COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1750

COMMONWEALTH

vs.

STEVE G. DEPINA.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

A jury in the Superior Court convicted the defendant of one count of unlawful possession with intent to distribute a class B substance (fentanyl), three counts of unlawful distribution of a class B substance (fentanyl), three counts of unlawful distribution of a class A substance (heroin), and driving with a suspended license. On appeal, the defendant claims that the judge erred by admitting (1) the expert opinion of a substitute chemist and (2) testimony that police officers were assigned to the "gang unit" and three photographs of evidence envelopes bearing references to the case as "gang related." We affirm.

We summarize the relevant background, reserving certain details for our discussion of the issues. As a result of a police investigation that included several undercover buys and searches pursuant to warrants of the defendant's Jeep and three

residences, the defendant was indicted on multiple drug and firearm offenses. Before trial, over the defendant's written objection, the judge allowed the Commonwealth's motion in limine to admit testimony of a chemist as a substitute for three chemists who tested some of the drugs. After a joint trial with a codefendant beginning November 26, 2018, a jury convicted the defendant of eight indictments, including seven involving fentanyl or heroin. The jury acquitted him of indictment number 003, alleging possession of fentanyl on January 26, 2016, with intent to distribute, and also acquitted him of three firearm-related indictments.

Substitute Chemist. The defendant argues that the judge erred in admitting testimony of Brittany Missett, a forensic chemist with the drug identification unit at the Massachusetts State Police crime laboratory, as a substitute for three chemists who tested some of the drugs. On the Commonwealth's motion in limine, the judge ruled, "As long as the substitute chemist has personal knowledge of testing procedures employed by the lab at that time, the substitute may testify."

At trial, Missett opined, based on her own testing, that the substance seized in a January 6, 2016 undercover buy was fentanyl. As a substitute chemist, Missett testified to her opinions about substances tested by three other chemists. As to testing done by two of those other chemists, Missett opined

based on their data that the substances they tested contained fentanyl, fentanyl and cocaine, and heroin.

As to the report of the third testing chemist, James Joseph, he had tested substances contained in the envelope marked as exhibit 15, which had been seized from the defendant's Jeep and home during execution of search warrants on January 26, 2016. Missett opined that the substances in exhibit 15 contained fentanyl and tetrahydrocannabinol (THC). In reaching her opinion, Missett noted errors in Joseph's report:[1] (1) it described one of the substances as containing marijuana, which is a plant, rather than THC, which is the chemical compound that is the active ingredient in marijuana; and (2) it referred in one place to the number of bags of fentanyl tested as three and in another as six. Missett explained that those reporting errors did not affect her opinion to a reasonable degree of scientific certainty that the substances in exhibit 15 contained fentanyl and THC. On cross-examination, defense counsel explored the foundation for Missett's opinion, re-eliciting the errors in Joseph's report and stressing that Missett did not personally test the substances tested by Joseph, did not observe Joseph test the substances, and was relying on data collected

[1] The defendant did not object or move to strike this testimony, nor does he argue on appeal that it was improperly elicited on direct examination.

from Joseph in forming her opinions. Defense counsel elicited from Missett that recently two other chemists had fabricated test results and stolen drugs from laboratories. Exhibit 15 contained both the substances found in the defendant's Jeep, which corresponded to indictment 001, on which the jury convicted the defendant, and the substances found in his home, which corresponded to indictment 003, on which the jury acquitted the defendant.

On appeal, the defendant claims that Missett's testimony as a substitute chemist violated his confrontation rights and precluded him from being able to meaningfully confront the chemists who had tested the substances. Because the defendant opposed the Commonwealth's motion in limine on the constitutional ground he raises on appeal, and renewed his objection during trial, he preserved the issue. See Commonwealth v. Grady, 474 Mass. 715, 719 (2016) ("We will no longer require a defendant to object to the admission of evidence at trial where he or she has already sought to preclude the very same evidence at the motion in limine stage"). "With respect to preserved constitutional error, we must vacate the conviction unless we are satisfied that the error was harmless beyond a reasonable doubt." Commonwealth v. Wardsworth, 482 Mass. 454, 465 (2019).

