

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

20-P-548

COMMONWEALTH

vs.

ANDREW M. ROSSETTI.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a jury trial, the defendant was convicted of intimidation of a witness in violation of G. L. c. 268, § 13B.<sup>1</sup> On appeal, he claims that the admission of certain prior bad acts evidence created a substantial risk of a miscarriage of justice, and that there was insufficient evidence to support his conviction. We affirm.

1. Prior bad acts. "[T]he prosecution may not introduce evidence of a defendant's prior or subsequent bad acts for the purpose of demonstrating bad character or propensity to commit the crime charged." Commonwealth v. Mendes, 441 Mass. 459, 464 (2004), quoting Commonwealth v. Barrett, 418 Mass. 788, 793

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<sup>1</sup> The defendant was acquitted of assault and battery on a family member, assault with a dangerous weapon, assault, and a second count of intimidation of a witness.

(1994). "Questions of admissibility, probative value, and unfair prejudice are left to the sound discretion of the trial judge, and will not be overturned absent clear error." Commonwealth v. Philbrook, 475 Mass. 20, 26 (2016). Where the defendant did not object to a witness's testimony, we review any error in the admission of such testimony for a substantial risk of a miscarriage of justice. See Commonwealth v. McCoy, 456 Mass. 838, 850 (2010). A substantial risk of miscarriage of justice exists only where we have "serious doubt whether the result of the trial might have been different had the error not been made." Id.

The defendant claims that the victim's testimony that the defendant said he would slit her throat if she called the police on him, and had his bail revoked, was an inadmissible prior bad act. He claims that the primary purpose of such testimony was to paint him as a bad person, who had been in jail, and was now out on bail. However, such evidence is admissible if relevant for another purpose, such as to demonstrate intent, motive, or state of mind, so long as the probative value of the evidence outweighs the risk of unfair prejudice. See Philbrook, 475 Mass. at 26.

Here, the victim's testimony was not offered for the purpose of showing the defendant's propensity to commit bad acts, but rather to show the motive and intent behind his threat

towards the victim. See id. To convict the defendant of intimidation of a witness, the Commonwealth was required to prove, among other things, that the defendant intimidated the witness with force or threats of force, with the purpose of influencing the witness. See Commonwealth v. Perez, 460 Mass. 683, 703 (2011). The victim testified that during a domestic dispute with the defendant, where he threw a plate of food, grabbed her by the hair, and pulled out a knife, the defendant stated that "if [the victim] called the police, or had his bail revoked, or did anything to get him sent back to jail, that he would slit [her] throat." The victim then testified that he repeated these threats, and said that were she to call the police, or have his bail revoked, then she "would pay for that."

This evidence was directly relevant to the defendant's motive and intent in threatening the victim, and the mere reference to the revocation of bail was not so unfairly prejudicial such that any prejudice outweighed the highly probative nature of the victim's testimony. See Commonwealth v. Weichell, 390 Mass. 62, 73 (1983) ("As a general rule, the Commonwealth is entitled to introduce all relevant evidence of motive"). See also Perez, 460 Mass. at 703 (Commonwealth entitled to show surrounding circumstances of allegedly threatening statement to demonstrate intimidation of witness). Accordingly, we find no error in the admission of the victim's

testimony, and therefore, there was no risk that justice miscarried.

2. Sufficiency of the evidence.

"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.' . . . 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 reasonable doubt.' Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)."

Commonwealth v. Rocheteau, 74 Mass. App. Ct. 17, 19 (2009).

Sufficiency of the evidence must be reviewed with specific reference to the substantive elements of the offense. See Jackson, 443 U.S. at 324 n.16; Latimore, 378 Mass. at 677-678. To prove the crime of intimidation of a witness in violation of 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 challenges the sufficiency of the evidence only as to

the fourth element.<sup>2</sup> He claims that the evidence was insufficient to demonstrate his specific intent to intimidate the victim, particularly where the victim's testimony relating to the potential revocation of his bail should have been deemed inadmissible.<sup>3</sup> We disagree.

The fundamental problem with the defendant's argument is that our consideration of the sufficiency of the evidence "is to be measured upon that which was admitted in evidence without regard to the propriety of the admission." Commonwealth v.

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<sup>2</sup> In any event, the evidence when viewed in the light most favorable to the Commonwealth was also sufficient as to the first three elements of intimidation of a witness. See Fragata, supra. The victim was going to be a potential witness for a criminal investigation or proceeding, given the defendant's alleged assault of both her and her son. Furthermore, the defendant willfully engaged in intimidating behavior towards the victim, when he "yanked" the victim by the hair, threatened her with a knife, and told her that he would slit her throat if she were to contact the police.

<sup>3</sup> The defendant's reliance on Commonwealth v. Ruano, 87 Mass. App. Ct. 98 (2015), for the proposition that he did not have the specific intent required for a conviction under G. L. c. 268, § 13B, is misplaced. In Ruano, a police officer appeared at a witness's home to apologize after an altercation, and asked the witness to recant. Id. at 99. The officer then told the witness that he "could make 200 plus friends . . . could have the key to the city . . . and everything could be good and if [he] got into trouble [he] could get out of trouble." Id. The court reversed the conviction, ruling that the Commonwealth failed to present any evidence of a threat or intimidation. See id. at 102. Here, however, the facts are distinguishable, as there was sufficient evidence of a threat or an intent to threaten the victim, where the defendant physically grabbed the victim and repeatedly screamed at her, threatening to slit her throat in the event she contacted the police.

Sepheus, 468 Mass. 160, 164 (2014), quoting Commonwealth v. Farnsworth, 76 Mass. App. Ct. 87, 98 (2010). Thus, the defendant's argument is without merit.

In any event, as discussed above, the admission of the victim's testimony was not erroneous, and instead, was highly probative of the defendant's intent to intimidate the victim. When viewed in the light most favorable to the Commonwealth, the evidence demonstrates that the defendant purposefully threatened the victim to prevent her from contacting the police, out of fear of his bail being revoked. Nonetheless, he claims that he did not actually interfere with the victim calling 911, and instead asked the victim to come to the door and speak with the police, after the police were called to the house. However, the defendant only made such a request after he explicitly threatened to slit the victim's throat during the domestic dispute, to which the victim then testified that she chose not speak to the police out of fear for her life. Furthermore, the defendant claims that he was cooperative with police, upon their arrival at the home. However, the responding officer testified that defendant was instead "evasive" during the encounter with police, as he initially claimed he was homeless, and "kind of just wandering around" the area of the home, rather than truthfully telling the police that he lived at the home with the victim. At bottom, when viewing the evidence in the light most

favorable to the Commonwealth, the jury were entitled to conclude that the defendant purposefully threatened the victim with the specific intent to impede her from contacting the police, as prohibited by G. L. c. 268, § 13B. See Fragata, 480 Mass. at 122. The defendant's motion for a required finding of not guilty was properly denied.

Judgment affirmed.

By the Court (Meade,  
Englander & Grant, JJ.<sup>4</sup>),



Clerk

Entered: June 9, 2021.

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<sup>4</sup> The panelists are listed in order of seniority.