

Commonwealth v. Scigliano

Appeals Court of Massachusetts

April 27, 2020, Entered

17-P-926

Reporter

2020 Mass. App. Unpub. LEXIS 314 *

COMMONWEALTH vs. EDWARD A. SCIGLIANO, FOURTH.

Notice: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS 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 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).

Disposition: Judgments affirmed.

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

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant was the drillmaster at the Boston Fire Department's training academy from 2007 until 2012, during which time he was responsible for ordering apparatus and equipment for the fire academy and department. In 2016, a Suffolk County Superior Court jury convicted the defendant of five counts each of larceny over \$250 and procurement fraud based on evidence that he had used his position as drillmaster to manipulate vendors into (1) providing him goods for his personal use in addition to those purchased for the fire department by the city of Boston (city), and (2) reimbursing him for personal expenses using city funds. The defendant appeals from his convictions, claiming that the indictments should be dismissed because Suffolk County is not the proper venue. He also claims that he was denied a fair trial as a result of the prosecutors' repeated efforts to introduce and repeated references to excluded evidence. We affirm.

1. *Venue.* Larceny may be prosecuted "in any county where the defendant had possession of the property alleged to have been stolen." G. L. c. 277, § 58. For the first time on appeal, the defendant claims that Suffolk [*2] County was not the proper venue because his acts occurred at the fire academy in Norfolk County or in Plymouth County, where he resides. This argument misses the mark, even assuming arguendo that the objection was not waived as a result of the defendant's failure to object to the venue before trial. See G. L. c. 277, § 47A. The indictments allege that the defendant stole property in the form of money, belonging to the city, "while a Captain in the Boston Fire Department, at Boston, in the County of Suffolk." The defendant induced vendors to submit false invoices to the city's purchasing department, which then used the false statements to calculate the amounts due. All of the money received by the vendors, and ultimately by the defendant, came from the city's purchasing office, located in Boston City Hall. Where the defendant was employed by the city, the victim of the defendant's crimes, and the defendant engaged in a scheme that largely took place in the city, and the defendant never objected to the venue, the belated argument that Suffolk

County was an improper venue lacks all merit. See *Commonwealth v. Wright*, 88 Mass. App. Ct. 82, 87, 36 N.E.3d 569 (2015).

2. *Uncharged acts.* Before trial, the Commonwealth sought permission to introduce evidence of the defendant's other [*3] bad acts, for which he was not charged, in order to establish a "course of conduct" by the defendant of manipulating public employers. Although the judge excluded most of the Commonwealth's proposed uncharged prior bad act evidence, the judge admitted evidence that the defendant procured and sold to fire academy recruits substituted, less costly, clothing than what was reflected on purchase orders the defendant submitted to the city. The Commonwealth referred to this evidence in its opening statement without objection. Thereafter, as the Commonwealth notes in its brief and the defendant appears to recognize, the judge carefully adhered to his expressed intention of "making sure that the allowance of any prior bad act testimony [did] not become propensity evidence and that it [did not become] unfairly prejudicial," by sustaining almost all of the defendant's objections to questions likely to elicit excluded evidence. Thus, when the prosecutor improperly referred to bid rigging in his closing argument, the judge sustained the defendant's objection and gave an immediate curative instruction.¹

The defendant does not challenge any of the judge's evidentiary rulings or his curative instruction [*4] but argues that he was deprived of a fair trial by the cumulative, prejudicial effect of what he claims was prosecutorial misconduct. In particular, the defendant points to allegedly improper references to uncharged conduct in the Commonwealth's opening statement and closing argument, and what he characterizes as repeated attempts to elicit inadmissible evidence. We are not persuaded.

The Commonwealth properly introduced evidence that the defendant previously "swapped" goods purchased by the city for other goods from which he derived a personal benefit because it "tended to rebut the defense of innocent intent and make more probable the existence of the requisite illegal intent, that of committing a larceny," during the transactions alleged in the indictments. *Commonwealth v. Campbell*, 371 Mass. 40, 43, 353 N.E.2d 740 (1976). See *Commonwealth v.*

¹ The judge stated: "I would note that there was no evidence presented to you that supported any claim of a rigged bid with [vendor] or anything else of that nature."

Abbott Eng'g, Inc., 351 Mass. 568, 572-573, 222 N.E.2d 862 (1967). Having received the judge's permission to introduce evidence regarding the defendant's sale of clothing to recruits, it was not improper for the prosecutor to refer to that evidence in her opening statement. See *Commonwealth v. Simpson*, 434 Mass. 570, 584, 750 N.E.2d 977 (2001) (prosecutor may state in opening what she expects the evidence to prove). The absence of an objection suggests that the defendant did not consider the prosecutor's comments to be unfair when made. See *Commonwealth v. Leary*, 92 Mass. App. Ct. 332, 339, 85 N.E.3d 989 (2017).

As we have [*5] noted, the judge diligently kept inadmissible propensity evidence from the jury by sustaining the defendant's objections. The only impermissible reference to excluded evidence came during the prosecutor's closing argument: the aforementioned reference to bids with a certain vendor being "rigged" which was not the basis of an indictment. Any harm that may have flowed to the defendant from this "isolated comment" was mitigated by the judge's immediate and specific curative instruction, which the jury is presumed to have followed. *Commonwealth v. Sylvia*, 456 Mass. 182, 194-195, 921 N.E.2d 968 (2010). "Since we have found no errors . . . there is no cumulative effect." *Commonwealth v. Gagliardi*, 418 Mass. 562, 572, 638 N.E.2d 20 (1994), cert. denied, 513 U.S. 1091 (1995).²

Judgments affirmed.

By the Court (Desmond, Wendlandt & McDonough, JJ.)³,

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² We decline to address the defendant's claim, made without citation to authority in the final sentence of his brief, that he was deprived of due process by "the length and scope of the prosecution's case." Mass. R. A. P. 16 (a) (9), as appearing in 481 Mass. 1628 (2019).

³ The panelists are listed in order of seniority.