COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-12975

HAMPDEN COUNTY

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COMMONWEALTH OF MASSACHUSETTS

v.

KEVIN O. ORTIZ

==========

BRIEF FOR APPELLANT KEVIN ORTIZ

ON APPEAL FROM THE JUDGMENT OF THE HAMPDEN SUPERIOR COURT

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I. ISSUES PRESENTED

1. Was evidence Defendant stopped briefly at a parked car and retrieved a traffic vest from it before allegedly selling heroin to an undercover police officer a few minutes later in the car he was driving, without any showing Defendant did not keep inventory in the apartment from which an informant told police he and his brother were selling drugs, without any information or officer testimony suggesting such an operation would utilize a 'stash spot,' without any prior surveillance or evidence Defendant followed a particular pattern in his business, and where police did not follow Defendant to the parked car or from the car to the meeting with the undercover, sufficient to make out probable cause to search the parked car?

2. May a police officer who is an eyewitness to an alleged crime, but who has no prior personal familiarity with the suspect, does not participate in the suspect's arrest, and does not participate in a non-suggestive post-incident identification procedure, identify the suspect in court eighteen months later as the person the officer saw commit the alleged crime? And was Defendant prejudiced by such an in-court identification in this case?

3. Did a trial judge's failure to instruct jurors that Defendant could not be convicted of both distributing and possessing with intent to distribute the same heroin, where neither the indictments nor the verdict slips distinguished between the separate acts and amounts of heroin alleged to constitute these distinct crimes, create an unacceptable risk Defendant was convicted of duplicative crimes?

II. STATEMENT OF THE CASE

Based on events that occurred February 15, 2018, on May 23 of that year a Hampden grand jury indicted Defendant Kevin Ortiz for Distribution of a Class A Controlled Substance (Heroin) as a Subsequent Offender, G.L. c.94C §32(a, b); Possession with Intent to Distribute a Class A Substance (Heroin) as a Subsequent Offender, G.L. c.94C §32(a, b); and Possession with Intent to Distribute a Class B Substance (Cocaine), G.L. c.94C §32A(c). RA:6,15-20.[1] A motion to suppress the fruits of warrantless entries to both an car and a residence was heard by Callan, J., on March 26 and June 5, 2019, and denied by written order on June 12, 2019. RA:9-10,21-28; AD:62-69.

Defendant was tried to a jury with two codefendants (his brother Rey Ortiz[2] and Jose Vargas[3]) in Hampden Superior Court before Ferrara, J., September 17-24, 2019. RA:11-13. At the close of the

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[1] Citations to transcripts of the pretrial hearings and trial, all of which occurred in 2019, are identified as Month/Day:Page; citations to Defendant's Record Appendix are identified as RA:Page; citations to Defendant's Addendum are identified as AD:Page.

[2] Rey Ortiz was charged with the same three crimes as Defendant. See Docket 1879CR00240.

[2] Rey Ortiz was charged with the same three crimes as Defendant. See Docket 1879CR00240.

[3] Vargas was charged with one count of Distribution of a Class A Controlled Substance (Heroin). See Docket 1879CR00242.

Commonwealth's case the judge directed a verdict in Defendant's favor on the intent to distribute portion of cocaine charge. RA:11-12. Defendant was acquitted of cocaine possession but convicted of both distribution of and possession with intent to distribute heroin. RA:12,30-32. Judge Ferrara imposed two concurrent sentences of four to six years in state prison, and Defendant timely noticed his appeal. RA:13,33.

The case entered in the Appeals Court December 23, 2019. See Docket 2019-P-1796. This Court allowed Defendant's Application for Direct Appellate Review on June 24, 2020, and the case entered here two days later.

III. STATEMENT OF FACTS

1. Suppression Hearing Testimony

According to testimony at the hearing on Defendant's motion to suppress, in February 2018 Springfield Police were investigating Kevin Ortiz, his brother Rey Ortiz, and a man named Jose Vargas on suspicion they were distributing heroin from Rey's[4] apartment at 26 Niagara Street. Detective Jaime Bruno, who led the investigation,

[4] Because Defendant and Rey Ortiz share a last name, for clarity Defendant is referred to as 'Mr. Ortiz' and Rey Ortiz as 'Rey.'

testified to his belief that the Ortiz bothers, "two individuals that I have known for some time…were responsible for…selling illegal narcotics, specifically heroin" from 26 Niagara. 3/26:11-12.

Bruno said his investigation "culminated from several sources to include a confidential source, the complaints that were coming in to our office from residents within the building which houses 26 Niagara Street, [and] ultimately ending the investigation through the use of an undercover officer." 3/26:11. According to Bruno, a confidential informant (CI) told police "an individual wanting to purchase heroin or crack cocaine, or even cocaine, would be able to do so by contacting Mr. Kevin Ortiz. There was a phone number that was provided [through which the CI claimed to have purchased drugs from Mr. Ortiz]. Along with that, Mr. Kevin Ortiz would be responsible for the actual delivery of the illegal narcotics that someone was looking to purchase. The base of the operation was...Mr. Rey Ortiz's residence" at 26 Niagara Street, where Defendant "would stay…at least during the daytime." 3/26:10-14,19. Bruno said he new the CI's name, date of birth, and social security number, and that information from the CI had led 'to the arrest and seizure of narcotics and firearms as well as convictions in the past.'

3/26:11,13. He offered no details of these purported arrests, seizures, or convictions.

Bruno directed an undercover officer to attempt a purchase of heroin via the phone number his CI provided, and with two calls the officer arranged to purchase "an amount of heroin" on February 15. 3/26:19-21. According to Bruno, Mr. Ortiz directed the undercover officer first to the corner of Main and Montpelier Streets and then, "10 to 15 minutes" later, to the nearby South End Gas Station; two men appeared be watching the officer as he arrived, one of whom Bruno identified as Vargas. 3/26:21-23. After observing the undercover for five or ten minutes, Vargas made a call on his mobile phone and then left the area. 3/26:95.

Meanwhile, a few blocks away, Detective Aristedis Casillas was conducting surveillance of "the Oswego Street and Niagara Street corner" near Rey's apartment. 3/26:121-23. Casillas saw a white Honda Accord arrive and park on the street; its driver exited and walked to an Acura registered to Rey that was parked on the other side. 3/26:26,123. The detective recognized the driver as "Kevin Ortiz. Well known to me from previous encounters...doing investigations, narcotics [distribution]

investigations." The officer was "familiar with both [Ortiz] brothers." 3/26:124. As Mr. Ortiz approached the Acura, Casillas "observed the lights go on, the rear lights." 3/26:125. He watched through binoculars from some distance away as Defendant opened the Acura's driver's side door, reached under the driver's seat, then flipped the seat forward and reached behind it to grab a yellow traffic safety vest. 3/26:125-26. As Defendant returned to the Honda and drove away, the Acura's lights flashed again, "[i]ndicative of someone locking the vehicle." 3/26:127.

Between five and ten minutes after Vargas left the area of the gas station and between ten and twenty minutes after the undercover officer arrived there, Officer Felix Aguirre saw "a white Honda appear[] at the gas station," the driver of which "was later determined as Kevin Ortiz." 3/26:91,96. Aguirre watched as the undercover entered the Honda and it drove away; later, surveillance officers were told a transaction had occurred. 3/26:24-25. Detective Bruno directed a team of officers to arrest Mr. Ortiz, which they did as he sat in a Dunkin' Donuts drive-through line. Neither the undercover officer nor Bruno participated in the arrest. 3/26:24-25,96. Aguirre, who did, said he "looked through [the passenger's side of Mr. Ortiz's] car briefly"

following the arrest and the only evidence he found was Rey's driver's license. 3/26:111,115. Aguirre did not recall who searched Mr. Ortiz at after his arrest, or whether a key fob for the Acura was recovered. 3/26:96-97,115. Bruno, who was not there, said arresting officers found marked buy money in Defendant's car and that the keys to the Acura were not found on his person. 3/26:25-26.

Following Mr. Ortiz's arrest, Bruno directed officers to secure the Acura. 3/26:27. They found the car locked, but Bruno testified that approximately fifteen minutes after police arrived Rey approached them holding a key fob and wanting to know what they were doing to his car. 3/26:27. Officers arrested Rey and used the fob they took from him to open the Acura, where they found what they believed to be drugs. 3/26:30,73-74,98. Later they arrested Vargas as well. 3/26:35.

The undercover officer did not testify at the suppression hearing. No officer testified to following Mr. Ortiz either before he arrived at the Acura or when he drove from where the Acura was parked to the gas station where he met the undercover officer.

