

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

21-P-346

COMMONWEALTH

vs.

JORDAN SANDMAN.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a jury trial, the defendant was convicted of assault and battery by means of a dangerous weapon (to wit, an extension cord) and assault and battery on a household member (grabbing of arm).¹ On appeal he challenges the denial of his motion to dismiss the indictments and the denial of his motion to revise the mittimus, in which he sought sixty-three days' credit toward his sentence. We affirm.

1. Motion to dismiss indictments. The only witness before the grand jury was the victim, who testified as follows. At the time of the events in question, the defendant and the victim had been dating for about five months and were living together. On

¹ The defendant was acquitted of a second charge of assault and battery by means of a dangerous weapon (to wit, a knife), kidnapping, and witness intimidation.

June 26, 2018, following an argument, the defendant hit the victim across the face with an extension cord, using enough force to draw blood. The victim ran outside and drove to her mother's house. That night the defendant sent her "six to eight hundred text messages," several of which were provided to the grand jury.

On June 27, 2018, the victim returned to "break up the right way" and collect her belongings. When the victim said she was not staying, the defendant grabbed a knife and threatened, "[T]he only way you're leaving here is if you walk over my dead body." For the next three hours, the defendant blocked the front door while holding the knife and at one point grabbed the victim's arm when she picked up her cell phone. The defendant finally allowed the victim to leave after noticing two people on the street looking at them through the window. The victim then drove to the police station and gave a written statement.

The defendant argues that his motion to dismiss the indictments should have been allowed because the Commonwealth withheld the victim's written statement from the grand jury, thereby impairing the integrity of the proceedings. The defendant claims that the written statement was exculpatory because it contradicted the victim's testimony in three ways: (1) in the written statement, the victim alleged that, after the defendant struck her with the extension cord, she went to a job

interview before going to her mother's house; (2) the statement did not mention that the defendant wielded a knife during the June 27, 2018 incident, but alleged only that the defendant sat in front of the door threatening to kill himself; and (3) the statement did not mention that there were people who witnessed the incident through the window.

In a grand jury proceeding, the Commonwealth does not have the duty to produce "all available exculpatory evidence," but only that evidence that would "gravely undermine evidence supporting probable cause." Commonwealth v. Biasiucci, 60 Mass. App. Ct. 734, 738 (2004). A "defendant bears a heavy burden to show impairment of the grand jury proceeding." Commonwealth v. LaVelle, 414 Mass. 146, 150 (1993). Specifically, the defendant must show that the Commonwealth knowingly provided false or deceptive evidence "with the intention of obtaining an indictment" and that the evidence "must probably have been significant in the view of the grand jury." Commonwealth v. Mayfield, 398 Mass. 615, 621 (1986).

Here, the motion judge was warranted in concluding that the defendant did not meet his burden. While the omission of any mention of the knife in the victim's written statement was fodder for cross-examination and impeachment, it did not directly conflict with her grand jury testimony, and the Commonwealth's withholding of the statement did not so distort

the presentation of evidence as to render the testimony false or deceptive. See Commonwealth v. McGahee, 393 Mass. 743, 747-748 (1985); Biasiucci, 60 Mass. App. Ct. at 738. Cf. Commonwealth v. O'Dell, 392 Mass. 445, 446-447 (1984). Moreover, even assuming error, the defendant suffered no prejudice because the jury acquitted him of the charges relating to the incident with the knife. See supra, n.1. The defendant makes no contention that, had the Commonwealth disclosed the victim's earlier failure to mention the knife, the grand jury probably would not have indicted on the charges that resulted in convictions. See Mayfield, 398 Mass. at 621.

