COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1317

COMMONWEALTH

vs.

BRENDAN W. RAY.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a jury trial, the defendant, Brendan W. Ray, was convicted of negligent operation of a motor vehicle in violation of G. L. c. 90, § 24 (2) (a). He argues that his citation for negligent operation should have been dismissed under the so-called "no-fix" law, G. L. c. 90C, § 2; that the evidence of negligent operation was insufficient; that the judge erred in admitting irrelevant, emotional testimony; and that several statements in the prosecutor's closing argument were improper. We affirm.

1. Compliance with no-fix law. Cited for negligent operation and later indicted for the felony of operating a motor vehicle recklessly or negligently while under the influence of alcohol or drugs causing serious bodily injury, see G. L. c. 90, § 24L (1), the defendant filed a motion to dismiss all charges

under the no-fix law. The motion judge allowed the motion in part, dismissing the felony charge but allowing the negligent operation charge to go forward. The Commonwealth took an interlocutory appeal of the dismissal, which this court affirmed. See Commonwealth v. Ray, 95 Mass. App. Ct. 848 (2019). In that appeal, "the propriety of allowing the negligent operation charge to remain [was] not before us." Id. at 851 n.1. The defendant now argues that the judge erred in denying his motion with respect to the negligent operation charge.

Because the defendant was not given the citation for negligent operation at the accident scene, the Commonwealth had the burden to establish that one of the three exceptions set forth in the no-fix law applied. See Commonwealth v. Burnham, 90 Mass. App. Ct. 483, 485 (2016). The motion judge found that "[t]he delay in issuing a citation from the day of the accident (January 23, 2015) to the date the citation was mailed (March 20, 2015) was excused under the statute because 'additional time was reasonably necessary to determine the nature of the violation . . . .' G. L. c. 90C, § 2." We agree.

At the time of the accident, both the defendant and the driver of the other car required immediate medical attention; indeed, it was unclear whether the other driver would survive the crash. Because the cause of the crash was also not

immediately apparent, the responding officers from the Whitman police department asked the State police collision analysis and reconstruction section (CARS) to assist with the investigation. Whitman police Detective Eric Campbell learned the results of the State police investigation from Brian Mahoney[1] in mid-March, "promptly researched the correct charges," and mailed the citation to the defendant on March 20.

The defendant argues that the delay between February 12, which was the last time State police personnel examined the defendant's vehicle, and the issuance of the citation on March 20 was not "reasonably necessary" because Campbell could have acted more diligently in following up on the results of the investigation and in researching the charges. However, the State police investigation did not end the moment of the last vehicle examination, and Campbell was not required to issue a citation immediately upon the conclusion of their investigation. The "need to analyze and integrate information already collected" is a legitimate reason to delay issuance of a citation. Commonwealth v. Provost, 12 Mass. App. Ct. 479, 485 (1981). We do not "engage in a comparison of the time periods involved in the different cases under the statute. Each case

[1] Campbell referred to "Trooper Mahoney" during the evidentiary hearing on the defendant's motion to suppress. By the time Mahoney testified at trial, he had reached the rank of sergeant.

must be decided on its own peculiar facts." Id. at 484. We agree with the motion judge that, in this case, the time taken to determine the nature of the appropriate charges and issue the citation was reasonably necessary.

Furthermore, we agree with the Commonwealth that the third statutory exception, "where the court finds that a circumstance, not inconsistent with the purpose of this section to create a uniform, simplified and non-criminal method for disposing of automobile law violations," G. L. c. 90C, § 2, applies.[2] The statute serves two purposes, to provide the offender with prompt notice of the nature of the alleged violation and to prevent abuse of the citation process. See Commonwealth v. O'Leary, 480 Mass. 67, 71 (2018); Commonwealth v. Carapellucci, 429 Mass. 579, 581-582 (1999).

With respect to the notice purpose of the statute, the defendant had both implicit and explicit notice of the possibility of criminal charges. The serious nature of the accident, in which the driver of the other vehicle sustained life-threatening injuries and had to be "med-flighted" to a hospital, gave the defendant constructive notice. "'It is

[2] "An appellate court is free to affirm a ruling on grounds different from those relied on by the motion judge if the correct or preferred basis for affirmance is supported by the record and the findings." Commonwealth v. Va Meng Joe, 425 Mass. 99, 102 (1997).

inconceivable that [a] defendant would be unaware of the seriousness of a situation in which his vehicle had crossed the center line of a public street and struck a pedestrian' (or, as here, another vehicle)." Provost, 12 Mass. App. Ct. 483-484, quoting Commonwealth v. Pappas, 384 Mass. 428, 431-432 (1981). In addition, Campbell testified that on January 31 he told the defendant "that there potentially would be criminal charges," and the motion judge credited this testimony. Although the defendant asks us to disregard this finding as clearly erroneous, we have no basis to question the judge's credibility determination. See Commonwealth v. Gonzalez, 93 Mass. App. Ct. 6, 11 (2018).

