19-P-245 Appeals Court

COMMONWEALTH vs. ATUNBI BRYAN.

No. 19-P-245.

Suffolk. May 8, 2020. - August 14, 2020.

Present: Singh, Wendlandt, & McDonough, JJ.[1]

Firearms. Constitutional Law, Investigatory stop, Reasonable suspicion, Search and seizure. Search and Seizure, Reasonable suspicion, Motor vehicle. Practice, Criminal, Motion to suppress, Comment by prosecutor. Evidence, Fingerprints. Motor Vehicle, Firearms.

Indictments found and returned in the Superior Court Department on June 10, 2014.

A pretrial motion to suppress evidence was heard by Charles J. Hely, J., and the cases were tried before Jeffrey A. Locke, J.

Kerry A. Ferguson for the defendant.
Benjamin Shorey, Assistant District Attorney, for the Commonwealth.

[1] Justice McDonough participated in the deliberation on this case and authored this opinion while an Associate Justice of this court, prior to his reappointment as an Associate Justice of the Superior Court.

McDONOUGH, J. A Superior Court jury convicted the defendant of unlawfully carrying a firearm and unlawfully carrying a loaded firearm in violation of G. L. c. 269, § 10 (a) and (n), based on evidence that the defendant was sitting on a firearm that became visible after he was ordered out of a minivan for safety reasons.[2] The exit order had been prompted, in part, by hearsay information communicated to the police officers at the scene that one of the occupants of the minivan had a gun.[3] On appeal, the defendant claims that his motion to suppress the firearm should have been allowed because the hearsay information did not pass the two-pronged Aguilar-Spinelli test that is used to determine the veracity and basis of knowledge of an informant's tip. See Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964). Therefore, the defendant claims, the police lacked reasonable suspicion to issue an exit order to him. The

[2] The defendant's conviction of unlawfully possessing ammunition in violation of G. L. c. 269, § 10 (h), was dismissed by the trial judge as duplicative.

[3] There were three occupants: the defendant, seated behind the driver in the middle row of rear passenger seats; Sadiq Williamson, who was driving; and Derrick Brown, the front seat passenger. There is some discrepancy in the record regarding the spelling of Williamson's name and whether his surname is Williams or Williamson. We use the spelling that appears in the defendant's motion to suppress.

defendant also claims that several trial errors require reversal, individually or cumulatively.

We hold that the Aguilar-Spinelli test does not apply in circumstances such as those presented by this case. We also see no trial errors that require reversal. Accordingly, we affirm.

1. Motion to suppress. a. Background.[4] We summarize the testimony of Boston Police Officers Sean Daniely and Gregory Vickers, which a Superior Court judge (motion judge) credited and adopted as part of his findings. Daniely was patrolling Blue Hill Avenue in the Mattapan section of Boston alone in a marked cruiser at 1:30 A.M. on April 12, 2014, when he observed a minivan pull out from Ansel Road, near a nightclub (club), and turn left onto Blue Hill Avenue. The minivan's headlights were not on, and it was moving slower than surrounding traffic. Daniely watched as the minivan approached the intersection with Morton Street from the middle lane before suddenly jerking into the left lane without signaling. After the minivan made a U-

[4] Brown was charged with possession with intent to distribute a controlled substance after drugs were found on his person. The hearing on the motion to suppress also addressed claims raised by Brown because he and the defendant were tried jointly. After the motion to suppress was denied, Brown pleaded guilty to the charge against him, and the defendant's first trial ended in mistrial. The defendant then "moved to dismiss the charges on double jeopardy grounds, contending that there had been no manifest necessity to declare a mistrial." Commonwealth v. Bryan, 476 Mass. 351, 352 (2017). The motion to dismiss was denied, and that decision was affirmed on appeal. See id. Williamson was never charged with a crime.

turn at Morton Street, Daniely activated his emergency lights and siren to initiate a stop. The minivan pulled over without incident directly across the street from the Area B3 police station.

Blue Hill Avenue is a six-lane, divided thoroughfare that runs from Interstate 93 through the city of Boston. Daniely was aware of or had been involved in numerous traffic stops in the area of Blue Hill Avenue and Morton Street "where firearms were recovered," including "as recently as within a few weeks of this particular car stop." "There were [also] numerous past assaults via firearm, homicides via firearm."

