

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-490

COMMONWEALTH

vs.

FABIAN LLANO.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a jury trial in the Superior Court, the defendant, Fabian Llano, was convicted of two counts of assault and battery by means of a dangerous weapon and one count of misleading a police officer.¹ On appeal, the defendant challenges one of the assault and battery by means of a dangerous weapon convictions on the ground that the judge erred in admitting testimony concerning a witness's pretrial identification of the defendant. The defendant also argues that the Commonwealth presented insufficient evidence to prove the crime of misleading a police officer. We affirm.

Background.² The incident occurred at a birthday party attended by the victim and the defendant, among many others. As

¹ The jury found the defendant not guilty of murder.

² We delineate additional facts in the discussion section below.

the victim was leaving the party, a dispute began between the victim and two other men who attended the party. As the victim and his group left the apartment building, the two men confronted the victim. The dispute became a fight outside of the apartment building. As the dispute escalated, the victim pulled out a knife. The fight further escalated, and various attendees of the party joined the fight. Several people surrounded the victim and his group. A brawl ensued. At some point, the victim reentered the apartment building, and the key events relating to the assault and battery by means of a dangerous weapon charges ensued in the hallway of the apartment building. At some point, the defendant, who had participated in the fight, threw a metal stand or object into the crowd of people in the hallway. The metal object struck the victim.

Soon thereafter, two gunshots were fired and struck the victim in the torso. After hearing the gunshots, the participants in the melee ran outside. Shortly thereafter, the defendant returned inside and stomped on the victim's head. As the victim lay on the ground, other people kicked him and struck him with wooden sticks.³ The victim passed away from his injuries.

³ A portion of the facts recited herein stem from a surveillance videotape that was admitted in evidence as an exhibit.

Police arrived on the scene and spoke to various people who attended the party. The police later interviewed the defendant, among others, at the police station. The defendant's statements at his interview form the basis for the conviction of misleading a police officer.

Defense counsel relied on cross-examination to assert the defense theory that the victim provoked and escalated the incident; that the defendant's statements to the police were not voluntary; and that the defendant's statements to the police constituted simple omissions as opposed to willful and intentional efforts to mislead the police. The defendant did not dispute that he stomped on the victim's body.⁴

Discussion. 1. Pretrial statements of identification.

The defendant contends that the judge erred in admitting substantively Detective MacIsaac's testimony regarding a witness's pretrial statement of identification. For evidence of a witness's prior identification of a defendant "to be presented by a third party and admissible as substantive evidence at trial, it is essential that the identifying witness . . . be available to testify and subject to cross-examination about the

⁴ The surveillance videotape captured the defendant stomping on the victim. This conduct was the basis of one of the two counts of assault and battery by means of a dangerous weapon. The defendant does not challenge this conviction in his appeal. The other conviction, which the defendant does challenge, stemmed from the throwing of the metal stand or object at the victim.

alleged identification statement." Commonwealth v. Herndon, 475 Mass. 324, 332 (2016). See Mass. G. Evid. § 801(d)(1)(C) (2020). Furthermore, "before introducing evidence of that alleged identification through a third-party witness," the Commonwealth must "inquire directly of the alleged identifying witness about the alleged prior identification." Herndon, supra at 334. This approach "may reduce confusion of the jury by providing them with both versions of the events in a timely fashion, 'leaving it to the jury to resolve the conflicting claims concerning that prior identification.'" Id. at 335, quoting Commonwealth v. Cong Duc Le, 444 Mass. 431, 440 (2005). This common-law rule does not "render a witness's entire statement admissible, but only so much as comprises relevant evidence on the issue of identification." Commonwealth v. Adams, 458 Mass. 766, 772 (2011). We review the admission of such evidence for abuse of discretion. See id. ("Judges have broad discretion in this area").

Here, there is no dispute that the Commonwealth followed the Herndon protocol. However, the defendant argues that the portion of the witness's statement that the metal object "struck [the victim]" was not "necessary to give context" to her out-of-court statement of identification, and was thus inadmissible hearsay.

Contrary to the defendant's framing of this issue, Massachusetts case law does not limit the admissibility of a witness's out-of-court statement to what is "necessary to give context" to a prior out-of-court identification.⁵ Rather, our case law limits the admissibility of the prior identification to "only so much as comprises relevant evidence on the issue of identification." Adams, 458 Mass. at 772. Here, the witness provided identification testimony at trial -- testimony that was ambiguous and inconsistent with her pretrial statement to Detective MacIsaac -- and was subject to cross-examination. Thus, the judge properly allowed Detective MacIsaac to testify regarding the witness's prior identification. Detective MacIsaac testified that during the witness's recorded interview, the witness stated, "And I do know the boy with the braids hit [the victim] with [the metal] shelf, for sure."⁶ This testimony constituted relevant evidence on the issue of identification, and the judge did not abuse her discretion in admitting it.

⁵ It appears that the defendant derived the "necessary to provide context" language from Adams. See Adams, 458 Mass. at 772 ("The extent of the statement needed to provide context will vary from case to case"). This language does not represent the standard for admissibility of pretrial identification evidence, but describes the broad, case-specific discretion a judge has in deciding what statements do and do not bear on identification.

⁶ From witness testimony, the surveillance videotape, and other evidence at trial, the record is clear that the reference to the "boy with the braids" or the "Spanish kid with braids" was the defendant.

