

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

20-P-578

COMMONWEALTH

vs.

KELBY CORREIA.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

A jury convicted the defendant, Kelby Correia, of (1) armed assault with intent to murder, G. L. c. 265, § 18 (b); (2) unlawful possession of a firearm, G. L. c. 269, § 10 (a); (3) unlawful possession of a loaded firearm, G. L. c. 269, § 10 (n); and (4) aggravated assault and battery by means of a dangerous weapon (firearm), G. L. c. 265, § 15A (c) (i). The defendant now appeals from his convictions on grounds that (1) there was insufficient evidence to support any of the convictions, (2) it was error to admit evidence of an enhanced surveillance video recording and "bad acts," (3) the prosecutor's closing argument contained prejudicial statements that warrant reversal, (4) the denial of the his motion pursuant to Mass. R. Crim. P. 25 (b) (2), as amended, 420 Mass. 1502 (1995), was error, and (5) the collective error doctrine requires a new trial. We affirm.

Discussion. 1. Sufficiency of the evidence. We review "the evidence in the light most favorable to the Commonwealth and ask[] whether the evidence and inferences reasonably drawn therefrom were sufficient to persuade a rational jury beyond a reasonable doubt of the existence of every element of the crime charged" (quotations omitted). Commonwealth v. DeJesus, 99 Mass. App. Ct. 275, 282 (2021), quoting Commonwealth v. Squires, 476 Mass. 703, 708 (2017).

We recite the facts as the jury could have found them, reserving other facts for later discussion. The defendant entered a pizza shop with two companions, Stephen Cabral and Christopher Cabral, as shown on surveillance video recordings from the shop. The trio purchased snacks and engaged in conversation with one another. Another man, Natalio Miranda, joined them. After a period of socializing, something outside the shop window caught the defendant's attention. He gestured to his companions and they all looked outside the window. The defendant quickly left the shop and got into the backseat of an SUV. The defendant then got out of the SUV with his arm at his side. He gestured to his companions to come outside and the friends got into the SUV. The defendant stepped from the side of the vehicle onto the sidewalk. The defendant raised his arm in a straight arm, ninety-degree position, and charged forward

off-camera. His hands were outside camera range, and the video recording does not show what was in his hands.

The victim was sitting in a car outside the convenience store, located in the same shopping center as the pizza shop. Witnesses on scene heard shots fired, and two nine millimeter shell casings were located in the area between the pizza shop and convenience store. The SUV sped away with one of its rear doors open. The defendant fled in the same direction and jumped in the SUV, leaving his cell phone, chips and soda in the pizza shop.

The victim sustained a gunshot wound to his knee. A gun was never located, and no fingerprints or DNA evidence were found on the shell casings.

a. Identity. The defendant contends there was insufficient evidence to prove he was the shooter. The defendant's argument is predicated on the assertion that the only eyewitness who claimed to have seen the assailant identified another person as the perpetrator, and did not identify the defendant.¹

¹ At trial, the eyewitness had difficulty recalling the exact details of the incident, but stated that the shooter had a low-cut hairstyle and was in a dark blue, gray, or black sedan. She believed the shooter did not have braids (which the defendant had at the time of the shooting and at trial) and did not identify the defendant as the shooter.

"The Commonwealth is entitled to the reasonable inferences that a jury may draw from its evidence on identification Where 'conflicting inferences are possible, it is for the jury to determine where the truth lies, for the weight and credibility of the evidence is wholly within their province.'" Commonwealth v. Blackmer, 77 Mass. App. Ct. 474, 483 (2010), quoting Commonwealth v. Lao, 443 Mass. 770, 779 (2005). The jury "may accept or reject, in whole or in part, the testimony presented to them," including the testimony of the eyewitness. Commonwealth v. Tennison, 440 Mass. 553, 566 (2003), quoting Commonwealth v. Ruci, 409 Mass. 94, 97 (1991).

The jury saw the surveillance video recording that depicted the defendant and his friends in the pizza shop. The defendant left the pizza shop, got into the backseat of an SUV parked outside, got out, and stood at the side of the vehicle. He then moved onto the sidewalk and ran off-camera with his arm raised in a shooting stance.² Witnesses on scene heard shots fired, and two shell casings were located in the area between the pizza shop and convenience store. The defendant fled with such haste that he left his cell phone on the table in the pizza shop.

