

MASSACHUSETTS SUPREME JUDICIAL COURT

Commonwealth v. Little

453 Mass. 766 (2009) · Decided May 14, 2009

OPINION

CORDY, J.

Cordy, J. The Commonwealth brought a complaint against Christopher Little, the defendant, charging him with possession of a Class D substance (marijuana) with the intent to distribute. At trial, Little contested the charge only insofar as it alleged an intent to distribute.

The Commonwealth called an experienced narcotics investigator, Detective Thomas Keating, who testified that in his opinion, the facts of Little's case were consistent with an intent to distribute. Little filed a motion for a required finding of not guilty, which the trial judge denied.

The jury returned a verdict of guilty, and Little was sentenced to a term of two years' imprisonment. Little appealed, and we granted his application for direct appellate review. Little, represented by new counsel, presses two arguments on appeal.

First, he challenges Keating's testimony as an expert witness, including his qualifications as an expert, the scientific basis for his opinions, and the sufficiency of his testimony to prove that Little had an intent to distribute marijuana.

Second, he challenges the judge's decision to deny Little's motion in limine to exclude his prior convictions of crimes involving drug distribution.¹ We conclude that the judge did not abuse his discretion in allowing Detective Keating to testify, nor did he err in denying the motion for a required finding of not guilty. While Keating's testimony sometimes strayed beyond the bounds of his expertise, there was no objection to it, and its admission did not create a substantial risk of a miscarriage of justice.

We also conclude, however, that the judge erred in denying Little's motion in li-mine, essentially ruling that if Little chose to testify, the Commonwealth would be allowed to introduce evidence of Little's prior convictions relating to drug distribution.

Therefore, we reverse the conviction and remand for a new trial. 1. Facts. The jury could have found the following facts beyond *768a reasonable doubt. Commonwealth v. Latimore, 378 Mass. 671, 677-678 (1979). On the evening of October 12, 2006, Officer Robert Stokinger of the Whitman police was parked on Route 14 when he saw a green sedan automobile with an expired inspection sticker drive by.

He entered the vehicle's registration plate number into his computer and learned that the car had failed an inspection in December, 2005, and that the license of the vehicle's owner had been suspended. Stokinger pulled the vehicle over; Little was driving, and he was the only person inside the car. Stokinger asked Little for his driver's license and automobile registration and confirmed that the license had been suspended.

He then called for backup and arrested Little. At the Whitman police station, Little's pockets were emptied, and for the first time, Stokinger smelled a strong odor of marijuana. In the crotch of Little's pants, the officers found a plastic bag holding fifteen smaller plastic bags, each containing a green, leafy substance. They also found a cellular telephone and \$254 in his pockets.

The officers did not find any smoking paraphernalia in Little's possession. 2. Discussion, a. Expert testimony. "Otherwise qualified expert testimony is admissible if, 'in the judge's discretion, the subject [of such testimony] is not within the common knowledge or common experience' of the trier of fact, and the testimony will assist the trier of fact in determining a fact in issue or in understanding the evidence." *Commonwealth v. Miranda*, 441 Mass. 783, 792-793 (2004), quoting *Commonwealth v. Francis*, 390 Mass. 89, 98 (1983).

That rule, however, is not rigid; and even in cases where the subject matter may be within the knowledge or common experience of the trier of fact, expert testimony will be admissible if, in the judge's discretion, it may be of assistance. See *Commonwealth v. Miranda*, *supra* at 793, citing *P.J. Liacos, M.S. Brodin, & M. Avery, Massachusetts Evidence* § 7.6.1 (7th ed.

1999). See generally *Mass. G. Evid.* § 702, at 204-213 (2008-2009). It is well established that "trial judges have broad discretion to allow the use of narcotics investigators as experts in drug cases." *Commonwealth v. Miranda*, *supra*, citing *Commonwealth v. Johnson*, 413 Mass. 598, 604 (1992).

