

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

20-P-1306

COMMONWEALTH

vs.

JUSTIN LEBLANC.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

On November 14, 2019, the defendant, Justin Leblanc, was convicted of possession of a large capacity feeding device, in violation of G. L. c. 269, § 10 (m); carrying a firearm without a license in violation of G. L. c. 269, G. L. c. 10 (a); and possession of ammunition without a firearm identification card in violation of G. L. c. 269, § 10 (h), based on his possession of a fully loaded firearm with a thirteen-bullet magazine without a license to carry a firearm or ammunition in Massachusetts. The defendant appeals, contending, first, that the trial judge erred in denying his request to instruct the jury on the defense of duress and, second, that the evidence was not sufficient to prove that he had knowledge that his firearm could hold more than ten rounds of ammunition, as required by the large capacity feeding device statute. We affirm.

Background. The defendant argues that the trial judge erred in refusing to instruct the jury on the defense of duress. His theory is that on the night of his arrest, he lawfully possessed the firearm in New Hampshire, but was forced to enter Massachusetts by the actions of some other person. Some background is in order.

According to the testimony of Officer Jeffrey Giles of the Townsend police department, at approximately 2:30 A.M. on June 30, 2018, after receiving a dispatch, he observed the defendant's Volkswagen behind a box truck "stopped at the red light in the center of town," in the southbound lane of Route 13, which is known there as School Street, at the intersection of School Street and Route 119, which is known there as Main Street. The truck and the car were coming from the direction of the abutting town to the north, Brookline, New Hampshire. The truck, which as indicated was in front of the Volkswagen, turned right on Main Street and the Volkswagen continued south on School Street.

Officer Giles followed the Volkswagen for "approximately a mile to a mile and a half" further south, that is, further into Massachusetts, until Officer David Phillips arrived in his cruiser as backup. Officer Giles then stopped the Volkswagen on Route 13 -- the address there was 140 Fitchburg Road -- slightly south of the center of town. That location is five and six-

tenths miles into Massachusetts and, without objection, a Google map was entered in evidence showing that it would take approximately nine minutes to drive from the New Hampshire-Massachusetts border to that location. The two officers approached the vehicle, discovering the defendant in the driver's seat and his companion, Melissa Mercer, in the front passenger seat.

When the officers approached, the defendant repeatedly said, "I knew this was going to happen," and asked why the police had stopped him. Officer Giles detained the defendant while Officer Phillips searched the glove box inside the car, a search about which there is no issue. Inside the glove box, Officer Phillips found a leather firearm holster and a black semiautomatic Glock .23 handgun with a magazine inserted into it. The magazine had a capacity of thirteen rounds and was fully loaded. The number "13" was engraved on the back of the magazine.

When Officer Phillips retrieved the Glock from the car, the defendant asked Officer Giles why the other officer had his gun. Officer Giles asked the defendant if he had a nonresident license to carry the firearm in Massachusetts and the defendant replied by dropping his shoulders and saying, "ah, fuck, is this what it's about[?]" Officer Giles testified that he inquired about an incident between the defendant and another driver and

the defendant stated that as the box truck was passing him he "flipped [the driver] off because that's what truck drivers do because he's one of them."

The defendant testified in his own defense. He claimed at trial, and maintains on appeal, that an incident with a box truck driver placed him under duress, forcing him to enter Massachusetts, and that it was as a result of that duress that he committed the crimes for which he was convicted.

The defendant testified that he left his New Hampshire apartment around 12:30 A.M. on June 30 for a "decompressing ride" with Mercer, as they typically did after he finished work on Fridays. This ride had no particular purpose other than to visit the house of his deceased grandmother in Goffstown, New Hampshire, which was "very dear" to him. He testified that as he was driving on Route 101 west in New Hampshire, a box truck came behind him at a high rate of speed and tailgated him. The driver of the truck honked its horn, flailed his hands, and swerved in and out of the breakdown lane whilst flashing the truck's high beams. The defendant claimed that he tried to evade the truck by speeding up, slowing down, moving over, and turning onto a side road, to no avail. The truck pulled alongside the defendant's car as though to pass it, but remained even with the Volkswagen and did not pass. The defendant testified that he was very distracted as he attempted to avoid

an accident with the truck driver who "was scaring the daylights out of [him]." He claimed that Mercer was "crying and screaming" during this ordeal whilst in a reclined position, covering her face.

