

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-109

COMMONWEALTH

vs.

BRENDAN B., a juvenile.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a trial in the Juvenile Court, a jury adjudicated the juvenile delinquent on charges of indecent assault and battery on a child under the age of fourteen, distribution of obscene matter to a minor, and indecent exposure. The juvenile appeals, focusing exclusively on the prosecutor's opening statement and closing argument. The juvenile argues that the prosecutor prejudicially misstated the evidence in her opening statement, and improperly appealed to the jury's sympathy and vouched for the victim's credibility in her closing. We affirm.

Background. At trial, the victim testified to two incidents that occurred when she was six years old. In the first incident, the juvenile, who was thirteen years old at the time and was the victim's half-brother, asked her to come to his

room. The victim then went into the juvenile's room, and the juvenile showed her his penis. In the second incident, the juvenile played truth or dare with the victim, and dared her to touch his penis. The victim testified that she did not want to touch the juvenile's penis, but that he convinced her to do so. The victim also testified that on multiple occasions, the juvenile asked the victim to come to his room, where he showed the victim pornographic videos on a cell phone.

In the prosecutor's opening statement, she stated that the victim would testify that the juvenile "forced" the victim to touch him and "threatened that if [the victim] wasn't going to touch [his penis] that he would hit her." However, that evidence was not elicited at trial.

In his closing argument, defense counsel's central theme was that the case depended upon the victim's testimony and that the victim was not credible -- that she was coached, that her memory was poor, and that she was trying to please her mother by testifying.

The prosecutor's closing focused on arguing that although the victim was only eight years old at the time of her testimony, her memory was sufficient, and her testimony as to the critical events was credible. The prosecutor repeatedly emphasized the victim's age -- eight at the time of trial and six at the time of the offense -- and commented on the victim's

testimony and her demeanor on the stand. In particular, the prosecutor made the following statements:

"I want to say that possible hesitation that she had about using those words requests (sic) 'penis' and 'vagina.' She didn't want to say those words. . . . She's eight years old. Those are words that are uncomfortable for an eight-year old to say.

". . .

"Again, also, she's eight years old. It's not easy to get up there. She needed to get comfortable to do that. I ask you to take that into consideration, again, using your common sense and life experience. Just remember, we're dealing with an eight-year-old child here. She is trying to remember stuff that happened when she was six years old going on seven. It is a long time ago for a six-year old. She couldn't remember everything. She couldn't remember the finer details, but this is what she could remember.

". . .

"I ask you to just remember when she was on the stand yesterday, the fact that she did initially have that trouble looking over the witness box. She had to talk about what happened. She was crouched down in her seat because it was so uncomfortable to share that story she had, to talk about what happened with her and her half-brother [the juvenile]."

". . .

"She tried to do what she could, to share her story, to say what she could."

Defense counsel did not object to the prosecutor's opening or to the closing argument.

Discussion. 1. Opening statement. The juvenile argues that a new trial is required due to the prosecutor's

representation in opening that the juvenile had "brought" the victim into his room and "forced" the victim to touch him by threatening her. Although no such evidence was presented, we disagree that a new trial is required.

Since there was no objection at trial, we review for whether there is a substantial risk of a miscarriage of justice. See Commonwealth v. Oliveira, 74 Mass. App. Ct. 49, 56 (2009). It is bedrock law that opening statements and closing arguments are not evidence, and the jury were so instructed here. Inasmuch as openings precede the taking of evidence, they necessarily are, to some extent, predictive. A prosecutor may make representations in an opening statement that "he or she reasonably believes in good faith will be proved by evidence introduced during the course of the trial." Commonwealth v. DePina, 476 Mass. 614, 627 (2017). The mere fact that the evidence in question "fails to materialize is not a ground for reversal," absent a showing of bad faith or prejudice. Commonwealth v. Qualls, 440 Mass. 576, 586 (2003).

