

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-618

COMMONWEALTH

vs.

THOMAS W. DUNLEVY.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The Commonwealth appeals from those portions of an order allowing the defendant's motion to dismiss one indictment charging him with indecent assault and battery on a person age fourteen or older in violation of G. L. c. 265, § 13H, and one indictment charging him with intimidation of a witness in violation of G. L. c. 268, § 13B. The indictments stemmed from allegations that the defendant, Thomas Dunlevy, a lieutenant with the Lakeville fire department, sexually assaulted a subordinate, Timothy Smith.<sup>1</sup> We affirm.

Background. The evidence the grand jury heard was as follows.<sup>2</sup> See, e.g., Commonwealth v. Truong Vo Tam, 49 Mass.

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<sup>1</sup> A pseudonym.

<sup>2</sup> The grand jury heard the testimony of Lakeville Police Lieutenant Sean Joyce, the officer who took a report from Smith, and Holly Dunlevy, the defendant's wife. Among other exhibits, the grand jury were presented with a twelve-page handwritten

App. Ct. 31, 37-38 (2000). Smith, who was eighteen years old at the time, met the defendant in 2012 while Smith was working as a call firefighter for the Lakeville fire department.<sup>3</sup> The defendant, then in his late forties, was a full-time lieutenant with the department. Over the next months, Smith began socializing with the defendant alongside other coworkers at the defendant's home.<sup>4</sup>

Some two years into this relationship, the defendant invited Smith to his camper for a weekend with the defendant's family, including his wife and their two daughters.<sup>5</sup> After the daughters went to bed, the defendant, in the presence of his wife, offered Smith two "nips" of hard alcohol to drink. Smith drank both nips, and after a few minutes, started feeling dizzy and light-headed. When Smith stood up and lost his balance, the defendant's wife told the defendant to "have fun dealing with him tonight" and went to bed.

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statement of Smith, a two-page typed statement of Smith, and text messages between Smith and the defendant.

<sup>3</sup> A call firefighter is a volunteer position. See Wenham v. Labor Relations Comm'n, 44 Mass. App. Ct. 195, 195-196 (1998).

<sup>4</sup> In his written statements, Smith explained that the defendant had taken Smith "under his wing." Smith stated that after a year of knowing each other, the defendant began inviting Smith over to his house for dinner and beers. Smith looked up to the defendant as a supervisor, a leader, a role model, and a father figure.

<sup>5</sup> Smith had also spent the previous weekend at the defendant's camper without incident and surrounded by friends.

The defendant then asked Smith to follow him outside, where Smith sat down on a picnic table and put his head in his hands. After the defendant asked about the health of one of Smith's ailing family members, Smith had an "emotional breakdown" and began to sob. The defendant, while consoling him, wiped the tears from Smith's eyes with his thumbs, then "grabbed" Smith's cheeks and kissed him on the lips.

According to Smith's hand-written statement, see note 2, supra, after the kiss, "everything started getting weird." The defendant asked Smith to tell him Smith's "deepest, darkest secret," and Smith replied that he did not have one. The defendant made off-color comments about Smith's genitals,<sup>6</sup> and then asked Smith whether he was gay. Smith denied that he was gay. Smith, feeling uneasy, told the defendant that he wanted to go to bed. The defendant helped Smith into the camper because he was unsteady on his feet. Smith alleged that soon thereafter, the defendant performed oral sex on him, leaving him "scared." After the encounter, Smith "act[ed] as if nothing happened."

Eight days later, Smith was again socializing and drinking with the defendant and his family at the defendant's house. Smith went to sleep on the couch when the rest of the people in

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<sup>6</sup> These comments included, "I bet you have a huge dick, why don't you pee over there and let me see how big it is."

the house went to bed. The defendant approached Smith and put his hand on Smith's left leg. The defendant again asked Smith if he was gay, and this time Smith said that he was. The defendant began undoing Smith's belt, but Smith said, "No, I don't want that." When the defendant asked Smith what he wanted, Smith replied with the name of the defendant's stepson. At this point, the defendant grabbed Smith by the arm and escorted him upstairs into the stepson's room. The stepson told the defendant to bring Smith back downstairs because he wasn't "dealing with this tonight." The defendant did so and apologized to Smith that the strategy "didn't work." Some twenty minutes later, the defendant approached Smith again on the couch and performed oral sex on him. Though Smith did not protest, he was afraid.

