

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-774

COMMONWEALTH

vs.

FRANCIS G. BYRNE, THIRD.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant was convicted after a jury-waived trial of four counts of assault by means of a dangerous weapon (ADW), two counts of malicious damage to a motor vehicle, and one count of malicious destruction of property.¹ The convictions stemmed from a series of incidents in which the defendant shot at a passing vehicle with a BB gun before driving to his sister and brother-in-law's home nearby and shooting at their home and vehicle.

The defendant noticed an appeal from his convictions.

Thereafter, the defendant filed a motion to revise and revoke his sentence pursuant to Mass. R. Crim. P. 29, as appearing in

¹ The count originally charging malicious destruction of property over \$1,200 -- a felony -- was reduced to simple malicious destruction of property -- a misdemeanor. An additional count charging the defendant with malicious damage to a motor vehicle was dismissed.

474 Mass. 1503 (2016). In his motion the defendant alleged that the trial judge impermissibly considered postsentencing conduct in revising his original sentence and imposing a longer one. After a hearing, the motion was denied. The defendant noticed a separate appeal from that order, which we later consolidated with the defendant's primary appeal.

The defendant argues that he is entitled to a new trial because the evidence was insufficient to identify him as the perpetrator; the judge erred by not amending the complaint to reflect the fact that a BB gun, not a firearm, was used in the commission of the crimes; and that the judge erroneously denied his motion to revise and revoke his sentence. For the reasons that follow, we affirm the convictions and the order denying the rule 29 motion, and we remand for entry of an order allowing the defendant's motion to amend the complaint.

Background. We recite the facts in the light most favorable to the Commonwealth. See Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979). On the evening of July 6, 2020, the defendant called one of his neighbors and said that "he was going to do something stupid." During this conversation, the defendant sounded distressed. That same evening, Shane Linehan was driving his friend, Gian Fusco, home to Middleborough. As they went through an intersection, Linehan heard loud bangs and his back windows "blew out." Although neither Linehan nor Fusco

recognized who was driving the car from which the shots were fired, Fusco saw that the shooter's vehicle was a small Volkswagen sedan and "was loud when it drove off."

Later that same night, the defendant's brother-in-law heard the loud exhaust of a car approaching his house. He then saw the defendant's vehicle parked outside and watched as a person, whose silhouette looked like the defendant, began shooting in the direction of the house. There were shots in the picture window on the front of the house, as well as a shot to a Jeep in front of the house. The brother-in-law was able to identify the defendant's vehicle -- which he described as a "very flashy" blue Volkswagen Jetta with a loud exhaust and chrome rims -- because the defendant had previously lived at his house and the car had been parked in his driveway for an entire year.

Six months earlier, the defendant's sister had asked the defendant to move out of the house, due to an altercation that created hostility between the defendant and her husband and led to a dispute over money the defendant owed her. The sister was able to identify the blue Volkswagen Jetta being present at her house on the night of the shooting. The sister had not known of anyone aside from the defendant to have ever driven the car.

Shortly after the shooting, the police went to the defendant's apartment in Carver and saw a blue Volkswagen Jetta in the parking lot of the apartment complex. When the police

arrived they heard "yelling and screaming coming from the back" and "could hear [the defendant] yelling in the basement." The defendant's mother, appearing frightened, "eventually" answered the officers' knock. She informed them that the defendant was in the basement and the officers advised her to leave the premises. She did so. The officers then attempted to speak to the defendant, who responded by making several threats to shoot a bow and arrow at them and said that he was not going to come out without a fight. After "well over an hour" the standoff was resolved when a crisis negotiator successfully talked the defendant into surrendering.

