SJC-12975

COMMONWEALTH vs. KEVIN ORTIZ.

Hampden. February 1, 2021. - June 8, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Controlled Substances. Constitutional Law, Search and seizure, Probable cause. Search and Seizure, Motor vehicle, Probable cause. Probable Cause. Identification. Practice, Criminal, Motion to suppress, Identification of defendant in courtroom, Instructions to jury, Duplicative convictions.

Indictments found and returned in the Superior Court Department on May 23, 2018.

A pretrial motion to suppress was heard by Michael K. Callan, J., and the cases were tried before John S. Ferrara, J.

The Supreme Judicial Court granted an application for direct appellate review.

Merritt Schnipper for the defendant.
David L. Sheppard-Brick, Assistant District Attorney, for the Commonwealth.

GEORGES, J. The defendant, Kevin Ortiz, and two codefendants were indicted on charges of multiple narcotics

offenses stemming from the same underlying events. After a joint trial in the Superior Court, the defendant was convicted of unlawful distribution of heroin, as a subsequent offender, in violation of G. L. c. 94C, § 32 (a); and unlawful possession of heroin with intent to distribute, as a subsequent offender, in violation of G. L. c. 94C, § 32 (a). One codefendant, Rey Ortiz,[1] the defendant's brother, was convicted of unlawful possession of heroin with intent to distribute and unlawful possession of cocaine. The other codefendant, Jose Vargas, was acquitted of unlawful distribution of heroin.

On appeal, the defendant challenges a Superior Court judge's denial of his motion to suppress evidence found during a warrantless search of a motor vehicle, the admissibility at trial of an in-court identification made by a police officer, and purported errors in the jury instructions on possession and distribution of narcotics.

For the reasons explained infra, we affirm the order denying the defendant's motion to suppress and his convictions.

Background. 1. Facts. We summarize the facts the jury could have found, in the light most favorable to the Commonwealth, reserving certain facts for later discussion.

[1] Because the defendant and his brother Rey Ortiz share a surname, we refer to Rey by his first name.

In February of 2018, Detective Jamie Bruno of the Springfield police department was investigating the sale of illegal narcotics from a base of operations at an apartment building on Niagara Street in Springfield, in particular from a single unit in that building.[2] As part of the investigation, Officer Nicholas Mancinone, working undercover, participated in a controlled purchase of narcotics from the defendant on February 15, 2018.

On the morning of the purchase, investigating officers were conducting surveillance of several locations near the Niagara Street apartment building. Specifically, Bruno set up surveillance of the building itself, Officer Felix Aguirre was surveilling a gasoline station two blocks from the apartment building, and Detective Aristedis Casillas was conducting surveillance at an intersection where he had a clear view of a black Acura of interest in the investigation, which was parked near the building.

Mancinone called the defendant to arrange to purchase a particular amount of heroin. The defendant agreed to the transaction and ultimately directed him to the gasoline station

[2] At the pretrial hearing on the motion to suppress, Bruno explained that police had initiated the investigation after receiving complaints from residents of the building, as well as from information provided to Bruno by a reliable confidential informant.

that was under surveillance by Aguirre. Meanwhile, Casillas, whose attention was focused on the Acura, saw the defendant drive up in a white Honda, which he parked across the street from the Acura. The defendant, with nothing in his hands, got out of the Honda and walked across the street toward the Acura. As he approached the vehicle, its rear lights flashed.

Casillas then saw the defendant open the driver's side door of the Acura, reach under the driver's seat to flip it forward, and then reach toward the rear passenger area, from which he retrieved a traffic vest. As the defendant walked away from the Acura holding the vest, its lights flashed again. The defendant then returned to the Honda and drove away.

Shortly after the defendant had retrieved the vest and driven away, Aguirre saw him drive a Honda into the parking area of the same gasoline station where Mancinone had been waiting. Mancinone telephoned the defendant, who told him to get into the defendant's vehicle. After Mancinone was seated in the Honda, the defendant drove it away. During the short, two- to three-minute drive, Mancinone placed money in a cup holder and the defendant handed him what Mancinone believed was heroin.

Upon getting out of the defendant's Honda, Mancinone relayed to Bruno that he had successfully purchased twenty bags of heroin from the defendant. The defendant was stopped by police a short distance from the gasoline station, in the

parking lot of a nearby coffee shop. Among the officers assisting in the arrest were Aguirre and Casillas. A subsequent search of the Honda revealed a driver's license belonging to Rey, but no remote key for the Acura.