2. The Superior Court Order Denying Defendant's Motion to Suppress

The motion judge found, "[b]ased on the credible evidence," that police

> had at their disposal a confidential informant ("CI") with a verified track record assisting police in securing arrests and convictions of drug purveyors. The CI advised the police that Defendants Rey Ortiz and Kevin Ortiz were selling heroin from a residence at 26 Niagara Street first floor.
>
> The CI arranged to make a drug purchase from an associate of the Ortiz brothers using the text feature on his phone. The buy was arranged to take place on February 15, 2018. The Ortiz brothers were known to the police from prior encounters with law enforcement…[The] CI was directed to call Kevin. The CI was directed by Kevin to a gas station on Main Street.
>
> On February 15, 2018, Officer Bruno established surveillance of 26 Niagara Street. He had a clear unobstructed view at all material times. Officer Bruno observed Kevin arrive at 26 Niagara from a northerly direction. Kevin walked directly into 26 Niagara Street, 1st Floor Left side. Kevin remained within the apartment and after about 10-15 minutes Officer Bruno observed Jose Vargas arrive in a gold Honda Odyssey. Mr. Vargas entered the same apartment with a large bag of what appeared to be clothes or laundry. Mr. Emmanuel Sandoval was observed arriving and remained at the apartment.
>
> The CI proceeded to walk toward the gas station as directed by Kevin. As the CI did so Officer Bruno observed Jose Vargas walk out of 26 Niagara and walk onto Montpelier Street towards Main Street.
>
> Another member of the police team, Detective Aguirre, had the CI under surveillance at or near the gas station. Detective Aguirre observed Mr. Vargas approach the CI. A Hispanic male was with Mr. Vargas. Together Vargas and

the unknown male were seen by Detective Aguirre to be closely observing the CI. Vargas and the male were scoping the CI out to be sure that he was a legitimate buyer. Shortly thereafter, Detective Aguirre observed Mr. Vargas step away and place a call. Moments after the call Kevin exited 26 Niagara Street. The unknown Hispanic male walked into a store located at the intersection of Main and Montpelier. Mr. Vargas continued walking onto Montpelier Street where he entered 26 Niagara Street.

After about a 2-3 minute period, Kevin arrived in the area of 26 Oswego Street. Kevin was driving a white Honda Accord. Kevin parked across the street from where Rey's Black Acura was parked. Kevin approached the Black Acura on foot. Detective Casillas observed the Acura's rear lights flash as Kevin approached, consistent with the vehicle being unlocked with a remote locking device. Kevin was not observed with the key fob in his hand approaching the Acura. The court finds that the Acura was unlocked remotely by Rey. Rey was later arrested with the Acura key fob and Kevin was not.

Kevin entered the driver side door of the Black Acura. Kevin was observed from at least 150 feet away leaning inside the vehicle and reaching underneath the driver's side seat. He then reached into the back seat and was observed pulling out a green traffic vest. Again, the court draws the inference that Kevin retrieved drugs from the Acura. There is no logical explanation for Kevin going to the Acura and having Rey remotely unlock it in order for Kevin to get a vest.

Kevin walked away and as he stepped away Detective Casillas observed that the Acura lights were re-activated. The rear brake lights came on and off. This was Rey locking the Acura. Kevin was not observed with a key fob while he was walking away from the Acura. Kevin got into the white Honda and drove directly to the South End Gas Station where the CI awaited. The CI got into the white Honda Accord with Kevin. A price was negotiated for an amount of heroin. The CI handed Kevin the buy money. Kevin handed

> over the heroin that was requested which he had just retrieved from the Acura. After confirming the purchase of drugs, Officer Bruno directed other officers to place Kevin under arrest. The detectives followed Kevin to a Dunkin Donuts lot and the arrest was made.
>
> The surveilling officers reasonably believed that heroin was being kept within Rey's black Acura. Probable cause existed that the Acura contained heroin. Detectives Goggin and Casillas responded to Oswego Street where they checked the doors of the black Acura. It was locked, which also supports the inference that the car had been locked by someone other than Kevin while Kevin walked away. The officers at or near the Acura were then approached by Rey who had exited his apartment and walked in the direction of his black Acura which was parked on the road. Rey told them he was checking on the Acura because he had received a call that someone was breaking into it. A key fob for the Acura was in Rey's hands. Detective Casillas and Detective Goggin arrested Rey and informed Officer Bruno by radio that Rey was in custody. A warrantless search of the black Acura belonging to Rey was conducted by the K-9 team. Officer Gonzalez recovered a clear baggy of crack cocaine along with a sum of money. Heroin was recovered under the seat.

RA:22-24; AD:63-65. Based on these findings the motion judge determined police had probable cause to search the Acura, and did so lawfully without a warrant pursuant to the automobile exception.

RA:25-27; AD:66-68.

3. Motion Practice Regarding In-Court Identifications by Police Officer Witnesses

Prior to their joint trial, the Commonwealth moved *in limine* to allow in-court identifications of Mr. Ortiz, Rey, and Vargas on the grounds that "identification of the defendants will be by the arresting/investigating officers—the [a]rresting/investigating officers here interacted with the defendant prior to his being placed under arrest. The Court in [*Commonwealth v.*] *Crayton* [470 Mass. 228, 241-43 (2014)] held that 'good reason' exists for the investigating and arresting officers to identify the defendant in court." RA:10,29.

At a pretrial motion hearing, Rey's counsel indicated she had no objection to in-court identifications of her client by the officers who arrested him, and the trial judge allowed the Commonwealth's motion to allow those identifications after "confirm[ing] that the witness making the in-court identification is going to be identifying Rey Ortiz as the person that was arrested on that date." 9/16:37-38. When Vargas's counsel indicated he also did not object to in-court identifications of his client by arresting officers but did object to such identifications by the undercover officer and a non-arresting surveillance officer, neither of whom had participated in a non-suggestive out-of-court procedure, the

Commonwealth argued that *Crayton* "goes to civilian witnesses...these are officer witnesses," and that therefore its 'good reason' standard did not apply. 9/16:53-57. The trial judge responded "I don't think there's necessarily that distinction" and reserved on the motion, though he also observed that regardless of whether in-court identifications were permitted, officer witnesses could describe the person they saw so jurors could compare that description with any given by the arresting officers. 9/16:57-58.

When Mr. Ortiz's counsel began to argue against in-court identifications of his client by two non-arresting officers, including Bruno, the court abruptly stated it was ending motions and would return to the issue the following day, though it did not address the officers' identifications again until they were offered at trial. 9/16:74-75.

4. Trial Evidence and Rulings

Nicholas Mancinone, the undercover officer, graduated from the police academy in November 2017 and had been a police officer approximately two and one-half months when he made the buy at issue in this case, though he testified at trial he had made "[n]umerous [undercover drug purchases]. I couldn't put a number on it." 9/18:36. He

told jurors that at Bruno's direction he called a phone number to set up a drug purchase, and that the person he spoke with directed him to a gas station at Main and Saratoga Streets. 9/18:37-42. Mancinone went to the station, and while waiting there saw two Hispanic men approach and stand roughly 50 feet away. 9/18:51-52,85. One man wore a maroon sweatshirt and stared at Mancinone, who "felt as though I was being watched." 9/18:53-55. After roughly ten minutes the man left, and "was talking on [his phone] as he walked away." 91/8:56. Mancinone testified "[a]pproximate[ly] a minute or two later, Mr. Ortiz arrived." 9/18:57.

This testimony drew an objection and motion to strike from Defendant's counsel, who pointed out there had been no identification of Mr. Ortiz admitted at that point. 9/18:57. The judge asked the Commonwealth "[i]s this...the Mr. Ortiz who arrived, the person who sold him the drugs or rode in a car with him?" and after being told Defendant was in fact that person, let the testimony stand. 9/18:58. Mancinone then testified that Mr. Ortiz's first name was Kevin, that he arrived in a white Honda Accord, that upon reaching the station he called Mancinone and told him to get in the car, and that the two then took a brief drive during which the undercover officer purchased what

he believed was two bundles, or twenty bags, of heroin. 9/18:57-62. Testimony from a chemist at the State Police Crime Lab confirmed that one of the bags contained heroin and fentanyl. 9/19:114-37. Mancinone estimated he spent two or three minutes in the Honda's passenger seat and said he was looking at the driver during that time. 9/18:78-79.

