APPENDICES

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

COMMONWEALTH

vs.

CARLOS RUBEN RUIZ

20-P-775

MEMORANDUM AND ORDER
PURSUANT TO RULE 23.0

State police found over twenty grams of heroin in the apartment the defendant shared with his girlfriend. Both the defendant and his girlfriend were charged with trafficking heroin in an amount between eighteen and thirty-six grams. A Superior Court jury convicted the defendant as charged and acquitted the defendant's girlfriend. On appeal, the defendant challenges the judge's refusal to provide a jury instruction on the lesser included charge of simple possession. He also claims reversible error in the judge's answer to a jury question. We affirm.

1. Jury instructions on lesser included offenses. The heroin was packaged in three bags, all of which were found inside a bedroom closet.[1] Within that bedroom closet, the bags were

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[1] The defendant had on his person a set of keys that included one to the apartment and one to the closet, but the evidence was mixed as to whether the closet was in fact locked when the police searched it. One trooper referred to the closet as "locked," but acknowledged that he

found in two separate locations. One bag, which itself contained over twenty grams of heroin, was found inside a container of laundry detergent alongside two digital scales. The other two bags—which together contained a total of only .39 grams—were found inside a metal box that was in a file cabinet located in the closet. The file cabinet was locked, and the defendant had a key to that lock on his person. Also inside the file cabinet was a lease for the apartment in the defendant's name. Clothes traditionally associated as men's were inside the closet where the heroin was found, while clothes traditionally considered women's were found in a closet in a different bedroom.

Unlike the large bag of heroin, the small bags found inside the file cabinet also contained caffeine. According to testimony from a trooper who testified as a drug expert, the amount of heroin in the small bags was consistent with personal use, while the amount found in the large bag would "typically be for distribution."

Neither defendant testified. During closing argument, the defendant's attorney conceded that the small bags of heroin were his client's. Specifically, after emphasizing that the defendant had the key to the locked file cabinet, counsel stated that "whatever was in that filing cabinet was his."

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personally did not try the door to see if it was locked. Another trooper testified that he had no memory as to whether it was locked. Similarly, the evidence was mixed as to whether the defendant's girlfriend also may have had keys on her. A trooper initially testified that the girlfriend was found with a set of keys on her person, which was consistent with his police report and grand jury testimony. He even identified a particular set of keys as the ones taken from her. However, when shown a photograph of those keys lying inside the file cabinet, the trooper changed his testimony and stated that he could not recall whether the defendant's girlfriend was found with a set of keys on her. It is undisputed that the police did not check to see if any keys found on the girlfriend worked to open the lock on the closet door.

The judge instructed the jury that to convict the defendants as charged, the Commonwealth would have to prove five elements beyond a reasonable doubt: (1) possession of a substance, (2) that the substance was heroin, (3) that the possession was knowing or intentional, (4) that the defendants had the specific intent to distribute the substance, and (5) that the amount of the heroin was eighteen grams or more. At the defendants' request, the judge also instructed the jury that if they found that the amount of the heroin was less than eighteen grams—but the other four elements satisfied—the jury could convict the defendants of the lesser included offense of possession with intent to distribute. However, the judge declined the defendant's additional request to instruct the jury on the lesser included offense of simple possession. The judge explained that she had not heard "any evidence that there was any indicia of possession; no hypodermic needles, syringes, or any other form of use was found at the scene." The defendant objected to the absence of the instruction.

The defendant argues that a rational jury could conclude that the Commonwealth had proven beyond a reasonable doubt that he possessed the small bags of heroin found in the locked file cabinet, but did not possess the large bag found elsewhere in the closet. Based on the amount of the heroin in the two small bags and how these bags were packaged, the defendant further argues that there was a rational basis for the jury to conclude that he possessed such heroin for personal use, not for sale. Accordingly, the defendant argues that he was entitled to an instruction on simple possession. See *Commonwealth* v. *Souza*, 428 Mass. 478, 494 (1998) (error not to give requested lesser included instruction where "the evidence provides a rational basis for acquitting the defendant of the crime charged and convicting him of the lesser included offense" [quotation and citation omitted]).

