COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-757

COMMONWEALTH

vs.

MARK S. TATARCZUK.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant appeals from his conviction of operating while under the influence of intoxicating liquor (OUI), fourth offense, in violation of G. L. c. 90, § 24 (1) (a) (1). We affirm.

Following a car accident in which he was involved in Brockton, the defendant was asked by Officer Hermer Cole to perform several purported field sobriety tests. Detective Lucas Pedro of the Brockton police department observed and took notes. During discovery the defendant filed motions seeking, among other things, a copy of the manual Officer Cole trained with and relied on in administering these tests. Although the record does not include a copy of an order of February 28, 2017, the defendant asserts, and we will assume, that on that date a judge of the District Court ordered the Commonwealth to provide

defense counsel with a copy of the manual the arresting officer trained with, and any materials the officer relied on in administering field sobriety tests. Ultimately, the Commonwealth did provide the defendant with the manual on which Officer Cole was trained at the police academy, and the title of the manual used during Detective Pedro's training at the police academy with a link to that training manual. The defendant had filed a motion in limine to prevent the Commonwealth from using any of the purported field sobriety tests because he had not received these materials, but after receiving them withdrew that motion.

Prior to the defendant's arrest, Officer Cole asked him to perform the "nine-step walk-and-turn" test. He also asked him to perform a "balance test," and to count backward from one hundred to eighty-three.

The nine-step walk-and-turn test is described in the training manuals turned over during discovery. The balance test does not appear in either one. On cross-examination, Detective Pedro testified that he had taken courses on OUI detection subsequent to leaving the academy. Specifically he testified that he had taken "an advanced OUI course," and "it introduced us to some other types of field sobriety tests that aren't in that manual," referring to the manual with which he had trained at the academy. Asked whether he was given a manual during the

subsequent training he said, "Yes. . . . It was like pamphlets."

The defendant moved for a mistrial on the ground that the Commonwealth had failed to produce any such training materials in discovery, undermining counsel's ability to cross-examine Pedro and provide a defense. The motion for a mistrial was denied.

The defendant's first argument on appeal is that that was error. We disagree. Even assuming there was a specific request for the materials to which Officer Pedro referred, and that they were covered by an order of the District Court, the denial of the motion for a mistrial was not an abuse of discretion. A mistrial must be allowed only where "a less drastic measure, such as a curative instruction, is inadequate." Commonwealth v. Amran, 471 Mass. 354, 360 (2015). See id. (where judge "promptly struck the improper testimony and gave a highly specific curative instruction, the judge acted appropriately and within her discretion"). The trial judge is in the "best position to assess any potential prejudice and, where possible, to tailor an appropriate remedy short of declaring a mistrial." Commonwealth v. Martinez, 476 Mass. 186, 197 (2017). Even if Detective Pedro's testimony were taken to mean that he had received training on and materials validating the balance test at some OUI training subsequent to leaving the academy, and the

Commonwealth violated the judge's discovery order in failing to turn such training materials over to the defense, the error could have adequately been addressed by striking the testimony and a curative instruction, for example one requiring the jury to infer that the balance test was not described in any training materials received by either officer. The defendant did not request any such alternative remedy but, in light of its availability, the denial of the motion for a mistrial was not an abuse of discretion.

The defendant's second argument is that the evidence is insufficient to support his conviction. This is more easily dispensed with. While driving at 1:30 A.M., the defendant rear-ended a car that was stopped in front of him at a red light, causing that car to crash into the rear end of yet another car stopped at the stop light in front of it. Officers observed him on the scene to be unsteady on his feet, with blood shot eyes, and a strong odor of alcohol emanating from his person. He admitted to having drunk an alcoholic beverage, albeit only one. And, even leaving the balance test to the side, as well as the test in which he was unable to count backwards from one hundred to eighty-three -- the validity of which was also challenged by the defense -- he failed the nine-step walk-and-turn field sobriety test. To be sure, as defense counsel capably brought up at trial, that test is not invariably accurate, and the

defendant was found to have failed with respect to only two of the eight tasks he was asked to perform. Nonetheless, although the inference is not inescapable, a reasonable juror viewing all the evidence in the light most favorable to the Commonwealth, see Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979), could reasonably conclude beyond a reasonable doubt that the defendant was guilty of OUI.

Finally, the defendant argues that the evidence was insufficient to establish that he had three prior OUI convictions. In particular, he refers to a docket sheet from Wareham District Court with respect to a 1989 OUI conviction that contains the defendant's name, but no address, date of birth, or any other identifying information. Although the Commonwealth introduced other documentation that might corroborate that he was the person named on the Wareham docket sheet, the defendant argues that the docket number does not match the docket number on a separate docket sheet that purports to address the same October 26, 1989 offense, and that that second docket sheet has an entry date of December 1, 1989, although the first docket sheet has an entry date of December 11, 1989.

The judge hearing the subsequent offense portion of the case could have found that the second docket sheet is a copy of the Brockton District Court docket, which presumably utilizes

the docket number in that court. He could have found that that docket sheet indicates that on December 1, 1989, the defendant was found guilty in a bench trial before Judge Quinn, and that he appealed that day under the de novo jury-of-six system that was in place at the time. He could have found that the first docket sheet includes only the docket number for the Wareham District Court, and that that was where the de novo jury trial was held. He could have found that the appeal entered on that latter docket on December 11, 1989. The disposition shown on the Wareham District Court docket sheet is a finding of guilt on December 18, 1989, and the docket indicates that the date of offense was October 26, 1989, and the place of offense was West Bridgewater. Registry of motor vehicles records submitted to the judge and that include the defendant's name, address, license number and date of birth, show a guilty finding in the Wareham District Court on December 18, 1989, for an October 26, 1989 incident of OUI in West Bridgewater. Thus, whether or not the defendant has identified arguable inconsistencies between the Wareham and Brockton dockets, the evidence before the judge was sufficient to support a conclusion beyond a reasonable doubt that the person whose conviction was shown on the Wareham District Court docket was, indeed, the defendant, and that,

consequently he was guilty of a fourth offense.

Judgment affirmed.

By the Court (Rubin, Desmond & Shin, JJ.[1]),

Joseph F. Stanton

Clerk

Entered: February 2, 2022.

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