The jury could reasonably infer that the defendant was the perpetrator from the surveillance video recording, the gunshots,

² The parties stipulated that the defendant was the man in the red shirt.

and the shell casings. See Commonwealth v. Buttimer, 482 Mass. 754, 762 (2019); Commonwealth v. Arroyo, 442 Mass. 135, 139 n.5 (2004). "Any weaknesses in . . . identification [evidence] were for the jury to weigh, and did not constitute grounds for a required finding of not guilty." Lao, 443 Mass. at 780. Though circumstantial, the evidence was sufficient to permit the jury to find that the defendant was the shooter.

b. Intent to murder. The defendant also asserts the evidence was inadequate to prove intent to murder. See Buttimer, 482 Mass. at 771; Commonwealth v. Bolling, 462 Mass. 440, 453 (2012). "[A]n intent to kill may be inferred from the defendant's conduct." Commonwealth v. Henson, 394 Mass. 584, 591 (1985). A rational jury were permitted to find that the defendant took the firearm from the SUV parked outside of the pizza shop, stood on the sidewalk, and fired at the victim. "[I]t was reasonable for the jury to infer an intent to kill from the defendant's use of a firearm." Commonwealth v. Quinones, 95 Mass. App. Ct. 156, 164 (2019). See Commonwealth v. Smith, 456 Mass. 476, 488 (2010). The evidence was sufficient.

c. Serious bodily injury. At trial, the Commonwealth presented evidence that the victim sustained a gunshot wound to his right knee. The defendant contends that this evidence was insufficient to prove the element of serious bodily injury in a

prosecution for aggravated assault and battery by means of a dangerous weapon under G. L. c. 265, § 15A (c) (i). Serious bodily injury means "bodily injury which results in a permanent disfigurement, loss or impairment of a bodily function, limb or organ, or a substantial risk of death." G. L. c. 265, § 15A (d). All three theories were argued at trial, but to uphold a conviction against a sufficiency challenge, "the alternative definitions [of § 15A (d)] do not constitute distinct theories of guilt, so we need determine only whether the Commonwealth met its burden of proving serious bodily injury under at least one of [the definitions]." Commonwealth v. Inoa, 97 Mass. App. Ct. 262, 263 (2020).

A bodily function is impaired if "a part or system of the body . . . is significantly impeded in its ability to fulfill its role." Commonwealth v. Heywood, 484 Mass. 43, 51 (2020), quoting Commonwealth v. Scott, 464 Mass. 355, 359 (2013). The medical records stated the victim sustained a gunshot wound to his knee, was unable to "ambulate," and required surgery to remove the bullet and smaller debris fragments from his knee. This evidence was sufficient to prove that the victim could not walk, that is, that his knee and leg were significantly impeded.

The defendant's reliance on Scott, 464 Mass. at 362, to claim that the jurors could only speculate as to the meaning of the medical records, is inapposite. In Scott, expert testimony

was required to interpret the medical records. Here, lay jurors, "draw[ing] reasonable inferences from the evidence based on their common sense and life experience," could find that a gunshot to the knee would interfere with the ability to walk. Commonwealth v. Beal, 474 Mass. 341, 346 (2016). On this point, the medical records stated the obvious. No expert interpretation was required. The evidence was sufficient to prove serious bodily injury beyond a reasonable doubt.

d. Firearm charges. The defendant next contends that the prosecution failed to prove that he possessed a firearm and, on appeal, newly asserts there was insufficient evidence as to the length of the firearm. See G. L. c. 269, § 10 (a), (n); Commonwealth v. Marrero, 484 Mass. 341, 343 (2020). "Proof of possession and knowledge may be established by circumstantial evidence and the inferences that can be drawn therefrom." Commonwealth v. Gouse, 461 Mass. 787, 795 (2012).

