COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

22-P-71

COMMONWEALTH

vs.

SHAWN LAMB.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a jury trial in the Superior Court, the defendant was convicted of assault and battery, in violation of G. L. c. 265, § 13A (a), and acquitted of assault by means of a dangerous weapon, in violation of G. L. c. 265, § 15B (b).[1] The defendant now appeals from the judgment and contends that the judge's self-defense instruction was deficient because he failed to instruct on the use of deadly force in self-defense. We conclude that there was not a substantial risk of a miscarriage of justice in failing to instruct on deadly force. We affirm.

Background. When any view of the evidence suggests that a defendant may have acted in self-defense, "the defendant is

[1] At the close of the Commonwealth's case, the trial judge granted the defendant's motion for a required finding of not guilty on the offense of strangulation or suffocation, in violation of G. L. c. 265, § 15D (b).

entitled to [a jury] instruction which places on the Commonwealth the burden of disproving . . . self-defense beyond a reasonable doubt." Commonwealth v. Reed, 427 Mass. 100, 102 (1998), quoting Commonwealth v. Maguire, 375 Mass. 768, 772 (1978). When considering the validity of a self-defense instruction, the evidence must be viewed in a light most favorable to the defendant. See Commonwealth v. Cataldo, 423 Mass. 318, 319 (1996).

We summarize the evidence presented in a light most favorable to the defendant. Tabitha Groux testified that on November 6, 2019, she lived in the third-floor attic of a multilevel home in Palmer. There was no kitchen or living room, just a bedroom that had a mattress, a side table, a mirror, and her clothing. Groux and the defendant had been dating for about two months, and he had stayed in Groux's home the night before.

Groux and the defendant got into an argument across the street from the home about a toy for the child for whom Groux was caring. They continued to argue and on returning to the home, Groux told the defendant, "I don't care what you say, you need to go home, I don't think this is a good idea."

An altercation ensued. The defendant called 911 outside of Groux's home. The defendant told the dispatcher that he and Groux had gotten into an argument and that she had thrown things at him and pulled a knife on him. He additionally informed the

dispatcher that Groux had slit his eye, but he had been able to take the knife from her and put it in his backpack. While taking the knife from her, the defendant said that he "had to put hands on her, but I wasn't going to let her stab me." Groux also called 911 and said that the defendant had assaulted her and pulled a knife on her.

Two Palmer police officers responded to the scene. The defendant told one officer that he had gotten into an argument with Groux and that she had threatened him with a knife. The defendant was cooperative with the officer and told him the knife was in his backpack. He showed the officer the backpack, which was a few feet away and contained the knife, visible and sheathed. The officer took possession of the knife. Another officer found Groux sitting on the porch in the back of the house and took her statement. Groux did not complain of any injuries, nor did the officer observe any.

The defendant was placed under arrest and taken to the police station, where photos were taken showing a cut over his right forehead and bruises to his limbs. The defendant was taken to the hospital and treated for his injuries.[2]

[2] The 911 recording and a transcription of the call were introduced in evidence at trial. Additionally, the aforementioned statements of the defendant to the police were also testified to by the police. The defendant did not testify at trial.

Discussion. "The prerequisites for self-defense vary depending on the level of force, deadly or nondeadly, that the defendant used against [the] victim." Commonwealth v. Tirado, 65 Mass. App. Ct. 571, 575 (2006). A defendant is entitled to a nondeadly self-defense instruction "if the evidence, viewed in the light most favorable to the defendant without regard to credibility, supports a reasonable doubt that (1) the defendant had reasonable concern for his personal safety, (2) he used all reasonable means to avoid physical combat, and (3) 'the degree of force used was reasonable in the circumstances, with proportionality being the touchstone for assessing reasonableness.'" Commonwealth v. King, 460 Mass. 80, 83 (2011), quoting Commonwealth v. Franchino, 61 Mass. App. Ct. 367, 368-369 (2004). To justify the use of deadly force in self-defense, the defendant must have reasonable cause to believe that "he was in imminent danger of death or serious bodily harm." Commonwealth v. Berry, 431 Mass. 326, 335 (2000), quoting Commonwealth v. Carrion, 407 Mass. 263, 268 (1990). Whether force is deadly or nondeadly is determined by whether a dangerous weapon was used. See Commonwealth v. Toon, 55 Mass. App. Ct. 642, 644 n.3 (2002). Where the level of force cannot be determined as a matter of law, instructions on both deadly force and nondeadly force must be given. See Commonwealth v.

