COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-355

COMMONWEALTH

vs.

MONDEL I. JOHNSON.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

A jury convicted Mondel Johnson of assault and battery by means of a dangerous weapon, G. L. c. 265 § 15A (b), and arson of a dwelling house, G. L. c. 266 § 1; both charges stem from an incident in which the defendant attacked the victim with a hammer and then lit the home they were in on fire. The defendant directly appeals from his convictions as well as from the trial judge's denial of his motion for a new trial, pursuant to Mass. R. Crim. P. 30, as appearing in 435 Mass. 1501 (2001);[1] we heard a consolidated appeal. The defendant contends that: (1) the judge abused his discretion in failing to dismiss juror no. 1 for cause for her alleged inability to be impartial; (2)

[1] In his motion for a new trial, the defendant only raised the issue of the judge's refusal to excuse a prospective juror for cause.

the judge erred in admitting hearsay evidence; and (3) the Commonwealth failed to present sufficient evidence to warrant a conviction for arson. We affirm.

Background. We summarize the evidence using the familiar standard of Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), reserving additional facts for our later discussion.

a. The attack. For three days leading up to the attack at issue, the defendant and the victim had been using drugs together; the defendant supplied the drugs, which they consumed in various houses. Around midnight on March 29, 2018, the pair walked to the home of Jonathan Sanders and Latoya Johnson (Latoya[2]) seeking more drugs. While there, Latoya heard the defendant say that he was "gonna kill this bitch," referring to the victim. The defendant also said to Sanders: "I'm gonna kill her," and told Sanders that the victim "threatened [the defendant's] mother's life." The defendant repeated several times that the victim was "going to die," said that he had "the hammer right here," and pulled up his sleeve to reveal the handle of a metal hammer to Sanders.

The defendant and the victim left Sanders' and Latoya's residence and went to 36 Restful Lane in Wareham, the home of William Nazario, to "get high." They entered through the

[2] Because Latoya shares a surname with the defendant, we use her first name to avoid confusion.

unlocked front door. As they stood in the kitchen, the defendant suddenly shoved the victim forward, causing the front of her head to smash into a cabinet. The defendant then struck the victim in the back of the head with a hammer, making her fall, and repeatedly kicked her in the back. He then poured a sticky liquid on the victim,[3] lit pieces of newspaper on fire, and threw them on the floors in the kitchen, near the victim, and the living room. At some point, the victim lost consciousness; when she awoke, she was alone and 36 Restful Lane was on fire. Her shirt had been removed and her skin and clothes felt sticky. She grabbed something to cover herself and ran out the front door.

After the attack the victim ran to a nearby house but quickly left because she did not want the owner to call 911. Barefoot, injured, and bleeding, the victim ran back to Sanders' and Latoya's house. Upon arrival, the victim told Sanders and Latoya what had happened.

b. 36 Restful Lane. 36 Restful Lane was a two-story, split-level home that contained furniture, appliances, personal belongings and food, including cooking oil. Nazario often allowed people to stay in his home, sometimes for extended periods, and these "tenants" paid him with drugs and used drugs

[3] From the victim's testimony, the jury could have inferred that the substance was cooking oil.

inside the home. Both the defendant and the victim had stayed at the house before. On March 22 (one week before the assault and fire), during a snowstorm, a tree had fallen on the house, opening a hole in the roof. That same day, Nazario locked all the doors and left, but some of the former "tenants" whom Nazario had permitted to stay with him still had keys to his home.

When Nazario returned on March 26, the tree had been removed and the hole was covered with a blue tarp. Nazario met with representatives of the fire department and building inspector who told him that the house was unsafe for occupancy, but they did not condemn it. Nazario then began making calls to contractors because he intended to fix his home. At the recommendation of the building inspector and fire department, Nazario shut off the water, electricity, and gas service to the house. He packed up some clothes and his computer, leaving behind personal belongings, furniture, his late wife's belongings, photos, and appliances. He locked the front door behind him.

Discussion. 1. Juror No. 1. The defendant claims that the judge abused his discretion by denying a for-cause challenge to juror no. 1, alleging that she was unable to set aside her biases because her father was a retired police captain, she expressed disapproval of illegal drug use, and, in her "young

years," she was in an abusive relationship. We are not persuaded.