We agree that the judge erred in declining to provide the defendant an instruction on simple possession. Where there was evidence on which the jury could have concluded that the Commonwealth had not proven beyond a reasonable doubt that the defendant possessed the large bag of heroin, and the jury could have concluded that small bags were consistent with personal use, an instruction on simple possession was warranted. We respectfully disagree with the judge's suggestion that the jury could have arrived at a verdict of simple possession only if there had been evidence of needles or other affirmative evidence of actual use.[2]

It does not follow, however, that the defendant therefore is entitled to a new trial. Although the jury were not instructed on simple possession, they were instructed on the lesser included offense of possession with intent to distribute. The jury were informed that they could convict the defendant of the latter if the heroin possessed by the defendant weighed less than eighteen grams, which is less than the weight of the large bag. Thus, the jury had the opportunity to find that the defendant possessed only the two small bags of heroin, and not the large bag, but declined to do so.[3] The fact that the jury passed over the lesser included option on which they were charged demonstrates that they did not have reasonable doubts about whether the defendant possessed the large bag. See *Commonwealth* v. *Martin*, 484 Mass. 634, 647-648 (2020) (although judge erred in declining to give jury instructions on lesser included offense of manslaughter, instructions on lesser included offense of murder in second degree rendered absence of manslaughter instructions harmless).

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[2] The Commonwealth need not prove personal use as an element of simple possession. In addition, as the record in this case reveals, heroin can be snorted as well as injected.

[3] There was no dispute over what each bag weighed.

This case does not present the concern that the jury convicted the defendant of the offense charged only because they faced the problematic choice "between convicting the defendant of an offense not fully established by the evidence or acquitting, even though the defendant is clearly guilty of some offense" (quotation and citation omitted). *Commonwealth* v. *Walker*, 426 Mass. 301, 305 (1997). By contrast, the jury could have convicted the defendant of a lesser included offense, but declined to do so. Under these circumstances, the judge's error in refusing the simple possession instruction was not prejudicial to the defendant.

2. Answer to jury question. During their deliberations, the jury posed the following two-part written question to the judge: "Can we take the defendants [sic] body language into consideration? As evidence?" In the discussion that followed outside the presence of the jury, the judge and all counsel expressed their uncertainty about what "body language" the jury might have been referring to. For example, with no outbursts by the defendant having been observed, it was not clear whether the jury's inquiry was prompted by a display of emotion or by a perceived lack of emotion. Because the jury simultaneously requested to view a video recording in which the defendant made an appearance, there was even some speculation that the jury were referring to body language the defendant might have displayed in that recording, not his body language during the trial.

Whatever prompted the jury's inquiry, the judge settled upon answering the jury's question in writing: "While not evidence, the jury [are] entitled to consider any observations you made of the defendants' demeanor during the trial." The defendant expressed his concerns over the jury's being allowed to try to decipher the defendants' body language, and he formally objected to the judge's answer to the jury's question. On appeal, the defendant maintains that the answer the judge provided improperly invited the jury to speculate about how the

defendant's nonverbal actions revealed his state of mind and to decide the case based on something other than the evidence adduced at trial. He also argues that the response impinged upon a number of his constitutional rights, including his right to choose not to testify.

We are sympathetic to the concerns that the defendant has raised, such as his claim that body language, especially when it is ambiguous, is fraught with the potential for misinterpretation. Such concerns are potentially amplified where jurors and defendants have different racial, ethnic, or cultural backgrounds from one another, or when defendants have mental or physical disabilities that may affect their demeanor. We also recognize that the defendant's arguments find support in several cases outside of this jurisdiction. See, e.g., *United States* v. *Schuler*, 813 F.2d 978, 981 (9th Cir. 1987) (prosecutorial comments on nontestifying defendant's courtroom behavior, absent curative instruction, constitute deprivation of Fifth Amendment to the United States Constitution right to fair trial); *Cunningham* v. *Perini*, 655 F.2d 98, 100 (6th Cir. 1981), cert. denied, 455 U.S. 924 (1982) (demeanor irrelevant "[u]ntil a defendant has placed his own demeanor in evidence by taking the stand to testify").

However, the judge's response is consistent with what the Supreme Judicial Court said in *Commonwealth* v. *Smith*, 387 Mass. 900, 907 (1983) ("The jury were entitled to observe the demeanor of the defendant during the trial"). We do not view this statement as having been overruled by *Commonwealth* v. *Young*, 399 Mass. 527, 528-530 (1987). Indeed, the Supreme Judicial Court recently expressly reaffirmed the statement in *Smith*. See *Commonwealth* v. *Watt*, 484 Mass. 742, 758 n.22 (2020) ("We have long held that juries are entitled to observe the demeanor of the defendant[s] during trial" [quotation and citation omitted]). Accordingly, we cannot reasonably say that the judge abused her discretion in responding to the jury's

question. It is up to the Supreme Judicial Court whether to re-visit the language set forth in *Smith*.

APPENDIX B

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

RE: DOCKET NO. FAR-28588

COMMONWEALTH

vs.

CARLOS RUBEN RUIZ

WORCESTER SUPERIOR COURT NO. 1585CR00526

A.C. No. 2020-P-0775

NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW

Please take note that on March 17, 2022, the application for further appellate review was denied.