When Daniely observed the driver, Williamson, staring at him through the side mirror, Daniely became concerned that "some sort of an attack on [him]" was being set up. Daniely then activated his bright overhead lights and positioned his spotlight onto the minivan's side mirror in an attempt to blind Williamson. Daniely approached the minivan from the passenger side as a safety precaution and signaled for the passenger to lower the window. The passenger, Brown, did so, and Daniely immediately noticed that Brown was not wearing a seat belt. Daniely also noticed for the first time that the defendant was in the car. The defendant also was not wearing a seatbelt. Daniely informed Williamson that he was pulled over because his headlights were off and asked for Williamson's license and

registration. Daniely also asked for identification from the defendant and Brown so he could issue them "seatbelt violation[s]." When Williamson leaned over Brown to hand Daniely the requested items, Daniely could smell an odor of alcohol emanating from Williamson. He also observed that Williamson's speech was slurred, and that his eyes were red and glassy. Williamson appeared nervous and "kept repeating himself." By contrast, Brown and the defendant "were sitting very stiff, like almost as if you're in the military sitting at attention, looking forward, not making any eye contact." Daniely asked if there was anything in the vehicle that he should be concerned about, "like, any guns, weapons, drones, bazookas, anything to kind of -- which usually gets a laugh out of people, kind of relaxes them." All three occupants "very abruptly" said "no."

Vickers was working a paid detail on Morton Street when he saw the stop and walked over to the scene. Daniely informed Vickers of what he perceived to be "the nervous behavior of the two passengers" and asked Vickers to stay by the van while Daniely returned to his cruiser to check the identifications and call for a backup unit to assist him in assessing Williamson's sobriety. Daniely checked Brown's identification first and learned that Brown "had a prior conviction for a firearm [charge]." Daniely was in the process of writing seat belt

citations for the defendant and Brown when he saw two security guards from the club cross Blue Hill Avenue and walk toward the scene "in a hurried type of manner." The security guards told Vickers that they had "kicked the occupants of the van out" of the club, that they had then observed them go across the street onto Ansel Road, and that about five minutes later they were "informed by a passerby or patron or someone out front of [the club] that a person had got into that van with a firearm." Vickers asked the security guards to "keep an eye on the van" while he conveyed the information to Daniely. After Vickers spoke with Daniely, the two officers decided to remove the occupants from the minivan and pat frisk them for weapons, because (1) "the front seat passenger ha[d] a firearm conviction," (2) "the two passengers were acting a little nervously," and (3) the officers "were just informed by two witnesses that there . . . is a firearm in the vehicle." Daniely could see fellow officers walking to the scene from the B3 police station. The officers approached Daniely, who disclosed this information.

Vickers and a fellow officer who had responded to the scene took positions on the passenger side of the minivan while Daniely, given that he "had not had [Williamson] turn the vehicle off or remove the keys or anything like that," approached the driver's side and asked Williamson to step out.

Vickers opened the minivan's sliding door because the windows were too dark to see inside. Vickers saw the defendant and asked him to stand up and get out of the minivan. The defendant "slowly got up and kind of like hovered above the seat." Vickers observed a gun on the seat underneath the defendant's "buttocks area." All three men were removed from the minivan, pat frisked, and placed in handcuffs while Vickers secured the loaded firearm. The club security guards stayed at the scene throughout the encounter and provided the police with their contact information. Neither Daniely nor Vickers investigated the source of the club security guards' information.

The defendant contended that the firearm should be suppressed because the police lacked reasonable suspicion to issue an exit order. Specifically, he claimed the officers had no basis of knowledge for the hearsay tip conveyed by the club security guards and no indicia of reliability, because "[n]obody bothered to speak to the individual that saw, allegedly saw the firearm." According to the defendant, after learning that Brown had a firearm conviction and one of the occupants may have a gun, the officers were required to determine whether any of the minivan's occupants had a license to carry a firearm and "tak[e] the time to speak to the individuals that reported the incident to the [club] security guards" before issuing the exit order.

