

## Commonwealth v. Santana

Appeals Court of Massachusetts

August 12, 2020, Entered

19-P-596

### Reporter

2020 Mass. App. Unpub. LEXIS 759 \*; 98 Mass. App. Ct. 1108; 152 N.E.3d 1157

COMMONWEALTH vs. JOHAN SANCHEZ SANTANA.

**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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**Subsequent History:** Appeal denied by *Commonwealth v. Santana*, 486 Mass. 1106, 2020 Mass. LEXIS 715 (Mass., Oct. 22, 2020)

**Disposition:** Judgments affirmed.

**Judges:** Singh, Wendlandt & McDonough, JJ. [\*1]

### Opinion

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*MEMORANDUM AND ORDER PURSUANT TO RULE 23.0*

After a jury trial on indictments arising from a shooting involving multiple parties, the defendant was convicted of six firearm-related charges.<sup>1</sup> During the defendant's trial, the judge allowed the Commonwealth's request to have the jury view the defendant standing next to an individual for comparison with two individuals in a video admitted at trial. On appeal, the defendant argues that the judge erred in permitting the in-court viewing and that he was prejudiced as a result. We affirm.

*Background.* On the afternoon of Friday, May 6, 2016, a shooting occurred outside a barber shop in Lynn. The shop's security camera video recording (video) captured images of a first individual in front of the barber shop shooting a gun into the street and then backing into the front door of the barber shop briefly before returning outside to continue shooting. The video then showed a second individual from within the barber shop follow the shooter out and join the shooter; the second individual also discharged a gun into the street. A bullet came through the glass pane of the storefront, sending barber shop patrons running for cover. [\*2] Also caught in the cross-fire were three men inside of a car that was stopped in front of the barber shop, which separated the shooting parties.

The Commonwealth's trial theory was that an unknown person outside the barber shop began shooting and that two individuals, who had been inside the barber shop earlier, returned fire. The focus of the trial was the identification of the first and second shooters who appeared in the video footage. A witness identified Miguel Mantilla as the first shooter and the defendant as the second shooter seen in the video.<sup>2</sup> The witness was familiar with both men, as they had been his roommates at the time of the incident. Moreover, the witness was at the barber shop getting a haircut at the time of the shooting. An additional witness who was familiar with the defendant from school days, and who had been at the barber shop earlier that day, identified the defendant as the second shooter in the video.<sup>3</sup>

In addition to the witness identifications of the shooters in the video, the Commonwealth obtained deoxyribonucleic acid (DNA) evidence in order to identify them. About one hundred yards away from the barber shop, police recovered a

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<sup>1</sup> Carrying a firearm without a license (G. L. c. 269, § 10 [a]), carrying a loaded firearm without a license (G. L. c. 269, § 10 [r]), discharging a firearm within 500 feet of a building (G. L. c. 269, § 12E), and three counts of assault by means of a dangerous weapon (gun) (G. L. c. 265, § 15B [b]). An indictment for unlawful possession of ammunition (G. L. c. 269, § 10 [h] [1]) was earlier nolle prossed.

<sup>2</sup> This witness testified pursuant to a cooperation agreement with the Commonwealth, a fact used by the defendant to try to impeach his credibility. Mantilla was also identified in the video by a police officer who was familiar with Mantilla from an unrelated investigation.

<sup>3</sup> The defendant attempted to impeach this witness through his convictions of witness intimidation and drug distribution.

gray hooded sweatshirt, like [\*3] the one worn by the first shooter in the video. DNA profiles were generated from the sweatshirt. Police then obtained saliva samples from individuals in order to generate DNA profiles for comparison. A State trooper testified and identified the individuals from whom he had obtained saliva samples as the defendant and Mantilla, who was also seated in the court room.<sup>4</sup>