When the Commonwealth asked the undercover officer to make an in-court identification of Mr. Ortiz, counsel objected on the grounds that Mancinone had never identified Defendant through a non-suggestive out-of-court procedure. 9/18:79-80. The judge described the Commonwealth as "relying on one of the exceptions to [*Crayton*]...either for an arresting officer or an officer or a witness who had...some prior knowledge," and said "[i]t's a close question in this case." 9/18:80. The Commonwealth confirmed Mr. Ortiz was arrested the same day as the undercover purchase, but had no information as to whether Mancinone had seen him again that day. 9/18:80. Counsel for Vargas pointed out that over a year had passed since the arrest (actually eighteen months) and police "had every opportunity to do an out-of-court identification and have chosen not to do so," and the Commonwealth responded that "with the length and time that the witness was in close proximity to

him...I think there would be good cause to allow him to make [an in-court] identification." 9/18:81-82. The trial judge observed "[i]t's a close question as to whether or not there would be good cause under the circumstances, even though he is a police officer. But I think there's not a substantial risk of mistaken identification in the context of this case." 9/18:82. After the Commonwealth told him both Defendant and Rey "were observed at [Rey's] residence by essentially every investigating officer" besides Mancinone at times other than the day of the undercover purchase, and that "others are going to testify," the judge ruled "I don't think the spirit and intent of those [*Crayton*] cases is to litigate the risk of a mistaken identification. I think under the entire circumstances here, that's not present" and allowed the in-court identification. 9/18:82-83.

Immediately after Mancinone identified Mr. Ortiz as the person who sold him heroin, the prosecutor elicited that he had observed the man in the maroon sweatshirt for between five and ten minutes from roughly fifty feet, that he got 'a good look at that individual' and would 'recognize him if [he] saw him again.' 9/18:85. When the prosecutor asked if Mancinone saw 'that individual in the courtroom today?'

Vargas's counsel objected before the in-court identification was made, and the judge sustained the objection without discussion. 9/18:85.

Aguirre testified that on the day of the undercover operation he was conducting surveillance of the South End Gas Station, and that he arrived approximately ten minutes before Mancinone for that purpose. 9/18:117-24. He described seeing a person in a burgundy sweatshirt or sweater arrive and immediately start looking at Mancinone and casting his eyes up and down the street and at cars parked along it; after between ten and fifteen minutes of this, the man took his phone from his pocket and appeared make a call as he walked away. 9/18:126-28.

When the Commonwealth sought to elicit an in-court identification of Vargas as the man Aguirre had observed notwithstanding his not having made an out-of-court identification through a non-suggestive procedure on the ground of the officer's "familiar[ity] with Mr. Vargas…[t]hrough previous investigations," the court conducted a *voir dire* to assess Aguirre's level of knowledge. 9/18:129. Aguirre testified he had never "interact[ed] with" Vargas but claimed he "knew him" based on "when I patrol the area around there, hanging around. His association with the Ortizes." 9/18:130. Aguirre

said he had seen Vargas more than five, and "probably" more than ten, times in the past, including seeing him with the Ortiz brothers; that he viewed him for between ten and fifteen minutes on the day in question, and that he was "positive" it was Vargas who was watching Mancinone. 9/18:131. Aguirre further acknowledged he knew Vargas's face but not his name, had seen him "hanging out" with the Ortizes at unspecified times during drives though the neighborhood but never in an investigative context, and that he learned Vargas' name and viewed his photograph at the police station while officers were organizing arrestees' property, though he did not participate in Vargas' arrest or booking. 9/18:133-41. Aguirre confirmed he did not interact with or even see any of the defendants, including Vargas, at the station post-arrest, and had never spoken or interacted with Vargas at any time. 9/18:140-42. He also explained Bruno had altered him by radio that a person of Vargas's description was headed toward the gas station before the undercover buy, so he knew who to look for. 9/18:143-44.

The trial judge noted this Court's prior finding that an in-court identification was not necessarily impermissibly suggestive "where eyewitnesses had known [a] defendant from [the] neighborhood prior to"

the crime at issue, *Crayton*, 470 Mass. at 242 (citing *Commonwealth v. Carr*, 464 Mass. 855 (2013)), though he also said "I don't know that this case compares favorably with [*Carr*] in terms of the degree of familiarity." 9/18:148-49. "But," he continued,

> under the circumstances of this case where Officer Aguirre had about 10 minutes to observe Mr. Vargas on that date near the parking lot, he's seen him 10 to 15 times before, had alerted to him because of his interactions with Kevin and Rey Ortiz, returned to the police station, learned his name, and looked at this picture. And it's implicit that when he looked at the picture that it was a picture of the person who he's seen earlier that date. I'm going to find there is good reason for him making an in-court identification [without having previously made an unequivocal identification through a non-suggestive out-of-court procedure].

9/18:149. After Aguirre made this in-court identification, he testified that five or ten minutes after Vargas left a white Honda pulled into the gas station, that Mancinone got in and left with the driver, that a few minutes later the Accord passed by without Mancinone in it, and that some time later he "s[aw] the white Honda Accord that I previously seen at the gas station in line at the Dunkin Donuts." 9/18:153-54. Aguirre testified that he saw the driver of the Honda arrested, and then identified the driver as Mr. Ortiz over defense objection. 9/18:154-55.

Officer Michael Goggin testified that he was conducting surveillance of 26 Niagara Street when he and other officers "were directed to respond to the Dunkin Donuts, which is at Main and Central Street, to place a Kevin Ortiz under arrest," and that he had participated in Defendant's arrest. 9/18:187. At the same time Goggin was watching 26 Niagara, Casillas was watching a black Acura parked nearby on Oswego Street. 9/18:209. Casillas testified he saw a white Honda turn onto Oswego from Niagara and park across the street from the Acura, and that he saw a man leave the Honda and walk to the Acura. 9/18:209-10. Casillas testified that as the man approached, the Acura's rear lights flashed on and off, and the man then opened the driver's door, flipped the set forward and started looking underneath it, and then reached toward the back seat and grabbed a yellow traffic vest. 9/18:210-11. The man walked back to the Honda holding the vest, got in, and drove away, while behind him the Acura's lights flashed again. 9/18:211-13. Casillas said that at some later point, he was "instructed to go to the Dunkin Donuts located at Main and Central, and that when he arrived "[t]he white Honda was in the drive-through" and he and other officers placed its driver under arrest "for narcotics

violations." 9/18:213-15. Casillas then identified Mr. Ortiz over defense objection as the person he arrested at the drive-through, and over a second objection testified that Defendant was also the person he saw stop and retrieve the traffic vest from the Acura on Oswego Street. 9/18:215-16.

Casillas testified that after helping arrest Mr. Ortiz, he returned to Oswego to secure the Acura. 9/18:216. A man holding a remote entry key fob then approached Casillas and Goggin and asked what they were doing, saying he had received a call that someone was breaking into his car. 9/18:217-18. Casillas took the fob from the man, confirmed that it worked on the Acura, and then placed him under arrest. 9/18:218. Casillas identified the person he arrested in-court as Rey. 9/18:219. He also testified that after Rey's arrest officers searched the apartment at 26 Niagara Street and found a digital scale and $142.00, but no drugs. 9/18:224-27.

Detective Bruno testified that on February 15, 2018 he was leading an investigation into narcotics distribution, and in that capacity was directing surveillance of the suspected operation and was personally watching 26 Niagara Street remotely over a closed-circuit

video setup. 9/19:11-18. Bruno said that before Mancinone made the necessary phone calls to set up the planned purchase, he saw both Mr. Ortiz and Vargas, who was wearing a maroon sweatshirt, arrive at 26 Niagara. 9/19:19. After Mancinone made his calls, Bruno saw Vargas leave 26 Niagara, walk to the location from which Mancinone and Aguirre testified they saw Vargas watching the undercover officer, and then eventually return back to 26 Niagara. 9/19:20-23. Sometime later Bruno "received information that...the transaction was completed [and] I informed...the remaining team to secure Mr. Kevin Ortiz at an opportune time." 9/19:25. Once Defendant was under arrest Bruno went to Oswego Street to lead a search of the Acura; Vargas reappeared near the vehicle and only left after being told to multiple times. 9/19:25-27. The search of the Acura turned up 199 bags of suspected heroin under the driver's seat, as well as two bags of suspected cocaine in a glove on the passenger seat. 9/18:106-13; 9/19:28-31. Testimony from a chemist at the State Police Crime Lab confirmed that one of the 199 bags found under the driver's seat contained heroin and fentanyl, and that the bags found on the passenger seat contained just under two grams of cocaine. 9/19:114-37. Bruno testified that after searching the Acura he went to

26 Niagara Street and saw Vargas leaving the apartment. 9/19:42-43. Bruno entered the apartment to search it, and when Vargas returned Bruno placed him under arrest; he made an in-court identification of Vargas without objection. 9/19:48-49.

Edward Kalish, an officer who did not participate in the investigation that led to the arrests of the Vargas and the Ortiz brothers, testified as an expert on methods of drug distribution. 9/19:92-100. He told jurors some dealers work in multi-person teams, and utilize one or more lookouts to scan for police before a sale. 9/19:97. He also told jurors a frequent model of street-level distribution involves a dealer picking up a customer in a car, driving around the block while exchanging drugs for cash, discharging the customer as soon as possible, and quickly leaving the area. 9/19:95-98.

