COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1831

COMMONWEALTH

vs.

ELBA MORALES.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

It is undisputed that the defendant stabbed Sasha Morris (victim) twice in the chest during an altercation between the women on December 20, 2016. The victim died from those injuries. A Superior Court jury acquitted the defendant of second degree murder but convicted her of the lesser included offense of voluntary manslaughter. On the defendant's appeal, we affirm. We address her four arguments in turn.

1. Mistrial. The defendant twice moved for a mistrial. As grounds, she claimed that the judge exhibited fractiousness toward her trial counsel to such a degree that it could have swayed the jury to convict her. She now claims error in the judge's denial of her motions. We review the denial of a motion for a mistrial only for an abuse of discretion. Commonwealth v. Martinez, 476 Mass. 186, 197 (2017).

As the Commonwealth acknowledges, the judge's behavior during the trial was not always a model of restraint. The judge's periodic impatience with, and curtness toward, defense counsel come through in the transcript. However, such interactions generally occurred outside the jury's presence.[1] More substantively, none of the judge's behavior manifested obvious bias against the defendant. Contrast Commonwealth v. Sneed, 376 Mass. 867, 870 (1978) (new trial warranted where judge "adopted the role of an advocate" and his "partiality" was "transparent"). In addition, the judge instructed the jury that her own beliefs were beside the point and that the jury "should not consider anything [she had] said or done during the trial as any indication that [she had] any opinion as to how [they] should decide this case."[2] We presume that the jury followed

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[1] At one point, the judge told defense counsel at side bar that "I can't tell you how furious I am." In her appellate brief, the defendant states that "[a]lthough this did not occur in front of the jury, it cannot be said that they did not hear it. Indeed, given the fiery tone of the judge's exclamation, it is likely the jury heard it." If the defendant wanted to maintain on appeal that the statement was made in a loud manner that the jury could hear, it was her burden to see that the record so reflected. See Allen v. Christian, 408 Mass. 1007, 1007 (1990) (burden is on appellant to provide appellate court with record showing error).

[2] The judge went on to instruct as follows:

> "If you, the jury, believe that I have expressed or hinted at any opinion about the facts of this case, or if you think from my tone of voice now or at any time during the trial that I have an opinion about the facts of the case or

those instructions. Commonwealth v. Williams, 450 Mass. 645, 651 (2008). The judge did not abuse her discretion in denying the defendant's motions for a mistrial.

2. Adjutant evidence. The defendant, who testified at trial, claimed that she acted in self-defense after the victim attacked her. There was one other eyewitness, the victim's boyfriend, who came upon the scene after the altercation between the women already was in progress. The boyfriend's testimony did not undercut the defendant's claim that the victim was the first aggressor. Instead, the problem that the defendant faced was that the defendant made no claim to having seen the victim wield a weapon, and it was uncontested that the defendant escalated the fight through grabbing a knife. In addition, there was testimony that the defendant made damaging admissions to both the victim's boyfriend and responding police officers. For example, two police officers testified that in the immediate aftermath of the stabbing incident, they overheard the defendant state to a man standing on the sidewalk, "This is what you get for fucking with me."

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about what your verdict should be, please disregard it. I have no opinion about the facts or about what your verdict should be. That is solely your duty, your responsibility."

The judge further instructed that, if the jury thought she had admonished an attorney during the trial, they should draw no inference from her having done so, and that she appreciated the conscientious efforts of both attorneys during the trial.

Pursuant to Commonwealth v. Adjutant, 443 Mass. 649 (2005), the defendant offered evidence of the victim's past violent behavior toward others. The judge allowed evidence of three such incidents. On appeal, the defendant claims that the judge committed reversible error by excluding evidence of additional instances of such behavior. The Commonwealth counters that no Adjutant evidence should have been admitted at all, because it essentially was uncontested that the victim was the first aggressor and the defendant was the first to use deadly force.[3] We need not reach the Commonwealth's argument that the judge erred in admitting any Adjutant evidence. For present purposes, it suffices to say that having allowed the jury to hear significant Adjutant evidence, the judge did not abuse her considerable discretion in deciding not to allow such additional evidence. See Commonwealth v. Olsen, 452 Mass. 284, 294 (2008). The judge's assessment that allowing the additional evidence could "overwhelm the case" to the prejudice of the Commonwealth was well supported on this record and a valid factor for her to consider.

