

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

17-P-1385

COMMONWEALTH

vs.

MANUEL REYES.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant was indicted for strangulation or suffocation and two counts of assault and battery based on allegations that he punched, bit, and attempted to smother his girlfriend, whom we shall call Amanda, on June 26, 2015. The Commonwealth presented evidence at the defendant's Superior Court jury trial that Amanda arrived in the emergency department at Lowell General Hospital on June 27, 2015, and was examined by a registered nurse. Over the defendant's objection, the nurse testified that several of the injuries she observed on Amanda were "consistent" with bite marks.

Amanda testified that the defendant punched her, bit her, and obstructed her breathing on June 26 because he was angry with her. She also testified about two prior occasions between January and June of 2015, when the defendant became angry and

then violent with her. The defendant testified in his own defense and denied the allegations. He offered an alternative version of events, claiming that he had to use his arms to restrain Amanda because she was attempting to "commit suicide." The defendant attributed Amanda's injuries to his rescue efforts and to "coining," a traditional Asian practice whereby a coin is warmed and pressed against a person's skin in the belief that it relieves pain.

The jury convicted the defendant of two counts of assault and battery and acquitted him of suffocation. On appeal, the defendant claims error in the admission of the bite mark testimony and prior bad act evidence, as well as Amanda's hospital records. He also argues that the prosecutor's closing argument was improper. We affirm.

Discussion. 1. Bite mark testimony. We review the judge's decision to admit the nurse's opinion for an abuse of discretion. See Commonwealth v. Fritz, 472 Mass. 341, 348 (2015) (determination of admissibility lies within trial judge's sound discretion). The defendant argues that the judge abused his discretion because expert testimony is required to identify injuries as bite marks, and the nurse was neither offered by the Commonwealth as an expert nor so qualified by the judge. The defendant claims that he was prejudiced by this error because the jury may have assigned the nurse's bite mark testimony undue

weight in the belief that she was an expert. The defendant preserved his objection to the nurse's testimony by filing a motion in limine to exclude it and by objecting when it was offered at trial. See Commonwealth v. Whelton, 428 Mass. 24, 25 (1998).<sup>1</sup> We review for prejudicial error. See Commonwealth v. Foxworth, 473 Mass. 149, 160 (2015).

We see no error because we agree with the prosecutor's argument at trial, that "[e]veryone can look at a bite mark and say that it looks like a bite mark."<sup>2</sup> The nurse looked at Amanda's injuries and testified that they resembled bite marks because there was broken skin interspersed with unbroken skin in regular, semicircular patterns. This testimony was helpful for the jury in determining whether to believe that the defendant

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<sup>1</sup> The defendant was tried before the Supreme Judicial Court decided in Commonwealth v. Grady, 474 Mass. 715, 719 (2016), that "[g]oing forward," a defendant no longer must object to the admission of evidence at trial in order to preserve a claim for appellate review "where he or she has already sought to preclude the very same evidence at the motion in limine stage, and the motion was heard and denied."

<sup>2</sup> The judge would not have abused his discretion in qualifying the nurse as an expert if expert testimony was required because she had twenty-five years' experience working as a licensed practical and then registered nurse. Ten of those years were spent working in the emergency department, for which she received special training. The nurse was trained to recognize bite marks because they can present a "higher risk" to patients, and she had seen bite marks on about fifty patients. See Commonwealth v. Mahoney, 406 Mass. 843, 852 (1990) (judge has wide discretion in qualifying witness to offer expert opinion and must determine whether witness has sufficient skill, knowledge, and experience in area of training to aid jury).

bit Amanda, as Amanda claimed, or that the injuries were from coining, as the defendant suggested. Unlike the bite mark expert opinion testimony used to identify the defendant in Commonwealth v. Cifizzari, 397 Mass. 560, 571 (1986), a case upon which the defendant relies, the nurse's testimony here was not based on scientific, technical, or other specialized knowledge because she did not testify that the bite marks matched the defendant's teeth. Her opinion that Amanda's injuries looked like bite marks was a lay one, and the judge did not abuse his discretion in admitting it. See Mass. G. Evid. § 701 (2019).

Moreover, the defendant suffered no prejudice from the admission of the nurse's bite mark testimony because the jury were provided with photographs of Amanda's injuries and instructed that (1) they alone determine the facts, and (2) they must be satisfied beyond a reasonable doubt that the defendant bit Amanda in order to convict him of one of the counts of assault and battery. The jury also were instructed that they were free to accept or to reject the nurse's testimony in whole or in part.

Finally, we conclude that Amanda's hospital records reflecting her bite mark injuries were properly admitted under G. L. c. 233, § 79, because a medical provider made the entries reflecting her observation of "broken skin . . . resembling

teeth marks" and a diagnosis of "[h]uman bite," for the purpose of medical treatment. See Commonwealth v. Sargent, 24 Mass. App. Ct. 657, 660 (1987) ("[r]ecords kept by hospitals . . . under [G. L. c. 111, § 70,] shall be admissible . . . as evidence . . . so far as such records relate to the treatment and medical history of such cases").<sup>3</sup> This conclusion is firmly buttressed by other entries showing that the medical staff provided Amanda with educational materials covering a human bite along with instructions to (1) "look at the bite area each day for the next [four] days for . . . signs of infection," which may include "[s]preading redness," "[i]ncreased pain or swelling," "[f]ever," or "[c]olored fluid draining from the wound," and (2) follow up with her primary care doctor.

