COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-493

COMMONWEALTH

vs.

MARCOS COLONO.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

On September 21, 2008, a masked intruder raped two college students at knifepoint in their Allston apartment. After fingerprint and DNA evidence linked the defendant to the rapes, he was indicted on four counts of aggravated rape, two counts of assault by means of a dangerous weapon, one count of home invasion, and one count of armed burglary in the nighttime. Following an eight-day trial in which the defendant represented himself, a Superior Court jury convicted the defendant of all charges. On his appeal, we affirm.

Background. Given the nature of the defendant's arguments on appeal, little would be served by recounting the details of the offenses. The following summary suffices, with certain additional facts reserved for later discussion.

The victims testified that after bursting into their apartment, the intruder repeatedly and brutally raped them. During one of the rapes, the intruder ejaculated, and DNA matching the defendant's was recovered in semen from a "single source" found on a swab taken of the vagina of one of the victims. A thumbprint matching the defendant's was found on a sewing machine in the apartment. The intruder used the sewing machine -- among other heavy objects -- to restrain the victims while they were lying on the floor.

Discussion. 1. On the sixth day of the eight-day trial, the defendant took the stand and for the first time suggested an alternative explanation for how his semen could have been found inside the vagina of one of the victims. Specifically, he testified that he might have had consensual sex with that victim close in time to her having subsequently been raped by an unidentified third party. According to him, it was only during the victim's testimony that he came to realize that "she looked like a woman I did have sex with in Allston in the summer of 2008." The defendant went on to describe the casual, one-time nature of such an encounter, and he specifically suggested that the sex may have occurred in a car that he had rented. He never claimed to have been in the victim's apartment.

After suggesting this alternative theory, the defendant proceeded to claim that the judge had prevented him from asking the victim whether she might have had consensual sex with him.[1] He renews that claim as his lead argument on appeal, asserting that the limitations placed on his cross-examination of one of the victims deprived him the opportunity to mount his defense.[2]

The defendant's claim that the judge prevented him from asking one of the victims whether she had had consensual sex with him is not accurate. He never asked, or sought approval to ask, that question. To be sure, during the defendant's cross-examination of the victim, he did ask the victim whether she was "sexually active with anyone during the time of the incident," and the judge sustained the Commonwealth's objection to that

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[1] He testified as follows:

> "I tried to ask her about her past sexual activity and with that sexual activity, does that include me, do you have any memory of me, could we have -- potentially have had consensual sex before, I wanted to ask her that, I wasn't allowed.
>
> But if she would have answered that she doesn't remember whether or not she had sex with me or not, it probably would have made her look loose too, that's probably [why] I wasn't allowed to ask her."

[2] The defendant also asserts that he was deprived of pretrial discovery that he was due with regard to photographs of the victims and their sexual history. In fact, a different judge ordered the Commonwealth to provide such discovery to the extent it was in its possession. The defendant has made no showing that the Commonwealth failed to abide by that order.

question. However, the question as asked plainly was objectionable under the Rape Shield law, and the judge's sustaining the Commonwealth's objection therefore was proper. See G. L. c. 233, § 21B; Commonwealth v. Chretien, 383 Mass. 123, 138 (1981) ("The defendant must show at least that the theory under which he proceeds is based on more than vague hope or mere speculation"). The defendant did not press the matter further, and raised no suggestion that what he was seeking to inquire about was whether the victim had had consensual sex with him. Instead, the defendant dropped any inquiry into the victim's sexual history.

Nor is the defendant's failure to ask the question he now claims was excluded excused by the judge's earlier ruling on a pretrial motion in limine. To the contrary, that history undercuts the defendant's claim. The motion in limine sought permission to delve into both victims' sexual history. In orally responding to the motion immediately before the commencement of the trial, the judge stated that such evidence is generally prohibited by G. L. c. 233, § 21B, but she also invited the defendant to explain how one of the exceptions to that rule applied. The defendant did not articulate any coherent argument as to how such evidence would be admissible here. Accordingly, the judge concluded that she did not "see

any basis to bring that up." At the same time, she indicated some openness to revisiting the issue during trial.[3]

