

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-467

COMMONWEALTH

vs.

ARTHUR E. SALSBURY, JR.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

A Superior Court jury convicted the defendant of rape.¹ On appeal, the defendant claims that the judge erroneously instructed the jury regarding inferences drawn from circumstantial evidence and abused his discretion in denying the defendant's request to poll the jury after the verdict was announced. The defendant also argues that the prosecutor's closing argument created a substantial risk of a miscarriage of justice because she vouched for the victim and implicitly suggested that the victim was credible simply because she subjected herself to testimony at trial. We affirm.

¹ The rape conviction was a lesser included offense of the indicted offense of aggravated rape based on an allegation that the rape occurred during the commission of a kidnapping. The jury acquitted the defendant of kidnapping and of a separate charge of aggravated rape based on an allegation that the defendant used a knife.

Background. We summarize the facts that the jury could have found. On February 22, 2018, the victim, who described herself as an "escort," communicated with a person identifying himself as "Joel" through an online dating application, and agreed to meet him on Elm Street in Holyoke to exchange sex for money. At approximately midnight, the victim met the defendant, entered his car on Elm Street assuming he was Joel, and agreed to "get drinks."² As the defendant drove toward South Hadley, he stopped in the parking lot of a business and consumed alcohol and cocaine. The victim became concerned and asked to be taken home. The defendant refused and became angry.

After the defendant drove away from the parking lot, the victim again asked to be taken home. Instead, the defendant drove to Dufresne Park and stopped his car in a secluded area. The defendant pulled the victim from the car by her hair, took her to a pavilion, pushed her down onto a picnic table, beat her, and raped her multiple times over the course of an hour.

After the victim put her boots and pants on, she asked the defendant if he saw something moving in the distance. While the defendant was distracted, the victim ran into the woods and hid in a swamp. Eventually, the victim approached a nearby

² As it turned out, the defendant was not the person with whom she had previously communicated.

residence. The owners took her into their home and called the police.

The defendant did not testify at trial. Through argument the defendant admitted that he had sex with the victim, but claimed the interaction was a consensual exchange of sex for money. The defendant challenged the victim's credibility based on her prior inconsistent statements, her heroin addiction, and the absence of evidence of any injury. Defense counsel argued to the jury that the victim fabricated the rape because she was angry with the defendant over a disagreement about money.

Discussion. 1. Jury instruction. "We review objections to jury instructions to determine if there was any error, and, if so, whether the error affected the substantial rights of the objecting party." Beverly v. Bass River Golf Mgt., 92 Mass. App. Ct. 595, 603 (2018), quoting Hopkins v. Medeiros, 48 Mass. App. Ct. 600, 611 (2000).

While explaining the difference between direct and circumstantial evidence, the judge erroneously instructed the jury that, in considering circumstantial evidence, "you may draw inferences only based upon facts proven to you beyond a reasonable doubt." The defendant timely objected. The Commonwealth concedes that "[w]hile the Commonwealth must prove all the essential elements of a crime beyond a reasonable doubt, see In re Winship, 397 U.S. 358, 364 (1970), preliminary

questions of fact and subsidiary facts need only be proved by a preponderance of the evidence." Commonwealth v. Edwards, 444 Mass. 526, 543 (2005). The defendant argues that because his defense was based on inferences of innocence, the instruction improperly shifted the burden of proof to him. We disagree.

"We evaluate the instruction as a whole, looking for the interpretation a reasonable juror would place on the judge's words. We do not consider bits and pieces of the instruction in isolation" (citation omitted). Commonwealth v. Young, 461 Mass. 198, 207 (2012). Here the judge clearly and repeatedly instructed the jury that the defendant was presumed to be innocent, that the burden of proof was on the Commonwealth, that the defendant had no obligation to present evidence, and that the burden of proof never shifted to the defendant. In these circumstances, the instruction, although erroneous, overburdened the Commonwealth rather than the defendant. See Commonwealth v. Walker, 443 Mass. 213, 222 (2005) (erroneously instructing jury that subsidiary facts must be proved beyond a reasonable doubt unduly burdened Commonwealth). Considering the charge as a whole, the jury could not reasonably have understood that the defendant was required to prove anything. Accordingly, the

defendant's substantial rights were not affected by the erroneous instruction.³

2. Polling the jury. "When a verdict is returned and before the verdict is recorded, the jury may be polled in the discretion of the judge." Mass. R. Crim. P. 27 (d), 378 Mass. 897 (1979). See Commonwealth v. Reaves, 434 Mass. 383, 395 (2001), citing Commonwealth v. Hardy, 431 Mass. 387, 399 (2000). The purpose of polling the jury is to confirm the unanimity of the verdict before it is recorded. A verdict may not be unanimous if a juror exhibits "public disagreement" with the verdict, that is, actions or words which are "reasonably intelligible as a disagreement." Hardy, 431 Mass. at 399. Here, the judge said, "I've looked at the jury, and no one seems to be in fear or upset or anything like that. They've returned two verdicts of not guilty so I'm going to deny that request." Defendant's trial counsel did not disagree with the judge's observation of the jurors. He requested that the jury be polled only because he thought the verdicts were "wildly inconsistent."