In closing, Defendant's counsel reminded jurors that no witness described what Mr. Ortiz was wearing the day of the alleged crimes. 9/23:34. The prosecutor responded that, notwithstanding any lack of physical description, surveillance footage, or other evidence indicating Defendant was the person who met the undercover officer at the gas station, Mancinone "gets into [Mr. Ortiz's] vehicle. He sat there [on the

witness stand] and he said, 'that's the guy I bought the heroin from." 9/23:47. With regard to the distinct charges against the three defendants, the prosecutor asked jurors to

> find Jose Vargas, Kevin Ortiz, and Rey Ortiz guilty of distribution of heroin for the undercover sale to Officer Mancinone where they were acting in concert, acting as a team, and all taking different roles in this distribution.
>
> I ask that you find Kevin and Rey Ortiz guilty for possession with intent to distribute heroin for the 199 bags that were recovered and tested found in the Acura that both had access to, both had control over, both had custody of. The heroin that Rey Ortiz was (indiscernible) around from prior to its sale, or Kevin Ortiz, prior to the sale to Officer Mancinone, and the heroin that Rey Ortiz had access to while he's walking around with his key fob and what he calls his car, as well as guilty of the possession of the cocaine that was recovered…based on its location, the proximity, and the access that both of those defendants had."

9/23:51.

5. Jury Instructions and Verdicts

Defense counsel did not request specific unanimity or separate and distinct acts instructions in connection with the two heroin-based charges, and when he instructed the jury on distribution and possession with intent the trial judge did not distinguish between the heroin allegedly distributed to Officer Mancinone and the heroin police found in Rey's Acura, or instruct jurors that the possession with intent charge

as to both Ortizes was based on the latter. 9/23:71-86. Nor did he tell jurors they could not convict Mr. Ortiz of both distribution and possession with intent based on the heroin he purportedly sold to the undercover officer.

Instead, the judge instructed the jury, in the context of the possession with intent charge, that "the fourth element [the Commonwealth must prove for conviction] is 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." 9/23:78-79. Several transcript pages later, and again in the context of the possession with intent charge, the judge reiterated that "[i]n this case, the Commonwealth alleges that the defendants actually intended to distribute heroin," 9/23:82, and "[t]he Commonwealth does not have to prove an actual sale, but it must prove that a…defendant specifically had it in his mind that he was going to distribute. That is to transfer possession of some portion of a controlled substance to another person." 9/23:83. No counsel objected to the judge's instructions. 9/23:95. The verdict slips for the separate distribution and possession with intent charges did not identify which heroin was the subject of each. RA:30-32.

The jury acquitted Vargas of distribution of heroin, the only charge he faced. 9/23:108. It acquitted Rey of distribution, but convicted him of both possession with intent to distribute heroin and possession of cocaine. 9/23:107. And it convicted Mr. Ortiz of both distribution of and possession with intent to distribute heroin but acquitted him of possession of cocaine. 9/23:108-09. Defendant then waived his jury trial rights as to the subsequent offender portion of his indictments, and the judge convicted him on both counts. 9/24:28-29. He sentenced Mr. Ortiz to two concurrent terms of four to six years in state prison. 9/24:37.

IV. SUMMARY OF THE ARGUMENT

The motion judge erroneously found that: the CI, not a police officer, made the heroin buy at issue; Detective Bruno saw Defendant arrive at 26 Niagara Street and depart immediately after Vargas' phone call; and Rey must have unlocked the Acura and permitted Defendant's access. Properly construed, the suppression hearing testimony showed only that Mr. Ortiz stopped briefly at the Acura before meeting Mancinone and did not establish either Defendant's location before or after his stop at the car or any pattern to his alleged drug-selling activity. This evidence was insufficient to make out probable cause to search the car. [34-42].

The rationale underlying *Crayton's* 'good reason' standard applies to police officer witnesses with the same force as it does civilians. In-court identifications by non-arresting police officer eyewitnesses that are not shown by the Commonwealth to be based on an officer's personal knowledge risk transmitting inadmissible 'collective knowledge' hearsay to jurors in the guise of powerful, highly persuasive identification testimony that lacks evidentiary value. The prejudice to Defendant from Mancinone's improperly admitted in-court

identification is demonstrated by the fact he was convicted of heroin distribution while Vargas, whom Mancinone was precluded from identifying in-court, was acquitted of the same crime. [42-52].

The trial judge did not instruct the jury that Defendant could not be convicted of both distributing and possessing with intent to distribute the heroin transferred to the undercover officer, and neither the indictments nor the verdict slips attributed discrete amounts of drugs to these separate charges. Together with the fact Defendant was acquitted of possession of the cocaine found in Rey's car and Rey was acquitted of distribution of the heroin delivered to Mancinone, these errors created an unacceptable risk that Mr. Ortiz was subject to duplicative convictions. [52-57].

V. ARGUMENT

1. Evidence Defendant Stopped Briefly at the Acura Prior to Meeting the Undercover Officer, Without Any Evidence of Where He Was Before or Afterwards and in Light of the Confidential Informant's Statement the Ortizes Were Selling Drugs from 26 Niagara Street, Was Insufficient to Establish Probable Cause to Search the Acura

A. The Motion Judge Clearly Erred When He Found the CI Was Involved in the Transaction at Issue, that Mr. Ortiz Was at 26 Niagara Street Before the Transaction, and that Defendant Did Not Have Independent Access to the Acura

When this Court reviews a lower court's ruling on a motion to suppress, it "accept[s] the judge's subsidiary findings of fact absent clear error, but conduct[s] an independent review of his ultimate findings and conclusions of law." *Commonwealth v. Rosa-Roman*, 485 Mass. 617, 620 (2020) (quotation omitted). Here, several of the motion judge's factual findings were clearly erroneous:

- The motion judge erroneously found Detective Bruno's CI performed the purchase from Mr. Ortiz. See RA:22-24; AD:63-65. In fact, all officer testimony was that an undercover officer, not the CI, made the buy. See 3/26:*passim*. The judge's mistaken finding made it appear the transaction was one of several the CI had made with the Ortizes, rather than a first-time police encounter with them.

- The motion judge erroneously found Bruno saw Mr. Ortiz arrive at 26 Niagara Street approximately fifteen minutes before Vargas and leave moments after Vargas used his phone to make

a call after observing the undercover officer. See RA:22-24; AD:63-65. In fact, there was no testimony about Mr. Ortiz's location either before he stopped at the Acura or between his stop at the Acura and the meeting with Mancinone. The only testimony connecting Defendant to 26 Niagara Street was Detective Bruno's statement that as a general matter, "Ortiz, at the time, would stay at 26 Niagara Street, first floor left, with the residents, at least during the daytime, see 3/26:14.

- The motion judge erroneously found Rey must have unlocked the Acura for Mr. Ortiz and locked it again after he departed. See RA:22-24; AD:63-65. Hearing testimony did not support a finding Mr. Ortiz did not have the independent ability to access the Acura: the only officer to observe him at the car said nothing one way or the other about whether Defendant had a fob to unlock the car with, and while no fob was found on Mr. Ortiz's person, the only officer to testify to his arrest said he only briefly searched one side of Defendant's car. See 3/26:26-27,96-98,111-15.

The Court's independent review of the motion judge's ruling should proceed cognizant of these inaccuracies.

B. Mr. Ortiz's Single Brief Stop at the Acura Before Meeting with Mancinone, Without Any Other Evidence Suggesting It Was the Location of a Drug Stash, Did Not Make Out Probable Cause to Search the Car

A CI told police the Ortizes were selling heroin from Rey's residence at 26 Niagara Street, and apparently some residents of the building had complained about drug activity at the apartment as well. No source mentioned the Acura or any other outside stash location.

Police corroborated the CI's information to the extent that Mr. Ortiz did in fact respond to a call police made to the phone number attributed to him, but had no information about where Defendant was immediately before or after he stopped at the Acura and had not observed his movements on any other occasion. In this context, Mr. Ortiz's brief stop at the Acura and retrieval of a traffic vest from its rear seat did not establish probable cause to search the car. The motion judge erred when he denied Defendant's motion to suppress the fruits of the warrantless search of the Acura.

The validity of a warrantless search of an automobile is determined by the same standard used to assess a warrant application: "police [must] establish probable cause to believe that a criminal amount of contraband [is] present in the car." *Commonwealth v. Sheridan*, 470 Mass. 752, 756-57 (2015) (quotation omitted). 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 on the specified premises…[s]trong reason to suspect is not adequate." *Commonwealth v. Escalera*, 462 Mass. 636, 642 (2012).