The defendant moved for a required finding of not guilty at the conclusion of the Commonwealth's evidence and argued that the evidence was insufficient because the defendant was not directly identified as the shooter. The judge denied the defendant's motion and ultimately found the defendant guilty on the charges described above. The judge sentenced the defendant to two years in the house of correction with one year to serve and the balance suspended for three years on the ADW charges, and three years straight probation on the property damage charges. The defendant then asked to address the judge, which the judge allowed with the caveat that "anything can change." The defendant then criticized the judge, blamed various people and institutions for his thirty-year history with the judicial

system, and, as further described infra, failed to accept any responsibility for his actions. Following the defendant's statement, the judge increased the sentence on the ADW charges to two and one-half years with two years to serve and the balance suspended, and probation for three years from and after on the remaining charges.

Discussion. 1. Identification evidence. The defendant argues that his motion for a required finding of not guilty should have been allowed because none of the Commonwealth's witnesses sufficiently identified him as the shooter. 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. Oberle, 476 Mass. 539, 547 (2017), citing Latimore, 378 Mass. at 676-677. "The Commonwealth may submit a case wholly on circumstantial evidence, and inferences drawn from that evidence need only be reasonable and possible; [they] need not be necessary or inescapable." Commonwealth v. Evans, 469 Mass. 834, 842 (2014) (quotations omitted).

The evidence permitted the judge to find that the defendant's distinctive car was used in both shootings, which occurred close in time and place. It was a reasonable inference

that the defendant was both the driver and the shooter, because (a) the car belonged to the defendant, and he was the only person known to drive it, (b) the defendant announced to a friend on the night in question that he was going to do something stupid, (c) the brother-in-law observed the shooter's silhouette and noted that it resembled the defendant, (d) the car used during the shootings and the defendant were in the same location shortly after the shooting, (e) there was a history of animosity between the defendant and his sister and brother-in-law, and (f) the defendant's reaction when the police arrived indicated that he was in a mood for violence on the evening of the shooting.

Because the circumstantial evidence the Commonwealth presented permitted a finding beyond a reasonable doubt that the defendant was the shooter, the judge did not err in denying the defendant's motion for a required finding of not guilty.

2. Motion to amend the complaint. Prior to trial, the defendant filed a motion to amend the complaint, which was discussed by the judge but never ruled upon. The defendant claims that the complaint, which stated that the dangerous weapon was a firearm, was defective because the evidence at a subsequent suppression hearing indicated that the dangerous weapon was alleged to be a BB gun. Due process requires the charging instrument to provide fair notice of the crime charged.

See Commonwealth v. Canty, 466 Mass. 535, 547 (2013). A complaint will not be dismissed or be considered defective if it is sufficient to enable the defendant to understand the charge and to prepare his defense. See G. L. c. 277, § 34.

The reference to a "firearm" in the complaint was surplusage and not an element of the crime that the Commonwealth was required to prove. See Commonwealth v. Salone, 26 Mass. App. Ct. 926, 930 (1988).² A "defendant is not to be acquitted on the ground of variance between the allegations and proof if the essential elements of the crime are correctly stated, unless he is thereby prejudiced in his defense." Commonwealth v. Grasso, 375 Mass. 138, 139 (1978).

At the time of the hearing on the motion, the judge stated that he would take no action on the motion to amend and "see how the evidence comes in." We presume that "a judge sitting in a jury-waived trial has instructed himself properly on the law." Commonwealth v. Graziano, 96 Mass. App. Ct. 601, 608 (2019). Although the complaint should have been amended as soon as the discrepancy came to light,³ there was no prejudice to the

² "The elements of assault by means of a dangerous weapon are that a defendant committed an assault, the defendant intended to commit an assault, and the assault was committed by means of a dangerous weapon." Commonwealth v. Buttimer, 482 Mass. 754, 767 (2019), citing Commonwealth v. Porro, 458 Mass. 526, 530 (2010).

³ In this case, the fact that the alleged dangerous weapon was a BB gun was contained in the police report and the Commonwealth acknowledged that the complaint should have specified that the

defendant at trial from the judge's failure to act on the motion to amend. See Grasso, 375 Mass. at 139. After trial, when the evidence was clear that the only dangerous weapon used was a BB gun, the motion should have been allowed, so that the record would not inaccurately suggest that the defendant had been convicted of offenses involving the use of a firearm.

