COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-448

COMMONWEALTH

vs.

RAMESES CANELUS.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant was indicted for rape, assault and battery by means of a dangerous weapon (knife), and assault and battery. Following a jury trial, the defendant was convicted of assault with intent to commit rape as a lesser included offense of rape, and the remaining two charges. On appeal the defendant argues: (1) trial testimony of a paramedic and a police officer that they did not detect any signs of drug use on the victim was improperly admitted, (2) the evidence did not support an instruction on the lesser included offense of assault with intent to rape, and (3) the cumulative effect of the claimed errors requires reversal of his convictions. We affirm.

Background. The jury could have found the following facts. Around 3:00 A.M. on June 10, 2015, the victim was walking home after visiting her mother when she passed a parking lot near

Boston's South End. The defendant appeared, approached the victim, and offered her money or drugs in exchange for oral sex. The victim declined and walked away, but then returned to the parking lot to make sure the defendant was not following her. Upon the victim's return, the defendant grabbed her by the hair and dragged her between two parked cars. There he stabbed her twice, once to get her to kneel down and a second time to get her to perform oral sex on him. The victim pleaded with the defendant to stop. The noise awoke a neighbor who called 911. Police arrived on the scene within minutes to find the victim covered in blood around her neck and chest and crouched or kneeling near the defendant's waist area, with the defendant's pants open and underwear showing.[1]

Discussion. 1. Testimony that the victim did not exhibit signs of drug use. At trial, two witnesses testified as to their observations of the victim at the scene of the crime, a paramedic and a police officer. The paramedic testified that he had "training to detect intoxication and drug use" and that he did not "detect any indications of drug use" on the victim. The

[1] Although the defendant did not testify, his trial theory was that he hit but did not stab or rape the victim. He challenged the victim's credibility by painting her as a "crack addict" and a "liar" with a motive to elevate the simple assault and battery into a stabbing and rape because she had open criminal cases and was on probation and feared the consequences if she tested positive for cocaine.

police officer likewise testified that he had "come across drug-induced people" in his work experience and that he did not "detect any use of drugs" on the victim. On appeal, the defendant contends that these two witnesses were erroneously permitted to give expert opinions that the victim was not under the influence of drugs.

"While an expert opinion is admissible only where it will 'help jurors interpret evidence that lies outside of common experience,' a lay opinion is admissible only where it lies within the realm of common experience." Commonwealth v. Canty, 466 Mass. 535, 541-542 (2013), quoting Commonwealth v. Tanner, 45 Mass. App. Ct. 576, 581 (1998). "A lay opinion is admissible only where it is (a) rationally based on the witness's perception; (b) helpful to a clear understanding of the witness's testimony or in determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge." Commonwealth v. Hernandez, 481 Mass. 189, 194 (2019), citing Mass. G. Evid. § 701 (2018). Although "[w]e are generally wary of lay opinion regarding the behavioral effects of intoxicants," id. at 194 n.6, "[a] lay witness may testify concerning a defendant's observable appearance, behavior, and demeanor." Commonwealth v. Gerhardt, 477 Mass. 775, 786 (2017). We review the judge's rulings for an abuse of discretion. See Commonwealth v. Connolly, 91 Mass. App. Ct. 580, 585 (2017).

Contrary to the defendant's claim, neither witness gave an expert opinion. Rather, each witness essentially testified that there was nothing about the victim's appearance, behavior, or demeanor to suggest that she may have used drugs. To the extent that the witnesses gave any opinion at all (as opposed to testimony relating direct observation), it was a permissible lay opinion as to the victim's sobriety. "A lay person may provide an opinion, in a summary form, about another person's sobriety, provided there exists a basis for the opinion." Commonwealth v. Orben, 53 Mass. App. Ct. 700, 704 (2002). Here, each witness had experience with people who were intoxicated by drugs and testified, in summary form, that the victim did not appear so intoxicated. There was no abuse of discretion.

2. Lesser included offense instruction. Before the case was submitted to the jury, the Commonwealth requested that the judge instruct on assault with intent to rape as a lesser included offense of rape. Over the defendant's objection, the judge instructed the jury on the lesser offense. The jury acquitted the defendant on the rape charge but returned a guilty verdict on the lesser offense. On appeal, the defendant contends that the judge erred in allowing the jury to consider the offense of assault with intent to rape because the evidence did not support such an instruction.

"When the evidence permits a finding of a lesser included offense, a judge must, upon request, instruct the jury on the possibility of conviction of the lesser crime." Commonwealth v. Woodward, 427 Mass. 659, 662-663 (1998), quoting Commonwealth v. Gould, 413 Mass. 707, 715 (1992). "Where, as here, 'the issue is whether the judge erred in giving a lesser included instruction . . . it is not error to give a lesser included offense instruction if on any hypothesis of the evidence, the jury could have found the defendant[] guilty of [the lesser included offense] and not guilty of the greater offense.'" Commonwealth v. Russell, 470 Mass. 464, 480 (2015), quoting Commonwealth v. Porro, 458 Mass. 526, 537 (2010).[2]

"The crime of assault with intent to rape is a lesser included offense of rape." Commonwealth v. Kruah, 47 Mass. App. Ct. 341, 347 (1999). Assault with intent to rape requires proof of "(1) an assault upon the victim, and (2) a specific intent by the defendant at the time of the assault to rape the victim." Commonwealth v. Berendson, 73 Mass. App. Ct. 395, 397 (2008),

[2] Citing Commonwealth v. Vanderpool, 367 Mass. 743, 746 (1975), the defendant contends that in determining whether any hypothesis of the evidence supports giving a lesser included instruction all reasonable inferences must be resolved in favor of the defendant. This case is distinguishable from Vanderpool, which applies in the procedurally different situation in which the defendant, rather than the Commonwealth, requests a lesser included instruction. See Porro, 458 Mass. at 537.

quoting Commonwealth v. Fulgham, 23 Mass. App. Ct. 422, 427 (1987).

Here, the Commonwealth presented evidence that the defendant actually assaulted the victim to force her to perform oral sex on him. Specifically, the Commonwealth's evidence suggested that the victim declined the defendant's offer for money in exchange for sex, then the defendant grabbed the victim by her hair, dragged her between two parked cars, and stabbed her twice. The victim testified that the defendant held her "[a]ll the time by the hair very hard" while ordering her to "give [him] some head." Upon arriving on scene, Officer Antonio observed the defendant standing over the crouched victim with his pants open and underwear showing. Thus, there was sufficient evidence that the defendant assaulted the victim with a specific intent to rape her. See Berendson, 73 Mass. App. Ct. at 397. As there was sufficient evidence of the crime of assault with intent to rape, the judge was obliged to give the instruction upon the Commonwealth's request. There was no error.

Given our disposition of the first two issues raised by the defendant on appeal, we do not reach the third issue.

Judgments affirmed.

By the Court (Sullivan, Kinder & Singh, JJ.[3]),

Joseph F. Stanton

Clerk

Entered: July 31, 2020.

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