According to his testimony, due to the distraction caused by this imminent threat of bodily injury or death, he did not notice he missed the Milford-Nashua exit to Route 101A, which he would have taken to get to his grandmother's house. He testified that he intended to take that exit to drive into Milford and take Route 13, which goes through Milford, north to his grandmother's house. The defendant testified that instead he took the next exit, what he believed to be the correct exit for Amherst and Milford, New Hampshire, but what was in actuality the exit for Route 13 at Milford and Brookline, New Hampshire. He then took a left off the exit, as he would have done had he taken the correct exit. Thus, he drove toward Brookline, New Hampshire although he believed he was going toward Milford.

As the box truck continued following him while behaving dangerously, he turned off Route 13 and traveled down various side roads until he ended up back on Route 13, still heading south with the truck still behind him. The defendant testified that he asked Mercer to call the police because he was unable to reach his phone, but she did not respond to him in her panicked

state. Allegedly fearing for his life, the defendant then brandished his firearm by pointing it straight into the air. This action -- which happened somewhere in New Hampshire and for which the defendant testified he pleaded guilty in that State to a criminal charge of brandishing a firearm -- did not, according to the defendant's testimony, deter the truck driver. The defendant testified that in his distraction he did not notice the Brookline and Townsend police stations, which he passed on his route, or, we may infer from his testimony, two signs along Route 13, which read "Welcome to Massachusetts" and "Entering Townsend, Massachusetts" respectively.

The defendant estimated that the encounter began after 1 A.M. and lasted twenty-five to thirty-five minutes. However, on cross-examination he admitted that the encounter began "around 1:00 in the morning" and lasted until a few minutes before he was pulled over at approximately 2:30 A.M. The defendant conceded that a direct route to Townsend would have taken about thirty minutes, but claimed his trip lasted an additional hour due to taking detours down various side streets and mixing speeds in order to evade the truck driver.

On cross-examination, the defendant did not dispute that, at the time the police encountered him, his car was behind the box truck, not the other way around. He testified that the truck had "in the end" forced him to pull over on Route 13 and

passed him, "a few minutes before the officers actually intervened." He testified that he waited until the box truck was out of sight, then proceeded straight. He said he did not know how he wound up behind the truck at the red light given his delay before proceeding and surmised the truck driver had "slowed down or he pulled over himself." Despite the fact that he was now no longer being followed by the truck, he testified that he did not turn around and head back to New Hampshire because of his misapprehension of his location. Believing he had taken the correct exit, he believed that by going straight he was "continuing on to Milford."

Discussion. 1. Duress instruction. The defendant contends the trial judge erred by refusing to instruct the jury on the defense of duress.

In reviewing a trial judge's refusal to instruct the jury on duress we must first determine whether there was sufficient evidence to raise the issue. See Commonwealth v. Monico, 373 Mass. 298, 304 (1977). "Once the question is fairly raised, the teaching of our cases on matters of justification, mitigation and excuse is that the burden is on the Commonwealth to prove absence of justification beyond a reasonable doubt."

Commonwealth v. Love, 26 Mass. App. Ct. 541, 548 (1988), quoting Commonwealth v. Thurber, 383 Mass. 328, 331 (1981). To

establish a justification defense of duress, three elements must be present:

"First, the defendant must have received a present and immediate threat which caused him to have a well-founded fear of imminent death or serious bodily injury if he did not do the criminal act. That must be imminent and must be present throughout the commission of the crime. Second, the defendant must have had no reasonable opportunity to escape. And third, the defendant, or any other person of reasonable firmness, must have had no other choice and been unable to do otherwise in the circumstances."