2. The defendant separately asserts error in how the prosecutor and judge responded to the claim he made while testifying that he was deprived of asking the victim whether she had had consensual sex with him. Immediately after he first made that claim, the judge sua sponte instructed the jury that they were "not to draw any inferences [from] any rulings of law I made, nor should this witness be commenting on them." Nevertheless, the defendant persisted in the presence of the jury, asserting that

> "if I wasn't allowed to question her about her past consensual activity, then she wasn't allowed to include me as a potential consensual source of DNA. And I want the jury to think about that when they're told by the prosecutor that my semen was found in her vagina because if it is my semen, it was left there consensually and before anyone had ever assaulted her."

During his closing argument, the defendant returned to the same theme, suggesting again that he might have had consensual sex with the victim in whom his semen was found, and adding, "It would be nice to know what she has to say about that." In

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[3] The judge instructed the defendant that "if you do intend to ask any questions in that regard, I would ask that you speak to me without the jury being present." The defendant asked his single question about one of the victim's sexual history without raising the issue with the judge, and after the judge sustained the Commonwealth's objection, the defendant did not make any effort to rephrase the question or to narrow its focus to what he now claims he was seeking.

response, the prosecutor stated in her closing argument that the defendant was incorrect in asserting that he was not allowed to inquire of the witness whether she had had consensual sex with him. When the defendant objected, the judge overruled the objection, stating that "in fact that is not a mistake." The prosecutor resumed her closing stating that "[t]his is not a mistake, he didn't take that opportunity. He didn't ask that question because he well knew -- he well knew what the answer from [the witness] could be."

As noted, the defendant never asked the victim whether she had had consensual sex with him, and therefore he was not prevented from doing so.[4] The prosecutor's using her own closing to counter the defendant's inaccurate claim was a fair response "to correct an erroneous impression created by [the defendant representing himself]" (quotation and citation omitted). Commonwealth v. Kozec, 399 Mass. 514, 519 n.9 (1987). The judge's expressed view that the prosecutor's statement "was not a mistake" also was accurate. Moreover, the judge's assessment was a characterization of her rulings at trial and, as such, it did not invade the jury's exclusive purview to resolve the underlying facts. We are confident that, in any event, the

[4] We have no reason to think that the judge would have prevented the defendant from asking such a question.

judge's observation did not cause a substantial risk of a miscarriage of justice.[5]

3. The defendant maintains that his claim to having had consensual sex with one of the victims amounted to an affirmative defense that the Commonwealth had an obligation to disprove beyond a reasonable doubt. Based on that premise, he argues that the Commonwealth failed to provide sufficient evidence to disprove that defense, and also that the judge erred by not instructing the jury that the Commonwealth had to disprove that defense beyond a reasonable doubt. These claims require little discussion. "[T]he concept of an affirmative defense is premised on the notion that, absent the excuse, the defendant would be guilty of the crime charged." Commonwealth v. Franchino, 61 Mass. App. Ct. 367, 374 (2004). The defendant does not argue that he was the masked intruder who assaulted and raped the victims but that he nevertheless had a lawful reason for doing so; his defense is that he did not commit the crime. His efforts to offer an alternative explanation for how his semen may have ended up inside one of the victims did not

[5] We note that while the defendant objected to the prosecutor's statement, he did not object to the judge's stating in front of the jury that the prosecutor's statement was accurate. In any event, while "it is the better practice to warn and rebuke counsel out of the jury's hearing . . . . we recognize that some warnings and rebukes must unavoidably be made in the jury's presence" (quotations and citations omitted). Commonwealth v. Jackson, 419 Mass. 716, 722 (1995).

constitute an affirmative defense on which the jury needed instruction. Contrast Commonwealth v. Rodriguez, 370 Mass. 684, 691 (1976). Nor is there any merit to the defendant's claim that the Commonwealth failed to provide sufficient evidence to "disprove" the defendant's claim. Indeed, the alternative factual scenario that the defendant offered to explain the presence of his semen inside the victim is based entirely on his own testimony, and does nothing to address the presence of his fingerprints at the crime scene. The jury were free to reject such testimony as not credible (as they apparently did).[6]

4. The defendant also asserts numerous errors in the prosecutor's closing argument, in addition to the claim already addressed regarding the prosecutor's statement that the defendant was not prohibited from inquiring about consensual sex. Because these additional claims of error were not preserved, our review is limited to whether any errors caused a substantial risk of a miscarriage of justice. See Commonwealth v. Dirgo, 474 Mass. 1012, 1016 (2016).