For the reasons outlined above, a rational jury could conclude that the defendant was the shooter and was armed. He reached in an SUV and when he got out, took a shooter's stance. Witnesses heard gun fire and bullet casings were found in proximity to the defendant. See generally Commonwealth v. Housewright, 470 Mass. 665, 680 (2015) (although no gun, casings, or bullets found, witnesses' testimony that defendant loaded and fired weapon that looked, sounded, and flashed like

gun held sufficient); Commonwealth v. Sylvester, 35 Mass. App. Ct. 906, 907 (1993) (jury could infer "hand held weapon" was firearm). As to barrel length, the defendant's stance and the fact that the weapon did not appear on the camera permitted an inference that its barrel was sixteen inches or less. See Commonwealth v. Manning, 44 Mass. App. Ct. 695, 707 (1998). Finally, shots were fired, and "a rational jury could infer that [the] individual who possessed a firearm was aware that it was loaded." Commonwealth v. Brown, 479 Mass. 600, 608 (2018).

2. Evidence. a. Enhanced video recording. The defendant objected to the admission of the enhanced version of the surveillance video recording, claiming that adjustments in the brightness, highlights, exposures, and contrasts were alterations that amounted to "enhanced tinkering." On appeal the defendant claims that the enhanced version created "significant distortions in the imagery."

We review the admission of the enhanced digital video recording for abuse of discretion. Commonwealth v. Rogers, 459 Mass. 249, 268, cert. denied, 565 U.S. 1080 (2011). We have reviewed both video recordings and discern no abuse of discretion in admitting the enhanced version of the surveillance video recording. "Concerns regarding the completeness or production of the image go to its weight and not its admissibility." Id. at 267, quoting Renzi v. Paredes, 452 Mass.

38, 52 (2008). The video recording was an enlarged perspective of the recording already entered in evidence. The content of the recording was not altered. See Commonwealth v. Leneski, 66 Mass. App. Ct. 291, 294 (2006) ("videotapes are on balance, a reliable evidentiary resource . . . and . . . should be admissible if they are relevant, they provide a fair representation of that which they purport to depict, and they are not otherwise barred by an exclusionary rule" [quotations and citations omitted]). The jury were able to view both video recordings and make their own assessment.

b. Bad acts. The defendant claims the trial judge erred in admitting testimony regarding bad acts of third parties that tainted the defendant. At trial the Commonwealth elicited testimony from Officer Graham, a narcotics detective investigating homicides and major felonies, that hours before the shooting Stephen Cabral drove an Audi SUV and attempted to evade police. Additionally, the Commonwealth presented testimony from another law enforcement officer, Trooper Ledin, that on the day after the shooting officers conducted surveillance of Stephen Cabral and subsequently found and arrested the defendant with "numerous police officers" present. This claim is unpreserved and is reviewed for error, and if error is found, for a substantial risk of a miscarriage of

justice. See Commonwealth v. Harrison, 100 Mass. App. Ct. 376, 386-387 (2021).

The Commonwealth asserts the contested testimony was relevant as it linked the defendant to Stephen Cabral, the Audi SUV, and was relevant to Cabral's state of mind and intent. Cabral was not a codefendant.³ This type of "[a]ssociational evidence . . . is suspect," Commonwealth v. Gonzalez, 47 Mass. App. Ct. 255, 259 (1999), and a conviction based on guilt by association is not permissible, Commonwealth v. Szemetum, 3 Mass. App. Ct. 651, 653-654 (1975). The need for this evidence was slight once the defendant stipulated that he was the man in the red shirt in the video recording. However, even if it was error to admit the testimony, there was no substantial risk of a miscarriage of justice. The evidence pertained primarily to Stephen Cabral, not the defendant, and the centerpiece of the prosecutor's argument was the video recording. See Gonzalez, supra. The trial judge was not required to give a limiting instruction sua sponte, "[n]or does the lack of a limiting instruction necessarily create a substantial risk of a miscarriage of justice." Commonwealth v. Oliveira, 74 Mass. App. Ct. 49, 55 (2009).

³ Stephen Cabral was originally a codefendant but died in 2017 before this case went to trial in 2019.

3. Closing argument. For the first time on appeal, the defendant makes multiple challenges to the prosecutor's closing argument. These claims are reviewed for error, and if there was error, for a substantial risk of a miscarriage of justice. See Harrison, 100 Mass. App. Ct. at 386-387.