We are not persuaded by the defendant's claim that the witness's earlier statement in the interview -- that the defendant picked up the metal "shelf or table or the metal thing in the hallway . . . and he threw it into the crowd" -- precluded the introduction of the challenged statement. Our case law does not draw such a fine line. See Adams, 458 Mass. at 772 ("The extent of the statement needed to provide context will vary from case to case, depending on what the witness remembers or denies at trial"). The statement that the defendant hit the victim with the metal object "for sure" constituted relevant evidence and was "limited context integral to the identification." Commonwealth v. Walker, 460 Mass. 590, 608-609 (2011) (noting that extraneous descriptions such as color and make of car, number of shots fired, color of firearm, and defendant's behavior after shooting go "beyond the context of the identification"). Moreover, the statement clarified the witness's level of certainty in the identification, and thus furnished the jury with "both versions of the events in a timely fashion, 'leaving it to the jury to resolve the conflicting claims concerning that prior identification.'" Herndon, 475 Mass. at 335, quoting Cong Duc Le, 444 Mass. at 440.⁷ There was no error.

⁷ In her initial ruling on the admission of Detective MacIsaac's testimony, the judge noted, inter alia, that "the jury can make

2. Misleading a police officer. The crime of misleading a police officer, G. L. c. 268, § 13B, consists of the following elements: "(1) wilfully misleading, directly or indirectly, (2) a police officer (3) with the intent to impede, obstruct, delay, harm, punish, or otherwise interfere thereby with (4) a criminal investigation." Commonwealth v. Paquette, 475 Mass. 793, 797 (2016). The defendant contends that the Commonwealth "failed to establish that the defendant intended to mislead police" in violation of the statute. Specifically, the defendant claims that his statements to police detectives did not constitute a "content-laden fabrication designed to send police off course, thereby interfering with their investigation." Commonwealth v. Morse, 468 Mass. 360, 374 (2014). We review to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979).

a decision between the different witnesses . . . as to whose testimony they want to credit. I think it really comes down to a question of credibility." Later at trial, the judge stated that she would not "draw a line" between the throwing of the object and the object striking the victim because "you can't parse it out." She further noted that, in the context of the evidence at trial, "it would be strange" and would not make sense to "draw a line between the throwing and the striking."

The defendant's police interview, taken the morning of the shooting, was admitted in evidence and played for the jury. In his interview, the defendant told police detectives, among other things, that the fight moved from outside the building to inside the hallway, and that he entered the hallway to take the elevator to his aunt's house to get his keys. He further stated that when he came back downstairs, the victim was lying "face down" on the floor in the hallway and "[t]here was nobody around him." When asked if he heard a gunshot, the defendant stated, "I was upstairs, Officer. Honestly, I was upstairs." He later repeated that he did not hear any gunshots, as he was upstairs.

Substantial evidence introduced at trial, including the surveillance videotape, testimony from police detectives, and testimony and pretrial statements from a witness, refuted or contradicted the defendant's statements to the police detectives. From this evidence, the jurors could have found that the defendant lied with respect to his involvement in the fighting; his whereabouts during the fighting; his presence and observations inside the hallway at critical times; and his actions, including, but not limited to, his stomping on the head of the victim after the victim had been shot twice and while the victim was lying on the ground.⁸ See Paquette, 475 Mass. at 804.

⁸ Defense counsel did not contest the defendant's presence in the hallway during the shooting. To the contrary, in closing

In addition, the jury could have found that the defendant's false statements influenced and misled the police detectives in a material way. See Paquette, 475 Mass. at 804 ("the jury might have inferred that the defendant 'misled' police within the meaning of § 13B by lying about his location at the time of the fight, or by misrepresenting that he did not know the identities of certain people involved, if they found that such statements reasonably could have influenced the investigation in a material way"). Detective MacIsaac testified that he did not seek gunshot residue testing of those interviewed after the shooting because "[n]ot one person interviewed that night said they were inside the hall during the shooting." In this regard, the timing of the defendant's false statements in relation to the stage of the police investigation is a relevant consideration. The Commonwealth presented evidence to the jury that the police detectives conducted the interview in the first few hours of the investigation, before they had reviewed the surveillance videotapes. Accordingly, the jury could have concluded that the Commonwealth proved the element of "willfully misleading" a criminal investigation. See id. ("Although the Commonwealth did not present any direct evidence of the effect of the defendant's

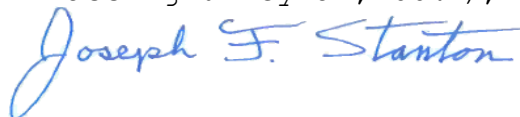
argument defense counsel acknowledged that during the defendant's statement to the police detectives, the defendant "omitted the part where he was in the hallway when the gunshots were fired and came back and kicked [the victim] when he was laying down."

statements at that interview on the investigation by police, the statements were made while the investigation still was in its early stages").

For similar reasons, we have little difficulty concluding that the Commonwealth also satisfied the intent element of the crime. Such intent may be inferred from a false statement designed to divert the police's attention. See Paquette, 475 Mass. at 803. Here, the evidence, viewed in the light most favorable to the Commonwealth, was sufficient for the jury to find that the defendant proffered a series of lies and misleading statements with the intent to lead investigators away from his involvement with the shooting or the fight with the victim. See id. at 804-805 ("The jury also might have inferred from circumstantial evidence that the defendant specifically intended to impede, obstruct, delay, or otherwise interfere with the investigation").

Judgments affirmed.

By the Court (Blake,
Massing & Neyman, JJ.⁹),



Clerk

Entered: October 23, 2020.

⁹ The panelists are listed in order of seniority.