The motion judge was unpersuaded and concluded that Daniely and Vickers "acted reasonably in having these men get out of the vehicle for a pat frisk for weapons." The motion judge found that (1) the officers had an "overall concern about the particular neighborhood in the vicinity of Blue Hill and Morton," (2) Daniely observed what he perceived to be nervous behavior by the passengers and signs of intoxication by the operator, (3) the officers knew that one of the occupants had a prior firearm conviction, and (4) the officers received information that someone in the minivan had a gun. In the motion judge's view, "[a]ll of these circumstances considered together surely warranted the officers in being concerned for their safety . . . and the safety of the public."

b. Discussion. "[A]n exit order is justified during a traffic stop where (1) police are warranted in the belief that the safety of the officers or others is threatened; (2) police have reasonable suspicion of criminal activity; or (3) police are conducting a search of the vehicle on other grounds." Commonwealth v. Torres-Pagan, 484 Mass. 34, 38 (2020). The defendant claims that the exit order in this case was not justified because the Commonwealth failed to establish that the tip from the club security guards was reliable, and, without the tip, Daniely and Vickers did not have a reasonable fear for their safety. He further contends that the officers had no

reason to suspect that a firearm was being possessed unlawfully or that the defendant was engaged in criminal activity separate from Williamson. In reviewing these claims, "we adopt the motion judge's subsidiary findings of fact absent clear error, but we independently determine the correctness of the judge's application of constitutional principles to the facts as found." Commonwealth v. Catanzaro, 441 Mass. 46, 50 (2004).

We need not decide whether the officers had reason to suspect the defendant was engaged in criminal activity separate from Williamson, because Daniely and Vickers testified, and the motion judge found, that the defendant was removed from the minivan because the officers were concerned for their safety and the public's safety. This action was constitutional if the officers' concern was objectively reasonable and "grounded in specific, articulable facts and reasonable inferences [drawn] therefrom rather than on a hunch" (quotations and citation omitted). Commonwealth v. Meneus, 476 Mass. 231, 235 (2017).

Daniely had stopped a minivan on a six-lane road at 1:30 A.M., for operating in an unsafe manner after apparently leaving a nightclub. Even though Daniely feared for his safety before approaching the minivan, given (1) his knowledge of and personal involvement in recent stops in that area where firearms were recovered and (2) Williamson's stare, Daniely's response to that fear was to activate his bright overhead lights, position his

spotlight on the driver's side mirror, and approach from the passenger side as a safety precaution. Daniely observed that he was outnumbered by the occupants of the minivan "three to one," Commonwealth v. Moses, 408 Mass. 136, 142 (1990); that the two passengers were not restrained by a seatbelt from reaching for anything within the minivan; and that the passengers were acting nervously, in Daniely's estimation. Still, Daniely did not issue an exit order. Instead, he returned to his cruiser. By his testimony, Daniely did not even decide to issue an exit order after he learned that Brown had a prior firearm conviction.[5] It was not until Daniely and Vickers received information hastily conveyed by two employees of the same nightclub -- that someone had recently entered the minivan with a firearm on Ansel Road, where Daniely first observed the minivan -- that the officers decided to issue an exit order. We agree with the motion judge that the exit order was objectively reasonable and supported by specific, articulable facts that there may be a threat to the safety of the officers or the public.

By this point in the encounter, Daniely and Vickers were the only officers on scene with five civilians (three vehicle occupants and two security guards), in an area known to the

[5] The year of this conviction was not included in the evidence at the motion hearing.

officers for gun violence. See Commonwealth v. Brown, 75 Mass. App. Ct. 528, 537 (2009) (area in which encounter occurs may be relevant factor in determining whether there is reasonable suspicion of threat to officer safety). Williamson had been driving without headlights and somewhat erratically, and the minivan's engine was still running. The passengers, one of whom had a prior firearm conviction, were acting nervously while unrestrained by seatbelts. While the nervousness alone could not have justified the exit order, Commonwealth v. Torres, 433 Mass. 669, 673 (2001), the officers had also learned from the club security guards that someone was seen on Ansel Road getting into the minivan with a gun. "[I]n combination with the [knowledge] of a suspected weapon" and the other factors just cited, we conclude that the nervous behavior "justif[ied] police concern for safety" in this case. Brown, supra at 534. This was "a swiftly developing situation," wherein events occurring in the course of the stop raised the officers' suspicion that the occupants of the minivan "posed a reasonable risk of harm to the officers or others." Commonwealth v. Hooker, 52 Mass. App. Ct. 683, 686 (2001). Contrast id.; Brown, supra at 535-536. Nothing in our recent jurisprudence narrowing the circumstances under which the police may issue an exit order "diminish[es] the fact that police officers are at risk during traffic stops as

well." Commonwealth v. Buckley, 478 Mass. 861, 877 n.3 (2018) (Budd, J., concurring).