To be sure, the issuance of the citation on March 20 may have "le[d] the defendant to believe that no more criminal charges were forthcoming," Ray, 95 Mass. App. Ct. at 854, but, prior to the issuance of that citation, he "no doubt had notice of the possibility of criminal charges arising from the accident," id. at 853.

Similarly, because of the seriousness of the crash, "the antiabuse purpose of the no-fix provision" was not implicated. O'Leary, 480 Mass. at 71. While Campbell may have taken a few days to research whether any charges other than negligent operation applied and to speak with his supervisor about what the charges would be, the nearly fatal accident "created an

ineradicable record of the event," Carapellucci, 429 Mass. at 581, "such that any potential for a 'fix' was eliminated." O'Leary, supra at 73. This was not "only a single-vehicle accident in which no third person was injured (let alone injured seriously or fatally)." Id.

2. Sufficiency of the evidence. The defendant was driving with a blood alcohol level of approximately 0.17 when he crossed the center line into incoming traffic and caused a head-on collision that resulted in serious injury to the driver of the other car. The CARS ruled out the possibility that a mechanical failure caused the defendant's vehicle to cross the center line. Under the familiar Latimore standard, a rational jury could have accepted this evidence and determined, beyond a reasonable doubt, "that the defendant failed to exercise that degree of care, diligence and safety that an ordinarily prudent person would exercise under similar circumstances" (quotation and citation omitted). Commonwealth v. Kline, 19 Mass. App. Ct. 715, 720 (1985).

In deciding whether the defendant operated negligently, the jury could also consider the fact that he was driving a vehicle in a state of disrepair, with an inspection sticker that had expired, even if the vehicle's condition did not contribute to the accident. Negligent operation "only requires proof that the defendant's conduct might have endangered the safety of the

public, not that it in fact did." Commonwealth v. Ferreira, 70 Mass. App. Ct. 32, 35 (2007). Accord Commonwealth v. Teixeira, 95 Mass. App. Ct. 367, 370-371 (2019).

While "a conviction of negligent operation requires something more than just operating a motor vehicle while under the influence of alcohol," Commonwealth v. Zagwyn, 482 Mass. 1020, 1022 (2019), or the "mere occurrence of an accident," Osborne v. Hemingway Transp., Inc., 28 Mass. App. Ct. 944, 945 (1990), here, unlike in those cases, there was evidence that the defendant both drove while intoxicated and struck an oncoming vehicle after crossing the center line. The totality of the evidence was sufficient "to warrant a finding that the defendant actually operated his vehicle in such a way as to endanger the lives or safety of the public." Zagwyn, supra.

3. Victim's wife's testimony. The defendant argues that the trial judge abused his discretion in allowing the wife of the accident victim to testify briefly, albeit poignantly, about how the accident affected the victim.[3] "The weighing of the prejudicial effect and probative value of evidence is within the sound discretion of the trial judge, the exercise of which we will not overturn unless we find palpable error." Commonwealth

[3] The victim was present in the courtroom but physically unable to testify.

v. Doyle, 73 Mass. App. Ct. 304, 307 (2008), quoting Commonwealth v. Bonds, 445 Mass. 821, 831 (2006).

The testimony was relevant. See Commonwealth v. Cohen, 27 Mass. App. Ct. 1210, 1211 (1989) ("Whether a person suffers injuries as a result of an automobile accident, as well as the nature of the injuries, is relevant to the crucial question whether the manner of operation was so negligent as to endanger lives and safety of members of the public"). See also Doyle, 73 Mass. App. Ct. at 307 ("testimony as to the locations and conditions of the victims immediately after the crash" relevant to prove reckless or negligent conduct element of motor vehicle homicide charge).

Moreover, the judge took pains to ensure that the probative value of the evidence would not be outweighed by any undue prejudicial effect. The judge directed and reminded the prosecutor to "keep it short, sweet, and to the point, and focused," going so far as to preview the questions the prosecutor intended to ask the wife.[4] Immediately after the wife's very brief testimony, the judge instructed the jury to

[4] In addition, the judge asked the venire whether they, or any immediate family member or close friend, "ever suffered any injury or loss on account of a motor vehicle accident" that involved negligent operation, alcohol, or drugs. The judge and the attorneys carefully questioned prospective jurors who answered in the affirmative.

decide the case "free of emotion" and "based on the facts that you find, and the law."

We discern no palpable error amounting to an abuse of discretion in the trial judge's careful handling of the wife's testimony. See Commonwealth v. Mazariego, 474 Mass. 42, 56 (2016) (not error to admit testimony of murder victim's daughter, who "briefly described the date and circumstances when she last saw the victim and how she learned of her death," with "immediate limiting instruction, telling the jury that the testimony was 'not an appeal to sympathy or emotions'").