A substitute chemist may testify in place of the testing chemist provided that the substitute chemist "reviewed the nontestifying analyst's work, . . . conducted an independent evaluation of the data[, and] then 'expressed her own opinion, and did not merely act as a conduit for the opinions of others.'" Commonwealth v. Greineder, 464 Mass. 580, 595, cert. denied, 571 U.S. 865 (2013), quoting Commonwealth v. Greineder, 458 Mass. 207, 236 (2010). The substitute chemist's testimony does not violate the confrontation clause so long as the defendant had "a meaningful opportunity to cross-examine the expert about her opinion and the reliability of the facts or data that underlie her opinion." Commonwealth v. Tassone, 468 Mass. 391, 399 (2014). See Mass. G. Evid. § 703 (2021). "[A] meaningful opportunity for cross-examination means that a defendant must have the opportunity substantively to explore the 'risk of evidence being mishandled or mislabeled, or of data being fabricated or manipulated, and . . . whether the expert's opinion is vulnerable to these risks.'" Tassone, supra at 400, quoting Commonwealth v. Barbosa, 457 Mass. 773, 791 (2010).

> "The risk of mishandling, mislabeling, or manipulation of raw material and data will not justify exclusion of the testifying expert's opinion because those possibilities inhere in the source material of typical forensic testimony and, as hypotheses, could always prevent the admission of reliable and informative expert assistance essential for education of the fact finder."

Commonwealth v. Taskey, 78 Mass. App. Ct. 787, 796 (2011).

Relying on Commonwealth v. Jones, 472 Mass. 707 (2015), the defendant argues that he could not meaningfully cross-examine Missett about the testing chemists' work, especially as to the number of bags that Joseph tested and the composition of the substances. In Jones, the Supreme Judicial Court ruled that it was error to allow an expert to testify to her "understanding" of how certain swabs had been collected by a nurse during a rape kit examination for which the expert was not present. 472 Mass. at 715. Here, unlike the expert in Jones, Missett did not testify about how the substances had been collected, or the specific tests the testing chemists used in their analyses. Rather, Missett testified, based on her five years' experience working in the drug identification unit and her familiarity with its procedures, that her opinion was based on her own conclusions drawn from her independent review of the data available to her. Contrast Tassone, 468 Mass. at 399-402 (defendant denied opportunity to explore whether testing flawed, where substitute expert not affiliated with testing laboratory and had no knowledge of evidence-handling protocols). Moreover, Missett's criticisms of Joseph's report made clear that she reached her own conclusions, rather than merely parroted his results. See Mass. G. Evid. § 703 note (2021) (substitute expert "may testify to his or her own opinion based on the tests and data contained in another analyst's report, so long as the

substitute expert does not testify to or assert the truth of the author's statements, observations, or opinions"). And the fact that the jurors acquitted the defendant on indictment 003, which corresponded to some of the substances tested by Joseph, indicates that they appropriately scrutinized the expert testimony.

In these circumstances, we conclude that the defendant had a meaningful opportunity to confront Missett as to the reasonable bases for her opinions as to the substances tested by the three other chemists. See Commonwealth v. Santana, 477 Mass. 610, 623 (2017), quoting Greineder, 464 Mass. at 585 ("independent expert opinion testimony, even where based on facts and data originating from a nontestifying examiner's report, does not infringe on a defendant's right of confrontation because the defendant has the opportunity to cross-examine the witness on 'the foundation of [her] opinion'"). Therefore, we discern no error in the admission of Missett's testimony.

Gang references. The defendant argues that the investigating troopers' testimony that they were assigned to the Brockton police "gang unit," and references on evidence envelopes designating the case as "gang related" were improperly admitted, and as a result a new trial is warranted.

As to the police testimony, in response to the prosecutor's introductory questions about his background, State Police Sergeant Steven Connolly replied that at the time of this investigation he was assigned to the "gang unit" of the Brockton Police Department, which was part of a "task force with the FBI." Defense counsel did not object, but the judge called both counsel to sidebar and asked if defense counsel wanted a curative instruction at that time. Defense counsel declined, reasoning that he did not want to further highlight the testimony.

After defense counsel repeatedly elicited on cross-examination that Trooper Connolly had failed to photograph another officer making undercover buys from the defendant, on redirect examination the prosecutor asked why the trooper had not taken any such photographs. The trooper replied that attempting to photograph undercover buys would jeopardize the safety of officers in the "gang unit"; this time, defense counsel objected and requested a curative instruction. In language suggested by defense counsel, the judge instructed:

> "Ladies and gentlemen, let me just give you an instruction at this point in time. There have been several references to Trooper Connolly's involvement and participation in the gang unit. Trooper Connolly's involvement in this case was for a narcotics investigation. You are not to consider this testimony as evidence of involvement in gangs. You're not to speculate whether the defendants were involved in gangs."