Subsequently, the judge instructed the jury that he was going to ask both Mantilla and the defendant to stand before them and show their profiles so that the jury could compare their appearance in the court room with the individuals in the video and determine whether either one of them was one of the individuals in the video.<sup>5</sup> The judge then asked Mantilla to step forward, face the jury, and then turn left and right. As Mantilla remained standing, the judge asked the defendant to stand next to Mantilla and face the jury and then turn left and right. Both men were then excused to return to their respective seats. The judge then instructed the jury not to speculate about whether Mantilla had been charged and if so, how any such charges may have been resolved. He further advised that Mantilla's status was irrelevant to the issue [\*4] whether the Commonwealth had proved its case against the defendant beyond a reasonable doubt.<sup>6</sup>

*Discussion.* The defendant contends that the judge erred in permitting the jury to view the defendant next to Mantilla in the court room because the comparison had little probative value but substantial risk of prejudice to the defendant. He argues that Mantilla's role as the first shooter was "conclusively proved" such that there was no purpose in having the jury compare him to the defendant, whom the Commonwealth sought to establish was the second shooter. On the other hand, he argues that the risk of "guilt by association" was great by the juxtaposition of Mantilla next to the defendant in the court room. We disagree.

A physical demonstration is permissible where it is "probative of the central issue at trial[,] . . . help[s] the jury better understand" oral testimony, and "assist[s] the jury in assessing [a witness's] credibility and determining the relative weight of his testimony." *Commonwealth v. McGee*, 469 Mass. 1, 9-11, 11 N.E.3d 1043 (2014). "The permission to perform or make experiments or illustrations in the presence of the jury rest[s] in the sound judicial discretion of the . . . judge." *Id.* at 9, quoting *Commonwealth v. Noxon*, 319 Mass. 495, 541-542, 66 N.E.2d 814 (1946). In

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<sup>4</sup> Testing concluded that Mantilla was a "major male contributor" to the DNA on the sweatshirt.

<sup>5</sup> The viewing was prompted by the Commonwealth's request and over the objection of the defendant.

<sup>6</sup> The record reflects that Mantilla had been sentenced and was in custody at the time of his appearance at the defendant's trial. Nevertheless, he appeared in plain clothes, without restraints, and without additional security surrounding him.

reviewing a trial judge's decision [\*5] to allow a demonstration for an abuse of discretion, we "will not interfere with the judge's determination unless it is plainly wrong." *Commonwealth v. Hartnett*, 72 Mass. App. Ct. 467, 474, 892 N.E.2d 805 (2008).

Here, the Commonwealth proffered the court room comparison of the defendant and Mantilla to enable the jury to obtain an in-person view of the physical characteristics, in particular relative height, of the two in comparison to the two shooters in the security video. The identity of the shooters was the central issue in the case. Witnesses who were familiar with the defendant and Mantilla identified them by their appearance in the video. The ability to compare the appearance of Mantilla and the defendant together in the court room with the shooters in the video helped the jurors understand the testimony of these witnesses as well as assess their credibility and determine what weight to give their testimony.<sup>7</sup> See *Commonwealth v. Poggi*, 53 Mass. App. Ct. 685, 688-689, 761 N.E.2d 983 (2002) (where case turned on identification, defendant entitled to reasonable opportunity to make best case by physical display in court).

Although the defendant contends that the court room view only bolstered evidence of Mantilla as the first shooter, a comparison of the relative heights of the defendant and Mantilla with that of the two individuals [\*6] depicted in the video was also probative of whether the defendant was the second shooter.<sup>8</sup> Therefore, the court room comparison was relevant. See *Commonwealth v. Snyder*, 475 Mass. 445, 456, 57 N.E.3d 976 (2016), citing *Commonwealth v. Carey*, 463 Mass. 378, 387, 974 N.E.2d 624 (2012) ("[t]o be relevant, evidence "must have a rational tendency to prove an issue in the case . . . or render a desired inference more probable than it would have been without it"). See also the note to § 401 of the Massachusetts Guide to Evidence (2020) ("The concept of relevance has two components: (1) the evidence must have some tendency [probative value] to prove or disprove a particular fact, and (2) that particular fact must be material to an issue [of consequence] in the case").