In this case, police were operating on bare-bones information from a CI about the Ortizes' supposed ongoing drug-selling and the fact they were operating from 26 Niagara Street. Officer witnesses did not testify to information about off-premises storage in a car or anywhere else, whether from the CI or any other source. They did not testify to conducting any controlled purchases through the CI, to having observed comings and goings at 26 Niagara Street, or to having surveilled Mr. Ortiz or his associates as they went about their alleged illicit business. Contrary to the motion judge's erroneous findings, police did not see Mr. Ortiz leave 26 Niagara Street and head to the Acura upon receiving an 'all clear' call from Vargas. Nor, once the motion judge's erroneous findings are set aside, did police show that Rey controlled access to the Acura. Rather, they showed only that Defendant stopped at the car and retrieved a traffic vest shortly before meeting with Mancinone. While this enigmatic act may have given police reason to suspect the car contained drugs, however, by itself it could not create probable cause to search.

When this Court has found probable cause in police observations of a suspect's travel to the location of a drug transaction, it has done so

on the basis of surveillance sustained enough to establish a pattern of behavior, not on an isolated observation like the one in this case. See, e.g., *Escalera*, 462 Mass. at 646 (finding probable cause where, "[a]lthough police only once observed the defendant leave from the apartment building to meet the informant, they twice observed him engage in the same pattern of behavior with others, on different days"); *Commonwealth v. Clagon*, 465 Mass. 1004, 1005-06 (2013) (probable cause established by combination of controlled buys and fact defendant "was seen on two occasions leaving the premises, going directly to a prearranged location, and delivering the substance that the officer believed to be heroin"). Noting that "[b]efore a sale, the drug dealer either is in possession of drugs, or must proceed to a location to obtain the drugs," *Escalera*, 642 Mass. at 645, it has also emphasized continuity of police observation when police seek to base probable cause on a defendant's location immediately prior to a transaction. See *Clagon*, 465 Mass. at 1006 ("the fact [defendant] did not stop anywhere en route [to transaction] indicates that he had the substance with him when he left the premises and did not obtain it elsewhere on the way"); see also *Commonwealth v. Hardy*, 63 Mass. App. Ct. 210, 212-13 (2005)

("In each of the two controlled buys, the defendant drove directly from his residence to the designated location and conducted a drug transaction…[b]ecause the defendant was under constant surveillance, it was unlikely that he obtained the drugs from a[nother] location"). Here by contrast, and notwithstanding the motion judge's erroneous finding, testimony at the suppression hearing did not establish either Mr. Ortiz's location before he stopped at the Acura or whether he stopped anywhere else between there and his meeting with Mancinone.

Moreover, the only information police had about the alleged operation before the day of Defendant's arrest was the CI's cursory statement the Ortizes were selling heroin out of Rey's apartment, backed by Bruno's even more cursory claim of complaints from other building residents. No source said anything about an off-site stash location, nor was there any 'training and experience' testimony to that effect.[5] Contrast *Commonwealth v. Colondres*, 471 Mass. 192, 202 (2015) (repeated observations of suspected dealer stopping at

[5] Casillas' "yes" response to the prosecutor's question "have you seen [drug dealers] store drugs or narcotics in their vehicles," without more, was hardly sufficient to establish the Ortizes' use of a vehicle as an off-premises stash spot as a known methods of doing business in the trade. 3/26:130-31.

defendant's apartment before controlled buys, combined with 'training and experience' testimony that "dealers commonly store drugs at 'stash houses' located somewhere other than their primary residences," established probable cause to search apartment). And as both this Court and the Appeals Court have observed, a person operating an ongoing, residence-based drug operation is unlikely to store their inventory in a vehicle. See *Commonwealth v. O'Day*, 440 Mass. 296, 302-04 (2003); see also *Commonwealth v. Rodriguez*, 75 Mass. App. Ct. 290, 299 (2009) ("A residence is a far more secure storage site than an automobile") and *Commonwealth v. Luthy*, 69 Mass. App. Ct. 102, 107 (2007) ("It was a reasonable inference that the drugs were stored someplace other than the automobile, particularly given that [defendant] was engaged in a drug distribution business"). Here, there was nothing—no information from the CI, no surveillance, no police experienced-based description of common dealer techniques—to suggest the alleged operation utilized an off-premises stash spot.

Despite these weaknesses, the motion judge found probable cause based on his conclusion "[t]here [wa]s no logical explanation for Kevin going to the Acura and having Rey remotely unlock it in order for Kevin

to get a vest." RA23; AD:64. But while an unexpected stop to pick up a seemingly unrelated object shortly before a drug transaction fairly raises suspicion, the record does not support the finding of Rey's control over access to the car the motion judge found conclusive for purposes of probable cause. The judge found "Kevin was not observed with the key fob in his hand approaching the Acura," RA23; AD:64, but the transcript shows that the only officer witness who saw Defendant at the vehicle was not asked about a fob one way or the other, or even about whether Mr. Ortiz had his hands in his pockets on the February morning in question. 3/26:123-27. While there was non-percipient testimony from Bruno that Defendant did not have its keys with him at the time of his arrest, see 3/26:26, police did not follow Mr. Ortiz from the Acura to his meeting with Mancinone and therefore could not have known based on the search incident to arrest whether Defendant had them at the time he retrieved the vest. Moreover, the only officer to testify about a search of Defendant's Accord was wholly noncommittal about whether it contained a key or fob for the Acura: Aguirre did no more than "look[] through [one side of Mr. Ortiz's] car briefly" following

the arrest and when asked said only "I don't recall. I didn't recover any key fob." 3/26:97,111,115.

In a case where police were working from a bare-bones informant tip about an apartment-based operation that made no mention of an off-premises stash spot, conducted no surveillance at all prior to the date of arrest, did not see where Mr. Ortiz was before he stopped at the Acura or follow him from it to his meeting with Mancinone, and only halfheartedly attempted to show he did not have independent access to the Acura, Defendant's enigmatic pickup of a traffic vest shortly before the transaction was enough to raise suspicions but not sufficient to make out probable cause to search. The heroin and cocaine found when police searched Rey's Acura without a warrant should have been suppressed.

2. The Trial Judge Erred When He Admitted Mancinone's In-Court Identification of Mr. Ortiz Without 'Good Reason' Under *Commonwealth v. Crayton* and Based on the Commonwealth's Assurances of Defendant's Guilt Rather than Any Showing the Identification Was Based on the Witness's Personal Observations

There is no reason to believe Officer Mancinone identified Mr. Ortiz in court as the person who sold him heroin based on his own firsthand observations. Mancinone viewed the seller a single time for

two or three minutes eighteen months earlier, and by his own testimony had conducted 'innumerable' undercover purchases in the time between the buy at issue here and trial. The undercover officer had no prior familiarity with Mr. Ortiz, never gave a description of the person who sold him drugs or participated in an out-of-court identification procedure, and was not present for Defendant's arrest or booking. Instead, there is every reason to believe Mancinone identified Mr. Ortiz as the person who sold him heroin based on his awareness of other officers' claimed prior familiarity with Defendant and his secondhand knowledge of the balance of police's investigation the day of the undercover purchase: surveillance of the buy and Mr. Ortiz's arrest after it in a car that matched the make and model of the one that picked him up and which contained the marked money he had exchanged with its driver. Whatever the legitimacy of this evidence as a basis for police's collective knowledge necessary to establish probable cause to arrest, however, it wholly lacked the basis in the witness's personal knowledge or observations necessary to admit an in-court identification under this Court's precedents. The undercover officer's in-court

identification of Mr. Ortiz as the person who sold him heroin should have been excluded.

Defendant objected to Mancinone's in-court identification both pretrial and immediately before it was made. 9/16:73-74; 9/18:80-83. The Court therefore reviews for prejudicial error, and must reverse unless it is assured the "identification here 'did not influence the jury, or had but very slight effect.'" *Commonwealth v. Dew*, 478 Mass. 304, 322-23 (2017) (Gants, C.J., concurring) (quoting *Commonwealth v. Flebotte*, 417 Mass. 348, 353 (1994)). In this case, where jurors convicted Mr. Ortiz, who Mancinone was permitted to identify in-court as participating in the distribution of heroin, but acquitted Vargas, who Mancinone was not, no such assurance is possible.

In *Commonwealth v. Crayton*, 470 Mass. 228, 241 (2014), this Court held that, due to the dubious evidentiary value and inherently suggestive nature of in-court identifications, "[w]here an eyewitness has not participated before trial in an identification procedure, [courts] shall treat the in-court identification as an in-court showup, and shall admit it in evidence only where there is 'good reason' for its admission." Such 'good reason' may exist where an eyewitness has prior familiarity with a

defendant, or "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. *Crayton* explained that in both the prior familiarity and arresting officer contexts, "the in-court showup is understood by the jury as confirmation that the defendant sitting in the courtroom is the person whose conduct is at issue rather than as identification evidence." *Id.*

Mancinone had no prior familiarity with Mr. Ortiz and did not participate in his arrest, and defense counsel argued that his identification should be excluded on these grounds, while the Commonwealth argued good reason for an in-court existed based on the time (according to Mancinone, two to three minutes) the undercover officer spent in close proximity to Defendant. 9/18:79-82. While the trial judge said the existence of good reason was "a close question in this case," he did not decide the issue or even rule on whether the *Crayton* standard applied to police officer witnesses. 9/18:80-83. Instead, the judge allowed Mancinone to identify Mr. Ortiz in-court based on the Commonwealth's assurances that other officers, who had prior familiarity with Defendant, would confirm Mancinone's identification

and his own determination there was no "substantial risk of mistaken identification in the context of this case" because the strength of the evidence against Mr. Ortiz convinced the court of his guilt. 9/18:58,80-83. On these grounds, the judge permitted Mancinone to both identify Mr. Ortiz as the person who sold him heroin and to use Defendant's name in a narrative description of the moments leading up to the transaction. 9/18:57,80-83.

