COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1155

COMMONWEALTH

vs.

JASON BURKE.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant, Jason Burke, appeals after a District Court jury trial from his convictions of breaking and entering into a building at night, G. L. c. 266, § 16, and felony larceny, G. L. c. 266, § 30 (1).[1] Concluding that the trial judge acted within his discretion in admitting evidence that the defendant threatened to do something to the victim if she did not pay him, that the evidence was sufficient to identify the defendant as

[1] General Laws c. 266, § 30, was amended to increase the property value for felony larceny from $250 to $1,200, effective April 13, 2018. St. 2018, c. 69, § 136. The crime here was committed before the effective date, but the defendant was not charged until after the effective date. See Commonwealth v. Pereira, 100 Mass. App. Ct. 411, 422 n.13 (2021) (G. L. c. 266, § 60 "was amended to increase the property value from $250 to $1,200, effective April 13, 2018. The defendant was charged before, but tried after, the effective date. Thus, the property value for purposes of trial was either $250 or less, or over $250"). We need not decide which property value applies here, as the judge instructed the jury that the $1,200 property value applied.

the perpetrator, and that inadmissible hearsay promptly struck did not create ineradicable prejudice, we affirm.

1. Evidence of uncharged conduct. "[E]vidence of prior bad acts 'is not admissible to show a defendant's bad character or propensity to commit the charged crime.'" Commonwealth v. Facella, 478 Mass. 393, 403 (2017), quoting Commonwealth v. Dwyer, 448 Mass. 122, 128 (2006). "[S]uch evidence is admissible when offered for another purpose, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or pattern of operation, so long as its probative value for that purpose is not outweighed by its prejudicial effect." Commonwealth v. Welch, 487 Mass. 425, 442–443 (2021), quoting Commonwealth v. Hall, 485 Mass. 145, 163 (2020). Accord Mass. G. Evid. § 404(b)(2) (2021). "These matters are 'entrusted to the trial judge's broad discretion and are not disturbed absent palpable error.'" Commonwealth v. Childs, 94 Mass. App. Ct. 67, 71 (2018), quoting Commonwealth v. Keown, 478 Mass. 232, 242 (2017), cert. denied, 138 S. Ct. 1038 (2018).

Here, the victim agreed to pay the defendant $500 to help her move her belongings from her apartment to a storage unit. The victim agreed to pay the defendant $100 once she got her disability check the following week and the other $400 once the job was done. The victim and defendant brought approximately

one hundred boxes in two truckloads to the victim's storage unit.

Before the week passed, the defendant "kept threatening [the victim] . . . and saying he was going to do something." The victim testified that the defendant "said he was going to do something, 'cause he was angry 'cause [she] wouldn't give him any money, 'cause [she] didn't have any. And he knew that." The victim blocked the defendant's phone number because "he kept harassing" her. These communications occurred prior to the break-in.

The defendant's threats demonstrated his motive to steal from the victim, see Commonwealth v. Ryan, 79 Mass. App. Ct. 179, 188 (2011), and were probative "to demonstrate the hostile nature of the relationship between the defendant and [victim]." Commonwealth v. Butler, 445 Mass. 568, 575 (2005). Accordingly, the judge acted within his discretion in admitting the testimony.

2. Sufficiency of the evidence. "When reviewing the denial of a motion for a required finding of not guilty, 'we consider the evidence introduced at trial in the light most favorable to the Commonwealth[] and determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Commonwealth v. Quinones, 95 Mass. App. Ct. 156, 162 (2019), quoting Commonwealth v. Faherty,

93 Mass. App. Ct. 129, 133 (2018). "The inferences that support a conviction 'need only be reasonable and possible; [they] need not be necessary or inescapable.'" Commonwealth v. Chin, 97 Mass. App. Ct. 188, 195 (2020), quoting Commonwealth v. Waller, 90 Mass. App. Ct. 295, 303 (2016). "[W]e will not let a conviction stand if it is 'based entirely on conjecture or speculation.'" Commonwealth v. Buttimer, 482 Mass. 754, 761 (2019), quoting Commonwealth v. Ayala, 481 Mass. 46, 51 (2018).

