

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-1120

COMMONWEALTH

vs.

VALENTINE UNDERWOOD.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Valentine Underwood, was convicted after a jury trial in the Superior Court of kidnapping and aggravated rape.¹ On appeal the defendant challenges the judge's refusal to excuse a juror for cause, the admissibility of certain evidence, the prosecutor's closing argument, and the judge's denial of his motion to dismiss. We affirm.

Discussion. 1. Impartial jury. The defendant claims that he was denied his right to an impartial jury because the judge refused to excuse juror seventy-five for cause. We disagree.

"Article 12 of the Declaration of Rights of the Massachusetts Constitution and the Sixth Amendment to the United States Constitution, applied to the States through the due

¹ The defendant waived his right to counsel and represented himself at trial with the aid of appointed standby counsel.

process clause of the Fourteenth Amendment, guarantee the right of a criminal defendant to a trial by an impartial jury." Commonwealth v. McCowen, 458 Mass. 461, 494 (2010). "The judge's duty is to 'examine jurors fully regarding possible bias or prejudice where it appears that there is a substantial risk that jurors may be influenced by factors extraneous to the evidence presented to them'" (quotations and citation omitted). Commonwealth v. Perez, 460 Mass. 683, 688 (2011). "A trial judge is accorded considerable discretion in the jury selection process and his finding that a juror stands indifferent will not be disturbed except where juror prejudice is manifest." Commonwealth v. Clark, 446 Mass. 620, 629-630 (2006).

Contrary to the defendant's argument, juror seventy-five unequivocally stated, and demonstrated, to the judge's satisfaction, that he could be a fair and impartial juror. During the individual voir dire of juror seventy-five, he indicated that as a child he had been the victim of a sexual assault by a male. The judge was not required to excuse juror seventy-five or allow the defendant's challenge for cause simply because this juror disclosed on initial questioning by the judge an extraneous factor that could influence the juror. See Commonwealth v. Jaime J., 56 Mass. App. Ct. 268, 274 (2002). Here, it is reasonably clear, that after the disclosure by the juror, the judge conducted a full examination of the prospective

juror before making a determination he could be fair and impartial. In response to further inquiry by the judge, juror seventy-five indicated that the sexual assault was never reported to the police and no criminal charges were ever brought against the male who had assaulted him. Juror seventy-five told the judge that there was nothing about the circumstances of the sexual assault against him that would affect his ability to be a fair and impartial juror. The transcript also reflects that earlier in the empanelment process the judge explained that he assesses a juror's demeanor and emotions when they indicate at voir dire that he or she had been a victim of a sexual assault. The judge stated that if a juror reveals that he or she was a victim of a sexual assault, he looks at him or her closely. Additionally, in response to further questions by the judge, this juror reiterated that he could be a fair and impartial juror and that there was nothing further he had to say about his ability to serve.²

We conclude that the judge did not abuse his discretion in denying the challenge of juror seventy-five for cause. Whether or not to accept juror seventy-five's declaration that he could be fair and impartial was in the broad discretion of the judge,

² A judge who observes the prospective juror is in the best position to determine whether follow up questions are warranted. Commonwealth v. Lattimore, 396 Mass. 446, 450 n.6 (1985).

as he was able to see juror seventy-five's demeanor and assess his credibility. See Jaime J., 56 Mass. App. Ct. at 272.

2. Evidentiary issues. The defendant contends that it was error to allow in evidence unauthenticated photographs and hearsay testimony of his appearance, his location, and the description of his truck. The photographs and hearsay testimony related to the defendant's arrest for rape in Binghamton, New York, less than one month after the events underlying these convictions. The defendant raises these arguments for the first time on appeal and the defendant acknowledges that the standard of review is whether any error created a substantial risk of a miscarriage of justice. See Commonwealth v. McCoy, 456 Mass. 838, 850 (2010); Commonwealth v. Sutherland, 93 Mass. App. Ct. 65, 71 (2018).

Prior to trial, the defendant's motion in limine challenging the admissibility of the booking photographs from the Binghamton arrest, on the grounds that they were more prejudicial than probative, was denied. At the hearing on this motion, the prosecutor informed the judge that although she had witnesses available to testify about the defendant's presence in Binghamton, she did not intend to present these witnesses, since the defendant was willing to stipulate to his having been present in Binghamton.

We conclude that there was no substantial risk of a miscarriage of justice here. The defendant's decision not to object to the admission of the hearsay and the unauthenticated photographs, after his motion in limine was denied, was a purposeful decision that cannot be said to have been unreasonable. See Commonwealth v. Jordan, 50 Mass. App. Ct. 369, 370-371 (2000). Witnesses were available to testify regarding the Binghamton events. The defendant could have insisted that the Commonwealth produce the witnesses in order to obviate any evidentiary issues he now claims. However, after his motion to exclude the booking photograph was denied, the defendant's determination to not oppose the hearsay testimony and the introduction of the Binghamton booking photographs was to the defendant's benefit, since opposing on hearsay and authentication grounds would have resulted in the prosecutor presenting witnesses from Binghamton "that would do the defendant more harm than good." Commonwealth v. Beliard, 443 Mass. 79, 89 (2004). Direct testimony from Binghamton law enforcement officers would likely have been far more damaging than offering this information through the Commonwealth's investigator. Additionally the judge provided a curative instruction to the jury at the time the photographs were introduced in evidence. We discern no substantial risk of a

miscarriage of justice in the admission of the hearsay evidence and the unauthenticated booking photographs.