Following the defendant's arrest, Bruno and other members of the Springfield police department returned to the Acura the defendant had accessed prior to the transaction with Mancinone, and found it to be locked. While the officers were examining the Acura, Rey approached to inquire what they were doing; he said that he had been informed that someone was attempting to break into his vehicle. Police arrested Rey and seized the remote key for the Acura, which he was holding. Using the remote key, the officers unlocked and searched the vehicle; they recovered one bag of cocaine "in a construction type glove . . . in the passenger's side of the vehicle" and 199 bags of heroin "[u]nder the driver's seat."

2. Prior proceedings. A grand jury returned indictments against the defendant charging him with distribution of a class A controlled substance (heroin) as a subsequent offender, G. L. c. 94C, § 32 (a); possession with intent to distribute a class A controlled substance (heroin) as a subsequent offender, G. L. c. 94C, § 32 (a); and possession with intent to distribute a class B controlled substance (cocaine), G. L. c. 94C, § 32A (c).

The defendant moved to suppress the evidence seized from the Acura on the ground that the warrantless search was unlawful. A Superior Court judge (motion judge), who was not the trial judge, determined that police had probable cause to believe the Acura contained contraband, and denied the motion. A Superior Court jury convicted the defendant of the underlying heroin-related offenses, but acquitted him of the charge of possession of cocaine with intent to distribute. At a jury-waived trial, the trial judge then convicted the defendant of the subsequent offender portions of the indictments. The defendant timely appealed from his convictions, and we allowed his application for direct appellate review.

Discussion. 1. Denial of motion to suppress. The defendant argues that the motion judge erred in denying his motion to suppress the evidence seized from the Acura because police lacked probable cause to search the vehicle at the time they did so. The defendant contends that his "single" and "enigmatic" stop at the Acura -- which was not the location of the suspected base of narcotic operations -- did not provide police with a reasonable basis for believing that contraband would be found in the vehicle. The Commonwealth maintains that police had probable cause to search the Acura because the defendant reached into its interior just before selling the

heroin to Mancinone, thus giving rise to a reasonable inference that the defendant had retrieved the drugs from the Acura.

a. Standard of review. When reviewing a decision on a motion to suppress, we "accept the judge's subsidiary findings of fact absent clear error and leave to the judge the responsibility of determining the weight and credibility to be given oral testimony presented at the motion hearing," Commonwealth v. Mauricio, 477 Mass. 588, 591 (2017), quoting Commonwealth v. Wilson, 441 Mass. 390, 393 (2004), but "conduct an independent review of [his or her] ultimate findings and conclusions of law" (citation omitted), Commonwealth v. Rosa-Roman, 485 Mass. 617, 620 (2020). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (citation omitted). Commonwealth v. Tremblay, 480 Mass. 645, 655 n.7 (2018).

b. Warrantless searches. Warrantless searches are presumptively unreasonable under both the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights. See Commonwealth v. Viriyahiranpaiboon, 412 Mass. 224, 226 (1992). This presumption "reflects the importance of the warrant requirement to our democratic society." Commonwealth v. Arias, 481 Mass. 604, 609 (2019),

quoting Commonwealth v. Tyree, 455 Mass. 676, 683 (2010). Warrantless searches, however, "may be justifiable . . . if the circumstances of the search fall within an established exception to the warrant requirement." Arias, supra at 610, quoting Commonwealth v. Tuschall, 476 Mass. 581, 584 (2017). Because "the inherent mobility of automobiles creates an exigency that they, and the contraband there is probable cause to believe they contain, can quickly be moved away while a warrant is being sought," Commonwealth v. Motta, 424 Mass. 117, 123 (1997), quoting Commonwealth v. Cast, 407 Mass. 891, 904 (1990), "less stringent warrant requirements have been applied to vehicles," Motta, supra, quoting Commonwealth v. Cavanaugh, 366 Mass. 277, 282 (1974).