Two days after that incident, Smith told the defendant in a text message that he wanted to speak with the defendant "about some stuff," and then asked, "How did you do it for so long." The defendant replied, "Do what? Pretend?" Smith responded, "Just. Life. Everything." The two agreed to meet at a local Dunkin' Donuts the next day. At the meeting, the defendant apologized to Smith for what he had done and urged Smith repeatedly, "Don't make my family hate me." Smith told the defendant that he would keep quiet and in turn begged the defendant to not tell anyone that he was gay. The defendant

responded that if Smith kept quiet, he would too. The defendant stated that he planned to tell his family about his "other life" once his daughter graduated.<sup>7</sup> After the conversation, Smith continued to socialize at the defendant's house once a week.

In September 2014, Smith began to reevaluate his relationship with the defendant and stopped socializing with him as often. In July 2015, Smith suffered an injury at work that took him away from his job for a few months. When he returned, he found that the defendant began to belittle him in front of his coworkers. Smith reported the defendant's conduct to the police on March 9, 2016.

On July 1, 2016, a grand jury indicted the defendant on a number of charges, including two charges of rape (involving Smith) in violation of G. L. c. 265, § 22 (b); one charge of indecent assault and battery on a person age fourteen or older in violation of G. L. c. 265, § 13H; one charge of intimidation of a witness in violation of G. L. c. 268, § 13B; and one charge of attempted rape (involving another individual) in violation of G. L. c. 274, § 6.<sup>8</sup> The defendant filed a motion to dismiss five

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<sup>7</sup> After the meeting, the defendant texted Smith and said, "Hey hope that talk helped. I've never been that honest with anyone always here for you. Always." Smith replied, "Thanks it really did help and I can honestly say the same thing." The defendant responded, "Love you man, I really do, not like a kid, a lover, but a friend." Smith responded, "Same goes to you, thanks."

<sup>8</sup> The defendant was also charged in two indictments with delivering alcohol to a person under age twenty-one in violation

of the indictments. After a nonevidentiary hearing, a judge of the Superior Court allowed the motion to dismiss with respect to the indictments charging indecent assault and battery on a person age fourteen years or older, intimidation of a witness, and attempted rape (involving another individual). The Commonwealth filed a motion for reconsideration regarding the dismissal of the two indictments charging indecent assault and battery and intimidation of a witness. That motion was denied without a hearing. The Commonwealth timely appealed.

Discussion. When considering a motion to dismiss indictments, a judge must decide whether the grand jury heard "sufficient evidence to establish . . . probable cause to arrest [the defendant]." Commonwealth v. Moran, 453 Mass. 880, 883 (2009), quoting Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982). Although "[p]robable cause to sustain an indictment is a decidedly low standard, . . . '[t]he grand jury must be presented with sufficient evidence of each of the elements'" of the offenses charged for an indictment to stand. Commonwealth v. Hanright, 466 Mass. 303, 311 (2013), quoting Moran, supra at 884. "[W]e review the motion judge's probable cause determination de novo" (citation omitted), Commonwealth v.

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of G. L. c. 138, § 34, and with assault and battery in violation of G. L. c. 265, § 13A.

Humberto H., 466 Mass. 562, 566 (2013), and view the evidence in the light most favorable to the Commonwealth. Moran, supra.

1. Indecent assault and battery. "To prove indecent assault and battery on a person age fourteen or older, the Commonwealth is required to establish that the defendant committed an intentional, unprivileged, and indecent touching of the victim" (quotation and citation omitted). Commonwealth v. Kennedy, 478 Mass. 804, 810 (2018). "Conduct is 'indecent' when it is 'fundamentally offensive to contemporary moral values . . . which the common sense of society would regard as immodest, immoral, and improper" (citation omitted). Commonwealth v. Benedito, 95 Mass. App. Ct. 548, 549 (2019). "The test for indecency is objective, turning on the nature of the conduct rather than the defendant's intent." Commonwealth v. Cruz, 93 Mass. App. Ct. 136, 139 (2018). "[W]e consider all of the circumstances." Id.

