

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 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-992

COMMONWEALTH

vs.

DAVID M. AGRO.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury-waived trial in the Central Division of the Boston Municipal Court Department, the trial judge convicted the defendant, David M. Agro, under G. L. c. 209A, § 7, of one count of violating an abuse prevention order. On appeal, Agro argues that the trial judge abused her discretion by admitting the Commonwealth's key evidence -- specifically, a screenshot that the victim took of her Facebook "Notifications" page. The screenshot shows that a Facebook user named Monte Agro "liked" a post to the victim written by a third party. The third party's post stated "Happy Birthday [victim]." The Commonwealth's theory was that the defendant violated the restraining order's no contact prohibition because by "liking" the third party's post, the defendant's "like" was communicated to the victim in accordance with Facebook's processes. Agro contends that the

image of the Facebook "like" was not properly authenticated and thus inadmissible. We disagree and affirm.

Background. Agro and the victim met in 2002 and were married in 2009; they separated in 2014. In May of 2015, a Probate and Family Court judge issued a c. 209A abuse prevention order against Agro after Agro had published a Facebook post, on the victim's birthday, containing lurid and thinly veiled threats of violence against the victim. Approximately one year later and six days before the expiration of the 209A order, the victim looked at her Facebook notifications page on her cell phone and saw that Facebook user Monte Agro had "liked" a birthday message to the victim posted one day earlier, on the victim's birthday. The "like" was communicated on the victim's "Notifications" page as follows: "Monte Agro likes a post on your timeline."¹ The victim took a screenshot of the page and

¹ The victim testified that the Facebook timeline is a Facebook interface that shows a record of "posts" -- for example, "people . . . post messages to you related to an event that's maybe marked by Facebook," such as a birthday. With respect to "liking," the victim stated:

"[W]hen someone sends a message to me and it . . . say[s] . . . happy birthday, if people want to reinforce or send the same message . . . instead of kind of taking the time to, like, type it out again, like is a way to say . . . I'm sending you the same message. It's kind of a lazy man's way of reinforcing something."

provided the image to the Boston Police Department.² The defendant was charged and thereafter convicted of violating the abuse prevention order. The defendant appeals.

Discussion. The sole issue that Agro raises on appeal is whether the Commonwealth sufficiently demonstrated that Agro was actually responsible for the "like."³ The relevance and admissibility of the Facebook screenshot of the "like" depended upon the defendant having authored it. See Commonwealth v. Meola, 95 Mass. App. Ct. 303, 308 (2019). Both the Supreme Judicial Court and this court have recently addressed the issue of authentication of electronic communications. See Commonwealth v. Purdy, 459 Mass. 442, 450-451 (2011); Meola, 95 Mass. App. Ct. at 310-315. "The requirement of authentication . . . as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Purdy, 459 Mass. at 447, quoting Mass. G. Evid. § 901(a) (2011). The trial judge,

² Although the parties have not included a copy of the abuse prevention order in the appendix, the victim read relevant portions of the order into the record. Among other things, the order prohibited Agro from "contact[ing]" the victim "in person, by telephone, in writing, electronically, or otherwise either directly or through someone else."

³ We note that Agro does not contend that in the circumstances the "liking" of a Facebook post made by a third party cannot constitute a violation of the no contact provisions.

acting as gatekeeper, determines whether the fact finder could find by a preponderance of the evidence that the proffered evidence is what its proponent says it is. See Purdy, 459 Mass. at 447; Meola, 95 Mass. App. Ct. at 307 (explaining further that authentication "represents a special aspect of relevancy" [citation omitted]). At trial, the defendant preserved his objection to the screenshot's admissibility. We review the judge's authentication determination for abuse of discretion. See Meola, 95 Mass. App. Ct. at 312; Commonwealth v. Connolly, 91 Mass. App. Ct. 580, 585 (2017).

