Commonwealth v. Miller

Appeals Court of Massachusetts

June 8, 2022, Entered

21-P-51

Reporter
2022 Mass. App. Unpub. LEXIS 435 *; 101 Mass. App. Ct. 1108

COMMONWEALTH *vs.* JOSEPH E. MILLER.

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, 881 N.E.2d 792 (2008).

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Disposition: Judgment affirmed.

Judges: Kinder, Sacks & D'Angelo, JJ. [*1]

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a district court jury trial, the defendant was convicted of unlawful possession of a firearm. On appeal, he argues that (1) the Commonwealth's failure to correct its firearms expert's allegedly false testimony created a substantial risk of a miscarriage of justice and (2) the Commonwealth failed to present sufficient evidence that the defendant's revolver was a working firearm. We affirm.

1. *Firearms expert*. The defendant challenges the Commonwealth's failure to correct its firearms expert's allegedly false testimony regarding his qualifications. Defense counsel did not raise this issue at trial, so we review to determine whether any error created a substantial risk of a miscarriage of justice. See *Commonwealth* v. *Ware*, 482 Mass. 717, 721-722, 128 N.E.3d 29 (2019). That question turns on whether we have "a serious doubt whether the result of the trial might have been different had the error not been made." *Commonwealth* v. *LeFave*, 430 Mass. 169, 174, 714 N.E.2d 805 (1999).

"The Commonwealth may not present testimony at trial 'which [it] knows or should know is false'" (citation omitted). *Ware*, 482 Mass. at 721. "Nor may the Commonwealth, 'although not soliciting false evidence, allow[ ] it to go uncorrected when it appears'" (citation omitted). *Id.* Unless the testimony [*2] is blatantly false and pertains to an issue central to the Commonwealth's case, some cases suggest that a prosecutor need not correct false testimony where the defendant has access at trial to materials showing the testimony is false. See *id.* at 725.

Here, the Commonwealth's firearms expert gave different answers to two questions at voir dire and at trial. First, when asked at voir dire approximately how many times he had "personally test-fired firearms to certify them as functioning, operable, under Massachusetts law," he answered "150 times."[1] When asked essentially the identical question at trial, however, he answered "approximately 400." Second, when asked at voir dire whether he had "previously appeared in court as an expert witness as to firearms identification and test-firing," he answered "[p]rior to this, no." When asked essentially the identical question at trial, however, he answered "yes" and that he had done so "[a]pproximately [twenty]" times.

Nevertheless, the defendant here has not shown, as he must, that the Commonwealth knew or should have known that the expert's *trial* testimony was false. See *Ware*, 482 Mass. at 721. Despite the discrepancies between the expert's voir dire and trial testimony, the [*3] defendant has cited no evidence showing that it was the trial testimony, as opposed to the voir dire testimony, that was incorrect. And if the expert improperly understated his qualifications during voir dire (rather than improperly exaggerating them at trial), it is difficult to see how the defendant was prejudiced. The judge found the expert qualified based on the

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[1] At voir dire, when defense counsel asked on cross-examination how many firearms the expert had test-fired in his career, the transcript states that the expert replied, "I would say hundred — four (phonetic . . . unclear word, noise) hundred." If we took this to mean that he had test-fired 400 firearms in his career, there would be less conflict between his voir dire and trial testimony. However, we assume arguendo, in the defendant's favor, that the testimony quoted in the text more accurately represents the expert's voir dire testimony.

voir dire testimony, and so surely would have done the same had the expert claimed at voir dire the greater qualifications to which he testified at trial.

Moreover, defense counsel, instead of cross-examining the expert at trial using the discrepancies with his voir dire testimony, used the expert's trial testimony for the defense's benefit. Counsel did so by pointing out that in all twenty cases where the expert had testified, he had opined that the firearm in question was "a legal firearm," thus painting the expert as believing (in counsel's words) that "[t]here's never been a firearms case where the firearm was not a legal firearm," and thereby suggesting that the expert was biased in favor of the Commonwealth. See *Commonwealth* v. *Alphas*, 430 Mass. 8, 13, 712 N.E.2d 575 (1999) (substantial risk of miscarriage of justice analysis takes into account whether counsel's failure to object [*4] was reasonable tactical decision). See also *Commonwealth* v. *Mercado*, 383 Mass. 520, 525, 420 N.E.2d 330 (1981) (no error where defendant knew at trial about information that allegedly showed testimony was false and chose not to cross-examine or impeach witness on issue).

Therefore, on this record, the defendant has shown no error related to the expert's testimony, let alone one creating a substantial risk of a miscarriage of justice.

2. *Sufficiency of the evidence*. Next, the defendant argues that the Commonwealth failed to present sufficient evidence that the defendant's revolver was a working firearm, as required for a conviction of unlawful possession of a firearm. See *Commonwealth* v. *Ramsey*, 466 Mass. 489, 496-497, 995 N.E.2d 1110 (2013). We review to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Commonwealth* v. *Latimore*, 378 Mass. 671, 677, 393 N.E.2d 370 (1979), quoting *Jackson* v. *Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). We keep in mind that "[a]n inference, if not forbidden by some rule of law, need only be reasonable and possible; it need not be necessary or inescapable." *Commonwealth* v. *Beckett*, 373 Mass. 329, 341, 366 N.E.2d 1252 (1977).

"Firearm" is defined in relevant part by G. L. c. 140, § 121, as "a pistol, revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged and of which the length of the barrel [*5] or barrels is less than 16 inches". "The burden on the Commonwealth in proving that the weapon is a firearm in the statutory sense is not a heavy one. It requires only that the Commonwealth present *some* competent evidence from which the jury reasonably can draw inferences that the weapon will fire." *Commonwealth* v. *Nieves*, 43 Mass. App. Ct. 1, 2, 680 N.E.2d 561 (1997). Where the weapon is damaged, it must be capable of discharging a bullet "with a 'relatively slight repair, replacement, or

adjustment.'" *Commonwealth* v. *Housewright*, 470 Mass. 665, 679 n.16, 25 N.E.3d 273 (2015), quoting *Commonwealth* v. *Bartholomew*, 326 Mass. 218, 220, 93 N.E.2d 551 (1950).

Here, the Commonwealth's expert testified that he was able to fire the defendant's revolver. Although, due to wear and tear on the revolver, the expert first had to manually advance the cylinder in order to align the cartridge with the barrel, he testified that the revolver would have fired even without that manipulation, albeit "not fired safely." Therefore, the evidence was sufficient to permit a rational trier of fact to find beyond a reasonable doubt that the defendant's revolver was capable of discharging a bullet both with and without a "relatively slight . . . adjustment," *Housewright*, 470 Mass. at 679 n.16, quoting *Bartholomew*, 326 Mass. at. 220, and thus was an operable firearm.

Judgment affirmed.

By the Court (Kinder, Sacks & D'Angelo, JJ.[2]),

Entered: June 8, 2022.

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