The judge's ruling—that admissibility of an in-court identification can be predicated on the strength of other evidence against a defendant and judicial determination police 'got the right guy' rather than on assessment of an eyewitness's personal knowledge and ability to make an identification outside the inherently suggestive context of a courtroom—was error. While the unfortunate fact "mistaken eyewitness identification is the primary cause of erroneous convictions" has been a driver of this Court's recent identification jurisprudence, *Commonwealth v. Gray*, 463 Mass. 731, 746 (2012), these cases have not tied admissibility solely to the risk of misidentification and wrongful conviction created by suggestive procedures but also to the probative value of in-court identifications themselves in light of jurors' inability to

independently assess the worth of such evidence.[6] As the *Crayton* court observed, when a witness who has not previously participated in a non-suggestive out-of-court procedure is asked to make an in-court identification

> the eyewitness knows that the defendant has been charged and is being tried for that crime. The presence of the defendant in the courtroom is likely to be understood by the eyewitness as confirmation that the prosecutor, as a result of the criminal investigation, believes that the defendant is the person whom the eyewitness saw commit the crime. Under such circumstances, eyewitnesses may identify the defendant out of reliance on the prosecutor and in conformity with what is expected of them rather than because their memory is reliable.

470 Mass. at 237. *Crayton* involved testimony from civilians, but the facts of this case show its rule applies equally to in-court identifications by non-arresting police officer eyewitnesses who have no prior familiarity with the person they are identifying. Nothing in the record suggests Mancinone had seen Mr. Ortiz, in person or even in a photograph, before the moment he entered the white Honda at South

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[6] Indeed, Massachusetts law has long held the federal 'reliability' standard of *Manson v. Braithwaite*, 432 U.S. 98 (1977), "unacceptable because it provides little or no protection from unnecessarily suggestive identification procedures, from mistaken identifications and, ultimately, from wrongful convictions." *Commonwealth v. Johnson*, 420 Mass. 458, 466 (1995); accord *Crayton*, 470 Mass. at 234-35.

End Gas Station the morning of February 15, 2018. Nor does anything in the record suggest police took any steps to determine whether Mancinone could identify the person from whom he purchased heroin as Kevin Ortiz, the person police arrested a short time later, at any time before trial. Instead, the record conclusively demonstrates that Mancinone identified Defendant in court not "because [his] memory is reliable," but rather because Mancinone understood "as a result of the criminal investigation [including his fellow officers' prior knowledge and observations] that the defendant [wa]s the person whom [he] saw commit the crime." *Id*.

That Mancinone is a police officer who played a pivotal but limited role in the investigation at issue, not a civilian witness, cannot change the fact that in evidentiary terms his identification testimony was rank, though disguised, hearsay: the observations of other officers presented as though they were his own. On the record before this Court, the only possible source of Mancinone's ability to identify Mr. Ortiz from the witness stand is secondhand information he either heard from other officers or learned from his department's investigative file as a whole—including an unidentified informant's claim the Ortiz brothers were

distributing heroin and that Mr. Ortiz was the person who would respond to a call made to a particular phone number, as well multiple officers' purported familiarity with Defendant, Rey, and Vargas through vaguely described prior drug investigations, see 3/26:12-19,124; 9/18:129-47—that was inadmissible through Mancinone. Cf. *Commonwealth v. King*, 67 Mass. App. Ct. 823, 830 (2006) ("the 'collective knowledge' doctrine, or 'fellow officer' doctrine, pursuant to which the knowledge of one officer is imputed to others…does not extend to allowing an officer to offer hearsay testimony as to what another, nontestifying officer allegedly observed"); see also *Commonwealth v. Watt*, 484 Mass. 742, 746 (2020) ("[b]ecause it is impossible to ascertain from the record what portion, if any, of such 'collective knowledge' was based on personal observations that would have been independently admissible, [officer's testimony based on that collective knowledge] improperly was admitted").

Introduction of otherwise inadmissible hearsay via the Trojan horse of an officer's in-court identification, as happened here, is plainly inconsistent with fair, evidence-based trials. Still, the unique position occupied by police officers who both witness and investigate or

participate in a crime may, in some circumstances, justify modification (though not elimination) of *Crayton's* good reason standard in officer-witness cases. For example, when conducted close in time to the crime at issue and in a case where the officer-witness provides a description of the suspect, a showup might be used in place of a full lineup or array to obtain the requisite out-of-court identification. See, e.g., *Commonwealth v. Sylvia*, 57 Mass. App. Ct. 66, 69-70 (2003) (undercover officer bought drugs "less than one hour before he was shown the picture of the defendant, and had provided a detailed description of the seller to the officers who were monitoring his activities"); see also *People v. Wharton*, 74 N.Y.2d 921, 923 (N.Y. Court of Appeals 1989) (admitting identification based on "station house viewing" to confirm work of "trained undercover officer who observed defendant during the face-to-face drug transaction knowing defendant would shortly be arrested").

But no such justification existed here. Mancinone never made a prior identification through any means, suggestive or otherwise. There was no evidence he gave arresting officers a description of the person who sold him heroin, viewed a photograph of the person police believed would deliver the heroin ahead of time, or took any other steps to

ensure the person police arrested was the same person who sold him drugs. Mancinone was barely two months out of the police academy when he made this undercover purchase, and therefore lacked the sort of experience that might, if established by the Commonwealth at a preliminary hearing, justify reliance on an officer's capacity for observation or recollection. And nothing in the record suggests Mancinone had specialized training that could substitute for such experience. There was no reason not to hold Mancinone to the *Crayton* standard in this case.

Prejudice to Mr. Ortiz from Mancinone's improperly admitted in-court identification and use of Defendant's name in his narrative of the transaction is demonstrated by the fact Mr. Ortiz was convicted of distributing heroin while Vargas, who Mancinone was precluded from identifying in-court as the man who acted as lookout during the transaction, see 9/18:85, was acquitted of the same crime. This acquittal came in the face of in-court identifications of Vargas by other officers who did not participate directly in the transaction, see 9/18:149-51; 9/19:49; extensive testimony to Vargas's monitoring of Mancinone before the purchase and attempts to interfere with police access to both

Rey's Acura and the apartment at 26 Niagara Street, see 9/18:52-56,126-28; 9/19:20-25,42-48; and expert testimony explaining to the jury the role he played in the distribution process, see 9/19:96. These disparate verdicts, differentiated largely by the fact one defendant was subject to an in-court identification from the undercover police officer at the center of the case while another was not, well illustrate that "jurors find eyewitness evidence unusually powerful and their ability to assess credibility is hindered by a witness' false confidence in the accuracy of his or her identification") (quoting *Perry v. New Hampshire*, 565 U.S. 228, 260 (2012) (Sotomayor, dissenting). Mr. Ortiz's distribution conviction must be reversed.

3. The Trial Judge's Failure to Differentiate Between the Separate Amounts of Heroin Mr. Ortiz Was Charged with Distributing and Possessing with Intent to Distribute and to Instruct Jurors Defendant Could Not Be Convicted of Both Charges Based Solely on the Heroin Transferred to the Undercover Officer Created an Unacceptable Risk Defendant Was Subject to Duplicative Convictions

The evidence at trial could have supported a finding there were two distinct amounts of heroin Mr. Ortiz possessed with the intent to distribute: the twenty bags transferred to Mancinone, and the 199 bags police found when they searched the Acura. The judge's instructions did

not tell jurors Defendant could not be convicted of both distribution and possession with intent based solely on the heroin transferred to Mancinone, and in fact referred to actual distribution in the context of the possession with intent charge, while neither the indictments nor the verdict slips specified which amount of heroin was the subject of which charge. These failings, together with the fact the jury convicted Rey of both counts related to the drugs found in his car while acquitting him of distribution and acquitted Mr. Ortiz of possessing the cocaine found in Rey's car, strongly suggest Defendant was subject to duplicative convictions for a single act of distribution. His conviction of possession with intent to distribute heroin must be reversed.