The judge's decision to allow this type of evidence "will be reversed only where the admission constitutes an abuse of discretion or error of law." *Commonwealth v. Johnson*, 410 Mass. 199, 202 (1991).² Narcotics investigators may testify as experts to describe how drug transactions occur on the street. *Commonwealth v. Miranda*, *supra* at 794, quoting *Commonwealth v. Robinson*, 43 Mass. App.

Ct. 257, 259 (1997) ("Characteristics of two-person street-level drug transactions are beyond the common store of knowledge of the average juror"). For example, this court and the Appeals Court have upheld decisions to allow testimony on the use of "lookouts" in drug transactions, *Commonwealth v. Miranda*, *supra* at 794-795 & n.13, and the significance of the purity of seized drugs, *Commonwealth v. Bienvenu*, 63 Mass. App.

Ct. 632, 636 (2005). We have also repeatedly held that there is no error in allowing "a police detective to testify that in his opinion the amount of [drugs] possessed by the defendant was not

consistent with personal use but was consistent with an intent to distribute.” *Commonwealth v. Johnson*, 410 Mass. at 202. See *Commonwealth v. Wilson*, 441 Mass. 390, 400-401 (2004) (Wilson); *Commonwealth v. Gollman*, 436 Mass. 111, 116 (2002) (Gollman). “An element of the Commonwealth’s case in proving a charge of drug possession with intent to distribute is whether the subject drugs, connected to a given defendant, were for personal use or for distribution.

This is not a matter within the common experience of jurors.” *Commonwealth v. Grissett*, 66 Mass. App. Ct. 454, 457 (2006), citing *Wilson*, supra at 401. In this case, as in *Gollman* and *Wilson*, the judge permitted Keating to opine as an expert witness whether the facts of the case were more consistent with distribution or personal use of drugs. Keating testified that he had been employed with the Brockton police department since 1987; that he had worked in the narcotics unit since 1994; that he had attended at least 200 hours of training in narcotics investigation; that he holds a master’s degree in criminal justice; that he had been involved in close to *770200 marijuana investigations; and that he had been involved in about fifty undercover purchases of marijuana.

The judge did not abuse his discretion in permitting Keating to testify as an expert on the distribution issue, and Little lodged no objection to his doing so.³ Little also challenges the content of Keating’s testimony. At no point during direct or cross-examination did Little object on the ground that Keating’s testimony went beyond his area of expertise, or on the ground that he gave an opinion on the ultimate question before the jury.

The conviction will therefore be reversed only if the testimony created a substantial risk of a miscarriage of justice. See *Commonwealth v. Daye*, 411 Mass. 719, 741-742 (1992); *Commonwealth v. Villanueva*, 47 Mass. App. Ct. 905, 907 (1999).

In *Wilson* and *Gollman*, we upheld convictions when experts offered testimony similar to Keating’s. In *Wilson*, supra at 400-401, a narcotics detective opined that possession of one-half ounce of marijuana packaged in twenty smaller bags, \$476 in cash, a pager, and a cellular telephone, and an absence of smoking paraphernalia, were more consistent with an intent to distribute than personal use.

In *Gollman*, supra, a narcotics officer opined that possession of “crack” cocaine with street value of \$540 and a pager, and an absence of smoking paraphernalia, were more consistent with an intent to distribute than personal use. Keating’s testimony fits squarely within the *Wilson* and *Gollman* framework. He began by testifying that drug dealers usually sell marijuana in “dime bags” (one gram, ten dollars), one-eighth of an ounce (3.5 grams, twenty-five dollars), one-half ounce (fourteen grams, seventy-five dollars), and one ounce (twenty-eight grams, \$125 to \$150).

He testified that the absence of smoking paraphernalia could be significant in determining whether drugs are for personal use or for distribution. He admitted that “everybody carries a cell phone,”

but noted that drug dealers use them to communicate with potential buyers.

The prosecutor then *771asked, in the form of a hypothetical, for Keating to consider a case where a defendant is arrested with fifteen individually packaged bags of marijuana, \$254 in loose currency, a cellular telephone, and no smoking paraphernalia. Keating testified that in his opinion, that situation was more consistent with distribution than personal use.