2. Prior bad acts. The defendant claims that testimony regarding the two prior episodes wherein he became angry and

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<sup>3</sup> We reject the defendant's unpreserved claim that Amanda's hospital records were admitted in violation of his constitutional right to confront witnesses. As we have concluded, the records fell within the scope of G. L. c. 233, § 79, and were not testimonial because (1) they were certified, and (2) the statement of diagnosis as "[h]uman bite," related to Amanda's treatment. See Commonwealth v. Irene, 462 Mass. 600, 618 (2012), and cases cited. Moreover, the nurse testified and was cross-examined at trial regarding the basis for her statements that Amanda's injuries were consistent with bite marks. See id. at 617 ("confrontation clause bars the admission of testimonial out-of-court statements by a witness who does not appear at trial unless the witness is unavailable to testify and the defendant had an earlier opportunity for cross-examination").

then violent with Amanda was more prejudicial than probative, and therefore should not have been admitted, because the conduct alleged on those occasions was too similar to that alleged in the indictment. "Whether evidence is relevant in any particular instance, and whether the probative value of relevant evidence is outweighed by its prejudicial effect, are questions within the sound discretion of the judge." Commonwealth v. Dunn, 407 Mass. 798, 807 (1990).

There was no abuse of discretion here. Where the theory of the defense was that Amanda was lying about being hit and bitten and that her injuries were inflicted accidentally, either by the defendant when he was trying to prevent her suicide or as a result of coining, evidence that the defendant became angry and then violent with Amanda two other times in the preceding four months was highly probative of the defendant's motive, intent, and the lack of accident on June 26. It was also admissible to depict the existence of a hostile relationship between the defendant and Amanda. See Commonwealth v. Oberle, 476 Mass. 539, 550 (2017). See also Mass. G. Evid. § 404(b) (2019). We are confident that the probative value of the evidence was not outweighed by its prejudicial effect because the details of the prior incidents were not repeatedly introduced through separate witnesses, contrast Commonwealth v. Anestal, 463 Mass. 655, 672-673 (2012), and the judge gave contemporaneous limiting

instructions that were repeated in his final charge. See Commonwealth v. Crayton, 470 Mass. 228, 251 (2014) (generally, court presumes that jury understand and follow limiting instructions and that application of such instructions renders potentially prejudicial evidence harmless).

3. Closing argument. The defendant did not object to the prosecutor's closing at trial, but claims on appeal that she exceeded the bounds of permissible argument by vouching for the credibility of the Commonwealth's witnesses, misstating the evidence, arguing facts not in evidence, and suggesting that the jury had a duty to convict. After reviewing the prosecutor's remarks in the context of her entire closing argument, defense counsel's closing argument, the judge's instructions to the jury, and the evidence produced at trial, we see no errors that created a substantial risk of a miscarriage of justice. See Commonwealth v. Lyons, 426 Mass. 466, 471 (1998).

In particular, the prosecutor's argument to the jury to "do your job . . . [and] [f]ind him guilty" did not deprive the defendant of a fair trial when considered in context. That phrase, if presented merely as a duty to convict, is an "untoward remark" that goes beyond "permissible advocacy" (citation omitted). Commonwealth v. Degro, 432 Mass. 319, 329 (2000). But here, the prosecutor took care to stress to the jury that their "job . . . is to decide who to believe and who

not to believe," and that it was their "job to look at not only what a witness says but how a witness says it, [and] how they respond to questions from both sides, from both parties."

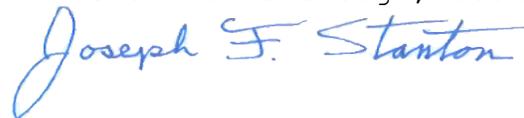
"Framed in this way, the reference to the jury's 'job' did not contain" an unacceptable suggestion of a duty to convict.

Commonwealth v. Adams, 434 Mass. 805, 822 (2001).

Even if error, the argument did not create a substantial risk of a miscarriage of justice. First, the lack of an objection at trial is "some indication that the tone [and] manner . . . of the now challenged aspects of the prosecutor's argument were not unfairly prejudicial." Lyons, 426 Mass. at 471, quoting Commonwealth v. Mello, 420 Mass. 375, 380 (1995). Second, the jury's decision to acquit the defendant of the most serious charge, strangulation or suffocation, "is strong evidence that the jurors were not swayed by emotion and shows that the jurors were able to sort out [any claimed] 'excessive' argument." Commonwealth v. Rock, 429 Mass. 609, 616 (1999).

Judgments affirmed.

By the Court (Blake,  
Ditkoff & McDonough, JJ.<sup>4</sup>),



Clerk

Entered: November 8, 2019.

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<sup>4</sup> The panelists are listed in order of seniority.