Because defense counsel did not ask the judge to tell jurors Mr. Ortiz could not be convicted of both distribution and possession with intent based on the heroin transferred to Mancinone or otherwise connect the distinct amounts of heroin at issue to the separate distribution and possession with intent charges, and did not object to his instructions as given, the Court reviews for a substantial risk of a miscarriage of justice. *Commonwealth v. Palermo*, 482 Mass. 620, 629 (2019). Such a risk exists if one or more jurors may have convicted

Defendant of possession with intent based on the transfer to Mancinone. *Id*. at 631; see also *Commonwealth v. Alphas*, 430 Mass. 8, 13 (1999) (error creates a substantial risk of a miscarriage of justice unless court is persuaded it did not materially influence verdict).

As this Court has previously noted, though G.L. c.94C §32 treats distribution of and possession with intent to distribute a controlled substance as distinct crimes, in actual distribution cases "possession with intent 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" in violation of double jeopardy principles. *Commonwealth v. Diaz*, 383 Mass. 73, 83 (1981). Said another way, in such circumstances possession with intent is a lesser included offense of distribution, and "[t]he appropriate inquiry is whether there is any significant possibility that the jury may have based convictions of greater and lesser included offenses on the same act." *Commonwealth v. Kelly*, 470 Mass. 682, 701 (2015). "A different case, however, is presented where…separate items are involved in the respective charges [and evidence shows] the defendant had completed one heroin sale, and was holding a separate cache of the drug for future

distributions." *Diaz*, 383 Mass. at 84. The risk of duplicative convictions in cases where a defendant sells some amount of drugs and retains another amount for potential futures sales has been thought low because "[i]n charging two violations of the same statute, the prosecutor will always attempt to distinguish the two charges by dividing the evidence supporting each charge into two distinct segments." *Commonwealth v. Rabb*, 431 Mass. 123, 128 (2000).

Here, the prosecutor in closing did attempt to assign the two amounts of heroin to distinct acts and charges (though he also referenced heroin accessible to "Kevin Ortiz, prior to the sale to Officer Mancinone" in his possession with intent argument), but his was the only such attempt made in the case. See 9/23:51. Neither the indictments nor the verdict slips identified, by volume or location, the discrete amounts of heroin subject to the distribution and possession with intent charges. See RA:15-20,30-32. And the judge's instructions to the jury not only failed to connect distinct amounts of heroin to distinct counts or explain that Mr. Ortiz could not be convicted of both distribution and possession with intent for the transfer to Mancinone, but also told jurors *in the context of the possession with intent* charge

that "[i]n this case, it's alleged that there was a distribution" and that the mental state required for conviction could be proved if a defendant intended to "transfer possession of some portion of a controlled substance to another person." 9/23:78-79,83.

This Court has previously found a substantial risk of a miscarriage of justice where, "although the prosecutor argued in closing that the defendant's [acts] occurred in two separate episodes that could support two distinct convictions, and the facts might support that conclusion, [the court was] unable to determine on which facts each conviction rested." *Commonwealth v. Beal*, 474 Mass. 341, 347 (2016); *Kelly*, 470 Mass. at 701-02 (same). Here, various aspects of the record highlight a significant risk Mr. Ortiz was convicted twice under c.94C §32 for transferring heroin to Mancinone. To convict Defendant of possession with intent to distribute the heroin and simple possession of the cocaine found in Rey's car, and to convict Vargas or Rey of distribution of heroin, jurors would have had to navigate confusing, interlocking joint venture and constructive possession instructions. See 9/23:74-85. The fact jurors acquitted Rey of distribution, even though the evidence showed he controlled Defendant's access to the heroin

transferred to the undercover officer, and acquitted Mr. Ortiz of possession of cocaine, though the case for his constructive possession of that drug was just as strong as that for his constructive possession of the heroin also found in the Acura, makes it impossible to determine whether Defendant's possession with intent conviction rested on the heroin distributed to Mancinone or that found later in the Acura. *Beal*, 474 Mass. at 347. "In the circumstances of this case, the lack of clarity amounts to a substantial risk of a miscarriage of justice" that requires reversal. *Palermo*, 482 Mass. at 631.

VI. CONCLUSION

For the foregoing reasons, the Court should reverse the order denying Defendant's motion to suppress, reverse Defendant's convictions, and remand his case to the Superior Court with an order directing suppression of the heroin and cocaine found in the Acura and a new trial on the distribution of heroin charge.

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By His Attorney,

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September 29, 2020

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-12975

HAMPDEN COUNTY

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COMMONWEALTH OF MASSACHUSETTS

v.

KEVIN O. ORTIZ

==========

APPELLANT'S ADDENDUM

G.L. c.94C §32(a, b)

(a) Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute or dispense a controlled substance in Class A of section thirty-one shall be punished by imprisonment in the state prison for not more than ten years or in a jail or house of correction for not more than two and one-half years or by a fine of not less than one thousand nor more than ten thousand dollars, or by both such fine and imprisonment.

(b) Any person convicted of violating this section after one or more prior convictions of manufacturing, distributing, dispensing or possessing with the intent to manufacture, distribute, or dispense a controlled substance as defined by section thirty-one of this chapter under this or any prior law of this jurisdiction or of any offense of any other jurisdiction, federal, state, or territorial, which is the same as or necessarily includes the elements of said offense shall be punished by a term of imprisonment in the state prison for not less than 3 1/2 nor more than fifteen years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of 3 1/2 years and a fine of not less than two thousand and five hundred nor more than twenty-five thousand dollars may be imposed but not in lieu of the mandatory minimum 3 1/2 year term of imprisonment, as established herein.

Article 14 of the Massachusetts Declaration of Rights

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

Fourth Amendment to the United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN , ss.

SUPERIOR COURT
CRIMINAL ACTION
No. 18CR240
18CR242
18CR243

COMMONWEALTH

vs.

REY ORTIZ
JOSE VARGAS
KEVIN ORTIZ

HAMPDEN COUNTY
SUPERIOR COURT
FILED
JUN 12 2019
CLERK OF COURTS

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS TO SUPPRESS

The Defendant Rey Ortiz stands indicted for two counts of alleged violations of G.L. c. 94C section 32(a) (heroin) and a single count of an alleged violation of G.L. c. 94C section 32(a) (cocaine). Jose Vargas has been indicted for a single count of an alleged violation of G.L. c. 94C section 32(a) (heroin) and Kevin Ortiz has been indicted for a single count of an alleged violation of G.L. c. 94C section 32(a) (heroin, subsequent offense) and a single count of an alleged violation of G.L. c. 94C section 32(a) (cocaine, subsequent offense).

The Defendants move to suppress any and all evidence seized from their persons or as the result of a search of a black Acura and the premises located at 26 Niagara Street, Springfield on February 15, 2018.

An evidentiary hearing was held on March 26, 2019 and June 5, 2019. Based upon the credible evidence the court makes the following Findings of Fact and Rulings of Law.

On or about February 14, 2018, Springfield police officers were investigating the illegal narcotics trade in and near Springfield's south end neighborhood.

12 D. via mail & cc to DA's office

The officers had at their disposal a confidential informant ("CI") with a verified track record assisting police in securing arrests and convictions of drug purveyors. The CI advised the police that Defendants Rey Ortiz and Kevin Ortiz were selling heroin from a residence at 26 Niagara Street first floor.

The CI arranged to make a drug purchase from an associate of the Ortiz brothers using the text feature on his phone. The buy was arranged to take place on February 15, 2018. The Ortiz brothers were known to the police from prior encounters with law enforcement. The Ortiz associate who was contacted by text to set up the buy was known by his street name "Nicer". A follow up conversation also took place on the morning of February 15. At that time, Nicer claimed he had no drugs so the CI was directed to call Kevin. The CI was directed by Kevin to a gas station on Main Street.

On February 15, 2018, Officer Bruno established surveillance of 26 Niagara Street. He had a clear unobstructed view at all material times. Officer Bruno observed Kevin arrive at 26 Niagara from a northerly direction. Kevin walked directly into 26 Niagara Street, 1st Floor Left side. Kevin remained within the apartment and after about 10-15 minutes Officer Bruno observed Jose Vargas arrive in a gold Honda Odyssey. Mr. Vargas entered the same apartment with a large bag of what appeared to be clothes or laundry. Mr. Emmanuel Sandoval was observed arriving and remained in the apartment.

The CI proceeded to walk toward the gas station as directed by Kevin. As the CI did so Officer Bruno observed Jose Vargas walk out of 26 Niagara and walk onto Montpelier Street towards Main Street.

Another member of the police team, Detective Aguirre, had the CI under surveillance at or near the gas station. Detective Aguirre observed Mr. Vargas approach the CI. A Hispanic

male was with Mr. Vargas. Together Vargas and the unknown male were seen by Detective Aguirre to be closely observing the CI. Vargas and the male were scoping the CI out to be sure that he was a legitimate buyer. Shortly thereafter, Detective Aguirre observed Mr. Vargas step away and place a call. Moments after the call Kevin exited 26 Niagara Street. Detective Aguirre observed Mr. Vargas walk back to Montpelier Street. The unknown Hispanic male walked into a store located at the intersection of Main and Montpelier. Mr. Vargas continued walking onto Montpelier Street where he entered 26 Niagara Street.