On cross-examination, Keating testified that he had “never dealt with a person buying marijuana in fifteen individual bags like that,” but admitted that the purchaser could not control how the drugs were packaged. He acknowledged that the total weight of the marijuana alone was insufficient to infer an intent to distribute. He also offered an imprecise economic argument to explain why a drug buyer would never purchase fifteen individual packages instead of a larger bulk package.

Finally, he testified that marijuana users usually (though not always) carry smoking paraphernalia with them. As we have noted, expert witnesses must limit their opinions to “matters within the witness’s field of expertise.” *Commonwealth v. Pikul*, 400 Mass. 550, 554 (1987), quoting *Simon v. Solomon*, 385 Mass. 91, 105 (1982). See Mass. G. Evid. § 702, at 208.

Keating’s economic argument is likely beyond his expertise as a narcotics investigator, especially when he testified how theoretical buyers “would” behave; however, the defendant did not object to it. Keating had stated, “I never saw in my twenty year career or since October of [1994] a person buying fifteen... individual bags for personal use, they’ll buy in bulk.” That testimony appears to be within Keating’s experience, and is more consistent with his qualifications as an expert.

Evaluated in context, and in light of Gollman and Wilson, Keating’s economic explanation did not create a substantial risk of a miscarriage of justice. Finally, Little essentially argues that reversal is required because the evidence “was equally consistent with possession for personal use as with possession with the intent to distribute.” Wilson, *supra* at 401. “We review the evidence in the light most favorable to the Commonwealth to determine whether ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ ” Id., quoting *Commonwealth v. Latimore*, 378 Mass. 671, 677 (1979).

The Commonwealth’s evidence was sufficient to prove the *772elements of the crime. In Wilson, *supra* at 401-402, we stated: “A reasonable jury could have found that the Commonwealth met its burden by relying on the amount of marijuana the defendant possessed in the absence of any smoking paraphernalia, the manner in which the marijuana was packaged, the defendant’s possession of \$476 in cash, a pager, and a cellular telephone, and Detective Smith’s testimony that the aforementioned facts are consistent with an intent to distribute.” The facts of this case are remarkably similar.

Here, as in *Wilson*, a rational jury could have found the elements of the crime beyond a reasonable doubt. Therefore, the judge did not err in denying Little's motion for a required finding of not guilty. b. Prior convictions. Little contends that the judge erred in ruling that if Little testified, the Commonwealth would be permitted to introduce in evidence Little's prior convictions of drug distribution to impeach his credibility.

We agree. "A judge has discretion to exclude evidence of a prior conviction, otherwise admissible to be used for impeachment under G. L. c. 233, § 21, if the danger of unfair prejudice resulting from such evidence outweighs its probative value." *Commonwealth v. Crouse*, 447 Mass. 558, 565 (2006), citing *Commonwealth v. Leftwich*, 430 Mass. 865, 869 (2000). "The judge must balance the danger of unfair prejudice which can result from the admission of evidence of prior convictions against the probative value of the evidence for the purpose of impeachment." *Commonwealth v. Fono*, 400 Mass. 296, 302 (1987), citing *Commonwealth v. Maguire*, 392 Mass. 466, 470 (1984).

A careful balancing is essential because the "admission of evidence of a prior conviction, particularly a conviction of a crime not involving the defendant's truthfulness and one closely related to or identical to the crime with which the defendant is charged, may well divert the jury's attention from the question of the defendant's guilt to the question of the defendant's bad character." *Commonwealth v. Maguire*, *supra* at 469.

See generally Mass. G. Evid. § 609, at 179-183. We consider seasonably raised challenges to the admission of evidence of prior convictions under the abuse of discretion standard. *Commonwealth v. Fono*, *supra*, citing *Commonwealth v. *773Maguire*, *supra* at 470.