3. Involuntary manslaughter. Next, the defendant argues that the judge erred when she declined to instruct the jury on

[3] The Commonwealth also points to the fact that the judge allowed the defendant to rely on hearsay evidence (a police report) to substantiate one instance of the victim's penchant for violence.

the lesser included offense of involuntary manslaughter. "An involuntary manslaughter instruction must be given if any reasonable view of the evidence would have permitted the jury to find wanton and reckless conduct rather than actions from which a plain and strong likelihood of death would follow" (quotations and citation omitted). Commonwealth v. Horne, 466 Mass. 440, 444 (2013). As the Commonwealth acknowledges, an instruction on involuntary manslaughter may be warranted even where a defendant killed the victim with a weapon, if the jury reasonably could conclude that the defendant was wielding the weapon in a manner that did not involve "a plain and strong likelihood of death." See Commonwealth v. Iacoviello, 90 Mass. App. Ct. 231, 245 (2016) (involuntary manslaughter instruction warranted where there was evidence defendant aimed gun at air or ground, not at victim). In determining a defendant's entitlement to an instruction, "all reasonable inferences should be resolved in favor of the defendant, and, no matter how incredible [her] testimony, that testimony must be treated as true." Commonwealth v. Pike, 428 Mass. 393, 395 (1998). See Commonwealth v. Abubardar, 482 Mass. 1008, 1009 & n.2 (2019); Commonwealth v. Magadini, 474 Mass. 593, 600 (2016).

The defendant claimed in her direct testimony that she did not intend to stab the victim, but rather that the stabbing somehow occurred while the defendant was merely swinging the

knife to try to get the victim to let go of her hair and "get [the victim] off of [her]."[4] On cross-examination, however, the defendant agreed that she "stabbed [the victim] twice," and that she "intended to make those motions that led to [the] stabbing." This was consistent with unchallenged medical evidence that the victim died of two deep stab wounds to her chest, one through her ribs that pierced her heart twice, and the other through her ribs and into her lung. Because the actions necessary to cause such wounds presented such an obvious risk of death, and because the defendant admitted that she intended those actions,[5] an involuntary manslaughter instruction was not warranted. See Commonwealth v. Sowell, 22 Mass. App. 959, 962-963 (1986) (no involuntary manslaughter instruction warranted where "deadly weapon was used to inflict a wound inconsistent with the reckless use of the weapon"). Accepting all reasonable views of the evidence in the defendant's favor, we are unpersuaded that rational jurors could have concluded that the defendant's stabbing of the victim was an unintended result of wanton or reckless conduct.

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[4] At the Commonwealth's request, the defendant showed the jury how she was brandishing the knife, a demonstration that the judge described for the record as a "swinging circular motion."

[5] The defendant did not claim that she was merely swinging the knife in a less dangerous manner and that it was the victim who moved her own chest onto the knife -- twice -- so as to cause the two deep stab wounds.

For similar reasons, even if we were to conclude that an involuntary manslaughter instruction should have been given, we also would conclude that the defendant has not shown sufficient prejudice to warrant a new trial even under a prejudicial error standard. In light of the unchallenged evidence about the nature of the victim's stab wounds, we are confident that the absence of an instruction on involuntary manslaughter would not have affected the jury's verdict.[6]

4. Adequacy of the investigation. At trial, the defendant sought to convince the jury that the police failed to conduct an adequate investigation and that this raised reasonable doubt about her guilt. The Commonwealth acknowledged that the police did little to collect forensic evidence at the scene, but suggests that this was appropriate given that the identity of the person who stabbed the victim was never in doubt.

While a judge may not instruct a jury to ignore alleged deficiencies in a police investigation, Commonwealth v. Bowden,

[6] During oral argument, the Commonwealth touched on a different issue related to prejudice. Specifically, it argued that whether the defendant was convicted of voluntary or involuntary manslaughter was of no consequence, because the two forms of manslaughter are set forth in the same statutory section, with the same sentencing consequences. This ignores the fact that the two forms of manslaughter are treated somewhat differently under the sentencing guidelines. Without resolving whether there is any merit to the Commonwealth's separate argument on prejudice, we note that we do not rely on it in affirming the judgment.

379 Mass. 472, 485-486 (1980), the defendant makes no such claim of error here. Nor does the defendant argue that the judge otherwise curtailed her ability to argue for an acquittal based on alleged inadequacies in the police investigation. Instead, she claims error only in the judge's refusal to instruct the jury that an inadequate police investigation could raise reasonable doubt about the defendant's guilt. However, the Supreme Judicial Court repeatedly has stated that a judge is not required to give such an instruction. See, e.g., Commonwealth v. O'Brien, 432 Mass. 578, 590 (2000). Accordingly, the defendant is left to argue that certain comments by the judge revealed her mistaken belief that she lacked any discretion to provide the requested instruction.[7]

Reading the judge's remarks in context, we interpret them as stating that it was her firm practice not to give such an instruction, not that she was prohibited from doing so. In addition, the tone and substance of the judge's remarks lead us to conclude that, in any event, she had no intention of giving such an instruction regardless of whether she knew she had authority to do so. Under these circumstances, even if the

[7] The judge stated: "I don't give Bowd[en] instructions. There's no such thing as a Bowd[en] instruction. You can argue it, but I'm not giving a Bowd[en] instruction. . . . I think there's [an] SJC case that says there's no such thing as a Bowd[en] instruction."

judge mistakenly believed she could not provide such an instruction, the defendant cannot demonstrate that she thereby was prejudiced. This is especially true given that the defendant's underlying arguments about the inadequacy of the investigation here had little force.

Judgment affirmed.

By the Court (Milkey, Kinder & Sacks, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: January 12, 2022.

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