First, the defendant contends it was error for the prosecutor to tell the jurors that they could use "your common sense and your life experience and your good judgment to connect those dots together to create a picture of the truth, because that's what you're here to do." Jurors are permitted to draw upon their common sense and life experiences. See Commonwealth v. Valentin, 474 Mass. 301, 310-311 (2016). The prosecution's use of the term "good judgment" was used in conjunction with the terms "common sense and life experiences" and did not suggest, as the defendant now argues, that "no intelligent jury could acquit." Compare Commonwealth v. MacDonald (No. 1), 368 Mass. 395, 402 (1975).

Second, the defendant contends the prosecutor shifted the burden to the defendant when he posed a rhetorical question asking, "Why would anybody do that?"⁴ Rhetorical questions that

⁴ The question arose in the following portion of the prosecutor's closing: "Yeah, there are, there are plenty of other people around at the time. It seems kind of crazy to believe that anybody would shoot at somebody in broad daylight with people milling about in a busy parking lot. Why would anybody do that?"

suggest that the defendant has failed to come forward with evidence are disfavored. See Commonwealth v. Habarek, 402 Mass. 105, 110-111 (1988). This comment was not improper in the context of the closing argument as a whole. The question was a comment on the shooting itself, and an expression of concern that anyone would shoot in a crowded public area. It was not a suggestion that the defendant should have come forward with an explanation for his conduct. Furthermore, the trial judge properly instructed the jury regarding the defendant's right not to testify. See Commonwealth v. Pena, 455 Mass. 1, 19-20 (2009).

Third, the defendant contends the prosecutor improperly vouched for the enhanced video recording by saying: "And what I want to emphasize to you about videos is that they don't change. They can be enhanced to help you see them better but they don't get fuzzy memories. They don't get confused. They don't forget. They stay the same." As the enhanced video recording was properly admitted, the statement was not improper.

Fourth, the defendant contends that the prosecutor misstated the evidence in multiple respects, and that the cumulative effect of allegedly improper remarks warrants reversal. We have reviewed the challenged statements and conclude that the evidence was not misstated, but we comment on one aspect of this claim. The prosecutor's argument that

disfigurement arose from scarring from the victim's knee surgery was permitted. To the extent that the defendant submits that the inference was so tenuous as to make such an inference either speculative or insufficient, the sufficiency of the evidence of substantial bodily injury has been addressed, supra.

Fifth and finally, the defendant contends the prosecutor aligned himself with the jury by stating "our" and "we know." Repeated use of the pronoun "we," when considered in conjunction with other statements, may be improper. See Commonwealth v. Burts, 68 Mass. App. Ct. 684, 688-689 (2007). "The issue, however, does not turn on the presence or absence of the pronoun. Rather, it is what is being communicated that is key." Commonwealth v. Jenkins, 458 Mass. 791, 797 (2011). The prosecutor's use of the words "our" and "we" was a mechanism to review the video recording, the inferences to be drawn therefrom, and the documentary evidence at trial. "Although it is preferable that counsel avoid arguing in a form that seeks to engage the jury with him or her personally, such argument is not improper. It is merely a means of involving the jury and suggesting that the prosecutor and the jury review the evidence together." Id.

4. Rule 25 (b) (2) motion. The defendant asserts the Rule 25 (b) (2) motion should have been allowed because the judge only analyzed the motion under the standard of Commonwealth v.

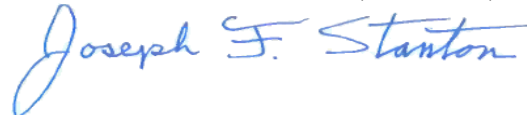
Latimore, 378 Mass. 671, 676-678 (1979), and failed to consider the weight of the evidence. "In deciding a rule 25 (b) (2) motion for a required finding of not guilty following a guilty verdict . . . the judge does not properly exercise discretion concerning the weight or integrity of the evidence, but instead must assess the legal sufficiency of the evidence"

Commonwealth v. Doucette, 408 Mass. 454, 456 (1990). The trial judge therefore properly reviewed the motion under the Latimore standard. The defendant also contends that the judge did not recognize she had the power to vacate or reduce the verdicts. In his motion, the defendant requested an acquittal, not a reduction of the verdicts. There was no error.

Collective error. Having rejected the defendant's claims of error, we accordingly find no cumulative error warranting reversal.

Judgments affirmed.

By the Court (Meade,
Sullivan & Walsh, JJ.⁵),



Clerk

Entered: January 28, 2022.

⁵ The panelists are listed in order of seniority.