"Here, the Commonwealth relied on circumstantial evidence, that, when taken together, 'formed a "mosaic" of evidence such that the jury could conclude, beyond a reasonable doubt, that the defendant was the [perpetrator].'" Quinones, supra, quoting Commonwealth v. Jones, 477 Mass. 307, 317 (2017). First, while the defendant assisted the victim with moving her items from her home to the storage facility, the victim noticed that the defendant opened boxes and checked the contents. The defendant continued to open boxes even after the victim asked him to stop.

Second, prior to the theft, the defendant threatened and harassed the victim in an attempt to get her to pay him. The defendant told the victim that "he was going to do something" because "he wanted money." The break-in occurred before the victim received her disability check, and she had not paid the defendant.

Third, the defendant knew the victim's unique gate code, which was used five times to enter and exit the facility between 3:51 and 4:37 A.M. on the morning of the break-in.[2] The victim, the storage facility employee, and the defendant were the only people who knew the victim's gate code.[3]

Finally, the storage unit lock was cut with bolt cutters, and, one day after the break-in, a police officer saw bolt cutters in the passenger seat of the motor vehicle that the defendant was driving. That there were "various tools strewn about" the vehicle does not eliminate the circumstantial value of the defendant's possession of an item that could have been used to commit the crime. See Commonwealth v. Dubois, 451 Mass. 20, 27 (2008). Accordingly, the judge properly denied the motion for a required finding of not guilty.

3. Struck hearsay. "The decision whether to declare a mistrial is within the discretion of the trial judge." Commonwealth v. Torres, 86 Mass. App. Ct. 272, 280 (2006), quoting Commonwealth v. Bryant, 447 Mass. 494, 503 (2006).

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[2] The facility was locked after hours.

[3] The defendant argues that the victim's abusive boyfriend had the victim's gate code because the victim brought paperwork home to their shared apartment. The victim, however, testified that her boyfriend did not have access to the paperwork, and the jury was entitled to credit that testimony. See Commonwealth v. Penn, 472 Mass. 610, 620 (2015). Furthermore, the fact that the boyfriend did not drive reduced the likelihood that he was the culprit because half of the approximately one hundred boxes in the victim's storage unit were stolen.

"[I]n response to the jury's exposure to inadmissible evidence, the judge may 'correctly rel[y] on curative instructions as an adequate means to correct any error and to remedy any prejudice to the defendant.'" Torres, supra, quoting Bryant, supra. "Jurors are presumed to follow a judge's clear instructions and disregard [stricken] testimony." Commonwealth v. Auclair, 444 Mass. 348, 358 (2005). "Only a compelling showing of ineradicable prejudice would cause us to conclude that the judge's instructions to disregard [witness's] testimony were inadequate." Commonwealth v. Thad T., 59 Mass. App. Ct. 497, 508 (2003). Here, the judge appropriately cured the error and properly did not declare a mistrial sua sponte.

Without a question being posed, the victim said, "He kept . . . calling me, and -- I had gotten a text from his girlfriend saying she wanted to give back . . . the stuff." The defendant immediately objected, and the judge said, "The jury would disregard -- the last answer was nonresponsive to the question." Later, when the prosecutor tried to refresh the victim's memory by showing her text messages from the defendant and asking whether she remembered any of the text messages, she said, "Just . . . from his girlfriend. That one message."

The content of the message was mentioned only once in a very brief statement. The judge immediately cured the error by asking the jury to disregard the testimony. See Commonwealth v.

Mullane, 445 Mass. 702, 712 (2006) (judge's curative instruction immediately following witness's improper testimony regarding prior arrest warrant "was sufficient to remedy any prejudice against the defendant"). See also Commonwealth v. Martinez, 458 Mass. 684, 700-701 (2011) (no error where judge appropriately instructed jury not to consider memorial to vehicular homicide victim). Cf. Commonwealth v. Costa, 69 Mass. App. Ct. 823, 827 (2007), quoting Commonwealth v. Kilburn, 426 Mass. 31, 38 (1997) ("Generally, as long as the judge's instructions are prompt and the jury do not hear the inadmissible evidence again, a mistrial is unnecessary"). The judge acted within his discretion in not declaring a mistrial sua sponte.

Judgments affirmed.

By the Court (Milkey, Sullivan & Ditkoff, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: April 22, 2022.

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