COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1188

COMMONWEALTH

vs.

RICHARD D. O'ROURKE.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Convicted of motor vehicle crimes,[1] the defendant appeals. He argues that (1) the jury heard insufficient evidence of his impairment or negligent operation, (2) two police officers should not have been permitted to opine that he was "drunk," and (3) a new trial is required because defense counsel referred in closing argument to the absence of evidence of a breathalyzer test or field sobriety tests. We affirm.

Sufficiency of evidence. The defendant argues that the Commonwealth did not prove that his driving was impaired or that he was operating negligently, and so the judge erred in denying his motions for a required finding of not guilty. We review the

[1] As relevant here, the defendant was convicted of operating a motor vehicle while under the influence of intoxicating liquor (fifth offense), G. L. c. 90, § 24 (1) (a) (1), and operating negligently, G. L. c. 90, § 24 (2) (a).

evidence in the light most favorable to the Commonwealth to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (citation omitted). Commonwealth v. Latimore, 378 Mass. 671, 677 (1979).

At about 5:30 P.M. on January 30, 2018, the defendant drove his small green hatchback vehicle, its headlights out, into the parking lot of the West Bridgewater police and fire station complex. He "bang[ed]" a U-turn, then accelerated out of the lot into heavy traffic on Route 106, where he "T-boned" a Ford Excursion SUV, forcing it into oncoming traffic. A fire lieutenant came to the scene, where the defendant was "staggering around"; his breath smelled of alcohol and he said, "I fucked up." To police, the defendant said, "I'm fucked," that he was an alcoholic, and that he had drunk alcohol earlier that day. In the light most favorable to the Commonwealth, that evidence was sufficient to support a conclusion both that the defendant operated a motor vehicle under the influence of alcohol, and that he operated negligently so that the lives and safety of the public might be endangered. See Commonwealth v. Ross, 92 Mass. App. Ct. 377, 380-381 (2017); Commonwealth v. Daley, 66 Mass. App. Ct. 254, 256 (2006).

Police testimony that defendant was "drunk." The defendant next argues that two police officers improperly testified that

he was "drunk." Before trial, he filed a motion in limine to exclude any opinion testimony to the "ultimate question" as to whether he operated a motor vehicle under the influence of liquor. Citing Commonwealth v. Canty, 466 Mass. 535 (2013), his motion conceded that witnesses "can opine as to his apparent intoxication." At argument on the motion, defense counsel acknowledged that "officers are allowed to testify as to their opinion of [the defendant's] intoxication or sobriety." The judge endorsed the motion: "Allowed as to opinion regarding operation; otherwise denied."

At trial, two police officers testified to their opinions that the defendant was "drunk." The defendant did not object, and so we review to determine if there was error, and, if so, whether any such error created a substantial risk of a miscarriage of justice. See Commonwealth v. Alphas, 430 Mass. 8, 13 (1999). There was no error. Like any lay witness, the officers could opine, based on their observations of the defendant, about his level of intoxication. See Canty, 466 Mass. at 540. See also Mass. G. Evid. § 701 (2021). The defendant's argument, in essence, appears to rest on the unstated premise, for which he offers no authority, that the word "drunk" was somehow impermissible even though its synonym "intoxicated" is permissible. The word "drunk" is permissible. See Commonwealth v. Jones, 464 Mass. 15, 17 n.1 (2012);

Commonwealth v. Guaman, 90 Mass. App. Ct. 36, 39, 42-43 (2016). The officers' testimony did not encroach on the ultimate issue of whether the defendant's drunkenness impaired his ability to drive. See Canty, supra.

3. Defense counsel's closing argument. Finally, the defendant is not entitled to a new trial based on his claim that defense counsel provided constitutionally ineffective assistance by presenting improper closing argument at trial. We conclude that the argument, although improper, is not grounds for a new trial.

Before trial, the defendant moved to exclude evidence pertaining to his refusal to take a breathalyzer test or to perform field sobriety tests. Quoting Commonwealth v. Healy, 452 Mass. 510, 513 (2008), the defendant's motion argued that such evidence is "inadmissible at trial." With the agreement of the prosecutor, the judge allowed the motion, and so the jury heard no such evidence.