Noble, 429 Mass. 44, 46-47 (1999). See also Commonwealth v. Walker, 443 Mass. 213, 217 (2005).

In this case, the judge did provide the jury with a self-defense instruction. For the first time on appeal, the defendant contends that the instruction was faulty because the judge only instructed on nondeadly force. "Where, as here, the defendant failed to object to the instruction at trial, we review the instruction to determine whether any error in the instruction created 'a substantial risk of a miscarriage of justice.'" Commonwealth v. Telcinord, 94 Mass. App. Ct. 232, 241-242 (2018), quoting Commonwealth v. Freeman, 352 Mass. 556, 564 (1967). A substantial risk of a miscarriage of justice occurs when we have a "serious doubt whether the result of the trial might have been different had the error not been made" (citation omitted). Commonwealth v. Valentin, 470 Mass. 186, 189 (2014). The Supreme Judicial Court's decision in Commonwealth v. Randolph, 438 Mass. 290, 298 (2002), sets out a four-question test to determine whether there is a substantial risk of a miscarriage of justice. Those questions are:

> "(1) Was there error? (2) Was the defendant prejudiced by the error? (3) Considering the error in the context of the entire trial, would it be reasonable to conclude that the error materially influenced the verdict? (4) May we infer from the record that counsel's failure to object or raise a claim of error at an earlier date was not a reasonable tactical decision?" (Citations omitted.)

Id. "Only if the answer to all four questions is 'yes' may we grant relief." Id.

Passing on the defendant's entitlement to the instruction, we conclude that not instructing on the use of deadly force in self-defense did not prejudice the defendant. "We examine the jury instructions in their entirety 'to determine their probable impact on the jury's perception of the fact-finding function.'" Noble, 429 Mass. at 47, quoting Commonwealth v. Mejia, 407 Mass. 493, 495 (1990). Here, the instructions, viewed as a whole, were comprehensive, explained and reiterated the Commonwealth's burden to prove that the defendant did not act in self-defense, and otherwise properly conveyed the law of self-defense.[3]

We also determine that in the context of the entire trial, if there was any error, it did not materially influence the verdict in a manner harmful to the defendant. See Freeman, 352 Mass. at 564. The defendant's theory of the case was that the victim attacked the defendant with the knife, and the defendant acted in self-defense by putting his hands on her only to get

[3] Here, by not instructing on the use of deadly force in self-defense, the judge deprived the Commonwealth of one means of defeating self-defense by forcing the Commonwealth to prove beyond a reasonable doubt only that the defendant did not have a reasonable concern for his own safety, instead of having to prove that the defendant did not have a reasonable belief that he was being attacked and in imminent danger of death or serious bodily injury. See Commonwealth v. Baseler, 419 Mass. 500, 503-504 (1995). Far from harming the defendant, this actually made the Commonwealth's burden of proof more difficult.

the knife away and defend himself. The defendant never argued that he used the knife in any way whatsoever against the victim. On the record before us, there was a reasonable tactical basis not to request such an instruction. See note 3, supra. There was little to be gained under the defendant's theory of the case by focusing the jury's attention on lethality.

Furthermore, we cannot see how the deadly force in self-defense instruction would have benefited the defendant. The jury did not find the defendant guilty of any offense in which a knife was used. Since there is no scenario in which it is possible that the jury both acquitted the defendant of assault by means of a dangerous weapon and found that he used excessive force in self-defense when he committed the assault and battery on Groux, there was no prejudice to the defendant. The error, if any, in not providing the deadly force in self-defense instruction was not to the defendant's detriment. As such, not

providing the deadly force in self-defense instruction did not create a substantial risk of a miscarriage of justice.

Judgment affirmed.

By the Court (Meade, Sullivan & D'Angelo, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: November 23, 2022.

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