Commonwealth v. Perl, 50 Mass. App. Ct. 445, 447 (2000).

A defendant is only entitled to an instruction on duress if he produces sufficient evidence to establish the elements of the defense, including the conclusion he had "no reasonable opportunity to escape." Commonwealth v. Melzer, 14 Mass. App. Ct. 174, 184 (1982) (defendant in armed robbery case was not entitled to instruction on duress based on threats to third party). In making its inquiry into whether the defense is sufficiently supported by the evidence to warrant an instruction, this court must view the evidence in the light most favorable to the defendant and even if the "defendant gives incredible testimony, he is entitled to any instruction required upon the hypothesis that the testimony is true," id., although of course a judge need not instruct on a theory where "[n]o reasonable juror could have concluded" that the Commonwealth had not proven the absence of justification. Perl, 50 Mass. App. Ct. at 452.

This case is unusual because the defendant's argument acknowledges that he possessed in Massachusetts the gun, large capacity feeding device, and ammunition without the requisite licenses and firearm identification cards. He asserts that he did not know he was in Massachusetts after entering, but that is no defense; knowledge that one is in Massachusetts is not an element of any of the crimes of which he was convicted. See G. L. c. 269, § 10 (m); G. L. c. 269, § 10 (a); G. L. c. 269, § 10 (h). His argument is that he entered Massachusetts while in possession of the firearm, ammunition, and large capacity feeding device, and thus committed the crimes, only due to duress.

The Commonwealth responds that the defense of duress is inapplicable to the instant case because presence in the State is not an element of any of the crimes for which the defendant was convicted. The Commonwealth asserts that presence was a mere jurisdictional requirement which is only an element of the crime where it is disputed at trial, and it was not disputed here. See Commonwealth v. Combs, 480 Mass. 55, 61 (2018) ("Where territorial jurisdiction is a triable issue, . . . we treat territorial jurisdiction as if it is an element of the offense"). Although it may be true that presence need not be instructed upon where it is not disputed at trial, see Commonwealth v. Jaynes, 55 Mass. App. Ct. 301, 308-309 (2002),

we think it is an element of the offense in the sense that, even if not disputed, where a defendant argues that his presence in Massachusetts was due only to duress, he is entitled to an instruction on the justification defense. Although it amounts essentially to a classroom hypothetical, we think that if one lawfully possessing a gun in New Hampshire but without the proper licensure in Massachusetts were forced at gunpoint to cross the border into Massachusetts, he or she would be entitled to an instruction on duress.

And we will assume without deciding that the testimony of the defendant, if true, was close enough to that hypothetical that it raised the issue whether he was under duress up until the point at which the box truck passed him. We will assume that the erratic and threatening behavior of the box truck driver to which the defendant testified might well have placed the defendant in present and imminent fear of death or serious bodily injury if he did not take steps to evade that truck. See Melzer, 14 Mass. App. Ct. at 181.

Once the box truck had passed the defendant, however, the contention that the defendant was under duress no longer obtains. According to the defendant's own testimony, he lost sight of the box truck by waiting after it passed him until it was out of sight. At that point, the defendant no longer could claim that he had "no reasonable opportunity to escape."

Indeed, the most rational step for a person in the defendant's position, once the box truck passed, would be to turn around and head in the other direction (which would be back toward New Hampshire).

The defendant did not turn around, however. Instead, after the threat had ended, he continued to drive to the center of Townsend and through it, deeper into Massachusetts, until he was arrested one to one and one-half miles further along the road. That is the point -- when the defendant was arrested -- at which we judge the possessory crime at issue, because the evidence of possession at trial came from the arrest and the seizure of the gun and ammunition. At that point, we are satisfied that as a matter of law, the defendant could not claim duress. The evidence did not show that he remained in fear of bodily harm, and moreover, he had a reasonable opportunity to escape. And, rather than act in accordance with that opportunity, he brought the firearm deeper into Massachusetts. The judge accordingly did not abuse his discretion by denying the requested instruction on duress.¹

¹ Had the defendant been actively returning to New Hampshire when he was stopped, the situation arguably would have been different. He was not, however.