After about a 2-3-minute period, Kevin arrived in the area of 26 Oswego Street. Kevin was driving a white Honda Accord. Kevin parked across the street from where Rey's Black Acura was parked. Kevin approached the Black Acura on foot. Detective Casillas observed the Acura's rear lights flash as Kevin approached, consistent with the vehicle being unlocked with a remote locking device. Kevin was not observed with the key fob in his hand approaching the Acura. The court finds that the Acura was unlocked remotely by Rey. Rey was later arrested with the Acura key fob and Kevin was not.

Kevin entered the driver side door of the Black Acura. Kevin was observed from at least 150 feet away leaning inside the vehicle and reaching underneath the driver's side seat. He then reached into the back seat and was observed pulling out a green traffic vest. Again, the court draws the inference that Kevin retrieved drugs from the Acura. There is no logical explanation for Kevin going to the Acura and having Rey remotely unlock it in order for Kevin to get a vest.

Kevin walked away and as he stepped away Detective Casillas observed that the Acura lights were re-activated. The rear brake lights came on and off. This was Rey locking the Acura. Kevin was not observed with a key fob while he was walking away from the Acura. Kevin got into the white Honda and drove directly to the South End Gas Station where the CI

awaited. The CI got into the white Honda Accord with Kevin. A price was negotiated for an amount of heroin. The CI handed Kevin the buy money. Kevin handed over the heroin that was requested which he had just retrieved from the Acura. After confirming the purchase of drugs, Officer Bruno directed other officers to place Kevin under arrest. The detectives followed Kevin to a Dunkin Donuts lot and the arrest was made.

The surveilling officers reasonably believed that heroin was being kept within Rey's black Acura. Probable cause existed that the Acura contained heroin. Detectives Goggin and Casillas responded to Oswego Street where they checked on the doors of the black Acura. It was locked, which also supports the inference that the car had been locked by someone other than Kevin while Kevin walked away. The officers at or near the Acura were then approached by Rey who had exited his apartment and walked in the direction of his black Acura which was parked on the road. Rey told them that he was checking on the Acura because he had received a call that someone was breaking into it. A key fob for the Acura was in Rey's hands. Detective Casillas and Detective Goggin arrested Rey and informed Officer Bruno by radio that Rey was in custody. A warrantless search of the black Acura belonging to Rey was conducted by the K-9 team. Officer Gonzalez recovered a clear baggy of crack cocaine along with a sum of money. Heroin was recovered under the seat.

A group of about eight officers were congregated outside the apartment. The officers then observed Nicer heading toward the rear door and then entering the apartment. Officers then apprehended Nicer and placed him under arrest. Officer Bruno approached 26 Niagara Street and knocked on the front door. He yelled "police" and finding the door ajar entered the apartment. While conducting a security search of the apartment he located Mr. Sandoval in a closet. Sandoval was placed under arrest and brought outside where he was secured and placed

in the rear of Detective Casillas' police cruiser. The intentions at this time were to clear the apartment of individuals that might destroy evidence and secure the apartment pending a search warrant application.

Officer Bruno returned to 26 Niagara Street and began checking closets and bedrooms to ensure the apartment was free and clear of any occupants. He made his way to the second-floor level of the apartment and as he checked into the master bedroom closet, Mr. Vargas walked behind him and began yelling "show me the search warrant". Mr. Vargas refused to leave. After a few warnings to leave, Officer Bruno then informed Mr. Vargas he was under arrest.

The officers learned that Janet Vargas was the lawful tenant of the apartment. Rey insisted that the officers call her. Officer Bruno called Ms. Vargas and explained that he would be requesting a search warrant authorizing the search of her apartment. Ms. Vargas arrived at the area and met with officers and gave her consent to search the apartment. The court does not credit Ms. Vargas testimony in any way. Ms. Vargas was explained the search warrant waiver which she signed voluntarily. The apartment was searched. Several items were seized from the apartment.

1. **The items seized from the Acura shall not be suppressed.**

The Acura was searched in the street outside the apartment without a warrant. Warrantless searches are presumptively unreasonable under both the Federal and Massachusetts Constitutions unless they are shown to fall within "a few specifically established and well-delineated exceptions." *Katz v. United States,* 389 U.S. 347, 357 (1967); see *Commonwealth v. Viriyahiranpaiboon*, 412 Mass. 224, 226 (1992). Courts acknowledge these exceptions on the premise that the Fourth Amendment ultimate touchstone is "reasonableness." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

The Commonwealth invokes the automobile exception to justify the warrantless search of the Acura. Police may conduct a warrantless search of a motor vehicle seized in a public place without having to show exigent circumstances beyond a vehicle's inherent mobility, so long as probable cause to search exists. *Commonwealth* v. *Motta*, 424 Mass. 117, 123-24 (1997). As explained above, police had probable cause to believe that the defendants had been storing illegal drugs in the Acura. The motor vehicle exception is premised on the inherent mobility of an automobile coupled with a vehicle owner's reduced expectation of privacy in a vehicle. *Id.*

The automobile exception applies to the facts of this case. "No exigency need ordinarily be shown beyond the inherent mobility of an automobile. . . ." *Commonwealth* v. *Bell*, 78 Mass. App. Ct. 135, 141 (2010).

The defendants essentially argue that the Acura was not useable since the police had seized the only known key fob from Rey. The automobile exception has been held to apply to vehicles which may appear to be inoperable. See *Commonwealth v. Holness*, 93 Mass. App. Ct. 368, 374-75 (2018) (warrantless search of defendant's car found in street, even though car appeared to be inoperable due to collision, was justified under automobile exception). "The automobile exception may apply even if the vehicle is not currently mobile." *Commonwealth* v. *Cruz*, 459 Mass. 459, 467 n. 11 (2011), citing *Commonwealth* v. *Nicholson*, 58 Mass. App. Ct. 601, 606-607 & n. 7 (2003) (car provisionally immobilized due to impoundment may be searched without warrant if probable cause exists to believe car contains contraband). The seizure of the key fob "provisionally immobilized" the Acura. In accordance with *Cruz* and *Nicholson*, since probable cause existed the search of the Acura under the automobile exception was proper.

Contrary to the defendants' arguments, the exigency required is not materially diminished by the presence of numerous police officers and the possibility that they could have guarded the Acura while a search warrant was sought. "Where police have probable cause to believe that a vehicle contains contraband, the feasibility of posting a police guard so that a warrant may be obtained before a search is conducted is not a heavily weighted factor mitigating against the finding of exigent circumstances." *Commonwealth* v. *Bakoian*, 412 Mass. 295, 304 (1992).

Consequently, the search of the Acura was lawful under the automobile exception to the search warrant requirement.

2. Valid consent was given to search the apartment and the items seized shall not be suppressed.

Whether consent is voluntary is determined by a "totality of the circumstances" test for which the government bears the burden of proof. *Commonwealth v. Aguiar*, 370 Mass. 490, 496 (1976); *United States v. Mendenhall*, 446 U.S. 544, 557 (1980). Proof is by a preponderance of the evidence. See *United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974); *Nix v. Williams*, 467 U.S. 431, 444 n.5 (1984). Here, there is no doubt that valid consent was given to search the apartment that was free from duress and was completely voluntary.

3. The stop and arrest of Kevin Ortiz were valid and supported by probable cause.

There was ample probable cause to stop and arrest Kevin. He had participated in a phone call and sold heroin to the CI. The search of Kevin was lawful as incident to lawful arrest. Kevin also moves to suppress any statements made by him but there was no evidence that any such statements were made.

ORDER

Based on the foregoing the defendants' Motions to Suppress are **DENIED**.

MICHAEL K. CALLAN
Justice of the Superior Court

DATE: 6/12/19

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the applicable provisions of Mass. R. A. P. 16, 20, and 21. This brief complies with the applicable length limitation set forth in Mass. R. A. P. 20, because it is in Century Schoolbook, a proportional font, 14 point, and contains fewer than 11,000 non-excluded words.

/s/ Merritt Schnipper
Merritt Schnipper

CERTIFICATE OF SERVICE

I certify that on September 29, 2020 I filed Appellant Kevin Ortiz's brief and record appendix in *Commonwealth v. Ortiz*, SJC-12975, with the Massachusetts Supreme Judicial Court through the Court's electronic filing service, which will automatically serve the same on ADA Katherine McMahon (50 State Street, Springfield MA 01102, kate.mcmahon@state.ma.us), counsel for the Commonwealth of Massachusetts, by electronic means.

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