COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1180

COMMONWEALTH

vs.

ALI H. ISMAIL.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a jury trial, the defendant was convicted of two counts of assault and battery on a family and household member, two counts of intimidation of a witness, and one count of assault and battery by means of a dangerous weapon (ABDW). On appeal, he claims the judge improperly admitted bad act evidence, there was insufficient evidence to convict him of witness intimidation and ABDW, errors in the prosecutor's closing argument, and ineffective assistance of counsel. We affirm.

1. Prior bad acts. Prior to trial, the judge allowed the Commonwealth's motion in limine to permit certain prior bad acts to be introduced at trial. On appeal, the defendant claims that the Commonwealth's evidence, through the victim's testimony, exceeded what the judge had permitted when she allowed the

motion in limine. In particular, the victim testified that the defendant expressed frustration when she called the police and the defendant called her a "cop caller cunt." The victim also testified that the defendant would "always" get upset at her chosen attire. Finally, the victim testified that after an occasion where the defendant bit her, the victim told him, "[I]t's late, somebody is going to call the cops, because there [were] incidents [of] people call[ing] the cops so I was scared."

The parties dispute whether these claims were properly preserved for appeal. In Commonwealth v. Grady, 474 Mass. 715, 719 (2016), the Supreme Judicial Court held that a defendant is no longer required "to object to the admission of evidence at trial where he or she has already sought to preclude the very same evidence at the motion in limine stage, and the motion was heard and denied." However, "[a]n objection at the motion in limine stage will preserve a defendant's appellate rights only if what is objectionable at trial was specifically the subject of the motion in limine." Id. "Where what is being addressed and resolved at the motion in limine stage differs from what occurs at trial, the defendant still must object at trial to preserve his or her appellate rights." Id. at 720.

With reference to the defendant's crassly worded request for the victim to not seek police assistance, the defendant

states that this was outside the parameters of the Commonwealth's motion in limine. The Commonwealth agrees. However, the language at issue was contained in the motion in limine, and is thus preserved. The remaining items at issue, even assuming they constitute prior bad acts, were not included in the motion in limine, nor were they objected to at trial. Those claims may only offer relief if they created a substantial risk of a miscarriage of justice. See Commonwealth v. Elam, 412 Mass. 583, 585 (1992). In the end, the defendant's claims are without merit.

While evidence of a defendant's prior bad acts "is inadmissible for the purpose of demonstrating the defendant's bad character or propensity to commit the crimes charged," Commonwealth v. Crayton, 470 Mass. 228, 249 (2014), such evidence may be admissible if it is relevant for some other purpose. One such proper purpose is to demonstrate the hostile nature of the relationship between the defendant and the victim. See Commonwealth v. Butler, 445 Mass. 568, 573-575 (2005); Commonwealth v. Oliveira, 74 Mass. App. Ct. 49, 54 (2009). All of the challenged testimony here bore directly on the hostile relationship the defendant had with the victim. For this reason, the first statement was properly admitted, and the judge was under no obligation to sua sponte strike the remaining

challenged testimony. There was no error, no abuse of discretion, and no risk that justice miscarried.[1]

2. Sufficiency of the evidence. a. Intimidation of a witness. The defendant claims that the evidence of the defendant telling the victim not to be a "cop caller cunt" after he beat her, and that their child would not forgive the victim if she "put [the defendant] in jail" was not sufficient to sustain his two convictions for intimidation of a witness. We disagree.

When analyzing whether the record evidence is sufficient to support a conviction, an appellate court is not required to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." Commonwealth v. Velasquez, 48 Mass. App. Ct. 147, 152 (1999), quoting Jackson v. Virginia, 443 U.S. 307, 318-319 (1979). Rather, the relevant "question is 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

[1] For the first time on appeal, the defendant claims that the judge should have given a limiting instruction regarding the prior bad acts. However, at trial, when the judge offered to so instruct, the defendant stated that he preferred that one not be given. Not relieving him of that preference was neither error, nor did it create a substantial risk of a miscarriage of justice. See Commonwealth v. Iago I., 77 Mass. App. Ct. 327, 333 (2010).

reasonable doubt." Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), quoting Jackson, supra.

