COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-775

COMMONWEALTH

vs.

CARLOS RUBEN RUIZ.

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 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.

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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 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.

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."

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

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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.

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).

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 revisit the language set forth in Smith.

Judgment affirmed.

By the Court (Milkey, Henry & Walsh, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: November 10, 2021.

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