4. Closing argument. Finally, we address the defendant's multiple claims regarding the prosecutor's closing argument.

a. Vouching. A prosecutor may not express personal belief in the credibility of a witness or suggest that the prosecutor has independent knowledge of information, not available to the jury, bearing on a witness's credibility. See Commonwealth v. Ortega, 441 Mass. 170, 181 (2004); Commonwealth v. Omonira, 59 Mass. App. Ct. 200, 205 (2003). But "[w]hen credibility is an issue before the jury, 'it is certainly proper for counsel to argue from the evidence why a witness should be believed.'" Commonwealth v. Freeman, 430 Mass. 111, 119 (1999), quoting Commonwealth v. Raymond, 424 Mass. 382, 391 (1997).

The prosecutor properly referred to Mahoney's training and experience, which was in evidence, to argue that the jury should

credit his opinion on the cause of the accident. The single reference to "call[ing] in the experts -- the [CARS] teams -- Sergeant Mahoney," was a fair response to the defendant's closing argument questioning the depth of Campbell's investigation. See Commonwealth v. Grandison, 433 Mass. 135, 143 (2001). In any event, to the extent the jury may have taken this isolated comment as a suggestion that Mahoney should be believed because he was an "expert," the judge quickly dispelled any such suggestion by specifically instructing the jury, both immediately after closing arguments and in his final charge, that expert witnesses are not entitled to any special consideration.

Likewise, the prosecutor did not inject a personal belief in the defendant's guilt when he argued that the defendant "shouldn't" have driven while intoxicated, "shouldn't" have driven a vehicle that "had no business being out on the road," and "never should have crossed into the southbound lane." Rather, the prosecutor properly argued, based on the evidence and the reasonable inferences that could be drawn from it, that the defendant's conduct amounted to failure to exercise the degree of care and judgment to be expected from a reasonably prudent person. See Kline, 19 Mass. App. Ct. at 720. "[A] prosecutor is permitted to argue on the basis of the evidence. The jury are presumed to understand that a prosecutor is an

advocate, and statements that are [e]nthusiastic rhetoric, strong advocacy, and excusable hyperbole will not require reversal" (quotations and citations omitted). Commonwealth v. Sanchez, 96 Mass. App. Ct. 1, 10 (2019).

b. Statements of law and fact. The prosecutor's arguments that the defendant was negligent for driving a vehicle that was "falling apart" and "unlawful" were proper. The evidence of the condition of the defendant's car and the expired inspection sticker supported the inference that the car was indeed unsafe and unlawful, and while "a civil infraction alone is not sufficient to constitute negligent operation," Teixeira, 95 Mass. App. Ct. at 370, it is evidence that the jury may consider. See id. at 370-371 & n.4.

Nor was it error for the prosecutor to argue that the Commonwealth did not "have to prove that the defendant was over .08 when he was driving, but that evidence is important to [the jury] in determining whether or not he was negligent." This argument was consistent with the law and the judge's instructions to the jury.[5] In addition, in response to the defendant's objection, the judge instructed the jury immediately after the prosecutor's closing that "What the attorneys say is

[5] "You also may consider any evidence concerning the defendant's use of alcohol or intoxication, although the defendant's use of alcohol or intoxication, by itself, does not mean that the defendant was negligent."

the law isn't necessarily the law -- with all due respect[,] that's my job."

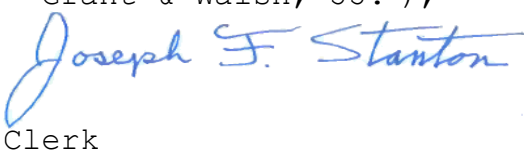
c. Burden shifting. A nurse's notation in the defendant's medical record reflected that he had consumed "four to five beers." In summation, defense counsel argued, "[W]e have no clue where that's coming from." The prosecutor did not engage in burden shifting when he argued in response that the jurors could infer, based on "common sense" and "life experience," that the defendant was likely the source of the information.[6] This argument was a fair inference from the evidence; it could not have been construed as a comment on the defendant's failure to testify. See Commonwealth v. Pena, 455 Mass. 1, 18-19 (2009). The lack of an objection from defense counsel to this aspect of the prosecutor's closing suggests that counsel did not construe

[6] The prosecutor argued, "She doesn't come up with that number out of thin air. She's either getting that information from the defendant, or from someone else that the defendant spoke to at the hospital, or in the ambulance, because he's the only one who knows how much he had to drink that night. So that information could only have come from him."

it as such at the time. See Commonwealth v. Lugo, 89 Mass. App. Ct. 229, 237 (2019).

Judgment affirmed.

By the Court (Massing, Grant & Walsh, JJ.[7]),



Clerk

Entered: April 28, 2022.

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