c. Probable cause. Probable cause exists if the information available to police "provide[s] a substantial basis for concluding that evidence connected to the crime will be found [in] the specified [location]." Commonwealth v. Escalera, 462 Mass. 636, 642 (2012), quoting Commonwealth v. Donahue, 430 Mass. 710, 712 (2000). "Strong reason to suspect is not adequate." Commonwealth v. Upton, 394 Mass. 363, 370 (1985). Nonetheless, in considering the existence of probable cause, "as the very name implies, we deal with probabilities[,] . . . the factual and practical considerations of everyday life on which reasonable and prudent [individuals], not legal technicians,

act." Commonwealth v. Agogo, 481 Mass. 633, 637 (2019), quoting Cast, 407 Mass. at 895-896. Thus, "[r]easonable inferences and common knowledge are appropriate considerations in determining probable cause." Commonwealth v. Alessio, 377 Mass. 76, 82 (1979). Cf. Commonwealth v. Beckett, 373 Mass. 329, 341 (1977) ("An inference [drawn from circumstantial evidence] . . . need only be reasonable and possible; it need not be necessary or inescapable").

In determining whether probable cause is supported, we have asked whether a sufficient nexus exists between the activities at issue and the location police expect to find contraband. See Commonwealth v. Sheridan, 470 Mass. 752, 757 (2015) ("police [must] establish probable cause to believe that a criminal amount of contraband [is] present in the car" [quotation and citation omitted]); Commonwealth v. O'Day, 440 Mass. 296, 302 (2003) (sufficient nexus existed between drug-selling activity and residence to establish probable cause to search). While a nexus between the crime alleged and the place to be searched must be established, the nexus "need not be based on direct observation." Donahue, 430 Mass. at 712, quoting Commonwealth v. Cinelli, 389 Mass. 197, 213, cert. denied, 464 U.S. 860 (1983). Indeed, in making this determination, we have looked to factors such as "the type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment,

and normal inferences as to where a criminal would be likely to hide" contraband. O'Day, supra, quoting Cinelli, supra.

The defendant argues that there was not a sufficient nexus between the suspected, apartment-based drug-selling operation and the Acura to provide probable cause to search it. In the defendant's view, because police believed that the illegal activity was confined to a single apartment in the Niagara Street apartment building, they had "nothing . . . to suggest the alleged operation utilized an off-premises stash spot" so as to justify searching the Acura. We do not agree.

d. Evidentiary hearing. After an evidentiary hearing, the motion judge found as follows. Investigating officers were aware that the defendant and his brother Rey were known to sell illicit narcotics together. Once the defendant agreed to sell narcotics to Mancinone, the defendant directed Mancinone through some intermediate, circuitous instructions, and then, finally, to a gasoline station only a few blocks from the suspect apartment building. The defendant had Mancinone wait in his vehicle for approximately ten minutes, and then told Mancinone to leave his own vehicle and to get into the defendant's Honda. Prior to meeting Mancinone, the defendant had driven a Honda to a location across the street from his brother Rey's Acura. The defendant parked the Honda and walked across the street to the Acura. After it was unlocked, seemingly remotely, the defendant

retrieved a vest from the Acura and drove off in the Honda, while the Acura was relocked remotely.

As the defendant argues, there was no police observation of his actions or where he went after he drove off in the Honda and before he entered the gasoline station parking lot. The evidence, however, establishes that he entered the parking lot only a few minutes after having retrieved the vest. At the time of his arrest, the defendant had no remote key for the Acura, and none was discovered in the Honda. When the defendant's brother Rey approached the officers, who were examining the parked Acura, however, Rey was holding a remote key for the vehicle.

Based on the sum of the evidence before the motion judge, it was not clearly erroneous for him to conclude that the defendant retrieved the narcotics from the Acura after Rey used the key to open the vehicle and provide the defendant access to its interior. To the contrary, the record at the hearing fully supports the motion judge's findings. Accordingly, when the defendant was stopped shortly after he left the gasoline station, police had probable cause to search the Acura, and there was no error in the denial of the motion to suppress.[3]

[3] The parties agree that the motion judge erred in finding that the defendant had been at the Niagara Street apartment building before stopping at the Acura. Indeed, no evidence was

2. In-court identification. The defendant also argues that the trial judge erred in permitting Mancinone to offer an in-court identification of the defendant at trial, without first having participated in a pretrial out-of-court identification, and that the in-court identification prejudiced the defendant. Because the defendant objected, we review to determine whether there was error and, if so, whether the error prejudiced the defendant. See Commonwealth v. Harris, 481 Mass. 767, 777 (2019). If there was error in the introduction of the identification testimony, the defendant is entitled to a new trial unless we are convinced that the identification here "did not influence the jury, or had but very slight effect." Commonwealth v. Chalue, 486 Mass. 847, 858 (2021), quoting Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994).

a. "Good reason." In-court identifications have been recognized as a type of "showup" identification that is inherently suggestive because "the prosecutor asks the eyewitness if the person who committed the crime is in the court room," and "the eyewitness knows that the defendant has been charged and is being tried for that crime." Commonwealth v.