³ We note that the subsidiary fact from which the defendant asked the jury to draw an inference of disagreement over money -- that the meeting between the defendant and the victim was a business transaction -- was not disputed. The victim testified that she was working as an "escort," that she obtained "dates" online through a dating application, and that she entered the defendant's car because she thought he was the person with whom she had arranged an encounter.

On appeal, the defendant does not argue that the verdicts were inconsistent or that such an inconsistency would require polling the jury. Rather, the defendant relies on dicta in Commonwealth v. Dias, 419 Mass. 698, 701 (1995), that "[i]t would be better practice . . . to poll the jury on request in cases in which the jury's deliberations have been lengthy or the trial has been long." According to the defendant, refusing to poll the jury was an abuse of discretion because the deliberations spanned four days, during which the jury announced they were deadlocked and one juror was excused for consideration of extraneous information. We disagree.

The judge was in the best position to observe the jury and nothing in the record undermines his finding that no juror exhibited disagreement with the verdict announced in open court. Indeed, after the verdict was announced and the motion to poll the jury was denied, each juror affirmed that their verdict was unanimous. In these circumstances, the judge did not abuse his discretion in denying the request to poll the jury.

3. Closing argument. In response to defense counsel's argument that the victim did not seek medical attention and her injuries were not visible to police, the prosecutor argued, "And would it have been nice if she had been willing to strip down naked to have someone poke and prod her vagina and find these injuries to be able to give you today? Absolutely. But there

is an explanation for why that didn't occur." The defendant contends that this part of the prosecutor's closing argument improperly vouched for the victim's truthfulness. See Commonwealth v. Wilkerson, 486 Mass. 159, 179 (2020). As defendant's trial counsel did not object, our review is for a substantial risk of a miscarriage of justice. Commonwealth v. Mitchell, 95 Mass. App. Ct. 406, 409 (2019).

"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.'" Commonwealth v. Felder, 455 Mass. 359, 368 (2009), quoting Commonwealth v. Ortega, 441 Mass. 170, 181 (2004). "It is not improper vouching for the prosecutor to point to reasons why a witness's testimony, or portion of a witness's testimony, should logically be believed" (citation omitted). Wilkerson, 486 Mass. at 181. Here the victim testified that after the police responded, she was "cold . . . shaking . . . [and that] [e]verything hurt," and that all she wanted to do was "take a shower." The prosecutor argued that these were the reasons that the victim declined to submit to a medical examination. Because the argument was grounded in the evidence, it was not improper vouching.

Next, the defendant contends that the prosecutor improperly argued that the victim was credible simply because she subjected

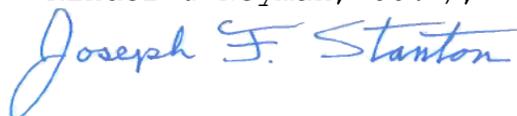
herself to public testimony. See Commonwealth v. Beaudry, 445 Mass. 577, 587 (2005). After the prosecutor emphasized the victim's willingness to admit that she was a drug addict and a prostitute, the prosecutor asked "[d]o you think that was something she wanted to come into this public courtroom and say to you, to everyone else that was sitting here? I would suggest to you no." For the first time on appeal, the defendant suggests that the prosecutor's rhetorical question improperly implied that the victim should be believed simply because she testified in open court.

"Where credibility is at issue, it is certainly proper for counsel to argue from the evidence why a witness should be believed." Commonwealth v. Raposa, 440 Mass. 684, 694-695 (2004), quoting Commonwealth v. Thomas, 401 Mass. 109, 116 (1987). However, it is impermissible for a prosecutor to "suggest to the jury that a victim's testimony is entitled to greater credibility merely by virtue of her willingness to come into court to testify." Commonwealth v. Helberg, 73 Mass. App. Ct. 175, 179 (2008). Compare Commonwealth v. Ramos, 73 Mass. App. Ct. 824, 826 (2009). While a better practice would have been for the prosecutor to avoid reference to the victim having "come into this public courtroom," the prosecutor's rhetorical question was a fair response to the attack on the victim's credibility. Viewing the challenged remarks "in the context of

the entire argument, and in light of the judge's instructions to the jury and the evidence at trial," we conclude that they were within the bounds of permissible argument.⁴ Commonwealth v. Kolenovic, 478 Mass. 189, 199 (2017), quoting Commonwealth v. Gaynor, 443 Mass. 245, 273 (2005).

Judgment affirmed.

By the Court (Green C.J.,
Kinder & Neyman, JJ.⁵),



Clerk

Entered: June 22, 2022.

⁴ We note that the judge repeatedly and thoroughly instructed the jury that closing arguments were not evidence and emphasized that "nobody -- not the attorneys, not the judge -- nobody may interfere with your role as fact finder." See Commonwealth v. Olmande, 84 Mass. App. Ct. 231, 237 (2013) ("We presume, as we must, that the jury follow[ed] the judge's instructions and underst[ood] the argumentative, not factual, nature of closing arguments").

⁵ The panelists are listed in order of seniority.