

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-165

COMMONWEALTH

vs.

RAYSHAWN K. MATTHEWS, SR.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant appeals from his conviction, by jury, of assault and battery on a family or household member in violation of G. L. c. 265, § 13M (a).¹ The defendant asserts that (1) the prosecutor, during closing argument, misstated the evidence, improperly alluded to the defendant's failure to testify, and improperly vouched for the eyewitness, and (2) the jury instructions on unconscious bias were erroneous. We affirm.

Background. We summarize the evidence presented at trial and in the record, reserving additional facts for later discussion. At the time of the incident, the defendant (a Black man) was living with the mother of his children, a Caucasian

¹ The jury also found the defendant not guilty of assault and battery on another in violation of G. L. c. 256, § 13A (a), as described more fully below.

woman whom we shall call Nadia, their three children, and Nadia's sister. On the evening in question, Nadia was preparing to leave for her first shift at her new job as a security guard when she and the defendant had an "altercation." The defendant became agitated, and as Nadia opened the door to leave, the defendant shut it, closing them inside. After Nadia managed to reopen the door, the defendant put both of his hands on Nadia's back and shoved her, chest first, into the doorway. When Nadia's sister tried to put her arm between the defendant and Nadia, the defendant nudged the sister's arm with his hand. Nadia then went to her next-door neighbor's home, called the police, and stayed at her neighbor's home awaiting the police.

When an officer arrived, he found the defendant, who appeared agitated, standing on the front porch. The defendant told the officer that he was upset and that "he and his girlfriend got into an argument about her leaving, and he didn't want her to leave, so he blocked the doorway, preventing her from leaving." The defendant admitted that "it probably wasn't a smart idea to do that."

Discussion. 1. Closing argument. "A defendant's challenge to a specific part of a closing argument is analyzed in 'the context of the whole argument, the evidence admitted at trial, and the judge's instructions to the jury.'" Commonwealth v. Shanley, 455 Mass. 752, 773 (2010), quoting Commonwealth v.

Whitman, 453 Mass. 331, 343 (2009). We review renewed trial objections for prejudicial error, Commonwealth v. Andre, 484 Mass. 403, 417 (2020), and other statements to determine whether there was error, and if so, whether the error created a substantial risk of a miscarriage of justice. Commonwealth v. Daigle, 379 Mass. 541, 549 (1980). A substantial risk of a miscarriage of justice exists when there is a "serious doubt whether the result of the trial might have been different had the error not been made." Commonwealth v. LeFave, 430 Mass. 169, 174 (1999), citing Commonwealth v. Alphas, 430 Mass. 8, 13 (1999). We discern no such errors.

a. Misstating the evidence. "In closing argument, '[p]rosecutors are entitled to marshal the evidence and suggest inferences that the jury may draw from it.' Those inferences need only be reasonable and possible" (citations omitted). Commonwealth v. Roy, 464 Mass. 818, 829 (2013). The defendant first challenges the prosecutor's two assertions that the defendant was "angry," a word not used by trial witnesses. The Commonwealth concedes error, at least to the extent that the prosecutor attributed the use of "angry" to the defendant and Nadia; we consider, then, whether the error was prejudicial. Andre, 484 Mass. at 417.

Because witnesses testified that the defendant was "agitated," "upset," "frustrated," and "mad," and the judge

twice instructed the jurors that closing arguments were not evidence and that the jurors' memories of the evidence controlled, we discern no prejudice. See Commonwealth v. Medina, 430 Mass. 800, 803 (2000) (jurors are presumed to follow instructions).

Second, the defendant challenges the prosecutor's statement that the defendant admitted that what he did "was inappropriate. By the defendant's own words, inappropriate." The Commonwealth concedes that the defendant did not use this word. Rather, the testimony was that the defendant said it was not "a smart idea to do that." Because the defendant made no objection, we review the error to determine whether it created a substantial risk of a miscarriage of justice, Daigle, 379 Mass. at 549, and conclude that it did not. Prosecutors are entitled to summarize the evidence presented at trial, and we cannot reasonably conclude that the difference between "not a smart idea" and "inappropriate" raised "serious doubt whether the result of the trial might have been different." LeFave, 430 Mass. at 174. Contrast Commonwealth v. Daley, 66 Mass. App. Ct. 254, 257 (2006) (prosecutor overstated evidence by referring to "strong" odor of alcohol, when testimony was that odor was "moderate").

Third, the defendant asserts that the prosecutor's argument that the defendant "didn't want [Nadia] out late" and "didn't want her to be out of the house past what he decided . . . was

necessary" mischaracterized the testimony about why the defendant did not want Nadia to leave for her new job. The defendant also argues that no testimony supported the prosecutor's statement, "[t]o be told, a woman of her age with three children, that she needed to stay in the house. And he told her to. Think about that." Because the defendant did not object at trial, we first review for error; finding none, we need go no further. See Commonwealth v. Randolph, 438 Mass. 290, 298-299 (2002).