We are not persuaded by the defendant's argument that the officers could not consider the club security guards' information in their reasonable suspicion calculus because they did not first engage in the Aguilar-Spinelli test to determine the reliability of the source of that information. The content of the tip revealed to the officers the basis for the informant's knowledge, and the security guards stayed at the scene and were subject to identification. See Commonwealth v. Love, 56 Mass. App. Ct. 229, 232 (2002) (strict reliability requirements for anonymous tipsters relaxed when information provided to police by identified private citizen). The defendant has not cited to a case, and we have not found one, that holds that the Aguilar-Spinelli test applies to information relied upon by officers in deciding to issue an exit order for safety reasons. In the circumstances presented by this case, we hold that officers who receive, during the course of a justified traffic stop, a tip that someone in the stopped vehicle has a gun are not required to investigate and determine the reliability of the informant before issuing an exit order. "Particularly" where, as here, the citizens who provided the police with information are standing alone next to a still-running vehicle, we believe the "test for determining reasonable

suspicion should include . . . the government's need for prompt investigation" (citation omitted). Commonwealth v. Stoute, 422 Mass. 782, 791 (1996). See Commonwealth v. Johnson, 36 Mass. App. Ct. 336, 338 (1994) ("In a potentially volatile situation an officer should not be required to wait to see if a suspected gun is drawn. Where the officer is justified in making inquiry, the law is clear that he may take prudent precautions for his own safety or that of others"). Because we conclude that "[t]he intrusion on the defendant was justified by, and proportional to, the concerns for the safety of the officers and of the public," Torres, 433 Mass. at 677, the motion to suppress was properly denied.

2. Claimed trial errors. Turning to the trial, the defendant claims that the prosecutor engaged in misconduct and that a fingerprint expert for the Commonwealth, Rachel Camper, should not have been permitted to offer certain testimony. Neither claim was preserved by an objection. We review to determine if there was error and, if so, whether the error created a substantial risk of a miscarriage of justice. See Commonwealth v. Freeman, 352 Mass. 556, 563-564 (1967).

"An error creates a substantial risk of a miscarriage of justice unless we are persuaded that it did not 'materially influence[]' the guilty verdict." Commonwealth v. Alphas, 430 Mass. 8, 13 (1999), quoting Freeman, 352 Mass. at 564. "In

making that determination, we consider the strength of the Commonwealth's case against the defendant (without consideration of any evidence erroneously admitted), the nature of the error, whether the error is 'sufficiently significant in the context of the trial to make plausible an inference that the [jury's] result might have been otherwise but for the error,' and whether it can be inferred 'from the record that counsel's failure to object was not simply a reasonable tactical decision'" (footnote and citations omitted). Alphas, supra.

The defendant did object to certain testimony by another fingerprint expert, Jacquelin Massua. The defendant claims that the judge abused his "wide discretion" to admit Massua's testimony, Alphas, 430 Mass. at 16, because it was more prejudicial than probative. A judge abuses his or her discretion only where we conclude that the judge made a clear error of judgment in weighing the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives. L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

a. Prosecutorial misconduct. In his preliminary instructions, the trial judge explained the attorneys' role, noted that arguments of counsel are not evidence, and stated that "an opening statement is the attorney's opportunity to give you an overview of what they expect the evidence will or will

not show." The judge reiterated this instruction before trial commenced the next day. In his opening statement, the prosecutor echoed the judge's "role" theme from the day before and told the jury that it was his role "to bring to you all the information I can," subject to "three limitations . . . : relevance, reliability, redundancy." The prosecutor continued:

> "Relevant: I'm going to make sure that the information we present to you is the information that relates specifically to what happened at about 1:30 in the morning on April 12th, 2014 at that intersection of Morton Street and Blue Hill Ave, and really none of this peripheral stuff.
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> "Reliability: the information I'm going to provide to you is going to be the reliable information, information that can be verified, authenticated, challenged and confirmed. And then finally, redundancy, or really, lack thereof. Not going to have three people come and tell you what one person could explain."

