COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-691

COMMONWEALTH

vs.

NICHOLAS J. BARRIEAULT.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant appeals from convictions of assault by means of a dangerous weapon, disorderly conduct, and resisting arrest. See G. L. c. 265, § 15B (b); G. L. c. 272, § 53; G. L. c. 268, § 32B. The defendant contends that (1) there was insufficient evidence to permit the jury to convict him of assault under either an attempted or threatened battery theory; (2) there was insufficient evidence to convict him of disorderly conduct, and (3) an eyewitness's reference to the defendant as the man she saw at the scene was unfairly prejudicial. We affirm.

Discussion. 1. Sufficiency of the evidence of assault by means of a dangerous weapon. "The elements of assault by means of a dangerous weapon are that a defendant committed an assault, the defendant intended to commit an assault, and the assault was committed by means of a dangerous weapon." Commonwealth v.

Buttimer, 482 Mass. 754, 767 (2019). The defendant contends there was insufficient evidence of assault by means of a dangerous weapon because no reasonable jury could have found that he intended to threaten a battery or "commit a battery on a police officer who was already standing behind the door of his cruisier, pointing a loaded rifle."

We summarize the evidence in the light most favorable to the Commonwealth. See Buttimer, 482 Mass. at 761. On the night of March 15, 2018, at about 10:45 P.M., a passenger in a car traveling on Electric Avenue in Fitchburg saw a car stopped in the middle of the road. A few minutes later, she saw a man walk in front of the car, "running around in the road, dancing, and, like, blocking traffic." She called the police, who instructed her to "pull over and watch where he was walking." She continued to watch the man from a nearby convenience store parking lot until the police arrived.

At approximately 10:46 P.M., Fitchburg Police Officers Tyler Robichaud, Barry Hyvarinen, and Daniel Minichiello arrived at the scene within moments of each other, approximately two minutes after the dispatch. When Robichaud arrived, he turned on his cruiser's takedown lights. The defendant was holding a knife in his right hand "halfway in almost . . . a raised position." Robichaud got out of his cruiser, drew his rifle at

the defendant, ordered him to drop the knife, and to get on the ground.

When Hyvarinen arrived at the parking lot, Robichaud was standing behind the driver's side door of his cruiser and the defendant was standing in the road, approaching Robichaud with a knife in his right hand and a bottle in his left hand. Hyvarinen drew his firearm as he got out of his cruiser. Minichiello then arrived at the scene and drew his weapon. The defendant continued to walk towards Robichaud holding the knife over his head in a partly raised position. The officers ordered the defendant to drop the knife, but he did not comply. After Hyvarinen and Robichaud repeatedly ordered the defendant to drop the knife, the defendant did so, but not until he had come within ten feet of Robichaud.[1]

The evidence of assault by means of a dangerous weapon was sufficient under both attempted battery and threatened battery theories. "A conviction of assault under a theory of attempted

[1] The incident did not end there. Hyvarinen then ordered the defendant to lie down on the ground. The defendant "got down into a seated position on the ground." The officer continued to order the defendant to lie down on his stomach, but the defendant did not. Hyvarinen holstered his firearm, approached the defendant, and "took him to the ground on his stomach with an arm bar takedown." The defendant pulled his hands towards his body, tucking them underneath his stomach. Hyvarinen ordered the defendant to pull his arms out, and the defendant did not. Hyvarinen grabbed the defendant's wrists and pulled his arms out. Hyvarinen and another officer handcuffed the defendant. Minichiello then kicked the knife away.

battery requires the prosecution to prove that the defendant 'intended to commit a battery, took some overt step toward accomplishing that intended battery, and came reasonably close to doing so.'" Commonwealth v. Porro, 458 Mass. 526, 530 (2010), quoting Commonwealth v. Melton, 436 Mass. 291, 295 (2002). The defendant repeatedly ignored commands from three officers to drop his knife. He continued to walk towards them with the knife raised until he was within ten feet of Robichaud. The jury could infer from these facts that the defendant intended to commit a battery on Robichaud.

"A conviction of assault under a theory of threatened battery requires the prosecution to prove that the defendant engaged in conduct that a reasonable person would recognize to be threatening, that the defendant intended to place the victim in fear of an imminent battery, and that the victim perceived the threat." Id. at 530-531. The jury permissibly could find that the defendant intended to place Robichaud in fear of an imminent battery, and that Robichaud perceived the threat. The defendant's actions, viewed in light most favorable to the Commonwealth, constituted an outward demonstration of force with apparent ability to injure.

The defendant's contention that there was no "outwardly menacing conduct" is belied by the facts. Similarly, the argument that it "strains credulity" to conclude that heavily

armed police officers could be in fear presents a question of credibility for the jury, not the appellate courts. See Buttimer, 482 Mass. at 761; Commonwealth v. Botelho, 87 Mass. App. Ct. 846, 852 (2015); Commonwealth v. Mercado, 24 Mass. App. Ct. 391, 398 (1987).

2. Sufficiency of the evidence of disorderly conduct. The defendant also contends there was insufficient evidence to convict him of disorderly conduct because the eyewitness did not identify him as the man who she saw blocking traffic, and because she and the police officers gave different descriptions of his clothing. The evidence was sufficient. The eyewitness candidly acknowledged that she could not identify the defendant, but she paid attention until the police arrived. The officers arrived within seconds of one another and within minutes of the eyewitness's call. The jury were permitted to find that the man she saw was the same man who was apprehended by the police. Any discrepancies in the descriptions of his clothing or appearance were for the jury to resolve. See Mercado, 24 Mass. App. Ct. at 398, citing Commonwealth v. Clary, 388 Mass. 583, 588-589 (1983).

3. Identification. Before trial, the Commonwealth moved in limine to permit the police officers to testify that the defendant was the man who was arrested. The motion was allowed. At trial, the officers so testified. The issue now presented

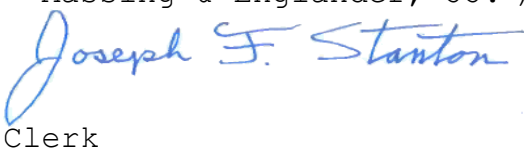
arises from the testimony of the eyewitness, who was asked by the prosecutor, "And can you tell us where the defendant was when you first saw him?" The defendant asserts that her answer, "Right here," resulted in an improper in court identification in violation of Commonwealth v. Crayton, 470 Mass 228, 236 (2014).

We agree that the prosecutor's phrasing was unfortunate and we therefore review this unpreserved error to "determine whether the error created a substantial risk of a miscarriage of justice." Commonwealth v. Grady, 474 Mass. 715, 716-717 (2016). It was clear to the jury that the eyewitness could not identify the man she saw. When asked if she could "describe this person for us" she said, "Not really." Although the description of his clothing varied among the witnesses, the evidence of identity was strong, if not overwhelming. Absent some evidence that there was a second dancing man with a knife blocking traffic in the street, the identification of the defendant was all but a

foregone conclusion. There was no substantial risk of a miscarriage of justice.

Judgments affirmed.

By the Court (Sullivan, Massing & Englander, JJ.[2]),



Clerk

Entered: April 6, 2021.

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