19-P-1385 Appeals Court

COMMONWEALTH vs. HECTOR RIJO.

No. 19-P-1385.

Essex. October 1, 2020. - December 2, 2020.

Present: Green, C.J., Ditkoff, & Hand, JJ.

Motor Vehicle, Leaving scene of accident. Assault and Battery by Means of a Dangerous Weapon. Statute, Construction. Practice, Criminal, Instructions to jury.

Indictments found and returned in the Superior Court Department on September 19, 2018.

The case was tried before Thomas Drechsler, J.

Richard P. Heartquist for the defendant.
Marina Moriarty, Assistant District Attorney, for the Commonwealth.

GREEN, C.J. Does a charge of leaving the scene of an accident after causing personal injury, under G. L. c. 90, § 24 (2) (a 1/2) (1), require proof that the defendant knew that personal injury or collision with a person occurred? Consistent with the construction of identical statutory language in

subsection (2) (a 1/2) (2) of the same statute, see Commonwealth v. Daley, 463 Mass. 620, 624 (2012), we conclude that it does. Because the evidence in the present case was insufficient to establish that the defendant knew he had caused personal injury, we reverse his conviction on that charge, and remand the case to the Superior Court for consideration of resentencing.[1]

Background.[2] Early on the morning of March 28, 2018, Loc Tu returned from work and parked his white Ford sport utility vehicle (SUV) on the street near his house in Lawrence. As he walked home, he was approached by the defendant, Hector Rijo, who asked Loc Tu for a ride. The two were acquaintances, and Loc Tu had given the defendant rides before. On that particular morning, Loc Tu declined. In response, the defendant forcibly took the SUV keys from him, threatened him with a brick, and drove off in the SUV. Loc Tu reported the theft to the police later that morning and identified the defendant in a photo array.

---

[1] As we shall discuss, we discern no merit in the defendant's other claims on appeal, and affirm his convictions of assault and battery, assault and battery by means of a dangerous weapon, and negligent operation of a motor vehicle.

[2] We recite the facts in the light most favorable to the Commonwealth. See Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979).

Around 1:30 A.M. the following morning, Officer Charles Saindon of the Lawrence Police Department spotted the stolen SUV and began a cautious pursuit in an unmarked vehicle. A number of backup police cruisers, with lights on, soon converged on the SUV, driven by the defendant, on a residential street. The defendant accelerated rapidly from a stop, pulling around a stopped cruiser and into the opposite side travel lane. This forced an oncoming vehicle in that lane, driven by Sergeant Joseph Cerullo, to take evasive action. The two did not collide but, as the defendant continued driving away, Sergeant Cerullo swerved around two other police cruisers before ultimately colliding with a third, parked, cruiser. Sergeant Cerullo was injured in the collision, and later received stitches for a cut on his scalp.

Though the defendant evaded Sergeant Cerullo, seconds later he struck a different oncoming police cruiser driven by Officer Phillip Hendrick.[3] That collision caused the defendant to lose control of the SUV, which careened off the road into a tree,

[3] Officer Hendrick was subsequently diagnosed with a concussion. The defendant was convicted on two indictments for assault and battery by means of a dangerous weapon ("to wit: motor vehicle") -- one against Hendrick, and one against Sergeant Cerullo. The conviction of leaving the scene of personal injury was with respect to Cerullo, and the conviction of assault and battery was with respect to Loc Tu.

ending the pursuit. The defendant was apprehended, arrested, and charged with various crimes.

Discussion. 1. Leaving the scene of an accident causing personal injury. In assessing the sufficiency of the evidence, we examine "whether the evidence, in its light most favorable to the Commonwealth, notwithstanding the contrary evidence presented by the defendant, is sufficient . . . to permit the jury to infer the existence of the essential elements of the crime charged . . . ." Commonwealth v. Mendes, 75 Mass. App. Ct. 390, 392 (2009), quoting Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979).

General Laws c. 90, § 24 (2) (a 1/2) (1), codifies the crime commonly known as "leaving the scene of an accident causing personal injury" where the crime is not aggravated by both a death and the defendant's leaving the scene in order to avoid apprehension:[4]

> "Whoever operates a motor vehicle upon any way . . . and without stopping and making known his name, residence and the registration number of his motor vehicle, goes away after knowingly colliding with or otherwise causing injury to any person not resulting in the death of any person, shall be punished . . . ."