In his summary of what he believed the evidence would show the facts to be, the prosecutor stated that "[o]ther people are approaching the vehicle [while Daniely had it stopped]; police are converging on it."

Daniely and Vickers testified at the trial in a manner consistent with the hearing on the motion to suppress, except that neither officer divulged the substance of their conversations with the club security guards or each other. Daniely recounted seeing the security guards "hastily walking" toward the scene of the stop from the area of Blue Hill Avenue and Ansel Road. Vickers described them "walking hurriedly

across the street towards me." Both officers testified that the club security guards engaged Vickers in a brief conversation before waiting off to the side.[6] Daniely and Vickers, along with the other officers who had walked over from the police station located across the street, approached the minivan. Vickers went to the passenger side and opened the sliding door; Vickers saw the defendant and asked him to exit the vehicle. Vickers testified that the defendant slid towards him rather than "get[ting] up in a proper manner" to exit and "had his behind just a little off the seat." "[A]t that point [Vickers] observed a black firearm underneath [the defendant's] buttocks." The defendant was placed in handcuffs while Vickers secured the gun. Without objection, Daniely testified that he "demanded [the defendant's] license to carry a firearm" but received no response.

The .45 caliber, Hi-Point pistol Vickers secured at the scene was loaded with a bullet in the chamber and seven more in the magazine. Fingerprint analysts Massua and Camper tested these objects and analyzed a latent fingerprint that appeared on the magazine. In Camper's opinion, that print "originated from the left index finger of [the defendant]."

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[6] The trial judge sustained the defendant's objection to the prosecutor's question whether Vickers was "able to gather from them any verifiable information" in the course of that conversation.

The defendant testified in his own defense that Brown and Williamson "got into some type of argument or something with security" at the club and the group "had to leave." The men were on their way home when Daniely pulled them over. The defendant stated that he was looking back at Daniely's cruiser when "next thing you know, there's a gun on my lap." The defendant "panicked" because he "was scared." He testified: "It was there. It was in two pieces. I put it together and I put it underneath myself." The defendant explained that the two pieces consisted of the "gun itself" and the "magazine," which he "inserted in the firearm." After the defendant responded to the prosecutor's questioning of how many times he was given the opportunity but chose not "to tell [the police] that [he] had an illicit firearm," the trial judge called counsel to sidebar and asked, "How is that not commenting on a defendant's right to remain silent?" Of his own accord, the trial judge struck the questions and gave a curative instruction.[7]

Thereafter, the prosecutor argued in his closing that the evidence showed Vickers was standing by the minivan when "[s]ome

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[7] "Ladies and gentlemen, let me instruct you that a person has no obligation to speak to the police, particularly when the person is confronted and ultimately in custody. The person has an absolute right to remain silent and the exercise of that right is not evidence of anything. It doesn't indicate anything. So, I am striking the question that was put to this witness and I am instructing you to disregard that question entirely."

security officers approach. There's a brief conversation. Officer Vickers sends them away." The trial judge's final instructions on the law included that "[t]he opening statements and closing arguments of the attorneys are not evidence."

On appeal, the defendant claims that the prosecutor engaged in misconduct by (1) implying during his opening that he would have presented more evidence but for evidentiary limitations, (2) repeatedly referring during the trial to the club security guards, creating the impression that they would have given testimony favorable to the Commonwealth, and (3) commenting on the defendant's pre- and postarrest silence.

The prosecutor committed no misconduct when, in anticipation of testimony from Daniely and Vickers consistent with that given at the hearing on the motion to suppress, he stated in his opening that he expected to prove that "other people" approached the scene of the stop and the "police [we]re converging on it." "The prosecutor properly could have referred in his opening to anything that he expected to be able to prove by evidence." Commonwealth v. Fazio, 375 Mass. 451, 456 (1978). The prosecutor's opening representation that the Commonwealth's evidence would be relevant and reliable was prefaced by his reference to the jury's "role," stating: "You're going to assess the credibility of that information and you're going to make a decision as to what happened." Thus, in context, the

comments do not take on the improper character ascribed to them. We agree with the defendant that the prosecutor's "redundancy" comments would have been better left unsaid. However, we are not persuaded that the jury would have considered the comments as a suggestion that there was more evidence against the defendant where the judge's "repeated instructions regarding the limited purpose and effect of the opening were timely, clear, and forceful." Id. at 458. The instant case simply does not in our view "present a situation where the force of the prosecutor's opening remarks was overwhelmingly prejudicial and likely to leave an indelible imprint on the jurors' minds." Id. at 455.