In this case the Commonwealth did not present direct evidence that the defendant authored the "like." Nor did anyone from Facebook testify as to what its business records showed regarding the "Monte Agro" account. "Evidence that the defendant's name is written as the author of an . . . electronic communication . . . is not sufficient alone to authenticate the electronic communication as having been authored or sent by the defendant." Purdy, 459 Mass. at 450. Purdy and Meola make clear, however, that direct evidence is not required, and that an electronic communication can be authenticated through circumstantial evidence -- so-called "confirming circumstances" -- that tend to show authorship by a particular person. See Purdy, 459 Mass. at 450; Meola, 95 Mass. App. Ct. at 311. Circumstantial authenticating evidence "may include the

'appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances'" (emphasis added). Meola, 95 Mass. App. Ct. at 311 n.20, quoting Mass. G. Evid. § 901(b)(4) (2019).

Here, the victim's testimony based upon her lengthy relationship with Agro furnished sufficient circumstantial evidence for the judge to make the preliminary finding that the Commonwealth had authenticated the Facebook "like," and thus to admit the screenshot displaying it. The victim had known Agro for sixteen years, and had lived with and been married to him. She testified that over the years she had communicated with Agro on Facebook through the user account "Mont[e] Agro." To the victim's knowledge, Agro did not give the victim or anyone else the password to his Facebook account, or enable others to access the account.

This history of communication was sufficient to support a determination of authenticity. Just as past patterns of telephone conversations may suffice to authenticate the identity of a caller, see Purdy, 459 Mass. at 449, so too may the details and history of communication with a certain Facebook user suffice to authenticate a Facebook post as emanating from that user. Moreover, here there were additional, and more specific, "confirming circumstances"; the event that led to the 209A order was itself a Facebook post directed at the victim, which post

came from "Monte Agro," on the victim's birthday, one year before. These circumstances supported a reasonable inference that Agro was also the author of the 2016 birthday "like" emanating from the same account. The victim had received no contact whatsoever from Agro since the prior, threatening birthday post. See Commonwealth v. Loach, 46 Mass. App. Ct. 313, 316 (1999) (reasoning that timing of phone call was confirming circumstance that supported authentication of phone call). In light of the context supplied by the victim's testimony, as well as our deferential review of authentication determinations, the judge did not err in admitting or relying upon the Facebook "like."⁴

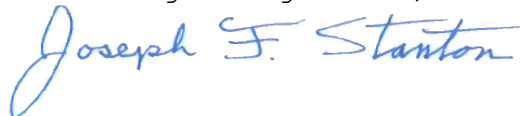
The prior course of dealing on Facebook between Agro and the victim falls squarely within the broad range of confirming circumstances that the judge may consider. Agro attempts to distinguish this case from Purdy, 459 Mass. 442, on the grounds that the types of circumstantial evidence present there are absent here. In Purdy, which concerned the authentication of e-mails, the circumstantial evidence supporting authentication

⁴ We note, as have prior courts, that the admission of the screenshot displaying the "like" did not preclude Agro from challenging the significance of the "like" or offering alternative interpretations of its meaning. See Meola, 95 Mass. App. Ct. at 313, citing United States v. Vayner, 769 F.3d 125, 131 (2d Cir. 2014). Such arguments speak to the weight of the evidence, not to its admissibility. Id.

included the presence of the e-mails on the hard drive of the defendant's computer (to which the defendant supplied the necessary passwords), as well as the content of the e-mails themselves. Id. at 450-451. But while the confirming circumstances in this case are different from those in Purdy, Purdy's holding does not limit the circumstantial evidence courts may consider to the type present in that case. See id.; Meola, 95 Mass. App. Ct. at 313. Indeed, in applying Purdy, the Meola court relied upon different factors as sufficient to authenticate a Facebook message with an attached video recording. 95 Mass. App. Ct. at 314. Here, the judge's decision is consistent with Purdy and Meola; she relied upon considerably more than "pure speculation," as Agro asserts, in deciding to admit the screenshot.

Judgment affirmed.

By the Court (Rubin,
Massing & Englander, JJ.⁵),



Clerk

Entered: November 21, 2019.

⁵ The panelists are listed in order of seniority.