When evaluating sufficiency, the evidence must be reviewed with specific reference to the substantive elements of the offense. See Latimore, 378 Mass. at 677-678. To prove the crime of intimidation of a witness pursuant to G. L. c. 268, § 13B, the Commonwealth was required to prove four elements: "(1) a possible criminal violation occurred that would trigger a criminal investigation or proceeding; (2) the victim would likely be a witness or potential witness in that investigation or proceeding; (3) the defendant engaged in intimidating behavior, as defined in the statute, toward the victim; and (4) the defendant did so with the intent to impede or interfere with the investigation or proceeding, or in reckless disregard of the impact his conduct would have in impeding or interfering with that investigation or proceeding." Commonwealth v. Fragata, 480 Mass. 121, 122 (2018).

The defendant does not challenge the first two elements, which the Commonwealth's evidence more than satisfied. Rather, the defendant claims that the evidence was insufficient because he merely used vulgar language and did not actually prevent the victim from contacting the police. However, on March 17, 2018, the defendant not only discouraged the victim from calling the police by employing the vulgar moniker, but did so after he

pushed her against the wall, slapped her, and caused her nose to bleed heavily. In the light most favorable to the Commonwealth, it was reasonable for the jury to conclude that this conduct was aimed at putting the victim in fear so that she would not call the police. See Commonwealth v. Perez, 460 Mass. 683, 703 (2011).[2] Furthermore, the intimidation needed not be successful to constitute a crime. See Commonwealth v. Rivera, 76 Mass. App. Ct. 530, 532-535 (2010).

On April 22, 2018, the defendant ripped the victim's dress, squeezed her neck, and bit her. After the fight, he asked the victim where her telephone was because he thought she would call the police. The victim did not call the police after this incident because the defendant told her that she was not a citizen and that she would not obtain custody of their child. To put this in context, the victim said she was reluctant to call the police because the defendant told her that he would take their child from her, and that the child would hate her if

[2] The defendant also claims that because the victim could not remember the exact moment he called her the vulgar name, the jury was prohibited from determining whether the defendant's choice of words was part of the charged conduct. Although the defendant cites no support for his claim that such specificity is required, which does not suffice for appellate argument, see Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019), the complaint sets forth the date of the offense as March 17, 2018, the Commonwealth argued it as such, and the sufficiency of the evidence was not affected by the victim's inability to pin point the exact moment the statement was uttered.

she is responsible for the defendant being in jail. Based on this conduct and the defendant's statement, again viewed in the light most favorable to the Commonwealth, the jury were free to conclude that the defendant was intimidating the victim with the intent to impede or interfere with a police investigation in this matter. See Fragata, 480 Mass at 122; Commonwealth v. Robinson, 444 Mass. 102, 109 (2005).

b. ABDW. The defendant also claims that the evidence was insufficient to establish that he committed an ABDW, where the dangerous weapon was a wall that was merely present, and which he did not intend to use as a dangerous weapon. We disagree.

To prove ABDW under G. L. c. 265, § 15A, the dangerous weapon must be either dangerous per se or one which is dangerous as used. See Commonwealth v. Appleby, 380 Mass. 296, 303 (1980). Stationary things may be employed as dangerous weapons. See Commonwealth v. Sexton, 425 Mass. 146, 150-151 (1997). Here, the defendant's claim presupposes that ABDW is a specific intent crime, but it is not. See Appleby, supra at 307. See also Commonwealth v. Connolly, 49 Mass. App. Ct. 424, 425 (2000). Instead, the dangerousness of an object that is not inherently dangerous, like a wall, "turns on the manner in which it is used . . . , not the intention of the actor when using it." Id.

Here, during an argument, the defendant pushed the victim into the wall and caused her to hit her head. The victim's nose was bleeding heavily; she thought it was broken. In the light most favorable to the Commonwealth, the jury could reasonably have found that the defendant intended to touch the victim and that the touch was exacerbated by his use of the wall, which functioned as a dangerous weapon. This evidence was sufficient to find the defendant guilty of ABDW.