The record does not support the defendant's contention that the club security guards' statements were introduced in evidence in violation of the defendant's confrontation rights or the rule against hearsay. Nor does it support a claim that the security guards were referred to repeatedly. Daniely and Vickers testified to nothing more than the fact of the security guards' presence. We do not agree that the testimony that the security guards walked hastily toward the scene necessarily created an impermissible impression that the security guards would have offered testimony favorable to the Commonwealth. Any such inference would have been equally supported by the defendant's

testimony that Brown and Williamson argued with the security guards and the three men "had to leave."

A new trial is not required because the prosecutor asked the defendant two consecutive impermissible questions that touched on the defendant's right to remain silent. See Alphas, 430 Mass. at 19-20. The trial judge immediately struck the questions and gave a curative instruction, which we presume the jury followed. See Commonwealth v. Isabelle, 444 Mass. 416, 420 (2005). Finally, to the extent the defendant now challenges (1) Daniely's testimony that the defendant did not respond when asked for his license to carry a firearm, and (2) Vickers's testimony that the defendant "didn't say anything" when asked "if he had anything [the officer] should be concerned with," there was no risk of a miscarriage of justice.

Because "the case against [him] was virtually irrefutable," the defendant would not be entitled to relief even if we agreed with his claims of error. Alphas, 430 Mass. at 14. The defendant testified that the "gun [was] on [his] lap" and he "was fumbling around with [the magazine]," that he inserted the magazine into the firearm, and that he then "put it underneath [him]self." Based on his testimony, the jury could have found that the defendant intended and had the ability to control the firearm when he loaded and sat on it. See Commonwealth v. Fernandez, 48 Mass. App. Ct. 530, 532 (2000) (essential elements

of possession "are knowledge plus ability and intention to control"). The possibility that someone else in the minivan touched the gun and magazine before the defendant handled it did not undermine the Commonwealth's case. "Possession need not be exclusive." Commonwealth v. Watson, 36 Mass. App. Ct. 252, 259 (1994). The jury were not required to believe the defendant's testimony that he loaded and sat on a .45 caliber firearm that was not his, especially where the manner in which the defendant left the van suggested that he was trying to hide the gun. See Commonwealth v. Whitlock, 39 Mass. App. Ct. 514, 519 (1995) (evidence of attempts to conceal contraband permit inference of unlawful possession). In short, there is no "substantial risk that an innocent person has been convicted" due to these claimed errors. Alphas, supra at 24 (Fried, J., concurring).

b. Fingerprint evidence. Massua testified that the lab for which she works is able to obtain a latent print from firearm evidence "[a]pproximately 16 percent of the time." Camper testified that her method of analysis was replicated and verified by another criminalist "per [her unit's] standard operating procedures as well as the discipline." The defendant claims that Massua's testimony should not have been admitted because it suggested that the quality of the defendant's print in this case was exceedingly high, while Camper's testimony

improperly suggested that the fingerprint evidence was infallible. Neither claim is persuasive.

Massua's testimony was not prejudicial to the defendant, even if it should not have been admitted, because it also supported an inference that others may have touched the firearm and magazine, but their prints were not recovered due to the infrequency of finding latent prints on such objects. Camper's testimony, in turn, showed that the Commonwealth's scientific evidence was reliable. See Commonwealth v. Sands, 424 Mass. 184, 185-186 (1997) (proponent of scientific evidence may lay foundation by showing that theory is reliable). Neither witness created an impression that the fingerprint evidence in this case was infallible, but even if they did, that impression would have been dispelled by the judge's final instruction to jurors that, "as with all witnesses, it is completely up to you to decide whether you accept the testimony of an expert witness, including any opinions the witness gave." Moreover, the defendant admitted during his testimony that he had handled the firearm and the magazine while inside the van.

"Since we have found no errors, . . . there is no cumulative effect." Commonwealth v. Gagliardi, 418 Mass. 562, 572 (1994), cert. denied, 513 U.S. 1091 (1995).

Judgments affirmed.