"The Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights entitle a criminal defendant to a trial before an impartial jury." Commonwealth v. Aduayi, 488 Mass. 658, 667 (2021), citing Commonwealth v. Williams, 481 Mass. 443, 447 (2019). "Where a prospective juror 'has expressed or formed an opinion regarding the case, or has an interest, bias, or prejudice related to the unique situation presented by the case,' the judge must satisfy him- or herself that the prospective juror will set aside that opinion or bias and properly weigh the evidence and follow the instructions on the law." Williams, supra at 448. "A judge's determination that a prospective juror is impartial is 'essentially one of credibility, and therefore largely one of demeanor.'" Aduayi, 488 Mass. at 668, quoting Commonwealth v. McCowen, 458 Mass. 461, 493 (2010). "For that reason, a judge enjoys considerable discretion in making such a determination." Id. "A judge's decision will be reversed only for an abuse of discretion." Id. The fact "[t]hat a juror has family members who work in law enforcement does not, without more, mean that the juror is incapable of being impartial." Commonwealth v. Colton, 477 Mass. 1, 17 (2017).

Upon learning thar juror no. 1's father was a former police captain, the judge asked the juror if she could be impartial, explaining that he wanted a juror who could "hear the evidence presented here in the courtroom and make their decisions based solely on the evidence that's presented here in the courtroom on the law as I instruct them on it." Juror no. 1 responded, "I think I should be fine, then." Later, the judge explained, "[w]e all come to court with life experiences and the question is whether or not you can be fair and impartial and make your decision based solely on the evidence presented here in the courtroom," to which juror no. 1 replied, "I think I can, yeah." Trial counsel posed questions that resulted in juror no. 1's stating, "I think I tend to believe police officers." The judge then specifically asked "are you going to just believe whatever a police officer says, or are you going to evaluate his testimony and make your own determination?" Juror no. 1 answered: "I can evaluate with response to other people's testimonies, I think."

When juror no. 1 expressed concerns about "heavy, serious drug use" and stated that heroin use might affect her evaluation of a witness's testimony, the judge asked her if she could be impartial and she replied, "I'm going to say I can be impartial." Additionally, when juror no. 1 informed trial counsel that she was in an "abusive relationship in [her] young

years," the judge again asked her if she could be impartial, and she responded that she would consider "both sides."[4]

The defendant asserts that these replies were impermissibly equivocal. However, a potential juror's use of seemingly equivocal language -- such as the phrase "I think" -- does not render the response equivocal. See Colton, 477 Mass. at 17. See also Aduayi, 488 Mass. at 668 (juror's response to question regarding impartiality -- "I believe I have the ability to do that" -- deemed satisfactory). Contrast Commonwealth v. Long, 419 Mass. 798, 804 (1995) (juror's response to question whether he could be fair to defendant -- "I would really hope that I could be" -- deemed equivocal). Given the responses and the judge's ability to observe the juror's demeanor while she made them, the judge reasonably could have satisfied himself that juror no. 1 would be able to set aside any biases about police, drug use, and abusive relationships, properly weigh the evidence, and follow his instructions on the law. There was no abuse of discretion in the judge's decision to seat juror no. 1. See Williams, 481 Mass. at 453; Aduayi, supra at 669-670.

Even if the judge had erred in seating juror no. 1, the result would be no different, as the defendant failed to establish prejudice. At trial, the defendant used one of his

[4] The transcript reports her response as: "I would take into consideration both sides of the (indiscernible)."

available peremptory challenges on juror no. 1 after the judge declined to excuse her for cause, but he did not ask for additional peremptory challenges. See Commonwealth v. Leahy, 445 Mass. 481, 499 (2005). Nor was the judge required to find prejudice based on trial counsel's affidavit stating that, had juror no. 1 been excused for cause, he would have used his last peremptory challenge on some other, unspecified juror.

2. Excited utterances. The defendant maintains that the victim's out-of-court statements, which came in through Sanders' and Latoya's testimony, were inadmissible hearsay and the judge erred by admitting them as excited utterances. An excited or spontaneous utterance is not excluded by the hearsay rule "if (A) there is an occurrence or event sufficiently startling to render inoperative the normal reflective thought processes of the observer, and (B) the declarant's statement was a spontaneous reaction to the occurrence or event and not the result of reflective thought." Mass. G. Evid. § 803(2) (2021). "The relevant factors to consider include whether the statement was made in the same location as the startling event; the amount of time between the startling event and the making of the statement; and the age, spontaneity, and degree of excitement of the declarant." Commonwealth v. Wilson, 94 Mass. App. Ct. 416, 421 (2018). "We review a decision that an out-of-court statement qualifies as an excited utterance under the abuse of

discretion standard. We defer to the judge's decision unless we conclude that he failed to weigh properly the relevant factors with the result that the decision was outside the range of reasonable alternatives." Id. at 423.

Here, the victim regained consciousness after a brutal attack, found herself in a flaming house, ran out, went briefly to a neighbor's house, then left and ran to the home of Sanders and Latoya, which is about a ten minute walk from 36 Restful Lane. The victim was barefoot, bleeding, injured, and naked from the waist up. Sanders and Latoya heard loud screams coming from outside and opened their back door to find the victim standing there, hysterically crying and bleeding. They brought her inside, where she repeatedly cried, "[h]e tried to kill me." Crying loudly, the victim said that the defendant tried to kill her with a hammer in Nazario's house and set the house on fire. Sanders could see the flames from Nazario's house as the victim spoke.

