COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-495

COMMONWEALTH

vs.

STEPHEN F. BURKE.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

A District Court jury convicted the defendant of operating a motor vehicle while under the influence of intoxicating liquor (OUI) and operating a motor vehicle while under the influence of liquor after his license had been suspended for operating a motor vehicle while under the influence of liquor (OUI while OAS for OUI). See G. L. c. 90, §§ 23, 24 (1) (a) (1). In a subsequent jury-waived trial, the judge found that the OUI conviction was the defendant's fourth. On appeal, the defendant claims that he was unfairly prejudiced by (1) the judge's decision to conduct a joint trial on the charges of OUI and OUI while OAS for OUI, (2) the admission of exhibits which suggested that the defendant had more than one prior OUI conviction, and (3) the admission of the defendant's statement that he "has made some mistakes in the past." We affirm.

Background. We summarize the relevant facts. The defendant was stopped on Route 3 in Norwell after a Massachusetts State Police trooper observed the vehicle the defendant was driving moving at an unusually slow speed and repeatedly crossing into the breakdown lane. The defendant appeared disheveled, his head was "wobbly," and "his eyes were rolling in the back of his head." In slurred speech, the defendant explained that he was driving because his girlfriend, who was seated in the front passenger's seat, was drunk. The defendant told the trooper that he had consumed "five beers and one shot."

The trooper assisted the defendant to prevent him from falling as he got out of the car. The trooper "could barely understand what [the defendant] was trying to say." After the defendant attempted to perform field sobriety tests, the trooper concluded that the defendant was "extremely drunk" and placed him under arrest.

Discussion. 1. Joinder. The Commonwealth filed a motion in limine seeking a joint trial of the charges of OUI and OUI while OAS for OUI. After a hearing, the judge allowed the motion over the defendant's objection, but agreed to redact exhibits so that they showed a single prior OUI conviction and provide limiting instructions consistent with Commonwealth v. Beaulieu, 79 Mass. App. Ct. 100 (2011). The defendant claims on

appeal that joinder of these offenses for trial violated G. L. c. 278, § 11A, and was unduly prejudicial because the joint trial resulted in the admission of evidence that the defendant's license was previously suspended for OUI. We disagree.

In Beaulieu, we held that a bifurcated trial on the charges of OUI and OUI while OAS for OUI is not required by G. L. c. 278, § 11A, because that statute compels severance only on a charge for which there is an enhanced penalty for a subsequent offense. Beaulieu, 79 Mass. App. Ct. at 102 n.2. Here, the prior OUI conviction was offered as evidence of an element of OUI while OAS for OUI, not as a penalty enhancement. Thus, while bifurcation in these circumstances "is an option worthy of serious consideration," it is not required. Commonwealth v. Lopes, 85 Mass. App. Ct. 341, 349 (2014). See Beaulieu, supra. The judge had discretion to decide whether the potential prejudice from evidence of the defendant's prior OUI conviction could be adequately addressed through redaction of exhibits and limiting instructions to the jury. See Lopes, supra; Beaulieu, supra at 103.

The Commonwealth introduced a certified copy of a notice from the Registry of Motor Vehicles (RMV) that the defendant's license was suspended for two years for a conviction of "DWI Liquor" in the Hingham District Court on April 28, 2015. Although the defendant had other OUI convictions, the RMV notice

was redacted so that it showed only that conviction. When the RMV notice was admitted, the judge immediately instructed the jury that they could not consider the defendant's prior OUI conviction as evidence of the substantive charge of OUI. The judge explained that the jury could consider the prior conviction only as to the charge of OUI while OAS for OUI. At the beginning of his final charge, the judge told the jury that the RMV notice "is only relevant to the issue of why [the defendant's] license was revoked if, in fact, it was revoked. It is not to be considered by the jury as any evidence that he was under the influence on September 3 of 2018." The judge repeated the limiting instruction a third time in his description of the elements of OUI.

We conclude that these "repeated and proper limiting instruction[s]," Lopes, 85 Mass. App. Ct. at 349, and the redaction of the documentary evidence, met the requirements of Beaulieu. Accordingly, there was no abuse of discretion in the joinder of offenses for trial and admission of the defendant's prior OUI conviction.

2. Exhibits. The RMV notice, a second RMV record, titled "Current Image, License/ID and Demographic Information," and the docket sheet from the Hingham District Court were all redacted in an effort to show a single prior OUI conviction. The defendant raised no objection to the exhibits and agreed they

could go to the jury as redacted. For the first time on appeal the defendant claims that the exhibits should not have been admitted because, even with the redactions, it would have been "readily apparent to the jury . . . that [the defendant] had more than one prior conviction for OUI."

We have carefully reviewed the original exhibits and do not agree with the defendant's contention that references to prior convictions remained visible through the redactions. We agree, however, that the word "offenses" on the RMV notice was inconsistent with a single prior OUI conviction and therefore should have been redacted accordingly. But even if this issue had been properly preserved, we discern no prejudice. Evidence of one prior conviction was already properly before the jury. The judge repeatedly instructed the jury regarding the limited purpose for which they could consider a prior conviction and we presume the jury followed those instructions. See Beaulieu, 79 Mass. App. Ct. at 103. In these circumstances, we are satisfied that any error in the admission of the RMV notice as redacted "did not influence the jury, or had but very slight effect" (quotation and citation omitted). Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994).

3. Defendant's statement. Over the defendant's objection, the trooper was permitted to testify that while he was transporting the defendant to the State Police barracks, the

defendant was "very apologetic, and he stated that he has made some mistakes in the past and he didn't want to go away and he didn't want to get locked up." On appeal, the defendant argues that this statement invited the jury to speculate about other bad acts and that its probative value was outweighed by its prejudicial effect. Specifically, the defendant claims that "the jury would have little doubt that 'mistakes in the past' . . . meant prior OUI convictions." We disagree. The defendant did not refer to any specific past conduct, much less a prior conviction for OUI. We cannot reasonably conclude that the vague reference to "mistakes in the past" would have caused the jury to conclude that the defendant had prior OUI convictions. See Commonwealth v. Lacey, 2 Mass. App. Ct. 889, 889 (1974) (no prejudicial error where testimony too vague to lead to reasonable inference of past criminal activity). A more likely inference was that the defendant's statement, considered in context, were intended as an apology for his conduct that morning. We discern no abuse of discretion in the judge's admission of the defendant's statement as evidence of the defendant's consciousness of guilt. See Commonwealth v. Robinson, 482 Mass. 741, 745 (2019) (defendant's statements considered evidence of consciousness of guilt).

Nor do we discern error in the prosecutor's use of the defendant's statement in closing argument. The prosecutor

alluded to the defendant's statement when she told the jury, "you can infer that one of those bad decisions was getting behind the wheel of that vehicle on September 3 of 2018 at 1:30 in the morning." This argument was grounded in the evidence and the prosecutor was entitled to argue "forcefully for a conviction based on the evidence and on inferences that may reasonably be drawn from the evidence." Commonwealth v. Kozec, 399 Mass. 514, 516 (1987). The judge repeatedly instructed the jury that the closing arguments were not evidence. "We presume, as we must, that the jury follow[ed] the judge's instructions and [understood] the argumentative, not factual, nature of closing arguments." Commonwealth v. Olmande, 84 Mass. App. Ct. 231, 237 (2013).

Judgments affirmed.

By the Court (Kinder, Henry, & Hand, JJ.[1]),

Joseph F. Stanton

Clerk

Entered: December 15, 2021.

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