The other two inconsistencies pointed to by the defendant also would not have "gravely undermine[d] [the] evidence supporting probable cause." Biasiucci, 60 Mass. App. Ct. at 738. Rather, those inconsistencies "were of the type that could be expected to exist in two recountings of an incident made some time apart," Commonwealth v. Jenkins, 458 Mass. 791, 807 (2011), and "would almost certainly have left unaltered the disposition to indict." Biasiucci, supra. This is especially so where the victim's testimony was corroborated by a photograph depicting the injury to her forehead and screenshots of the text messages between the victim and the defendant, which referred to the June 26, 2018 incident and contained an admission from the defendant that he "was mad and threw something in the wrong direction."

The defendant further argues that his motion to dismiss should have been allowed because the Commonwealth presented inflammatory and irrelevant evidence to the grand jury -- namely, testimony from the victim that the defendant allowed a friend to watch them through FaceTime² during their "intimate" moments. But assuming this testimony was irrelevant, it was "not so inflammatory as to impair the integrity of the grand jury proceeding." Commonwealth v. Miranda, 484 Mass. 799, 834 (2020). The testimony was fleeting, and the jury did not show any "particular interest" in it. Commonwealth v. Good, 409 Mass. 612, 620 (1991). Given the victim's testimony as a whole, and the corroborating evidence, we are confident that any error did not influence the jury's decision to indict.

2. Motion to revise mittimus. At the sentencing hearing in October 2019, the Commonwealth recommended a five to seven-year incarcerated term, from and after the sentence that the defendant was then serving in the house of correction for a probation violation. The defendant, on the other hand, recommended a two to three-year incarcerated term, imposed nunc pro tunc to June 27, 2018, the date of his arrest in this case. The trial judge plotted a middle ground by imposing a

² "FaceTime is a type of 'face-to-face video technology'" (citation omitted). Noelle N. v. Frasier F., 97 Mass. App. Ct. 660, 662 n.3 (2020).

"forthwith" sentence of three to five years, with jail credit for sixteen days previously served. This effectively terminated the remainder of the defendant's probation violation sentence, which would have expired on May 17, 2021.

In October 2020 the defendant filed a pro se motion asking that his jail credit be increased to 465 days to reflect the entire period he spent in pretrial custody after his arrest. A judge, who was not the trial judge, denied the motion on the ground that the defendant was not entitled to credit for the time served on the probation violation, observing also that the defendant benefited from his sentence having been imposed forthwith. The defendant then filed, through his trial counsel, a motion to revise the mittimus in which he asked for sixty-three days of credit to reflect the time that the trial was continued because of discovery delays by the Commonwealth. The same motion judge declined to grant relief "for the reasons set forth in the endorsement" on the defendant's pro se motion.

The defendant appeals only from the denial of the motion to revise the mittimus.³ We discern no abuse of discretion in the judge's ruling. Where a defendant "was in confinement pursuant to a sentence for an unrelated crime of which he had been convicted," he cannot be said to have been held "in custody

³ A single justice of this court allowed the defendant's motion to file a late notice of appeal.

awaiting trial" (quotations omitted). Commonwealth v. Barton, 74 Mass. App. Ct. 912, 913 (2009). See Commonwealth v. Pearson, 95 Mass. App. Ct. 724, 726 (2019). The defendant thus rightly concedes that he is "not entitled" to the credit.

Nonetheless, the defendant contends that the judge abused his discretion by not allowing the motion "in the interests of justice." We disagree. The record does not support the defendant's assertion that the judge failed to consider the defendant's argument concerning the discovery delays. It is implicit in the judge's ruling that he considered and rejected that argument because, as he explained, the defendant already benefited from a favorable sentence, which extinguished the remainder of his probation violation sentence, and received the sixteen days of credit to which he was legally entitled. The judge was within his discretion to conclude that the defendant's sentence did not offend the interests of justice or basic fairness. See Pearson, 95 Mass. App. Ct. at 727 ("The key

consideration in this analysis is fairness to the defendant").

Judgments affirmed.

By the Court (Meade, Shin &
Hershfang, JJ.⁴),

Clerk

Entered: June 21, 2022.

⁴ The panelists are listed in order of seniority.