

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

19-P-732

COMMONWEALTH

vs.

CECELLA MARTINEZ.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A Boston Municipal Court jury convicted the defendant of assault and battery on a person with a disability causing bodily injury. On appeal, the defendant argues that the evidence that the victim suffered from a disability was insufficient as a matter of law. She also claims error in the jury instructions and in the judge's response to questions posed by the jury. We affirm.

Background. 1. The fight. The altercation at issue in this case took place on June Street, a dead end street in the Roslindale section of Boston. On the afternoon of June 11, 2017, the defendant was present at a family gathering at her in-law's house near the end of June Street. The house next door was the home of Arlene Rojas. According to her own testimony, Rojas arrived home in her car after driving down June Street at

a safe rate of speed while carefully avoiding children playing in the street. Once Rojas had parked but was still in her car, an unidentified woman in a white T-shirt started yelling at her for a reason that was not apparent to Rojas. Then, after the woman in the white T-shirt disengaged, the defendant -- who was wearing a pink shirt -- also began verbally accosting Rojas, threatening her, and blocking the entrance to Rojas's home. Then, when Rojas had walked past the defendant, the defendant -- unprovoked -- hit her in the head from behind. At that point, according to Rojas, the woman in the white T-shirt returned, and she and the defendant continued to attack her (whereupon she blacked out).

The defendant testified to a markedly different version of events. According to her, the confrontation began because Rojas was speeding down the street, thereby placing the children who were playing there in danger. She admitted to getting into a verbal and physical altercation with Rojas but claimed it was mutual combat initiated by Rojas. She described facing Rojas during the altercation and denied ever seeing any third woman involved in the confrontation. Rojas and the defendant each sustained certain injuries.

2. Evidence of Rojas's disability. Rojas testified that her left hand was afflicted with a condition known as brachial plexus palsy. She explained that, as a result of this

condition, she cannot "use" or "raise" her left hand, nor could she "try to cover [her]self" with it during the fight. One of the responding police officers testified that, in examining Rojas's arm, he "noticed she had a disability." At least two photographs of Rojas's left arm were admitted in evidence. These photos reveal that Rojas's left hand is noticeably misshapen and connected to her arm at an unnatural angle.

As the defendant highlights, Rojas acknowledged that notwithstanding the condition of her left hand, she is able to provide some care for her parents, to hold a job, and to drive.

3. The jury instructions. The judge instructed the jury that in order to convict the defendant of the crime charged, they had to find -- among other elements -- that Rojas "suffers from a disability." He did not provide further instruction on what it meant for someone to have a disability, nor did either party ask him to do so. It appears that at the time the jury instructions were forged, neither the judge nor the parties may have appreciated that the statute expressly defined the term "person with disability." See G. L. c. 265, § 13K (a), defining a "person with disability"¹ as: "a person with a permanent or long-term physical or mental impairment that prevents or

¹ The transcript reveals that the judge had looked in the model jury instructions for an instruction on a person with disability and could not find one.

restricts the individual's ability to provide for his or her own care or protection."

Discussion. 1. Sufficiency. The defendant's argument that there was insufficient evidence that Rojas was a "person with disability" requires little discussion. In reviewing a claim of insufficiency, we view the evidence adduced at trial in the light most favorable to the Commonwealth, drawing all reasonable inferences therefrom, to determine whether the evidence was sufficient to persuade any rational jury to find the essential elements of the crimes charged beyond a reasonable doubt. See Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979). Based on Rojas's testimony, rational jurors could have concluded, beyond a reasonable doubt, that the condition of her left hand "restrict[ed]" her "ability to provide for . . . her own . . . protection," thereby rendering her a "person with disability" as that term is defined by the statute.² With Rojas

² The defendant also suggests that there was insufficient evidence that the impairment of her hand was "permanent or long-term." This plainly is incorrect given that Rojas testified that the condition she suffered was the result of a "birth trauma."

To the extent that the defendant argues that some of Rojas's testimony contained impermissible hearsay, this testimony was not objected to at trial. In any event, the diagnosis itself need not be considered for the truth of the matter asserted, and the fact that Rojas's arm was malformed was plainly a statement of observed fact.

meeting that definition, it matters not whether she nevertheless could hold a job, care for her parents, or drive.

2. Jury instructions. Whether reversal is required because of an error in the jury instructions presents a closer question. The defendant argues -- with some force -- that the statutory definition of "person with disability" is somewhat narrower than the ordinary meaning that lay jurors presumably assigned to that term. After all, she argues, under the statutory definition, the Commonwealth has to prove not only that Rojas suffers from a physical or mental impairment, but also that the impairment is "permanent or long-term," and that it "prevents or restricts the individual's ability to provide for his or her own care or protection." According to the defendant, had the jury been asked to consider whether the condition of Rojas's arm restricted her in that manner, they might have acquitted her.