3. Closing argument. For the first time on appeal, the defendant claims that the prosecutor's closing argument improperly vouched for the victim, appealed to sympathy, and misstated the evidence. Because these claims were not preserved at trial, we review to determine if error exists, and if so, whether it created a substantial risk of a miscarriage of justice. See Commonwealth v. Chambers, 93 Mass. App. Ct. 806, 821 (2018).

The defendant claims that the prosecutor improperly vouched for the victim and appealed to sympathy when she characterized the victim as "candid" and "straightforward." "A prosecutor may not express a personal opinion as to the credibility of a witness or assert personal knowledge of the facts in issue." Commonwealth v. Francis, 432 Mass. 353, 357 (2000). Nor may a prosecutor invoke sympathy in her argument. See Commonwealth v. Ridge, 455 Mass. 307, 330 (2009). However, "[a] prosecutor can

address, in a closing argument, a witness's demeanor, motive for testifying, and believability, provided that such remarks are based on the evidence, or fair inferences drawn from it, and are not based on the prosecutor's personal beliefs . . . . When credibility is an issue before the jury, 'it is certainly proper for counsel to argue from the evidence why a witness should be believed.'" Commonwealth v. Freeman, 430 Mass. 111, 118-119 (1999), quoting Commonwealth v. Raymond, 424 Mass. 382, 391 (1997).

Here, the complained of phrases were tied to the evidence and the victim's demeanor. Specifically, the prosecutor explained to the jury that her characterization of the victim was based on the victim correcting the defense attorney regarding the dates of the offenses and the photographs that were submitted into evidence. Even more importantly, the prosecutor employed the rhetorical devices of "I submit," and "I suggest," in her argument which clarifies that the prosecutor's statement did not constitute an impermissible expression of personal belief. See Commonwealth v. Silva, 401 Mass. 318, 329 (1987); Commonwealth v. Garcia, 94 Mass. App. Ct. 91, 103 (2018).

The defendant also claims impropriety in the prosecutor's argument that the victim was not "getting anything" for her testimony and rhetorically asking "why would she make this up?"

However, defense counsel focused his closing argument on the victim and her credibility. He argued that the victim's testimony "contradict[ed] itself," and that it was "convoluted" and "confusing." The prosecutor's argument was an appropriate response for arguing why the victim was credible, and why she lacked a motive to testify falsely. See Commonwealth v. Lawton, 82 Mass. App. Ct. 528, 541-542 (2012).

The defendant next claims error in the prosecutor's argument where she states, "The evidence is really just [the victim's] testimony, the police officer's testimony, and the photographs that were introduced to you as exhibits. But that's all you need, ladies and gentlemen." This, the defendant claims, "misstated" the evidence by suggesting that the defendant's testimony was not evidence. We disagree.

The defendant reads the challenged statement out of context. The prosecutor was not asking the jury to ignore or even discount the defendant's testimony. Rather, the prosecutor was reminding the jury what she had told them in her opening statement and that this was not a case involving "fancy scientific and technological evidence," as the jury may have seen on television. The argument was a simple reminder that the Commonwealth had proven its case through the exhibits and the victim's and the police officer's testimony, assuming the jury found their testimony credible. Prosecutors are entitled to

forcefully argue to the jury, based on the evidence, why the defendant is guilty. See Commonwealth v. Kozec, 399 Mass. 514, 516 (1987). Nothing more occurred here. Because there was no error, there is no risk that justice miscarried.

4. Ineffective assistance of counsel. For the first time on appeal, for a variety of reasons,[3] the defendant claims he received ineffective assistance of counsel. Given this weak procedural posture, we are without evidence from defense counsel and no findings from the judge. Because the basis of these claims do not appear indisputably on the appellate record, and involve factual questions that would more appropriately be considered first by the trial judge, we decline to resolve them. See Commonwealth v. Zinser, 446 Mass. 807, 811 (2006); Commonwealth v. Keon K., 70 Mass. App. Ct. 568, 573-574 (2007).

Judgments affirmed.

By the Court (Meade, Sullivan & Sacks, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: October 23, 2020.

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[3] The defendant claims that his counsel should have objected to certain hearsay evidence, failed to explore a motive mentioned in his opening statement, failed to object to a portion of the victim's testimony, did a poor job cross-examining the victim, failed to pursue a fabrication defense, and gave an unfocused closing argument.

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