At trial, the Commonwealth did not proceed under the "colliding with" theory; it was undisputed that the defendant's

---

[4] As to the aggravated form of the crime, see G. L. c. 90, § 24 (2) (a 1/2) (2); note 6, infra.

vehicle did not collide with Sergeant Cerullo. The defendant's conviction was based on the second theory: "causing injury" to the officer. On that question, the defendant asserts that the evidence is insufficient to establish that he knew he caused injury to Sergeant Cerullo.

As we have observed, the defendant was driving in the opposite direction from Sergeant Cerullo when his incursion into the opposite travel lane caused Sergeant Cerullo to take evasive action to avoid him. There is no direct evidence to suggest that the defendant saw Sergeant Cerullo's cruiser collide with another cruiser following that encounter. The Commonwealth suggests, however, that a rational jury could infer that the defendant must have known of the collision, as he continued driving in the opposite direction.[5]

The suggestion is unavailing; even if we assume, favorably to the Commonwealth, that a rational jury could infer that the defendant knew that his swerve caused Sergeant Cerullo's cruiser to collide with another vehicle, there is no evidence to establish that the defendant knew that injury resulted from the collision. To be sure, it is possible that the defendant could

[5] We reject the defendant's argument that the interval and distance between his encounter with Sergeant Cerullo's cruiser and his own apprehension were, respectively, too brief and across too short a distance to constitute "leaving the scene."

have heard sounds suggesting a crash (though there was no testimony from any percipient witness regarding the force of the collision, or the volume of any sound emanating from it). The photographs of the crash scene entered in evidence as trial exhibits do not depict Sergeant Cerullo's cruiser, or the other cruiser it struck, following the collision. There was no testimony or other evidence of the rate of speed at which Sergeant Cerullo's cruiser was traveling at the time of the collision, whether and to what extent the parked cruiser was damaged, or any details regarding the damage to Sergeant Cerullo's cruiser beyond the bare testimony that it "suffered substantial damage." In short, even if we accept the premise that the defendant was aware that Sergeant Cerullo's cruiser was involved in a collision, caused by the evasive action Sergeant Cerullo took to avoid the defendant's swerve into Sergeant Cerullo's travel lane, there is no evidence to inform a conclusion about the force of that collision, much less a conclusion that Sergeant Cerullo (or any other occupant of the cruiser) would have been injured as a result. Compare Commonwealth v. Martin, 98 Mass. App. Ct. 727, 732 (2020) (evidence of knowledge of property damage sufficient where defendant's vehicle struck both victim and side of victim's vehicle, causing dents to sides of both defendant's and victim's vehicles and cracked side mirror on victim's vehicle).

When questioned at oral argument about the evidence supporting the defendant's knowledge of injury, the Commonwealth suggested that the word "knowingly" in the statute modifies only "colliding with," and not "otherwise causing injury." We consider the question to be controlled by the reasoning of the Supreme Judicial Court in Daley, 463 Mass. at 624. In Daley, the court analyzed identical language in the statute governing leaving the scene of a fatal accident.[6] The court concluded that "the adverb 'knowingly' modifie[d] both verbs within the clause," such that the statute could be fairly read as criminalizing leaving the scene after either "knowingly colliding with a person" or "knowingly causing injury to a person" (emphasis omitted). Id.

In the present case, the identical statutory language mandates an identical result. Under the plain and ordinary meaning of G. L. c. 90, § 24 (2) (a 1/2) (1), in order to

---

[6] The crime of leaving the scene of a fatal personal injury is codified at G. L. c. 90, § 24 (2) (a 1/2) (2), the subsection immediately after § 24 (2) (a 1/2) (1), the nonfatal variant at issue here. Section 24 (2) (a 1/2) (2) provides, in pertinent part:

> "Whoever operates a motor vehicle upon any way . . . and without stopping and making known his name, residence and the registration number of his motor vehicle, goes away to avoid prosecution or evade apprehension after knowingly colliding with or otherwise causing injury to any person shall, if the injuries result in the death of a person, be punished . . . ."

convict, the Commonwealth must prove that the defendant left the scene after either "knowingly colliding with . . . any person" or "knowingly . . . otherwise causing injury to any person."[7]

2. Other issues. The defendant's remaining arguments require only brief discussion.

a. Jury instructions. The defendant argues that the judge, in giving his charge on assault and battery by means of a dangerous weapon (here, a motor vehicle), erred by failing to define "dangerous weapon." As the defendant made no objection to the instructions at trial, we inquire whether any error caused a substantial risk of a miscarriage of justice. See Commonwealth v. Alphas, 430 Mass. 8, 13 (1999).