In closing, defense counsel argued, "You didn't hear anything about any field sobriety tests. You didn't hear anything about any blood alcohol tests and any breathalyzers." The prosecutor objected, and the judge immediately called counsel to sidebar and questioned whether the argument was permissible. At first, defense counsel maintained, "I assumed that it was. I apologize if it's not." Pressed by the judge,

she conceded that the defendant had refused to undergo field sobriety or breathalyzer tests, but insisted that she should "be able to argue in the alternative" about the absence of testing. When the judge pointed out that she was seeking to argue facts not in evidence, defense counsel asked for a mistrial. The judge declined, instead giving a prompt and forceful curative instruction. He cautioned the jury to disregard the portion of defense counsel's closing argument referencing "scientific testing or . . . [f]ield [s]obriety testing," because "[t]here is no evidence regarding that testing in this case." He warned the jurors that there may be "any number of . . . valid reasons" for the absence of that testing, and they "are not to consider the absence of that sort of evidence in this case in any way." The defendant did not object to the instruction.

On appeal, the defendant does not argue that the judge abused his discretion in declining to grant a mistrial, or that defense counsel's closing created a "manifest necessity" for one. See Commonwealth v. Bryan, 476 Mass. 351, 356 (2017). Nor did he move for a new trial contending that his lawyer was ineffective under the standard of Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). Absent a motion for new trial, we are deprived of a record by which we could assess whether trial counsel's comments about the lack of testing were a deliberate strategy, or made with any input or approval from the defendant.

See Commonwealth v. Stewart, 460 Mass. 817, 833 (2011). The defendant may prevail on a claim of ineffective assistance of counsel without such a motion only "when the factual basis of the claim appears indisputably on the trial record" (citation omitted). Commonwealth v. Dyer, 77 Mass. App. Ct. 850, 858 (2010).

From the trial record, it is apparent that defense counsel's closing argument "f[ell] measurably below that which might be expected from an ordinary fallible lawyer," Saferian, 366 Mass. at 96. As the judge pointed out, by mentioning the absence of breathalyzer, field sobriety, or blood alcohol tests, trial counsel was referring to facts not in evidence. See Mass. G. Evid. § 1113(b)(3)(A) (2021). This was not a case where police failure to conduct tests might have been grounds to argue that the investigation had been inadequate, see Commonwealth v. Bowden, 379 Mass. 472, 485-486 (1980). Indeed, as the judge elicited at sidebar, police had offered the defendant field sobriety and breathalyzer tests, but he had declined them. Trial counsel was not permitted to refer to the lack of evidence of those tests and then invite the jury to speculate that the lack was due to police failure to offer the tests. That is particularly so where the defendant's own motion in limine precluded reference to his refusal to take breathalyzer or field sobriety tests. "Counsel may not, in closing, exploit the

absence of evidence that had been excluded at his request. . . . Such exploitation of absent, excluded evidence is fundamentally unfair and reprehensible" (quotations and citation omitted). Commonwealth v. Harris, 443 Mass. 714, 732 (2005). See Commonwealth v. Demetrius D., 94 Mass. App. Ct. 12, 20-21 (2018).

However, as to the second prong of the Saferian test, we conclude that trial counsel's closing argument did not "deprive[] the defendant of an otherwise available, substantial ground of defence." Saferian, 366 Mass. at 96. The judge struck the inappropriate argument and instructed the jury to disregard it, and we presume that the jury followed that instruction. See Commonwealth v. Chin, 97 Mass. App. Ct. 188, 201 n.11 (2020). Cf. Commonwealth v. Wall, 469 Mass. 652, 669 (2014) (after defense counsel improperly argued that murder defendant's blood alcohol level was "almost three times higher than the legal limit," judge properly gave curative instruction). The evidence was overwhelming, including on the issues to which testing would have pertained: that the defendant's ability to drive was impaired by intoxication, and that he drove negligently. See Commonwealth v. Facella, 478 Mass. 393, 412-413 (2017) (defense counsel's improper arguments not likely to influence jury in light of Commonwealth's overwhelming evidence). Contrast Commonwealth v. Westmoreland,

388 Mass. 269, 273 (1983) (where evidence raised "substantial question" as to deliberate premeditation, counsel's closing argument disavowing insanity defense warranted reversal).

Judgments affirmed.

By the Court (Green, C.J., Singh & Grant, JJ.[2]),

Joseph F. Stanton

Clerk

Entered: November 23, 2021.

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