There was no abuse of discretion in admitting the victim's statements as excited utterances. The victim, who was hysterical and injured, made these statements close in time and geographical proximity to a shocking event. The judge was not required to find that the victim's normal reflective thought processes were functioning because she left the neighbor's house when the neighbor mentioned calling 911. Nor was such a finding

required by the testimony that the victim did not speak for five minutes after arriving at Sanders' and Latoya's home; Sanders testified that the victim was crying hysterically from the moment she arrived.

3. Sufficiency of the evidence. The defendant asserts that the Commonwealth presented insufficient evidence that he committed arson under G. L. c. 266, § 1, because (a) 36 Restful Lane was not a "dwelling house" and (b) crucial details regarding his intent to commit arson were missing. Viewing the evidence in the light most favorable to the Commonwealth, we conclude that the evidence presented at trial was sufficient to permit a rational jury to find the essential elements of arson beyond a reasonable doubt. Latimore, 378 Mass. at 677.

a. Dwelling house. The term "dwelling house" includes "all buildings used as dwellings such as apartment houses, tenement houses, hotels, boarding houses . . . or other buildings where persons are domiciled." G. L. c. 266 § 1. "It is not necessary to prove actual occupancy. There must, however, at least be proof that the structure in issue is capable of being occupied as a dwelling and domicile." Commonwealth v. DeStefano, 16 Mass. App. Ct. 208, 214 (1983). "[I]n virtually every case the question whether a building is in fact a 'dwelling' is one for the fact finder." Id.

The thrust of the defendant's argument is that 36 Restful Lane ceased to be a dwelling house when a tree fell on the roof during the storm on March 22. While the roof was damaged, the house was not condemned. Nazario voluntarily shut off the utilities; they were not unavailable due to damage. Furthermore, after the storm and before the fire, a neighbor saw people coming in and out of the residence through the back door and lights on in the kitchen and living room. Also, when Nazario returned to his home, the sliding door was open even though he locked the residence upon his departure, and the front door was unlocked when the victim and defendant arrived on the night of the attack.

A reasonable juror could infer that, after Nazario left, tenants continued to enter and use the home, which contained food, furniture, and appliances that were out of service only because Nazario had shut off the power. As such, a reasonable juror could conclude beyond a reasonable doubt that the residence was capable of being occupied as a dwelling and domicile. See Commonwealth v. Anolik, 27 Mass. App. Ct. 701, 712 n.13 (1989) (evidence of electrical service to building containing furniture, kitchenware, and food at time of fire sufficient to establish that building was dwelling house). Contrast DeStefano, 16 Mass. App. Ct. at 214 (insufficient evidence that residence was dwelling house where house was

"uninhabitable" because of heavy smoke and soot damage and items in house were exposed to same damaging elements).

b. Intent to commit arson. The arson statute requires proof that the defendant "willfully and maliciously" set fire to a dwelling house. G. L. c. 266, § 1. The defendant maintains that the victim's testimony did not demonstrate that the defendant had a malicious intent to burn 36 Restful Lane. "[E]ven in the absence of proof that a defendant acted purposefully to set fire to or burn some portion of a dwelling house, the intent element of § 1 still may be satisfied by proof that a reasonable person in the defendant's position would have known that there was a plain and strong likelihood that some portion of a dwelling house would be set on fire or burned." Commonwealth v. Pfeiffer, 482 Mass. 110, 121 (2019). Furthermore, "proof of arson must often rely on circumstantial evidence because arsonists are furtive criminals. 'Circumstantial evidence is competent evidence to establish guilt.'" Commonwealth v. Jacobson, 19 Mass. App. Ct. 666, 674 (1985), quoting Commonwealth v. Rojas, 388 Mass. 626, 629 (1983).

Here, there was sufficient evidence for the jury to find that the defendant lured the victim, whom he intended to kill, to Nazario's house, beat her, and poured cooking oil on her. Once he incapacitated her, the defendant lit newspaper on fire

and threw pieces of it on the kitchen floor, near the victim, and in the living room. When the victim regained consciousness, 36 Restful Lane was on fire. The jury could reasonably conclude that the defendant purposefully set the residence on fire and that a reasonable person in his position would have known that there was a plain and strong likelihood that some portion of 36 Restful Lane would be burned due to his actions.

Judgments affirmed.

Order denying motion for a new trial affirmed.

By the Court (Sacks, Hand & Hershfang, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: May 4, 2022.

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