

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as 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 23.0 or 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-814

COMMONWEALTH

vs.

JOSE ALVELO.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0.

A jury convicted the defendant, Jose Alvelo, of assault and battery on a family or household member, G. L. c. 265, § 13M (a), assault and battery by means of a dangerous weapon causing serious bodily injury, G. L. c. 265, § 15A (c) (i), and strangulation, G. L. c. 265, § 15D (b).<sup>1</sup> The defendant raises three issues on appeal. He asserts error in the prosecutor's closing argument, prejudice from the admission of the victim's prior consistent statements, and claims that the Commonwealth failed to prove that the victim suffered a serious bodily injury. We affirm.

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<sup>1</sup> The jury acquitted the defendant of assault by means of a dangerous weapon, G. L. c. 265, § 15B (b), assault with intent to rape, G. L. c. 265, § 24, and breaking and entering in the daytime with the intent to commit a felony, G. L. c. 266, § 18.

Discussion. The defendant asserts that the prosecutor improperly inflamed the jury's sympathy and vouched for the key witness's credibility when she argued:

"Imagine being held at knifepoint, believing that you are going to be killed, and then having to recount every detail of that event within minutes. . . . Imagine telling the same story multiple times in multiple days."

We are not persuaded.

It is well settled that "[t]he jury should not be asked to put themselves 'in the shoes' of the victim, or otherwise be asked to identify with the victim." Commonwealth v. Bizanowicz, 459 Mass. 400, 420 (2011). However, "[a] prosecutor may argue 'forcefully for a conviction based on the evidence and on inferences that may reasonably be drawn from the evidence.'" Commonwealth v. Lewis, 465 Mass. 119, 129 (2013), quoting Commonwealth v. Kozec, 399 Mass. 514, 516 (1987). Likewise, "[a] prosecutor is permitted to 'make a fair response to an attack on the credibility of a government witness.'" Commonwealth v. Smith, 450 Mass. 395, 408 (2008), quoting Commonwealth v. Chavis, 415 Mass. 703, 713 (1993).

Here, while not wavering on her account of the assault, the victim gave inconsistent descriptions of the events leading up to the attack. The defendant used these inconsistencies to marshal a strong attack on the victim's credibility. The prosecutor countered by pointing out the chaotic nature of the

attack. There is no doubt that the substance of these arguments -- absent the use of the words "you" and "imagine" -- was entirely proper. See Commonwealth v. Valentin, 420 Mass. 263, 274 (1995) (despite prosecutor improperly placing jury in witnesses' shoes, "the jury could not have understood it for anything more than a rhetorical effort on the part of the prosecutor to explain that testimony about the conduct of the witnesses after [the incident] had been affected by the stress of what they had seen"). Accordingly, the Commonwealth's brief use of the terms "you" and "imagine" in this context was also not improper.<sup>2</sup> Cf. Commonwealth v. Carney, 472 Mass. 252, 258 (2015), quoting Commonwealth v. Espada, 450 Mass. 687, 699 (2008) ("Merely using a 'first person pronoun does not interject personal belief into a statement'").

In any event, even assuming error, the defendant suffered no prejudice from the brief use of these words. The challenged comments were relatively brief, the case against the defendant was strong, and the judge instructed the jury on three occasions that closing arguments were not evidence. See Commonwealth v.

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<sup>2</sup> To the extent that the defendant argues that using the terms "you" or "imagine" constitutes "vouching" for the victim's credibility, this argument is without merit. The defendant has pointed to no place where the prosecutor "expresse[d] a personal belief in the credibility of a witness, or indicate[d] that he or she has knowledge independent of the evidence before the jury." Commonwealth v. Wilson, 427 Mass. 336, 352 (1998).

Roberts, 433 Mass. 45, 54-55 (2000) (improper remarks during closing argument unlikely to make difference where evidence was strong and judge gave appropriate instructions to jury about purpose of summations); Commonwealth v. Deloney, 59 Mass. App. Ct. 47, 53 (2003) (improper statements not prejudicial where they constitute only brief portion of closing arguments). Here, the victim's testimony was corroborated by proof of the injuries she sustained. Further, her identification of the defendant as her attacker never wavered, and was supported by the defendant's prompt arrival to the same location to which the victim had fled. There was no prejudice to the defendant.

Similarly, assuming error in the admission of the victim's prior consistent statements, there was no prejudice. Of the approximately twelve questions on redirect examination which referenced prior consistent testimony, seven of these related to charges of which the defendant was acquitted. See Commonwealth v. Sosnowski, 43 Mass. App. Ct. 367, 372 (1997) ("it is difficult to find that the admission of the evidence caused prejudice where the jury returned not guilty verdicts on two of the three indictments"). Four statements pertained to the assault for which there was substantial medical corroboration. See Commonwealth v. Wilson, 427 Mass. 336, 348-349 (1998) (defendant not prejudiced by admission of improper hearsay "in light of other evidence of his guilt"). The remaining statement

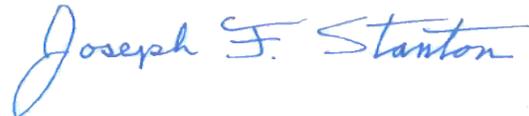
pertaining to the defendant's use of a knife was brief and presented minimal risk to the defendant. See Commonwealth v. Vuthy Seng, 456 Mass. 490, 499 (2010) (where victim does not testify regarding prior consistent statements at length, "any harm inflicted on the defendant is minimal"). Accordingly, even assuming error, reversal is not warranted.

Last, we reject the defendant's assertion that the record does not support the element of serious bodily injury. The defendant's reliance on Commonwealth v. Scott, 464 Mass. 355, 363-364 (2013), is misplaced. Unlike in Scott, where a jury could not be expected to know how a laceration to the liver would impair its function, the impairment here was readily apparent. It is commonly known that breathing is the primary function of the lungs, and the victim complained of difficulty breathing as a result of the attack. The medical records confirmed that she suffered from a collapsed lung and had difficulty breathing. On this record, there can be no doubt, therefore, that the victim suffered impairment of a bodily function as a result of her injuries. See id. at 359 ("An impairment of an organ . . . occurs when damage to the structure of the organ is significant enough to compromise its ability to perform its function in the victim's body"). We conclude that

the record amply supports a finding of serious bodily injury.

Judgments affirmed.

By the Court (Green, C.J.,  
Maldonado, & Blake, JJ.<sup>3</sup>),



Clerk

Entered: July 31, 2020.

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<sup>3</sup> The panelists are listed in order of seniority.