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introduced at the hearing with respect to the defendant's location before he stopped across the street from the Acura. Nonetheless, this error was not crucial to the finding of probable cause; the motion judge concluded that the contraband ultimately delivered to Mancinone was retrieved from the Acura, and not from the apartment building.

Crayton, 470 Mass. 228, 237 (2014). To lessen the unfairness of suggestive in-court identification testimony, "[w]here an eyewitness has not participated before trial in an identification procedure," a subsequent in-court identification by that witness is permissible "only where there is 'good reason' for its admission." Id. at 241. "Good reason" may subsume instances where "the witness is an arresting officer who was also an eyewitness to the commission of the crime, and the identification merely confirms that the defendant is the person who was arrested for the charged crime." Id. at 242. Such an identification is not impermissibly suggestive because, rather than "identifying the defendant based solely on his or her memory of witnessing the defendant at the time of the crime," the witness's identification is "understood by the jury as confirmation that the defendant sitting in the court room is the person whose conduct is at issue rather than as identification evidence." Id. at 242-243. An officer who did not participate in the arrest of a defendant cannot make such an assertion, and thus good reason does not exist to justify the risk of misidentification that may result from the suggestive in-court showup.

The Commonwealth argues that Mancinone's in-court identification was proper because he had been involved in the ongoing investigation that culminated in the defendant's arrest.

At the same time, the Commonwealth urges us to revisit our decision in Crayton, 470 Mass. at 241-243, and to hold explicitly that in-court identifications by investigating officers are proper, even when those officers neither participated in the arrest of a defendant nor made a prior, nonsuggestive out-of-court identification. We conclude that Mancinone's in-court identification was improper and should not have been permitted, and we decline the Commonwealth's invitation to adopt a revised standard of admissibility.

Here, there was no "good reason" for Mancinone's suggestive in-court identification of the defendant. Testimony at trial indicated that Mancinone did not participate in the defendant's arrest. Rather, Mancinone's involvement in the defendant's arrest was limited to his role in the investigation, by acting as an undercover officer, and making a purchase of narcotics from the defendant while the two were together in the defendant's Honda. Immediately after Mancinone left the vehicle and informed Bruno that the sale had been completed, Mancinone returned to the police station. Thus, Mancinone's in-court identification could not be viewed as identifying the defendant as the person whose conduct was at issue but, rather, served to identify the defendant as the individual who entered into the heroin transaction with Mancinone.

Additionally, the testimony at trial does not demonstrate any other good reason for the in-court identification. There was no evidence, for example, that Mancinone had any knowledge of the defendant before the commission of the offense, nor evidence that Mancinone had any continued interactions with the defendant throughout the booking process. See Crayton, 470 Mass. at 242-243. Therefore, the trial judge erred in allowing the admission of Mancinone's in-court identification.

b. Prejudice to the defendant. Given that the defendant objected to the erroneous admission of Mancinone's in-court identification, we must determine whether that error prejudiced the defendant. See Harris, 481 Mass. at 777.

> "An error is nonprejudicial only '[i]f . . . the conviction is sure that the error did not influence the jury, or had but very slight effect. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.'"

Commonwealth v. Brown, 456 Mass. 708, 725-726 (2010), S.C., 466 Mass. 1007 (2013), quoting Flebotte, 417 Mass. at 353.

In addition to Mancinone's improper identification, there was extensive other evidence at trial that the defendant was the individual who had participated in the sale of heroin to Mancinone. See Commonwealth v. Collins, 470 Mass. 255, 266 (2014) (no risk of prejudice where other evidence identifying

defendant was compelling). This included multiple identifications of the defendant by other police officers, together with other compelling evidence. Therefore, Mancinone's in-court identification likely would have had little if any impact on the jury.