The defendant may challenge the judge's ruling even if he never testifies. *Commonwealth v. Crouse*, *supra* at 564 (declining to adopt holding of *Luce v. United States*, 469 U.S. 38 [1984]). However, "[i]t is well established that a motion in limine, seeking a pretrial evidentiary ruling, is insufficient to preserve appellate rights unless there is an objection at trial." *Commonwealth v. Whelton*, 428 Mass. 24, 25 (1998), citing *Commonwealth v. Keniston*, 423 Mass. 304, 308 (1996). "[B]ecause the defendant did not object at trial, we review the claim to determine whether there was a substantial risk of a miscarriage of justice." *Commonwealth v. Whelton*, *supra* at 26.

See *Commonwealth v. Crouse*, *supra*. But see *Commonwealth v. Brown*, 451 Mass. 200, 210 (2008) (Botsford, J., dissenting) (concluding that objection preserved even though not renewed at trial). In conducting a review for an abuse of discretion, we have analyzed several factors, including whether the prior conviction is substantially similar to the crime charged, *Commonwealth v. Drumgold*, 423 Mass. 230, 250 (1996); whether the prior conviction involves a crime implicating truthfulness, *Commonwealth v. Maguire*, *supra* at 469; whether there were other prior convictions that the Commonwealth could have used to impeach the defendant, *Commonwealth v. Whitman*, 416 Mass. 90, 95 (1993); and whether the judge conducted the

required balancing test, *Commonwealth v. Paulding*, 438 Mass. 1, 12 (2002).⁴ We have repeatedly held that “no defendant should be convicted of a crime by proof of his reputation or propensity to commit similar crimes.” *Commonwealth v. Fano*, 400 Mass. 296, 303 (1987), quoting *Commonwealth v. DiMarzo*, 364 Mass. 669, 681 (1974) (Hennessey, J., concurring).

As a result, when deciding whether to admit evidence of a prior conviction, a paramount factor is whether the crimes have “substantial similarity.” *Commonwealth v. Maguire*, supra at 471, and cases cited. Although substantial similarity alone does not create “per se error,” *Commonwealth v. Whitman*, supra at 94, quoting *Commonwealth v. Reid*, 400 Mass. 534, 538 (1987), it may be impossible to show an abuse of discretion otherwise.

Commonwealth v. Drumgold, supra, quoting *Commonwealth v. Preston*, 27 Mass. App. Ct. 16, 23 (1989). See Mass. G. Evid. § 609, at 181-182. In this case, the Commonwealth does not dispute that the crimes involved in the prior convictions are substantially similar to the ones at issue in the current charges. Little was charged with possession with the intent to distribute a Class D drug; if Little had testified, the Commonwealth intended to introduce evidence that he had been convicted of both distribution and possession with the intent to distribute controlled substances.⁵ Because the underlying crimes are so similar, there is a higher attendant risk that Little might improperly be convicted based on his reputation or his propensity to commit a crime.

Additionally, “admission of evidence of prior convictions solely because of the similarity of the conviction to the crime being tried is reversible error” (emphasis in original). *Commonwealth v. Fano*, supra at 302 n.11, citing *Commonwealth v. Guilfoyle*, 396 Mass. 1003, 1004 (1985) (judgments reversed where judge considered “similarity of crimes to be the basis for admission of the records of conviction instead of a reason for excluding them”).

In this case, the judge committed precisely that error. After hearing the attorneys’ arguments on Little’s motion in limine to exclude the prior convictions, he stated, “If the issue is did he have the intent to distribute, then these prior convictions become much more relevant.” The judge appears to have conflated the analysis; because the sole issue was whether Little had an intent to distribute, admitting the prior convictions for drug distribution carried a high risk that the jury would convict Little because of his supposed propensity to commit that crime.

The similarity of the crimes should have raised a “red flag.” Instead, that factor was employed as a basis for admitting the convictions. Finally, the judge gave short shrift to the required balancing of the convictions’ probative value against their potential ^{*775}prejudicial impact. While the judge stated several times that he believed the convictions would be probative,⁶ he made only one passing reference in his analysis of the possible prejudice: “I agree the prejudice increases.” This falls short of the careful balancing that is required, especially because the judge was aware that his decision to deny Little’s motion might make it “unwise, at best, for him to testify.”⁷ The judge’s error created a substantial risk of a miscarriage of justice.