Accordingly, we remand the case to the trial court for the limited purpose of allowing the defendant's motion to amend the complaint.

3. Rule 29 motion. The defendant claims that his rule 29 motion should have been allowed because the judge impermissibly considered his postsentencing statement when the judge revised the original sentence and imposed a longer one.

We review the denial of a rule 29 motion for errors of law, including whether, at sentencing, "the judge . . . considered improper factors in formulating a sentence." Commonwealth v. Richards, 44 Mass. App. Ct. 478, 482 (1998). Although a judge may not consider conduct that occurs subsequent to the original sentencing, see Commonwealth v. DeJesus, 440 Mass. 147, 152 (2003), a judge may resentence based on "information which existed at the time of the original sentencing but was not known

weapon was a BB gun. Also, the Commonwealth had no objection to the defendant's motion to amend the complaint.

to the judge." Commonwealth v. Jackson, 80 Mass. App. Ct. 528, 533 (2011).

While the defendant argues that the judge impermissibly considered his postsentencing statement in revising the original sentence, the record does not support this assertion. The judge's revision relied on facts that, while then unknown to the judge, existed at the time of the original sentencing.⁴ For example, the defendant stated, "I've been coming to this courthouse for the last 30 some-odd years because of my father," to which the judge replied, "You don't take any responsibility at all for being here for 30 years?" The judge further referred to the defendant "blaming all that on your father," not being "accountable for your behavior over the years," and not taking "any responsibility for any of it." Once it became clear that the defendant was not going to accept responsibility for his conduct over the course of many years, the judge revised his sentence.

Our decision in Jackson, supra, is instructive. In that case, following the imposition of his sentence, the defendant refused to sign the conditions of his probation, which caused

⁴ Although the judge could have provided a more explicit warning about the potential risk of an increased sentence, our review of the transcript leads us to conclude that the judge's statement that "anything can change" -- while not fulsome -- was sufficient to alert the defendant to the peril.

the judge to increase his sentence. See Jackson, 80 Mass. App. Ct. at 530-532. In concluding that the judge did not err, we explained that "because the defendant's refusal to sign the conditions of probation was simply a manifestation of his attitude at the time of the original sentencing . . . the consideration of such conduct is properly viewed not as postsentencing conduct but as a manifestation of an attitude present at the time of the original sentencing which might be considered by the judge." Id. at 534.

This case presents a similar situation. While addressing the judge, the defendant revealed an attitude showing his inability to accept responsibility for his prior conduct -- an attitude that existed at the time of his original sentencing just a few minutes earlier. In response, the judge concluded that the defendant posed a more serious public safety concern than the judge had previously understood, and he revised the defendant's sentence accordingly.⁵

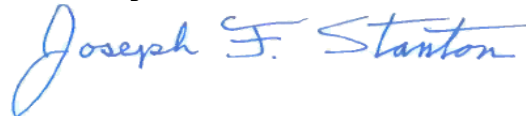
Conclusion. For the reasons set forth above, the judgments of conviction are affirmed. The order entered July 19, 2021,

⁵ We have considered, but find inapposite, both Commonwealth v. Mills, 436 Mass. 387, 400 (2002) (judge may not punish defendant for refusing to confess before sentencing); and Commonwealth v. Jones, 71 Mass. App. Ct. 568, 573 (2008) ("Generally, constitutional concerns appear to increase as the sentencing judge criticizes the defendant for not expressing remorse, or otherwise considers the defendant's failure to do so as an aggravating factor").

denying the defendant's rule 29 motion to revise and revoke is affirmed. The case is remanded for the entry of an order allowing the motion to amend the complaint.

So ordered.

By the Court (Vuono,
Wolohojian, Kinder, Sacks &
D'Angelo, JJ.⁶),



Clerk

Entered: June 10, 2022.

⁶ The panelists are listed in order of seniority.