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT

COMMONWEALTH OF MASSACHUSETTS

v.

CARLOS RUBEN RUIZ
YARITZA MUNOZ-DELACRUZ

Docket Nos. 1585CR00526, 1585CR00534

JURY TRIAL BEFORE THE
HONORABLE JANET KENTON-WALKER

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(Proceedings translated through the Interpreter.)

THE CLERK: Your Honor, we're back on the record with Docket 1585CR526 and Docket 1585CR534, the Commonwealth v. Carlos Ruben Ruiz and Yaritza Munoz-Delacruz.

The jury has submitted question Nos. 2 and 3. And for the record, question No. 2 has been marked E for ID and question No. 3 has been marked F for ID.

THE COURT: All right. So question E for ID is a question first from the jurors that asks: Can we take the defendants' body language into consideration, and then followed by, as evidence, with a question mark after that.

The second question asks: Can we please see the video? And the answer to that one, which is F for ID, is the answer to that is yes, and we'll send somebody in to do that.

* * *

THE COURT: Yeah. So that brings us to question E for ID. Commonwealth?

MR. TOSCHES: Your Honor, I would say that if they are talking about body language on the video, because they are briefly on the video, I'd suggest that that is in evidence and they could consider that if they deem it to have any sort of evidentiary value.

With respect to body language in the courtroom throughout the course of the trial, I have no idea.

MR. ROJCEWICZ: I've never heard of a question like that in 40 years, your Honor. It's—in all honesty, I always tell my client to remain as still as possible and to, you know, be a gentleman or gentlewoman, whatever. I'm not quite sure what they're getting at.

But I would just tend to agree with the prosecution that body language on the video, fine. This one, I think I'd ask you to stay away from.

THE COURT: Mr. Vukmirovits?

MR. VUKMIROVITS: Your Honor, I'm not sure if I understand the question. But as Attorney Tosches said, if it applies to the courtroom versus the video—if it applies to body language in the courtroom, I would ask that they not be able to consider that because they have a right to remain

silent. And certainly they could consider a witnesses', as part of the jury instructions. Anybody that testified, their demeanor, the way they answered a question, that's fair game. But they never testified. They were sitting at the table and did nothing inappropriately, and I think that would interfere with their right to remain silent and the Commonwealth's burden of proof.

THE COURT: Well, there's a big difference between testimonial evidence—there's a distinction there. And I don't agree with that, per se.

Obviously observations that the jurors make of the defendants during the course of the trial is certainly something that jurors, from the beginning of time to the end of time, take into consideration when they weigh the evidence. And so to that extent, it's not evidence, but it is certainly observations. They take observations of the lawyers, the judges, everybody.

So they certainly can consider it. Is it evidence? No. But they can certainly—and it doesn't invade the right or it doesn't invade the privilege against self-incrimination because they're not testifying.

MR. ROJCEWICZ: Well, Judge, if it's not evidence and—

THE COURT: Well, if that were true, then why haven't we in all of these years been given instructions to the jurors saying: Pay no attention to those two people sitting over there, because anything that you see them do or say is not evidence in this case and cannot be considered by you.

That's never been charged. There's no such charge to that effect. So to be frank with you, when I remove it from the opposite side and I look at it from that perspective, clearly observations of the defendants while they're in the courtroom is certainly something that the

jurors are entitled to consider. But technically, it is not evidence and it's not testimonial evidence. That's for sure.

MR. ROJCEWICZ: When you put it that artfully, Judge, then (inaudible - simultaneous speech at 12:18:25).

THE COURT: I don't know that it's artful.

MR. ROJCEWICZ: I don't think I could disagree with that, because you are correct because they're looking over all the time at the clients.

THE COURT: Right. And my only feeling is that—I mean I'm not a rocket scientist and I certainly have been involved in the court system as lawyer and judge for, as we said, well over 40 something years.

And I know perfectly well that there is law out there that says certainly jurors can look at or they—you know, we don't tell them not to look at the defendants. So I can't tell them that.

MR. VUKMIROVITS: Your Honor, my concern is—and I think there was a recent SJC decision within the past year or so that talked about coming to the courtroom and not having to check all your previous preconceptions and—you know, at the door. And you said you can't erase whatever's inside of you.

But I just worry that in a case like—an officer is testifying and one or both of the clients don't agree with what is said. And so their reaction, as Attorney Rojcewicz indicated, as instructed by their counsel to just remain seated. If you don't agree with testimony, don't act out. Don't cause any attention to yourself.