Defense counsel did not ask that the prosecutor be instructed to refrain from eliciting in the future that police witnesses were assigned to the "gang unit."

During the remainder of the trial, four State police troopers testified in response to introductory questions that each was assigned to the "gang unit." Each time, the judge interrupted their testimony, sometimes before defense counsel had a chance to object, and cautioned the jury[2] four more times that the case was a narcotics case, and not to draw any inferences from the troopers' assignments to the "gang unit."

Because "[d]efense counsel acquiesced in the curative instruction and specifically indicated he was satisfied," we review the issue for a substantial risk of a miscarriage of justice.[3] Commonwealth v. Beaudry, 445 Mass. 577, 587 (2005). There was no such risk.[4] The references were "isolated, fleeting, and completely unrelated" to the prosecution's theory

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[2] The transcript reflects that after one of the troopers referred to the "gang unit," one or more jurors preemptively nodded their heads in the affirmative that they understood, even before the trial judge was able to finish her instruction.

[3] Defense counsel did not request at the charge conference that the judge repeat the curative instruction in her final charge, and she did not do so. The defendant did not object to the charge, but argues on appeal that in it the judge should have repeated the curative instruction again. He did not preserve the issue. See Mass. R. Crim. P. 24 (b), 378 Mass. 895 (1979).

[4] Even if we were to treat the error as preserved based on defense counsel's objections to troopers' testimony that they were assigned to the "gang unit," we would still conclude that the error was not prejudicial.

of the case. Commonwealth v. Sullivan, 76 Mass. App. Ct. 864, 872 (2010). The prosecutor did not imply when examining witnesses or in closing argument that the defendant was associated with any gang. Further, any prejudice to the defendant was mitigated by the judge's strong and repeated limiting instructions. "We generally 'presume that a jury understand and follow limiting instructions, . . . and that the application of such instructions ordinarily renders any potentially prejudicial evidence harmless.'" Commonwealth v. Proia, 92 Mass. App. Ct. 824, 829 (2018), quoting Commonwealth v. Crayton, 470 Mass. 228, 251 (2014).

As to physical evidence, three photographs of Brockton Police Department evidence envelopes were admitted, each of which was preprinted with the words "gang related?" after which the word "yes" was circled. Defense counsel made no objection to admission of those photographs, and no request to redact them. Those exhibits were admitted on the second and third days of trial, close in time to several of the judge's reiterations of the curative instruction. And, before they went to the jury, defense counsel agreed that he was "content with the exhibits." Accordingly, we review to determine whether the failure to redact those three exhibits gave rise to a substantial risk of a

miscarriage of justice. See Commonwealth v. Dargon, 457 Mass. 387, 394 (2010).

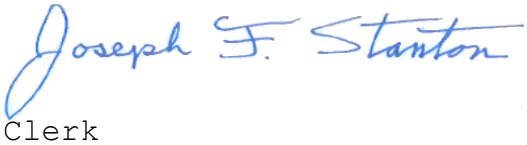
The defendant argues that the judge's curative instructions addressed only the troopers' testimony about their assignments to the "gang unit," and so were insufficient to mitigate any prejudice resulting from the three exhibits referring to the case as "gang related." We disagree. Although the judge did not explicitly state that her curative instructions also applied to those three exhibits, her instructions were specifically geared toward mitigating prejudice from any implication that the defendant was involved in a gang. The instructions made clear that (1) the case was a narcotics case, (2) the jury were not to draw any inferences that the defendant was involved with a gang, and (3) the jury were not to speculate whether the defendant was involved in a gang.

Moreover, the jurors returned not guilty verdicts on the firearm charges and on indictment 003, which pertained to some of the substances tested by Joseph. We are confident that the jurors followed the judge's instructions and were not swayed by testimony about the troopers' assignments to the gang unit or the designations on the evidence envelopes that the case was gang related. See Commonwealth v. Duffy, 62 Mass. App. Ct. 921, 923 (2004), quoting Commonwealth v. Sosnowski, 43 Mass. App. Ct. 367, 372 (1997) ("'difficult to find that the admission of the

evidence caused prejudice' where defendant was acquitted on two of three indictments").

Judgments affirmed.

By the Court (Milkey, Hand & Grant, JJ.[5]),



Clerk

Entered: August 6, 2021.

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