

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-965

COMMONWEALTH

vs.

MASON MABERRY.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant appeals from his conviction of assault and battery causing serious bodily injury, in violation of G. L. c. 265, § 13A (b). On appeal, he claims that he is entitled to a new trial because he was improperly cross-examined about his prearrest silence. We affirm.

Background. The victim, Jonathan Buonomo, was a friend and coworker of the defendant. By happenstance, Buonomo met the defendant and his girlfriend, Arianna Zagarella, at a bar on the evening of January 11, 2016. The three socialized together for thirty minutes, traveled to another bar and remained until closing time, after which the defendant and Zagarella offered to drive Buonomo home. Buonomo accepted the offer and got into the back seat of Zagarella's car on the driver's side. Zagarella drove, and the defendant sat in the front passenger seat. Up to

this point, the facts are relatively undisputed. However, from this point forward, the Commonwealth and the defendant presented different versions of the events.

Buonomo testified that Zagarella and the defendant began to argue and that this made him feel uncomfortable. Consequently, when Zagarella stopped at a red light, he got out of the car. The defendant became upset, walked around the car to where Buonomo was standing, and struck him in the face multiple times. Buonomo acknowledged that he did not have a clear memory of the evening, and remembered little to nothing after the point at which the defendant hit him.

The defendant testified on his own behalf and did not deny striking Buonomo. He claimed that Buonomo had leaned forward and "groped" Zagarella when she was stopped at a red light. Zagarella was startled and momentarily took her foot off the brake pedal, causing the car to lurch forward and hit the car in front of her, a taxicab. The defendant got out of the car, went around to the driver's side, and told Buonomo to get out of the car, but he refused. Buonomo then slammed the door open, hitting the defendant as he did so and attempted to strike the defendant with a "closed fist." The defendant claimed that he defended himself by punching Buonomo twice in the face. Thereafter, the defendant asserted, he decided the best course of action would be to walk away and wait for the police.

Meanwhile, the driver of the taxicab called the police, and various police officers, including Officer David Barkhouse of the Cambridge Police Department, were dispatched to the scene. Buonomo was on the ground unconscious and subsequently was transported to the hospital, where he was treated for his injuries, including a broken nose. The investigation into the motor vehicle accident ended quickly once it was ascertained that neither vehicle had sustained any damage and the officers then focused on what had happened to Buonomo. Officer Barkhouse went to the hospital to interview Buonomo, and questioned him for about ten minutes. As he was returning to the police station, Officer Barkhouse learned that another officer had located the defendant. Officer Barkhouse then interviewed the defendant, who admitted that he had been involved in an altercation. Officer Barkhouse testified that the defendant said that he had struck Buonomo in the face several times because he did not like how Buonomo was behaving in front of his girlfriend. At trial, the defendant claimed that he also told Officer Barkhouse that Buonomo also "groped" Zagarella. A few months later, after he had received a summons to appear in court, the defendant went to the police station and obtained Officer Barkhouse's police report. The defendant testified that the report was not accurate because it did not include his statement that Buonomo had groped Zagarella.

The defendant was cross-examined about his alleged failure to tell Officer Barkhouse that Buonomo had assaulted Zagarella:

Q: "You did not explain to them that Mr. Buonomo had groped your girlfriend?"

A: "I did."

Q: "The next day did you become aware as to whether or not Ms. Zagarella had reported that to the police?"

A: "She didn't report it."

Q: "Okay. And to the best of your knowledge, there was no investigation into whether or not Mr. Buonomo groped Ms. Zagarella?"

A: "I don't believe there was."

There was no objection to this line of questioning.

The prosecutor also questioned the defendant about his failure to "follow up" with the police once he obtained Officer Barkhouse's police report and learned that the report was incorrect:

Q: "You didn't tell the Cambridge Police that it was improperly reported?"

A: "I don't -- I don't really see your position for me to do that."

. . .

Q: ". . . you heard in testimony that you had explained on that night as what the officer said that you explained you punched him because you were unhappy with how Mr. Buonomo was behaving around your girlfriend?"

A: "That's what their statement says about me, but that's not what I say about me."

Q: "I understand it's not what you said, but when you learned that that was in the police report, you did not follow up with the Cambridge Police?"

A: "Like I said, I went for the report and none of the police officers were there so I didn't really have a position to."

Q: "But there wasn't another police officer on duty when you went?"

A: "I -- I wasn't aware that I could influence police officers to change their report."

Again, trial counsel did not object to this line of questioning.

Discussion. The defendant argues that the prosecutor's questions regarding his failure to tell Officer Barkhouse that Buonomo had groped Zagarella and his failure to "follow up" with the police to correct the police report amounted to an improper comment on his right to remain silent. As trial counsel did not object to the questions, we review the alleged error to determine whether it caused a substantial risk of a miscarriage of justice.<sup>1</sup> See Commonwealth v. McCollum, 79 Mass. App. Ct. 239, 256 (2011). The defendant claims that a substantial risk of a miscarriage of justice occurred because the questions damaged his credibility to such an extent that the jury could not properly assess his claim that he acted in self-defense. We are not persuaded that a substantial risk of a miscarriage of justice arose with respect to either set of questions.

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<sup>1</sup> Given our conclusion that there was no substantial risk of a miscarriage of justice, there is no merit to the defendant's related claim that trial counsel was ineffective for not lodging an objection.

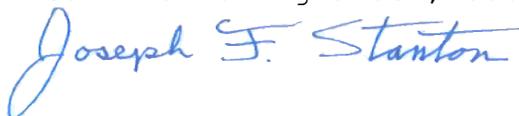
We begin by noting that the prosecutor's questions about his failure to tell Officer Barkhouse that Buonomo had assaulted Zagarella were permissible. The questions did not infringe on the defendant's right to remain silent for the simple reason that he did not exercise that right. Once the defendant spoke with Officer Barkhouse, it was reasonable to expect that he would have told him that he had struck Buonomo because Buonomo had groped Zagarella and therefore the omission was a proper subject of cross-examination. See Commonwealth v. Sosa, 79 Mass. App. Ct. 106, 113 (2011) ("The defendant had a constitutional right to silence, not a right to tell a story and then avoid explaining crucial omissions by stating they were an exercise of the right to silence"). See also Commonwealth v. Niemic, 472 Mass. 665, 672 (2015) ("The prosecutor was entitled to cross-examine the defendant about those inconsistencies [in his prearrest statements], including any omissions in those statements that were different from his trial testimony"); Commonwealth v. Rivera, 425 Mass. 633, 639 (1997) ("A defendant who takes the witness stand . . . is subject to the ordinary rigors of proper cross-examination, including questioning about . . . [an] omission from a pretrial statement where it would have been natural to include the omitted fact").

We need not decide whether asking the defendant why he failed to "follow-up" to correct the police report resulted in a

violation of his right to remain silent, because even if the prosecutor should not have asked the defendant the question, we discern no risk that justice miscarried. Contrary to the defendant's assertion, the evidence supporting his claim of self-defense was not strong. It suffices to note that even if the jury had accepted his testimony as truthful, there was no evidence that the defendant attempted to retreat once Buonomo became aggressive toward him, a necessary element of self-defense. See Commonwealth v. Galvin, 56 Mass. App. Ct. 698, 702 (2002) (Commonwealth may overcome claim of self-defense by showing that defendant "had not availed [him]self of the opportunity to retreat before resorting to physical force").

Judgment affirmed.

By the Court (Vuono,  
Sullivan & Englander, JJ.<sup>2</sup>),



Clerk

Entered: January 7, 2021.

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<sup>2</sup> The panelists are listed in order of seniority.