Nor do we think it matters that the defendant claims that he became confused as to where precisely he was located. As noted, the defendant does not have to know he was in Massachusetts to commit the crime. Carrying the gun in Massachusetts, without a license, is flatly prohibited. Under

2. Motion for a required finding of not guilty. The defendant next argues that the trial judge erroneously denied his motion for a required finding of not guilty at the close of the Commonwealth's case on the charge of unlawful possession of a large capacity feeding device in violation of G. L. c. 269, § 10 (m). Specifically, the defendant argues that the evidence viewed in the light most favorable to the Commonwealth failed to establish that the defendant knew that the fully loaded magazine inserted into his firearm and engraved with the number "13" was capable of holding more than ten bullets.

"We review the denial of a motion for a required finding of not guilty to determine 'whether the evidence offered by the Commonwealth, together with reasonable inferences therefrom,

the law it was the defendant's responsibility to know where he was.

Even assuming we would excuse the defendant's reasonable but mistaken belief that he was still in New Hampshire if that belief was the result of the imminent threat of death or serious bodily harm posed by the box truck, the record in this case cannot support a finding that the defendant's asserted belief about his location at the time of his arrest was reasonable. His testimony was that he believed he was on Route 101A heading toward Milford, New Hampshire, even after passing, while not under threat, through the center of Townsend. An examination of the maps that were submitted in evidence shows, however, that a driver would come upon Milford immediately upon taking the exit that the defendant claimed he thought he took, the Milford-Nashua exit onto Route 101A. No reasonable person having passed through the center of Townsend (which, in fact, one cannot arrive in on Route 13 without driving all the way through Brookline, New Hampshire, and then several more miles on Route 13 after crossing into Massachusetts) could believe he was still on Route 101A having not yet come to Milford.

when viewed in its light most favorable to the Commonwealth, was sufficient to persuade a rational jury beyond a reasonable doubt of the existence of every element of the crime charged.'" "

Commonwealth v. Barry, 481 Mass. 388, 397-398 (2019), quoting Commonwealth v. Whitaker, 460 Mass. 409, 416 (2011). Under this standard, we find no error.

With respect to the possession of a large capacity feeding device, "the Commonwealth must prove that a defendant either knew a firearm or feeding device he or she possessed qualifies as having a large capacity under the statute or knew that the firearm or feeding device is capable of holding more than ten rounds of ammunition." Commonwealth v. Cassidy, 479 Mass. 527, 536 (2018). "[K]nowledge can be inferred from circumstantial evidence, including any external indications signaling the nature of the weapon." Id. at 537, quoting Staples v. United States, 511 U.S. 600, 615 (1994).

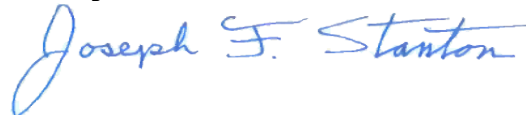
Here, even limiting our review to the evidence introduced in the Commonwealth's case in chief, it was sufficient to deny the defendant's motion for a required finding of not guilty. The Commonwealth presented ample circumstantial evidence of the defendant's knowledge. The magazine, which was fully loaded with thirteen rounds, was inserted into the firearm in his possession; he acknowledged that he owned the firearm by asking why one of the officers was taking away his gun; the magazine

had the number "13" engraved on it; and when inserted into the firearm, the base of the magazine visibly protruded from the bottom of the firearm's handle. Taken together, this evidence is sufficient to support a finding beyond a reasonable doubt that the defendant knew his firearm was capable of holding more than ten rounds of ammunition.

Conclusion. Because we see no error, the judgments are affirmed.

So ordered.

By the Court (Rubin, Blake & Englander, JJ.²),



Clerk

Entered: December 21, 2021.

² The panelists are listed in order of seniority.