"[A] judge need not grant a particular instruction so long as the charge, as a whole, adequately covers the issue." Commonwealth v. Delong, 72 Mass. App. Ct. 42, 49 (2008), quoting Commonwealth v. Key, 19 Mass. App. Ct. 234, 243 (1985). A review of the transcript reveals that the judge properly instructed the jury on all essential elements of assault and battery by means of a dangerous weapon. "Dangerous weapon" is not defined in G. L. c. 265, § 15A, the statute establishing the

---

[7] To the same effect is Commonwealth v. Velasquez, 76 Mass. App. Ct. 697 (2010). See Daley, 463 Mass. at 624, citing Velasquez, supra at 700 ("adverb 'knowingly' applies to both 'colliding with' and 'causing injury to' property" for crime of leaving scene of property damage, G. L. c. 90, § 24 [2] [a]).

crime, nor is it a technical term. See Commonwealth v. Fuller, 421 Mass. 400, 411 (1995) ("[T]he judge should explain the meaning of technical terms where that meaning is obscure and there is a possibility of confusion . . ."). Because the judge's instructions adequately placed the charge before the jury, there was no error. See Commonwealth v. Roberts, 378 Mass. 116, 130 (1979) ("As long as a judge gives adequate and clear instructions on the applicable law, the phraseology, method and extent of the charge are matters within his discretion").[8]

b. Intent to wield a noninherently dangerous weapon. Where the weapon used in a case of assault and battery by means of a dangerous weapon is not inherently dangerous, the defendant asks us to require the Commonwealth to prove that the defendant intended to use the object as a weapon. As the defendant acknowledges in his brief, his request invites us to "appl[y] . . . the law in a different manner" than settled precedent,

[8] Even if the failure to define "dangerous weapon" had been error, there was no substantial risk of a miscarriage of justice because such error would not have materially influenced the verdict. See Commonwealth v. Randolph, 438 Mass. 290, 297-298 (2002). The overwhelming and essentially uncontested evidence was that the defendant was driving the SUV in a dangerous manner: he accelerated sharply, exceeded the speed limit, crossed onto the wrong side of the street, swerved around a number of police cruisers, struck one, and ultimately crashed into a tree.

which has long recognized that assault and battery by means of a dangerous weapon can be proved by reckless conduct, regardless of the inherent dangerousness of the weapon. We decline the invitation. See Commonwealth v. Connolly, 49 Mass. App. Ct. 424, 425 (2000) (rejecting argument advanced by defendant here).

c. Overcharging. Finally, the defendant alleges that the Commonwealth overcharged him in bad faith by knowingly bringing charges that were not supported by probable cause, and suggests, by way of relief, that we overturn all of the defendant's convictions. The defendant cites no authority supporting the asserted impropriety, or the relief he requests.[9] We accordingly decline the defendant's request for relief.

Conclusion. On the charge of leaving the scene of an accident after causing personal injury, the judgment is reversed, the verdict is set aside, and judgment shall enter for the defendant on that indictment. The remaining judgments are

[9] The universally recognized avenue for relief from indictments not supported by probable cause is a motion to dismiss the charges. See Commonwealth v. McCarthy, 385 Mass. 160 (1982). Such a motion was not filed in this case. At oral argument, the defendant suggested for the first time that the failure to do so may have been ineffective assistance by trial counsel. We need not entertain an argument raised only orally, see Commonwealth v. Richardson, 479 Mass. 344, 357 n.17 (2018), but on the record before us, we cannot say that the failure to file a McCarthy motion likely deprived the defendant of a substantial defense. See Randolph, 438 Mass. at 295 n.9.

affirmed. The case is remanded to the Superior Court for consideration of possible resentencing.

So ordered.