In this case, although the evidence is sufficient under the “rational trier of fact” test, *Commonwealth v. Latimore*, 378 Mass. 671, 677 (1979), it is far from overwhelming. Only two witnesses testified, both called by the Commonwealth.

The expert witness, Keating, admitted that “everyone” carries cellular telephones; that drug purchasers have no control over the way drugs are packaged; that the weight of drugs in Little’s possession was not sufficient to infer intent; and that not all marijuana users carry smoking paraphernalia.

The judge’s decision that he would admit the prior convictions effectively prevented Little from testifying. Because this case was a close one, Little’s ability to testify in his own defense might have had a significant effect on the outcome of the trial.⁸ The judge’s decision effectively prevented him from doing so, thereby creating a substantial risk of a miscarriage of justice. *7763.

Conclusion. We reverse the judgment, set aside the jury verdict, and remand the case for a new trial. So ordered. Those prior convictions included possession with the intent to distribute a Class B substance (cocaine) in violation of G. L. c. 94C, § 32A (c); possession with the intent to distribute a Class D substance in violation of G. L. c. 94C, § 32C; distribution of a Class B substance in violation of G. L. c. 94C, § 32A (a); and conspiracy to violate the Controlled Substance Act in violation of G. L. c. 94C, § 40.

At trial, Little did not challenge Detective Keating’s qualifications as an expert. Little also failed to request a hearing pursuant to *Commonwealth v. Lanigan*, 419 Mass. 15, 24 (1994), to establish “the reliability of the theory or process underlying the expert’s testimony.” In this appeal, Little advances no argument based on the *Lanigan* case; therefore, we do not address the application of that case to narcotics investigators testifying as experts.

The judge did not make a specific finding that Keating was qualified to act as an expert witness. In the absence of a request by the defendant, however, a judge is not required to explicitly find that the officer is qualified to testify as an expert. See *Commonwealth v. Salcedo*, 405 Mass. 346, 350 (1989) (“It is evident from the transcript that the judge believed the... officer was qualified, and his allowing the testimony implies he made that finding”).

We have also evaluated whether the judge provided limiting instructions to the jury and whether the prosecutor referred to the prior convictions in the closing argument. *Commonwealth v. Brown*, 451 Mass. 200, 211 (2008) (Botsford, J., dissenting), citing *Commonwealth v. Walker*, 401 Mass. 338, 346 (1987). These factors do not apply in this case.

The prior convictions were never introduced at trial and, therefore, were not mentioned to the jury by either the judge or the prosecutor. The defendant’s prior conviction of conspiracy to violate the Controlled Substance Act was placed “on file.” We express no view whether that conviction, which did not charge distribution, or possession with intent to distribute a controlled substance,

might properly be used to impeach the defendant's credibility at a retrial, after the required balancing by the judge. "If the issue is did he have the intent to distribute, then these prior convictions become much more relevant....

And the fact that someone has two prior convictions for dealing in drugs, I think, is a substantial factor that goes to a person's credibility. Should a fact finder believe someone who has two prior drug convictions?... I think here [the convictions have] a substantial impact on the defendant's credibility with two prior drug convictions." The final two factors also inure to Little's benefit.

The Commonwealth has not argued that these were Little's only prior convictions, and that the Commonwealth was therefore limited in its ability to impeach the defendant. Additionally, the prior convictions do not reflect "previous untruthfulness." *Commonwealth v. Maguire*, 392 Mass. 466, 469 (1984), quoting *Commonwealth v. Chase*, 372 Mass. 736, 750 (1977).

Therefore, they are not particularly well suited for impeachment purposes. The dissent correctly points out that the defendant failed to make an offer of proof to show how his testimony would have aided his defense. Post at 778. While such a failure is not fatal in this case, it is a close question. Where the defendant chooses not to testify in the face of a ruling on the admissibility of his prior convictions, the failure to make such an offer properly may be construed against him on the questions of prejudice and substantial risk.