Here, the juvenile concedes there was no bad faith, and he points to no evidence indicating that the prosecutor did not reasonably expect such testimony to materialize at trial. Nor was there a showing of prejudice that rises to the level of a substantial risk of a miscarriage of justice. The representations in the opening that the juvenile now highlights

were never again referenced at trial. The judge granted defense counsel's motion for a required finding on the charge of threat to commit a crime, and the judge repeatedly instructed the jury that the lawyers' arguments are not evidence.¹ We are satisfied that the prosecutor's opening statement did not create a substantial risk of a miscarriage of justice.

2. Closing argument. The juvenile also argues that the prosecutor acted improperly by repeatedly referencing the victim's age and by vouching for the victim. Once again, we review for a substantial risk of a miscarriage of justice because there was no objection to the closing argument at trial. Commonwealth v. Ferreira, 460 Mass. 781, 788 (2011).

"[P]rosecutors have a particular obligation to argue in a manner that inspires confidence that the verdict was reached based on the evidence rather than sympathy for the victim" (quotations omitted). Commonwealth v. Peno, 485 Mass. 378, 397 (2020). However, a prosecutor may aid the jury by analyzing the evidence, and by suggesting "what conclusion[s] the jury should draw from the evidence" (quotation omitted). Commonwealth v. Grimshaw, 412 Mass. 505, 510 (1992). The propriety of a closing argument must be evaluated in the context

¹ To the extent that the juvenile argues that the prosecutor's opening misstated the evidence by stating that the juvenile "brought" the victim into his room, whereas the victim testified that the juvenile "asked" her to go to his room, we do not consider these differences in language material.

of the entire trial -- including the opposing party's arguments, the evidence submitted, and the judge's instructions to the jury. See Commonwealth v. Beland, 436 Mass. 273, 289 (2002). We also have in mind that where, as here, there was no objection, the lack of objection "is some indication that the tone [and] manner . . . of the now challenged aspects of the prosecutor's argument were not unfairly prejudicial" (quotation omitted). Id.

We do not agree that the prosecutor improperly appealed to the jury's sympathy by her repeated references to the victim's age. To begin, in this case the victim's age was an element of the crimes charged -- indecent assault and battery on a child under fourteen, and distribution of obscene material to a minor. See Commonwealth v. Cruz, 93 Mass. App. Ct. 136, 138 (2018); G. L. c. 265, § 13B; G. L. c. 272, § 28. Furthermore, much of the prosecutor's argument that the juvenile now objects to was responsive to defense counsel's closing argument, during which defense counsel told the jury that they could not credit the victim's testimony, and that the jury should consider "[w]hether or not a girl who says unicorns can talk would be something that you could believe." In the face of a credibility attack on her key witness, the prosecutor reasonably and appropriately referenced the victim's age -- that the victim was eight years old, that she could be expected to have a less than perfect

memory, and that a belief in unicorns is not a basis to disbelieve her testimony. See Commonwealth v. Sanders, 451 Mass. 290, 297 (2008). The prosecutor appropriately argued that the jurors should use their common sense and life experiences regarding the behavior of eight year old children when evaluating the victim's testimony, which is of course a permissible argument. See Commonwealth v. Valentin, 474 Mass. 301, 310 (2016).

Nor are we convinced that the prosecutor improperly vouched for the victim. "Improper vouching occurs if an attorney expresses a personal belief in the credibility of a witness, or indicates that he or she has knowledge independent of the evidence before the jury" (quotations omitted). Commonwealth v. Ortega, 441 Mass. 170, 181 (2004). Here, the prosecutor argued that the victim was credible based upon her demeanor on the stand, having in mind the victim's age. Her argument responded to defense counsel's argument that the victim was not credible and that her testimony was coached. In context, the prosecutor's statements did not cross the line into an expression of personal belief.

Even if we agreed with the juvenile that the prosecutor's closing argument contained improper statements, we note that the judge instructed the jury repeatedly that closing arguments are not evidence. Any prejudice presented would accordingly have

been mitigated, and this case presents no substantial risk of a miscarriage of justice. See Commonwealth v. Beaudry, 445 Mass. 577, 588 (2005).

Adjudications of delinquency
affirmed.

By the Court (Rubin, Neyman &
Englander, JJ.²),



Clerk

Entered: November 24, 2021.

² The panelists are listed in order of seniority.