Specifically, Casillas testified to having seen the defendant parking a white Honda across the street from the black Acura, crossing the street to the Acura, and opening the driver's door. Casillas testified that, after moving the driver's seat forward and reaching under the seat toward the rear of the vehicle, the defendant retrieved a yellow vest, shut the door, walked back to the Honda in which he had arrived, and drove away. Police later recovered 199 bags of heroin from under the driver's seat in the Acura. Aguirre testified that he saw the defendant arrive at the gasoline station, where Mancinone got into the defendant's Honda. After a two- to three-minute drive, and after Mancinone got out of the Honda and relayed the information that he had completed the transaction, other officers followed the defendant to a nearby coffee shop and arrested him. Both Casillas and Aguirre, the arresting officers, identified the defendant at trial as the driver and sole occupant of the Honda. See Crayton, 470 Mass. at 241-243.

Simply put, because the improper identification evidence was cumulative of other substantial evidence of identification,

we conclude that it would have "had minimal, if any, effects on the jury such that the error was non-prejudicial." Commonwealth v. Wilson, 486 Mass. 328, 339 (2020).[4]

3. Jury instructions. The defendant contends that his heroin-related convictions of distribution and possession with intent to distribute are potentially duplicative because the judge specifically did not instruct the jury that convictions of these offenses had to be based on their finding separate and distinct caches of narcotics. In the defendant's view, this omission, along with language the judge added to his instructions on the charge of possession with intent to distribute, could have permitted the jury to infer that they could convict the defendant of both heroin-related charges based solely on the heroin sold to Mancinone. We are not persuaded.

a. Standard of review. Where, as here, "the defendant did not object at trial to the judge's jury instructions, we determine if any of the alleged errors 'created a substantial

[4] The defendant points out that Mancinone was not permitted to offer an in-court identification of codefendant Vargas. Because Vargas was acquitted of the charge of heroin distribution, based on allegedly acting as lookout during the transaction, while the defendant was convicted of distribution, the defendant argues that the difference indicates prejudicial error. We are not convinced. The Commonwealth presented differing evidence regarding the two codefendants' roles in the sale; Vargas was not contacted to make a purchase, did not agree to sell to Mancinone, and did not go on a drive with Mancinone in his vehicle.

risk of a miscarriage of justice.'" Commonwealth v. Shea, 467 Mass. 788, 790-791 (2014), quoting Commonwealth v. Alphas, 430 Mass. 8, 13-14 (1999). A substantial risk of a miscarriage of justice exists if we have "a serious doubt whether the result of the trial might have been different had the error not been made." Commonwealth v. Azar, 435 Mass. 675, 687 (2002), S.C., 444 Mass. 72 (2005), quoting Commonwealth v. LeFave, 430 Mass. 169, 174 (1999).

In making this determination, "we review the judge's final charge to the jury as a whole in the context of the totality of the evidence," Shea, 467 Mass. at 796, and interpret the instructions "as would a reasonable juror," Commonwealth v. Kelly, 470 Mass. 682, 697 (2015). Trial judges have "considerable discretion in framing jury instructions, both in determining the precise phraseology used and the appropriate degree of elaboration." Id. at 688, quoting Commonwealth v. Newell, 55 Mass. App. Ct. 119, 131 (2002). "The adequacy of instructions must be determined in light of their over-all impact on the jury" (alteration omitted). Commonwealth v. Blanchette, 409 Mass. 99, 103 (1991), quoting Commonwealth v. Sellon, 380 Mass. 220, 231-232 (1980).

b. Duplicative convictions. Both the United States Constitution and Massachusetts common law prohibit the imposition of multiple punishments for the same offense. See

Commonwealth v. Rivas, 466 Mass. 184, 187 (2013). Thus, a defendant may not be convicted of both a greater and lesser included offense as a result of the same act. See Commonwealth v. Porro, 458 Mass. 526, 531 (2010), quoting Commonwealth v. D'Amour, 428 Mass. 725, 748 (1999) ("lesser included offense is one which is necessarily accomplished on commission of the greater crime"). We previously have pointed to decisions in other jurisdictions where courts have held that, "where the accused, being in possession of a particular packet or quantum of a drug, passes it to a buyer or other recipient, and this is sought to be charged as both distribution and possession with intent," "the possession with intent [to distribute] is incident to, and inherent in, the very distribution, and double charges would appear to be an artificial and unconstitutional cumulation of crimes and punishments." Commonwealth v. Diaz, 383 Mass. 73, 83 & n.19 (1981), and cases cited. The risk of duplicative convictions, however, does not arise where "separate items are involved in the respective charges: the defendant had completed one heroin sale, and was holding a separate cache of the drug for future distributions." Id. at 84.