We begin by addressing the applicable standard of review. Because the defendant did not object to the instruction on disability, our review is limited to whether any errors caused a substantial risk of a miscarriage of justice. See Commonwealth v. Mitchell, 95 Mass. App. Ct. 406, 412 (2019). The parties debate what that means in the context of this case. Relying on cases such as Mitchell and Commonwealth v. Azar, 435 Mass. 675, 687-690 (2002), the defendant argues that because the error went

to how the jury were instructed as to an essential element of the offense, we must find a substantial risk of a miscarriage of justice unless we can say that the relevant element of the offense could be "ineluctably inferred" from the evidence. However, the case before us can be distinguished from the cases the defendant cites in two important respects. First, while the Commonwealth retained the burden to prove Rojas's disability, this was not a contested issue at trial. Indeed, the defendant acknowledged during her opening statement that Rojas had a disability (urging the jury not to act out of sympathy for that disability). Contrast Mitchell, 95 Mass. App. Ct. at 414-418 (concluding that relevant factual issue in case was contested). Second, the alleged infirmity in the jury instructions was different than that at issue in the cases on which the defendant relies. In Mitchell, the judge failed to inform the jury that they had to find an element of the offense. Id. at 411. In Azar, the instructions that the judge gave with respect to a particular element were erroneous. 435 Mass. at 681-684. In the case before us, the judge properly instructed the jury that they had to find that the putative victim had a disability, but failed to flesh out specifically what that meant. Thus, we know the jury found that Rojas suffered from a disability, even if we cannot be sure of how narrow a definition was used in coming to

that conclusion. In short, Azar and Mitchell are distinguishable from the present case.

We conclude that the defendant has not demonstrated a substantial risk of a miscarriage of justice. While it is true that the jury were not required to credit Rojas's testimony about the extent to which the condition of her left hand limited her ability to protect herself, the photographs of that hand admitted in evidence leave next to no doubt in our mind that the jury would have accepted Rojas's claims on that specific point. Moreover, while defense counsel's acknowledgement that Rojas had a disability did not relieve the Commonwealth of proving the issue, it helps demonstrate that the issue was neither contested at trial nor ever in serious doubt. Accordingly, we conclude that although the jury instructions regarding "disability" were incomplete, there was no reversible error.

3. Responses to jury questions. As noted, there was disputed testimony about how many people were involved in the altercation. Rojas testified that in addition to the defendant, a woman in a white T-shirt attacked her, while the defendant disclaimed the presence of any third combatant. During the trial, neither side sought to use the potential role played by a woman in a white T-shirt to its advantage. Thus, the prosecutor did not argue that the defendant was responsible under a joint venture theory for any actions taken by the third combatant, and

the defendant did not argue that it was the third combatant, not her, who was responsible for Rojas's injuries. Nevertheless, during their deliberations, the jury posed a written question in apparent reference to the woman in the white T-shirt.

Specifically, the jury asked: "If some or much of the damage was done by somebody else should we hold [the defendant] responsible for that damage?"

The transcript indicates that both sides proposed responses to the jury's question, but the substance of them were not preserved for the record. It is apparent from the discussions between the judge and counsel that the Commonwealth proposed that the judge instruct the jury on joint venture, which the judge was reluctant to do in light of the fact that the Commonwealth had not up to that point proceeded on such a theory. In any event, the approach the judge settled upon was to reinstruct the jury about the elements of the offense, including the requirement that the defendant's unconsented-to touching resulted in bodily injury.

At no point did defense counsel firmly object to this approach. The closest he came was a passing remark questioning whether the approach was really responsive to what the jury were asking. This was not sufficient to preserve an objection, and our review therefore is limited to whether any error caused a substantial risk of a miscarriage of justice. See Commonwealth

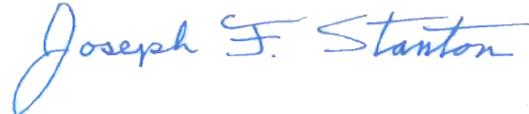
v. Sherman, 481 Mass. 464, 471 (2019). In any event, we conclude that the judge did not abuse his discretion in formulating a response to the jury's question. See generally Commonwealth v. Wood, 469 Mass. 266, 293 (2014), quoting Commonwealth v. Delacruz, 463 Mass. 504, 518 (2012) ("proper response to a jury question must remain within the discretion of the trial judge, who has observed the evidence and the jury firsthand and can tailor supplemental instructions accordingly").

We additionally note that, based on the particular phrasing of the inquiry, the defendant has not shown prejudice. While the question presupposed that at least some jurors may have been considering whether a third party caused "some" or even "much" of the injury to Rojas, nothing suggests that any jurors thought the third party caused all of that injury. If the jury believed that the defendant herself caused some of the injury to Rojas, this was enough for them to convict her. Put differently, there is little reason to think the jury's verdict would have been any different had the judge even more directly informed the jury that they could convict the defendant only if they found that

her own actions in attacking Rojas caused her bodily injury.³

Judgment affirmed.

By the Court (Milkey, Shin &
Englander, JJ.⁴),



Clerk

Entered: May 22, 2020.

³ Before the judge responded to the jury's question about a third combatant, the jury posed yet another question: "When we use the phrase 'did not do everything reasonable[,]'" [i]s the definition of reasonable solely acting with reason and level-headed? Or does it include average, realistic and practical?" Although the meaning of this question is somewhat opaque, it appears to go to the issue of self-defense, specifically, how strict the jury should be in assessing whether the defendant had availed herself of all reasonable means of avoiding combat. As to this question, the judge settled on reinstructing the jury with regard to self-defense. The defendant does not actually argue that this was error. Instead, she posits that the jury's concerns about the application of the law on self-defense exacerbate the problems caused by the potential presence of a third combatant. Specifically, she suggests the possibility that the jury rejected the defendant's self-defense theory based on a finding that the force used jointly by her and the woman in the white T-shirt was excessive. Such theoretical hypothesizing about the jury's potential thought process does little to persuade us that the judge erred in his response to the jury's questions. See Commonwealth v. Van Bell, 455 Mass. 408, 420 (2009) ("If appropriate, the judge need only consider the question asked by the jury, and is not required to instruct on any other matters in response to the question").

⁴ The panelists are listed in order of seniority.