We disagree with many of the defendant's contentions regarding improprieties in the closing argument, especially in light of the well-recognized principle that "enthusiastic

[6] We discern no merit in the defendant's suggestion that the prosecutor had an affirmative obligation to cross-examine the defendant about his claims of consensual sex.

rhetoric, strong advocacy, and excusable hyperbole . . . [are] not grounds for reversal" (quotation and citation omitted). Commonwealth v. Siny Van Tran, 460 Mass. 535, 554 (2011). See Commonwealth v. Wilson, 427 Mass. 336, 350 (1998) (jurors "are presumed to have a certain measure of sophistication in sorting out excessive claims on both sides").

That said, the prosecutor ventured very close to the boundaries of propriety, and at least twice crossed them. In one instance, the prosecutor urged the jury to convict the defendant immediately after saying that they were the rape victims' "voice." As the Commonwealth acknowledges, this was improper. See Commonwealth v. Walker, 421 Mass. 90, 103 (1995) (prosecutor erred by arguing to jury that victim of armed robbery had faith that they would restore her security by doing justice). The other instance involves the prosecutor's statement -- made in reference to her decision not to cross-examine the defendant -- that "[t]he Commonwealth of Massachusetts yesterday knew something that [the victims] knew on September 21st, 2008, you can't argue with evil, you can't debate evil, now you just silenced evil." This statement was in fact improper in two respects. First, by referring to what "the Commonwealth knew," it could be taken to suggest to the jury that the prosecutor had knowledge that they did not or that her

view mattered.[7] See Wilson, 427 Mass. at 352 ("Improper vouching can occur if an attorney expresses a personal belief in the credibility of a witness, or indicates that he or she has knowledge independent of the evidence before the jury"). Second, the prosecutor's repeated reference to the defendant as "evil" amounted to an improper attack on the defendant's character, rather than an argument as to why the jury should find the defendant guilty based on the evidence. See Commonwealth v. Rosario, 430 Mass. 505, 515-516 (1999) (prosecutor's reference to defendant as "monster" constituted "hyperbole to cast a negative light on the defendant" and was "wholly inappropriate").

Nevertheless, we conclude that any errors here did not cause a substantial risk of a miscarriage of justice, especially in light of the strength of the Commonwealth's forensic evidence. In addition, the judge properly instructed the jury that closings are not evidence and urged them not to be swayed by emotion or sympathy. We are confident that any improprieties in the prosecutor's closing did not materially affect the jury's

[7] The Commonwealth conceded at oral argument that the statement was improper for this reason.

verdicts.[8] See Rosario, 430 Mass. at 514.

Judgments affirmed.

By the Court (Wolohojian, Milkey & Shin, JJ.[9]),

Clerk

Entered: March 17, 2020.

[8] In an argument submitted under the rubric of Commonwealth v. Moffett, 383 Mass. 201, 208-209 (1981), the defendant argues that the judge committed reversible error by not allowing him to call a particular witness. That person was one of the victims in a separate case in which the defendant had been convicted of rape based on an incident in Cambridge. The defendant indicated that he wanted to call that witness in support of his claim that that person in fact had raped him, which he claimed would explain why his DNA was found at the Cambridge crime scene. The defendant was unable to show how that line of inquiry about the Cambridge rape case had any probative value in the case involving the Allston rapes. The judge's refusal to allow the defendant to call that witness therefore was entirely proper. See Commonwealth v. Simpson, 434 Mass. 570, 578-579 (2001) (whether evidence is relevant and whether its probative value is substantially outweighed by its prejudicial effect are matters entrusted to trial judge's broad discretion and are not disturbed absent palpable error).

[9] The panelists are listed in order of seniority.