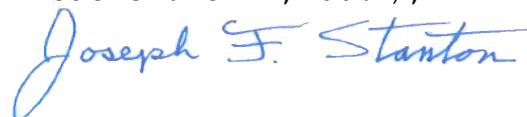
Discussion. We review the defendant's claims for prejudicial error, see Commonwealth v. McCravy, 430 Mass. 758,

764 (2000), and, seeing no prejudice from the admission of Lincoln's in-court identification, need not decide whether it was error. See Commonwealth v. Stewart, 94 Mass. App. Ct. 485, 488 (2018) ("even assuming arguendo that the two identifications were erroneously admitted, we see no prejudice to the defendant flowing from their admission").

Because the additional evidence of the defendant being in Lincoln's vehicle, detailed supra, was overwhelming, any error here was nonprejudicial. See Stewart, 94 Mass. App. Ct. at 488-489; Commonwealth v. Silvester, 89 Mass. App. Ct. 350, 362 (2016). In these circumstances, Lincoln's in-court identification was merely cumulative and therefore "did not influence the [fact finder], or had but very slight effect." Commonwealth v. Peruzzi, 15 Mass. App. Ct. 437, 445 (1983), quoting Kotteakos v. United States, 328 U.S. 750, 764-765 (1946).

Judgment affirmed.

By the Court (Desmond,
Sacks & Shin, JJ.¹),



Clerk

Entered: June 22, 2020.

¹ The panelists are listed in order of seniority.