

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-1684

COMMONWEALTH

vs.

MANUEL R. LUCERO.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A jury convicted the defendant of two counts of rape in violation of G. L. c. 265, § 22 (b). In this direct appeal, the defendant argues (1) that the judge should have sua sponte declared a mistrial after receiving a note from the jury asking how much longer they would have to deliberate, referencing outside obligations, and stating that they were unlikely to agree; (2) that the judge erred by giving a dictionary definition of the meaning of "bias," in response to the jury's request for a definition; and (3) that the judge should have instructed the jury, consistent with Commonwealth v. Mountry, 463 Mass. 80 (2012), regarding the defendant's alcohol consumption. We affirm.

1. Mistrial. The defendant argues that the judge should have declared a mistrial sua sponte after receiving a note from

the jury. When the jury sent the note, they had already deliberated a half-day and had sent several earlier questions to the judge, including one indicating that there was a juror whose view differed from that of the rest. The note at issue here read:

"If we continue to deliberate the same points without agreeing, what are our next steps? We all feel we've discussed all evidence, (several times). Some jurors are curious how long we will need to continue to deliberate, only because there are personal matters . . . that need to be taken care of outside of this trial. We are all happy to continue deliberating, but also feel that we will not come to a unanimous vote."

The defendant contends that a mistrial was required because the note indicated the jury were deadlocked and that some members had personal business to attend to that precluded their fair deliberation. We review the trial judge's decision whether to declare a mistrial for abuse of discretion. See Commonwealth v. Mullane, 445 Mass. 702, 711 (2006).

To begin with, the defendant's argument depends on his mischaracterization of the jurors' note. Although the jury reported a "feeling" that they would not come to a unanimous view, they stated that they were happy to continue deliberating. This was not, in our view, an unequivocal statement of impasse. Second, although the note indicates that some jurors were curious about how long

deliberations might continue, and referenced outside obligations, the note does not in any way suggest that the press of those obligations would affect their ability to continue to deliberate fairly. Indeed, to the contrary, the topic was phrased as one of curiosity and planning, and stated that the jurors were happy to continue to deliberate. Thus, read fairly, the note does not support the factual premises of the defendant's argument: namely, that the jury were deadlocked or that extraneous influence raised a serious question of prejudice. See Commonwealth v. Roman, 470 Mass. 85, 97 (2014).

As a result, the judge was within his discretion in not conducting a voir dire of the jurors, see Commonwealth v. Tennison, 440 Mass. 553, 557 (2003), and in not declaring a mistrial sua sponte.

2. Definition of "bias." The defendant argues that the judge erred by giving a dictionary definition of "bias" in response to the jurors' note seeking a definition of that word. In fact, the judge did no such thing. Instead, after both the prosecutor and defense counsel stated the proposed instruction was "perfect," the judge instructed, "The term is not a legal term. You should apply the common definition and understanding of the term."

Alternatively, the defendant argues that the judge should have provided a uniform definition of the term and that the failure to do so created a risk that the jurors used differing definitions. Where, as here, the defendant failed to object, we review the instruction to determine whether any error in the instruction created a substantial risk of a miscarriage of justice. See Commonwealth v. Pires, 453 Mass. 66, 73 (2009).

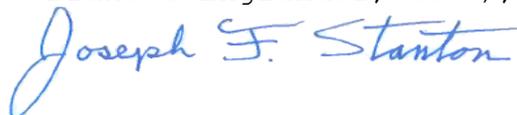
"[A] judge should explain the meaning of technical terms where that meaning is obscure and there is a possibility of confusion." Commonwealth v. Kessler, 442 Mass. 770, 777 (2004), quoting Commonwealth v. Fuller, 421 Mass. 400, 411 (1995). The term "bias" is not an element of rape, nor is it a technical term. Rather, it is an ordinary concept, the meaning of which is one of general knowledge and understanding. Because the term is not a legal term, and in any event is neither obscure nor open to confusion, the judge's instruction was proper.

3. Mountry instruction. The defendant argues that the judge erred by failing to instruct the jury that his alcohol consumption may have affected his ability to know of the victim's incapacity to consent. The defendant lodged no objection to the jury instructions, thus, we review his claim to determine first whether there was error, and if so, whether the error created a substantial risk of a miscarriage of justice. See Commonwealth v. Marinho, 464 Mass. 115, 122 (2013).

Under Commonwealth v. Mountry, when there is evidence of debilitating intoxication, a defendant "is entitled to have the jury instructed that they may consider credible evidence of his mental incapacity, by intoxication or otherwise, when deciding whether the Commonwealth has met its burden of proof as to his knowledge of the victim's incapacity to consent." Commonwealth v. Mountry, 463 Mass. 80, 81 (2012). Here, the defendant has not pointed us to evidence that his intoxication had reached the level of debilitation, thus hindering "him from possessing actual knowledge that the victim was incapable of consent or from possessing knowledge that reasonably would have led him to such an understanding," id. at 93, nor has our review of the trial transcript revealed any such evidence. Moreover, a Mountry instruction would have been at odds with the defendant's theory at trial, which was that the rape never occurred -- not that he was too intoxicated to know that the victim was incapable of consent. Thus, the judge did not err in not giving a Mountry instruction.

Judgments affirmed.

By the Court (Wolohojian,  
Blake & Englander, JJ.<sup>1</sup>),



Clerk

Entered: November 25, 2019.

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<sup>1</sup> The panelists are listed in order of seniority.