

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as 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 23.0 or 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-1402

COMMONWEALTH

vs.

MARLENA FERRELL.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a jury trial in the District Court, the defendant was convicted of operating a motor vehicle while under the influence of alcohol. On appeal, the defendant claims that the judge erred in permitting a police witness to testify that she "failed" field sobriety tests. We conclude that there was no error and affirm.

Discussion. "Evidentiary rulings on a motion in limine are left to the sound discretion of the trial judge and we review only for abuse of that discretion" (quotation and citation omitted). Commonwealth v. Spencer, 465 Mass. 32, 48 (2013). Here, the defendant sought to preclude "[a]ny testimony stating that the defendant 'failed' (or 'passed') a field sobriety exercise, as the exercises, such as the walk and turn, are

subjective in nature, and whether the defendant passed or failed is a question for the jury." The defendant argued that "[t]hese are indicators, and it's up to the jury to decide . . . if you say failed, it's like a pass/fail test. There's no such thing in field sobriety tests." The judge ruled that the defendant was "free to cross-examine" but the police witness would be allowed to testify, as a lay witness, that the defendant failed field sobriety tests. The judge's ruling was an appropriate exercise of discretion.

Lay witness opinion testimony based on the witness's rationally based perceptions or observations is admissible. Mass. G. Evid. § 701 (2020). Moreover, "[t]he testimony of a police officer about the results of ordinary field sobriety tests like those involved in this case . . . is lay witness testimony, not expert witness testimony." Commonwealth v. Brown, 83 Mass. App. Ct. 772, 774 n.1 (2013). "A lay juror understands that intoxication leads to diminished balance, coordination, and mental acuity from common experience and knowledge." Commonwealth v. Sands, 424 Mass. 184, 188 (1997).

The defendant argues nevertheless that "the jury may have perceived that this testimony was based on technical or other specialized knowledge." Yet, the witness was not introduced as an expert, nor were the field sobriety tests characterized as scientifically based. Rather, the witness testified that he was

a police officer who had attended a training academy. As to field sobriety tests, the witness testified that they were "a series of divided attention tests . . . that make that person do more than one thing at once. Just like operating a motor vehicle, as you're driving, you have to make split second decisions. Sometimes more than one at once."

As the judge had indicated, the defendant was permitted to cross-examine the witness on this point and, in fact, in response to one of defense counsel's questions, the witness conceded that, although he used the term "fail," he had no numerical scoring system. The officer explained that he was simply trained to look for certain missteps in a defendant's performance on field sobriety tests when making an overall determination.

Under the circumstances, there was minimal risk that the field sobriety tests were "misunderstood by jurors as testimony based on scientific, technical, or other specialized knowledge." Commonwealth v. Gallagher, 91 Mass. App. Ct. 385, 398-399 (2017) (Agnes, J., dissenting). Moreover, any such risk was tempered by the judge's instructions on opinion testimony concerning sobriety and field sobriety tests:

"Now, you heard an opinion about the Defendant's sobriety given by the police officer. You've heard testimony of an opinion about the Defendant's sobriety. Ultimately, it is for you as the jury to determine whether the Defendant was under the influence of alcohol according to the definition

I have provided. You may consider any opinion you've heard and accept it or reject it. In the end, you and you alone must decide whether the Defendant was under the influence of intoxicating liquor.

"Now, you've heard evidence in this case that the Defendant performed field sobriety tests. It is for you to decide if those tests demonstrate the Defendant's ability to operate a motor vehicle safely was diminished. It is for you to determine whether to rely on this evidence. You may accept it or reject it. And you, and you may give it such weight as you think it deserves. In making your assessment, you may consider the nature of the tests, the circumstances under which they were given and performed, and all other evidence in the case."

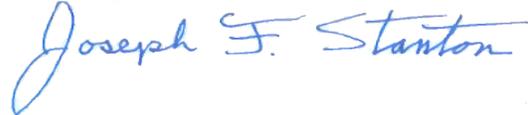
In addition to the field sobriety tests, evidence of the defendant's impairment due to alcohol consumption was abundant. The defendant was speeding and then abruptly stopped, blocking a lane of travel, when the officer signaled for her to pull over. When the officer approached to speak with the defendant, he "immediately noticed she had bloodshot and glassy eyes, and there was an overwhelming smell of odor of an alcoholic beverage." And when she spoke to him, she had "slurred speech and spoke with a thick tongue." The defendant told the officer that she believed she was in Brockton when she had been pulled over in West Bridgewater. She also told the officer that she had last consumed alcohol about an hour earlier, specifically "several shots of Hennessy," commenting "that stuff is pretty strong."

Entirely apart from the field sobriety tests, the defendant showed signs of physical impairment, including swaying from side

to side and holding her arms out, as if on a balance beam, as she walked, and moving in a two to three inch circular sway as she stood. The defendant appeared to the officer to be "drunk." Even if the officer's testimony that the defendant "failed" field sobriety tests was improper in some way, which we do not hold, the defendant was not prejudiced. See Commonwealth v. Canty, 466 Mass. 535, 544-545 (2013); Commonwealth v. Gallagher, 91 Mass. App. Ct. at 390-391.

Judgment affirmed.

By the Court (Vuono, Blake & Singh, JJ.¹),



Clerk

Entered: July 20, 2020.

¹ The panelists are listed in order of seniority.