The prosecutor was entitled to marshal the testimony and suggest reasonable and possible inferences that the jury may draw from it. See Roy, 464 Mass. at 829. Nadia testified that the defendant "didn't want [her] to leave. [The defendant] wanted [her] to be there to put the kids to bed and get everything ready for the next day for them." Nadia's shift was from 9:00 P.M. to 2:00 A.M., and she testified that the defendant "didn't like the fact that [she] would be [working as a security guard], being at bars around drunk people" because "[h]e didn't know what could happen to [her]." In light of this testimony, the prosecutor's statements were not error.

b. Failure to testify. The defendant asserts that the prosecutor twice improperly commented on the defendant's failure to testify, creating a substantial risk of a miscarriage of justice. Responding to the defendant's claim to the officer

that Nadia's sister attacked the defendant, the prosecutor argued, "[a]nd you didn't hear that from anyone else that was testifying here today." "The prosecutor was entitled to respond to the defense argument and also to comment on the strength of its case and weakness of the defense, 'as long as argument is directed at the defendant's defense and not at the defendant's failure to testify.'" Commonwealth v. Silva, 471 Mass. 610, 623 (2015), quoting Commonwealth v. Garvin, 456 Mass. 778, 799 (2010). Her statement permissibly referred to the absence of evidence supporting the defendant's claim.² It was not error.

Second, the defendant challenges the prosecutor's invocation to the jury to, "weigh the credibility of everyone that testified today." This statement was aligned with the law and the model jury instructions and was not improper. See Commonwealth v. Molina, 454 Mass. 232, 240 (2009) ("Questions of credibility and weight of testimony are for the jury to decide"). See also Instruction § 2.120 of the Criminal Model Jury Instructions for Use in the District Court (2019) ("In evaluating a witness's testimony you have to decide what testimony to believe, and how much weight to give that testimony"). There was no error and thus no substantial risk of miscarriage of justice.

² The jury acquitted the defendant of a charge of assault and battery on Nadia's sister; see note 1.

c. Improper vouching. In closing, defense counsel attacked Nadia, saying she "doesn't really have any credibility" and "had a motivation to lie," and sought to discredit her based on her "demeanor," "body language," "eye contact," and "the way that she was on the stand." Responding, the prosecutor highlighted part of Nadia's testimony that was favorable to the defendant, suggested that Nadia "was very forthcoming, very honest with you," and asked the jury to "take into consideration how frustrated she might've been by words being put into her mouth . . . you're not here to like her. You're here to decide whether or not she was telling the truth. And I suggest to you that she was." We conclude that these statements were not error.

"A prosecutor may not assert his or her personal opinion as to the credibility of a witness or the guilt of an accused." Commonwealth v. Chavis, 415 Mass. 703, 713 (1993). Courts recognize improper vouching when "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. Wilson, 427 Mass. 336, 352 (1998). "The jury are presumed to understand that a prosecutor is an advocate, and statements that are '[e]nthusiastic rhetoric, strong advocacy, and excusable hyperbole' will not require reversal.'" Commonwealth v. Martinez, 476 Mass. 186, 199

(2017), quoting Wilson, supra at 351. "While a prosecutor may not vouch for the truthfulness of a witness's testimony, . . . where the credibility of a witness is an issue, counsel may 'argue from the evidence why a witness should be believed'" (citation omitted). Commonwealth v. Brewer, 472 Mass. 307, 315 (2015), quoting Commonwealth v. Smith, 460 Mass. 385, 399 (2011).

We conclude that the prosecutor placed the issue of Nadia's credibility in the hands of the jury, suggesting that the context supported her testimony, and permissibly responded to defense counsel's arguments that Nadia was not a credible witness. See Commonwealth v. Ahart, 464 Mass. 437, 445 (2013) (no improper vouching where prosecutor "placed the issue of the [witness's] credibility squarely in the domain of the jury"); Commonwealth v. Mitchell, 428 Mass. 852, 857 (1999) (prosecutor's use of phrase "I suggest," viewed in proper context, did not imply prosecutor had personal knowledge or was stating personal belief). There was no error.

2. Jury instructions. "We evaluate jury instructions as a whole and interpret them as would a reasonable juror." Commonwealth v. Marinho, 464 Mass. 115, 122 (2013). "We do not require that judges use particular words, but only that legal concepts are properly conveyed." Id. "Because the defendant did not object to the jury instruction at trial, we review his

claim to determine first whether there was error, and if so, we then inquire whether the error created a substantial risk of a miscarriage of justice." Id. As the defendant concedes, the judge "instructed the jury largely along the lines set forth in the Criminal Model Jury Instructions for Use in the District Court §§ 1.100, 1.120, 2.120 (Mar. 2019) ('Impaneling the jury,' 'Preliminary instruction to jury before trial' and 'Function of the jury; what is evidence; credibility of witnesses')."

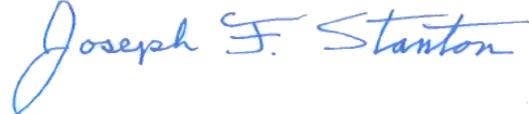
The judge did not err in following the model jury instructions. See Commonwealth v. Odgren, 483 Mass. 41, 54 (2019) ("we have concluded that it is not error for a judge to give this instruction in accordance with the operable model jury instructions"). Minor changes like the ones here (omitting the phrases "including me" and "myself included") do not change this conclusion. See Commonwealth v. Kelly, 470 Mass. 682, 688 (2015), and quoted case ("Trial judges have 'considerable discretion in framing jury instructions, both in determining the precise phraseology used and the appropriate degree of elaboration'").

To the extent that the defendant asks us to invalidate the model jury instructions, we decline to do so. The instructions were not error when the evidence against the defendant was ample and "[t]he defendant has not shown juror bias" or that he was he

was deprived of an impartial jury. Commonwealth v. Hampton, 457
Mass. 152, 168-169 (2010).

Judgment affirmed.

By the Court (Meade, Shin &
Hershfang, JJ.³),



Clerk

Entered: August 5, 2022.

³ The panelists are listed in order of seniority.