Next, the defendant claims that it was error to allow evidence of uncharged conduct that occurred outside of Essex County. The Commonwealth moved before trial to admit evidence that the defendant raped the victim in Middlesex County and stabbed and beat her in New Hampshire. Over the defendant's objection the judge found the evidence to be admissible. The defendant now argues that the unfair prejudicial effect of this evidence substantially outweighed its probative value and its admission at trial constituted an abuse of the judge's discretion.

"It is long established that evidence of uncharged criminal acts or other misbehavior is not admissible to show a defendant's bad character or propensity to commit the charged crime, but may be admissible if relevant for other purposes such as 'common scheme, pattern of operation, absence of accident or mistake, identity, intent or motive.' Commonwealth v. Marshall, 434 Mass. 358, 366 (2001), quoting Commonwealth v. Helfant, 398 Mass. 214, 224 (1986)." Commonwealth v. Dwyer, 448 Mass. 122, 128 (2006). "Whether evidence is relevant and whether its probative value is substantially outweighed by its prejudicial effect are matters entrusted to the trial judge's broad

discretion and are not disturbed absent palpable error."

Commonwealth v. Simpson, 434 Mass. 570, 578-79 (2001).

Here, the judge found that the evidence of the criminal acts in Middlesex County and New Hampshire was relevant and its probative value was not outweighed by its prejudicial value. The judge found the evidence was relevant to the defendant's state of mind, to the victim's ability to observe and recall the defendant's appearance, and to avoid the jury's hearing a distorted view of the events.³ The judge also provided a limiting instruction to the jury that clarified the purpose of the evidence and the restrictions on its consideration. "We generally 'presume that a jury understand and follow limiting instructions, . . . and that the application of such instructions ordinarily renders any potentially prejudicial evidence harmless'" (citations omitted). Commonwealth v. Crayton, 470 Mass. 228, 251 (2014). We see no abuse of discretion.

3. Prosecutor's closing argument. The defendant maintains that the prosecutor misstated evidence and referred to facts not in evidence in her closing argument. Because there was no objection at trial, "[w]e review these claims for error and, if

³ See Commonwealth v. Bradshaw, 385 Mass. 244, 269-270 (1982) ("prosecution was entitled to present as full a picture as possible of the events surrounding the incident itself").

there was error, for a substantial risk of a miscarriage of justice." Commonwealth v. Rivera, 91 Mass. App. Ct. 796, 801 (2017).

Although "prosecutor[s] may not misstate evidence or refer to facts not in evidence in a closing argument," Commonwealth v. Goddard, 476 Mass. 443, 449 (2017), they are "entitled to marshal the evidence and suggest inferences that the jury may draw from it." Commonwealth v. Drayton, 386 Mass. 39, 52 (1982). The defendant argues that the prosecutor misstated the statistical probabilities of the DNA evidence when she compared them to a roll of the dice. Here, the prosecutor stated the correct DNA statistical probabilities that were provided by the expert. However, her analogy to a roll of the dice included incorrect statistical odds. Even though the prosecutor's argument provided an incorrect analogy of the DNA statistical probabilities to a roll of a die, we are confident that it did not have an impact on the verdict. Closing argument is argument, not evidence, and jurors are presumed to be capable of discounting excessive claims. Moreover, the judge in this case directly instructed the jurors not to credit statements made by counsel if such statements did not coincide with the jurors'

recollection of the evidence, and that closing arguments are not evidence. See Commonwealth v. Kozec, 399 Mass. 514, 517 (1987).⁴

4. Motion to dismiss. The defendant claims the judge erred in denying his motion to dismiss, arguing that inaccurate and prejudicial information impaired the integrity of the grand jury. At the commencement of the grand jury proceedings against the defendant, the prosecutor read the two indictments to the grand jurors. The aggravated rape indictment incorrectly contained language that the defendant had "been previously convicted of said offense." Before trial the defendant moved to dismiss both indictments contending the incorrect reference to a prior conviction impaired the integrity of the grand jury. The judge concluded the integrity of the grand jury was not impaired and denied the motion.

Dismissal of an indictment is warranted where the Commonwealth's presentation of evidence is misleading in a way that compromises the integrity of the grand jury proceeding. Commonwealth v. O'Dell, 392 Mass. 445, 447 (1984). However, dismissal is not required merely by showing that false or

⁴ There is no merit to the defendant's argument that the prosecutor's closing argument referred to facts not in evidence. The defendant claims the prosecutor's statement referencing the number of people on the planet was error since this fact was not in evidence. However, the record reveals that the DNA expert provided testimony that the world's population was seven billion.

deceptive evidence was presented to the grand jury. Rather, the defendant has the burden of showing not only that false or deceptive evidence was given to the grand jury knowingly and for the purpose of obtaining an indictment, but also that on the entire grand jury record, the false or deceptive evidence was material to the question of probable cause and probably made a difference in the grand jury's decision. Commonwealth v. Mayfield, 398 Mass. 615, 621 (1986).

The judge ruled that the integrity of the grand jury proceedings was not impaired by inaccuracies in the grand jury presentation. We agree. Here, other than the prosecutor's reading of the indictment, there was no evidence presented to the grand jury of a prior conviction. The inaccuracy in the indictment was not read to the grand jury with knowing or reckless disregard of its truth for the purpose of obtaining an indictment. Nor did this inaccuracy likely influence the grand jury. See id.

Judgments affirmed.

By the Court (Rubin, Lemire &
Hand, JJ.⁵),

Clerk

Entered: March 17, 2020.

⁵ The panelists are listed in order of seniority.