Viewing the evidence in the light most favorable to the Commonwealth, we are unpersuaded that the grand jury heard sufficient evidence to establish probable cause that the kiss constituted an indecent assault and battery. It is true that the mouth is considered an intimate part of the body, see Commonwealth v. Rosa, 62 Mass. App. Ct. 622, 625 (2004), and in certain instances, even a kiss without the insertion of the tongue has been found to be sufficient if the surrounding

circumstances are suitably "immodest, immoral and improper" (citation omitted). Id. See Commonwealth v. Vazquez, 65 Mass. App. Ct. 305, 307 (2005). See also Benedito, 95 Mass. App. Ct. at 551. Nonetheless, the circumstances in those cases differ substantially from those at issue in this case.<sup>9</sup> Here, the defendant and Smith, notwithstanding their age difference, were adults and friends. The kiss, which did not involve the tongue, took place immediately after the defendant wiped tears from Smith's cheeks while consoling him. While the Commonwealth argues that the defendant acted "surreptitiously" -- kissing Smith while the defendant's family was asleep, in the cover of darkness outside the camper -- those facts are reasonably consistent with the defendant attempting to keep his other relationships hidden from his family. In these circumstances, we do not see this as "fundamentally offensive to contemporary moral values . . . [and] which the common sense of society would regard as immodest, immoral and improper." Commonwealth v.

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<sup>9</sup> In Benedito, the defendant kissed his girlfriend's sister while she was asleep and he was completely nude. See Benedito, 93 Mass. App. Ct. at 548. In Vazquez, one of the victims was the defendant's niece, who was visiting him and his wife in the afternoon after school. Vazquez, 65 Mass. App. Ct. at 307. As the niece watched television, the defendant stood up to leave and asked her for a "good-bye kiss." Id. When she attempted to kiss him on the cheek, he turned his head and kissed her on the lips for two seconds such that she could feel the inside of his mouth." Id. at 308.



Lavigne, 42 Mass. App. Ct. 313, 314-315 (1997), quoting Commonwealth v. Mosby, 30 Mass. App. Ct. 181, 184 (1991).

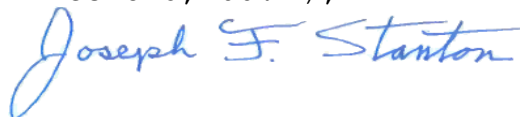
2. Intimidation of a witness. The Commonwealth also challenges the dismissal of the indictment charging intimidation of a witness based on allegations that the defendant took steps to prevent Smith from disclosing the physical contact between them, including asking Smith not to tell anyone and not to make the defendant's family "hate him." Conviction on this charge requires the Commonwealth to prove beyond a reasonable doubt that "(1) the target of the alleged intimidation was a witness in a stage of a criminal proceeding, (2) the defendant wilfully endeavored or tried to influence the target, (3) the defendant did so by means of intimidation, force, or threats of force, and (4) the defendant did so with the purpose of influencing the complainant as a witness." Commonwealth v. Robinson, 444 Mass. 102, 109 (2005), quoting Commonwealth v. McCreary, 45 Mass. App. Ct. 797, 799 (1998). "The assessment whether the defendant made a threat is not confined to a technical analysis of the precise words uttered[;] . . . the jury may consider the context in which the allegedly threatening statement was made and all of the surrounding circumstances." Commonwealth v. Carvalho, 88 Mass. App. Ct. 840, 845-846 (2016), quoting Commonwealth v. Pagels, 69 Mass. App. Ct. 607, 613 (2007).

Taking the evidence in the light most favorable to the Commonwealth, we conclude that it was insufficient to establish probable cause that the defendant was acting in regard to his criminal exposure, as is required. See Pagels, 69 Mass. App. Ct. at 613. Indeed, the thrust of the defendant's comments to Smith were confined to each man's public image. On these facts, no reasonable jury could infer that the defendant threatened to expose Smith as gay if Smith reported the alleged assaults to the police, as the Commonwealth contends.

Conclusion. The portions of the order dated September 15, 2017, dismissing the indictments charging the defendant with indecent assault and battery on a person age fourteen or older, and with intimidation of a witness, are affirmed.

So ordered.

By the Court (Hanlon, Agnes &  
Desmond, JJ.<sup>10</sup>),



Clerk

Entered: November 13, 2019.

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<sup>10</sup> The panelists are listed in order of seniority.