During the course of the prosecutor's closing argument, he highlighted that the two heroin-related charges were predicated on two separate and distinct caches of narcotics. Specifically, the prosecutor asked the jury "[t]o find . . . [the defendant]

guilty of distribution of heroin for the undercover sale to . . . Mancinone" and "guilty for possession with intent to distribute heroin for the 199 bags that were recovered and . . . found in the Acura." The judge then went on to instruct on the two heroin-related charges as part of his final instructions. The defendant does not challenge these instructions, which are a useful starting point for our analysis.

When the judge instructed the jury on the heroin-related charges, he began with the unlawful distribution of heroin. The judge informed the jury that the Commonwealth had to prove three elements beyond a reasonable doubt: "First, that the substance in question is a [c]lass A controlled substance, namely heroin; [s]econd, that the defendant participated in the distribution of some perceptible amount of that substance to another person or persons; [a]nd third, that the defendant did so knowingly or intentionally." With respect to the second element, the judge explained that "[t]he term 'distribute' means to actually deliver a controlled substance to another person."

The judge then instructed on possession with intent to distribute. He explained that the Commonwealth had to prove four elements beyond a reasonable doubt: first, "that the defendant possessed a certain substance"; second, "that the substance was a controlled substance, namely heroin"; third, "that the defendant possess that controlled substance knowingly

or intentionally"; and fourth, "that the defendant had the specific intent to distribute, manufacture, or dispense the controlled substance. In this case, it's alleged that there was a distribution" (emphasis supplied).

The defendant argues that the highlighted statement must have confused the jury, and that, in conjunction with the absence of explicit instructions that they had to find that each of the two offenses was committed with different quantities of heroin, the instructions created a risk that the jury impermissibly reached its verdicts based on the same cache of drugs. We disagree. While the highlighted language in the judge's instructions was error, any resulting prejudice did not materially affect the verdicts, nor did it result in a substantial risk of a miscarriage of justice.[5]

When the judge instructed on unlawful distribution, he told the jury that the term "distribute" meant "to actually deliver a controlled substance to another person." Subsequently, when he explained the first element (possession) of the offense of

[5] We assume that the judge meant to instruct that the Commonwealth alleges that the defendant had the specific intent to distribute the drugs recovered from the Acura, not that there "was" a distribution. The judge should have instructed the jury: "In this case, it's alleged that the defendant's intent was to distribute." See Commonwealth v. Tavernier, 76 Mass. App. Ct. 351, 355 (2010) ("The two basic elements for conviction of possession with the intent to distribute [a controlled substance] are [1] knowingly possessing the drug and [2] intending to transfer it physically to another person").

unlawful possession of heroin with intent to distribute, the judge instructed the jury on the two types of possession -- actual and constructive. Regarding constructive possession, the judge explained, "A person who, although not in actual possession, knowingly has both the power and the intention at any given time to exercise dominion, power, or control over an object . . . is in constructive possession of the object. Thus, constructive possession means knowledge of the location of an object combined with the ability and the intention to exercise dominion and control over it."

Here, the judge's instructions would have allowed the jury to differentiate between the different amounts of heroin possessed by the defendant not only by their location, but also by their purpose. The evidence would have allowed the jury to find that the defendant possessed an amount of heroin that he distributed to another person, Mancinone. At the same time, the jury could have found that the defendant possessed the heroin recovered from the Acura, and that the 199 bags stored there were intended for future sales. Indeed, in order to convict the defendant with respect to the drugs that formed the basis for the distribution charge, the jury must have found that the defendant distributed the drugs "to another person," whereas to convict of the offense of possession with intent to distribute,

they did not have to find an actual transfer of drugs to any third person.

Moreover, although the judge added the additional, improper language that "there was a distribution" when instructing on the offense of possession with intent to distribute, he also properly instructed the jury on the required elements of the charge. Considering the evidence at trial that police recovered 199 bags of heroin from the Acura, that Rey, not the defendant, possessed the Acura's remote key, in combination with the trial judge's instruction on constructive possession, militates the conclusion that the jury predicated the conviction of possession with intent to distribute on the heroin recovered from the Acura on a theory of constructive possession. Indeed, the evidence supports the inference that the defendant had both the ability and intention to exercise control over the drugs recovered from the Acura.

We conclude, therefore, that the instructions, taken as a whole, would not have confused a reasonable juror regarding whether convictions of the two heroin-related charges had to be predicated on two separate and distinct caches of drugs. Accordingly, there was no substantial risk of a miscarriage of justice.

Judgments affirmed.