So they're seated, following directions of—advice of counsel, could be misinterpreted by the jurors as, well, if they don't agree with what's being said, I would be

outraged if somebody said something that's not true about me, so why aren't they expressing some emotion. And I just—

THE COURT: Well, I think that—well, first of all, we have no idea because we have not been—I personally have never been a deliberating juror and I don't know what they would talk—or what they're talking about, in terms of observations that they've made.

But certainly it wouldn't shock me or surprise me to find out that jurors do talk about what they observe in the courtroom. And I'm pretty convinced that that is fair game as to when they're deciding whatever it is that they're deciding.

But here's what I'm going to do. We're going to step this back and punt a little bit. I agree it is not evidence, per se. The question is is whether they can take it into consideration. And I agree a little bit with the Commonwealth. As to body language on the video, yes. That is evidence and they can take that into consideration. They observed it.

Body language as they observed in the courtroom, I'm going to do a little bit of work on it and decide. So what we're going, to do is we're going to send back letter—note No. 3, which is F for ID. And in the middle of that, we'll have them take a look and watch the video, and then I'll respond to the second one in between. And I'll obviously go over it with you before I do that.

MR. ROJCEWICZ: Would you tell them, Judge, that they are to or not to—to continue their deliberations before they hear from you or to—

THE COURT: I'm not going to—I've already told them that in my other instructions. If they can continue to deliberate, they will. If they can't, they know to stop.

So my response on question—on F for ID, which is can we please see the video, it says: Yes, and it will be brought in. There are two files on the DVD. Both contain video of the apartment. The third file just has a picture of the front door.

All right. So let's deliver the letter and then we'll bring in the thing. And you can bring it all in at the same time, Chris, if you want.

All right. And then I will do a little thinking about what to do with this. All right?

MR. VUKMIROVITS: Thank you.

THE COURT: Okay.

MR. TOSCHES: Thank you, your Honor.

THE COURT: We'll call everybody back in in a bit.

(Court recessed at 12:22 p.m.)

(Court reconvened at 12:56 p.m.)

(Defendants present.)

(Proceedings translated through the Interpreter.)

THE CLERK: Your Honor, we're back on the record with Docket 1585CR526 and Docket 1585CR534, the Commonwealth v. Carlos Ruben Ruiz and Yaritza Munoz-Delacruz, on for a continuation of discussion of the jury question No. 2.

THE COURT: All right. So going back to E for identification, the question that we're addressing is: Can we take—the jury has asked: Can we take the defendants' body language into consideration, followed by the second question right after it is: As evidence, with a question mark.

So quick research shows—confirms that which I—and I think all of us already know, that yes, the jury can and is entitled to consider or observe the demeanor of the defendant.

And I'm going to cite you—the only case that I can find that sort of remotely sort of addresses it, at least on quick research, is *Commonwealth v. Smith*, 387 Mass. 900, at Page 907. And that's a 1983 case.

And although I haven't read the case in great detail, there was evidently a comment made by the prosecutor during the course of his closing argument that was—and I'm quoting now—the prosecutor commented on the defendant's demeanor during the trial by saying, quote, and you have had an opportunity to look at him during the trial as he squirms and smirks and laughs or whatever you have seen him do, period, end quote.

The sentence then reads: The jury were entitled to observe the demeanor of the defendant during the trial. And then it goes on to say that the comment by the prosecutor did not suggest that he had knowledge that the jury did not. And so there was no error in this regard.

So based on that, I think it confirms that which I believe, which is yes, the jury is entitled to consider the demeanor of the defendants during the trial, which are observations.

So I intend to answer the questions of the jury as follows: While not evidence, the jury is entitled to consider any observations you made of the defendants' demeanor during the trial, period. And I'm not going to comment any further as to which demeanor on what particular thing, whether it's on the video or whether it's in the courtroom. I can leave it at that.

Commonwealth, any objections?

MR. TOSCHES: No, your Honor. Thank you.

THE COURT: Defense?

MR. ROJCEWICZ: I agree. I think we kind of came to a consensus that that's how we would ask that it be answered, Judge. At least Mr.—at least the DA and myself. I'm satisfied.

THE COURT: Mr. Vukmirovits?

MR. VUKMIROVITS: I think just to stay consistent, I'll—on the record, I'll just maintain my original position that they shouldn't be able to consider body language.

THE COURT: Okay. Your exception is saved.

MR. VUKMIROVITS: Thank you.

THE COURT: All right. So I've written it exactly as I just said: While not evidence, the jury is entitled to consider any observations you made of the defendants' demeanor during the trial.

All right. We'll return this to the jury room. And we will not take any questions or anything for the next hour. Okay. All right.

MR. TOSCHES: Thank you, your Honor.

MR. VUKMIROVITS: Thank you.

(Court recessed at 1:01 p.m.)

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