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<sup>7</sup> In permitting the court room view, the judge noted: "I don't think that a photograph is ever as adequate as actually seeing someone in person 3D, with all the angles that then provides." It was within the judge's discretion to conclude that the additional "angles" were helpful to the jury's assessment of whether the defendant was the person depicted as the second shooter standing next to the first shooter in the video.

<sup>8</sup> In his reply brief, the defendant argues that the comparison of the height differential of two people in the court room with two individuals in a video was beyond the common knowledge and understanding of the jury and that expert evidence was required to enable them to come to any determination. This argument was not raised before the trial court. Nor was it raised in the defendant's principal brief. We do not consider arguments raised for the first in a reply brief. See *Commonwealth v. Stewart*, 460 Mass. 817, 831, 957 N.E.2d 712 (2011).

The defendant contends that, even if the demonstration had some marginal probative value, it was outweighed by the prejudice of guilt by association with Mantilla. See *Commonwealth v. Rosario*, 444 Mass. 550, 557, 829 N.E.2d 1135 (2005) (relevant evidence may be excluded if its probative value is outweighed by risk of unfair prejudice). He argues that the Commonwealth's chief witness (who had identified both Mantilla and the defendant in the video) had been successfully impeached, and that the court room presentation served to rehabilitate the witness because he "correctly" identified Mantilla as the first shooter, thus suggesting [\*7] that the witness should be credited in his identification of the defendant as the second shooter. According to the defendant, the jury would presume the witness's identification of Mantilla to be correct because (1) the case against Mantilla was strong, and (2) the jurors would speculate that Mantilla had pleaded guilty.

Yet, even without the court room view, the jury could have determined that the case against Mantilla was strong, due in particular to DNA evidence, and on that basis could have credited the Commonwealth's chief witness's identification of the defendant, despite the defendant's impeachment of the witness. The greater risk presented by Mantilla's physical appearance at trial was jury speculation that he had pleaded guilty. The judge was cognizant of this danger, however, and he took appropriate measures to prevent it, including limiting jury instructions. See *McGee*, 469 Mass. at 12, citing *Commonwealth v. Auclair*, 444 Mass. 348, 358, 828 N.E.2d 471 (2005) (jury presumed to follow judge's instructions). Under the circumstances, we cannot say "the judge made 'a clear error of judgment in weighing' the factors relevant to the decision, . . . such that the decision [fell] outside the range of reasonable alternatives." *L.L. v. Commonwealth*, 470 Mass. 169, 185 n.27, 20 N.E.3d 930 (2014), quoting *Picciotto v. Continental Cas. Co.*, 512 F.3d 9, 15 (1st Cir. 2008).

Finally, we note that, even if [\*8] there had been error in the court room demonstration, we would conclude that the defendant was not prejudiced, as the case against the defendant was strong. See *Commonwealth v. Britto*, 433 Mass. 596, 610, 744 N.E.2d 1089 (2001) (strength of case relevant to prejudice inquiry). There was lengthy video of the activity within and just outside of the barber shop, including the shooting itself. The defendant's roommate, as well as a school acquaintance, identified the defendant in the video. Although the defendant attempted to impeach them, the jury had the video from which they could gauge the credibility of the identifications. See *Commonwealth v. Rosario*, 444 Mass. 550, 558-559, 829 N.E.2d 1135 (2005) ("proposed demonstration . . . was highly probative on the critical issue [of identification] in the case").

*Judgments affirmed.*

By the Court (Singh, Wendlandt & McDonough, JJ.<sup>9</sup>),

Entered: August 12, 2020.

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<sup>9</sup> The panelists are listed in order of seniority. Justice McDonough participated in the deliberation on this case while an Associate Justice of this court, prior to his reappointment as an Associate Justice of the Superior Court.