

NOTICE: Summary decisions issued by the Appeals Court pursuant to its 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 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

17-P-1452

COMMONWEALTH

vs.

SHANE T. PERKINS.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant was convicted of assaulting his wife, G. L. c. 265, § 13A (a). The testifying percipient witnesses were two police officers who were dispatched to the defendant's home. According to the officers, they saw, through a window, a woman (the wife) on the floor. The defendant was shirtless, angrily pacing back and forth towards and away from her, which caused her to flinch away and move her hands in a defensive manner. He was yelling at her, "[Y]ou ruined my life. You fucking got pregnant. You blame all your shit on me." The officers then saw him take off his belt, fold it in half, and walk towards her. She put her hands up and ducked in response. The officers knocked on the door and announced their presence, and, after a brief struggle, arrested the defendant.

The defendant first argues that the trial judge erred by refusing to give a missing witness instruction with respect to the wife, who did not testify at trial. We review for abuse of discretion. Commonwealth v. Williams, 450 Mass. 894, 901 (2008). The following considerations are significant in determining whether a missing witness instruction is appropriate:

"(1) whether the case against the party is so strong that the party would naturally be expected to call a favorable witness; (2) whether the purported evidence of the missing witness is important or collateral and cumulative; (3) whether the party has superior knowledge of the identity and whereabouts of the missing witness; and (4) whether the party has given a plausible reason for the nonproduction of the witness."

Commonwealth v. Ortiz, 67 Mass. App. Ct. 349, 357 (2006).

The judge did not abuse her discretion in refusing to give the instruction, because the Commonwealth had a plausible reason for not producing the wife. The judge ruled, "The Court based on the representation by the Commonwealth that [the wife] has indicated to them that she intends to assert her marital privilege and since she has taken up residence outside of the [S]tate, the Court finds that giving the proposed instruction by the defendant is inappropriate in this case and that is the reason for the Court's denial of the request."¹ We agree that a

¹ The defendant on appeal suggests that the prosecutor only heard this information second-hand from the wife's victim-witness advocate. This is belied by the record: the prosecutor stated

prospective witness's expressed intent to assert a testimonial privilege is a plausible reason why a party would not call that prospective witness, and that the judge therefore did not abuse her discretion in refusing to give a missing witness instruction.²

The defendant argues that the judge could not find that the Commonwealth had a plausible reason for not producing the wife without first requiring her to invoke her privilege in court. This is incorrect. The underlying premise of the missing witness instruction is that a party's failure to call a prospective witness raises a reasonable inference that this witness would have provided testimony adverse to that party. See Commonwealth v. Graves, 35 Mass. App. Ct. 76, 80 n.6 (1993) (approving a missing witness instruction against a defendant that began, "Now, if the defendant in this case did not call a potential witness to testify you are free, not required to, to infer that the witness's testimony would not be favorable to the defendant only if four conditions are satisfied . . ."). Where there is another plausible reason for failure to call the witness, that inference is weakened. To use this case as an

that the wife "indicated to me" that she intended to assert her privilege.

² Contrary to defense counsel's assertion at oral argument, neither the prosecutor nor the judge stated that "the wife had invoked spousal immunity." They stated only that she told the prosecutor that she intended to invoke it.

example, if the prospective witness credibly told the party that she would assert a valid testimonial privilege and refuse to testify, that alone may suffice to explain why the party did not call the prospective witness. And the defendant has cited no authority that the judge may not accept, at face value, an attorney's unchallenged representation that the prospective witness told her that she (the witness) would assert a valid testimonial privilege.³

The defendant also argues that, after properly permitting him to "point out absence of evidence and that [the wife is] just not present and that [the jury] have to look elsewhere," the judge "simultaneously bolstered the credibility of the Commonwealth's witnesses and undercut the argument made by [d]efense [c]ounsel," in violation of due process and the right to present a defense, by directing the jury, "You are instructed not to speculate the reason for [the wife's absence] because you are likely to guess wrong. You are not permitted to infer anything from the absence of her testimony and you must decide this case solely on the evidence presented in the courtroom." Specifically, he argues that this instruction undercut his

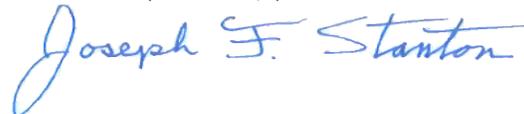
³ At trial, the defendant argued only that "[t]o be unavailable for the marital privilege she has to appear and take the marital privilege." He did not dispute the prosecutor's representations about what the wife told her, and indeed appeared to concede that the wife had told her victim-witness advocate that she intended to assert her privilege.

argument that there were gaps in the evidence concerning the wife's apprehension of an imminent battery, evidence that only could have come from the wife's testimony.

The instruction not to speculate as to the reason for the wife's absence told the jury nothing about what gaps might have existed in the evidence. Likewise, the instruction not to "infer anything from the absence of her testimony" did not suggest that the jury could find the purportedly missing evidence in the testimony of the other witnesses. This is supported by the subsequent instruction to decide the case "solely on the evidence presented in the courtroom." And there is nothing to the defendant's contention that the challenged instruction bolstered the credibility of the Commonwealth's witnesses, to whom the instruction did not even allude.

Judgment affirmed.

By the Court (Vuono, Meade &
Rubin, JJ.⁴),



Clerk

Entered: March 7, 2019.

⁴ The panelists are listed in order of seniority.