

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

18-P-1231

COMMONWEALTH

vs.

TUNG NGUYEN.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Tung Nguyen, appeals from his convictions, after a jury trial in Superior Court, of three counts of indecent assault and battery on a child, G. L. c. 265, § 13B, and one count of assault and battery, G. L. c. 265, § 13A (a). Concluding that there were no reversible errors in the Commonwealth's closing and that the judge properly denied the defendant's motion for a postverdict inquiry concerning a juror, we affirm.

1. Prosecutor's closing argument. "Closing argument must be limited to discussion of the evidence presented and the reasonable inferences that can be drawn from that evidence." Commonwealth v. Rakes, 478 Mass. 22, 45 (2017). "Counsel may, however, zealously argue in favor of those inferences favorable to his or her case." Id. "Because the defendant did not object

to the prosecutor's closing statement at trial, we review [any error] for a substantial risk of a miscarriage of justice."

Commonwealth v. Childs, 94 Mass. App. Ct. 67, 76 (2018), quoting Commonwealth v. Proia, 92 Mass. App. Ct. 824, 835 (2018).

a. Appeal to emotion. "Although prosecutors may use dramatic descriptions of the facts, an overt appeal to emotions may cause a jury to decide the case based on considerations other than the weight of the evidence." Commonwealth v. Leary, 92 Mass. App. Ct. 332, 339 (2017). "Prosecutorial 'appeals to sympathy . . . obscure the clarity with which the jury would look at the evidence and encourage the jury to find guilt even if the evidence does not reach the level of proof beyond a reasonable doubt.'" Commonwealth v. Niemic, 483 Mass. 571, 591 (2019), quoting Commonwealth v. Bois, 476 Mass. 15, 34 (2016).

Here, the prosecutor referred to the victim as a "child" numerous times. The abuse began when the victim was approximately eight or nine years old and continued until she was approximately eleven or twelve years old. The prosecution's description of the victim's age is factually accurate and an element of several of the charges. Moreover, the prosecutor's emphasis on the victim's youth may have been intended to explain inconsistencies in her testimony. See Commonwealth v. Grinkley, 75 Mass. App. Ct. 798, 808 (2009) ("We recognize that the line between improper appeals to juror emotions and proper

explanations of difficulties witnesses may have had in testifying is not always clear, particularly with regard to young children in sexual assault cases"). Contrast Commonwealth v. Rosa, 73 Mass. App. Ct. 540, 545 (2009) (stating that defendant left "a firefighter lying on the cold, wet street" and stating four times that defendant "took out a firefighter" was improper emotional appeal).

Furthermore, "[i]nstructions may mitigate any prejudice in the final argument." Commonwealth v. Rivera, 482 Mass. 259, 270 (2019), quoting Commonwealth v. Carriere, 470 Mass. 1, 19 (2014). Here, the judge properly instructed the jury "not to be swayed by prejudice or sympathy, by personal likes or dislikes, toward either side." We discern no error.

b. Credibility. The prosecutor asked, "what motive did [the victim] and all the other witnesses have to come in and, under oath, talk to a roomful of strangers about the things that you have heard them talk about?" Such a suggestion that a victim should be believed simply because she testified is improper. See Commonwealth v. Beaudry, 445 Mass. 577, 587 (2005); Commonwealth v. Ramos, 73 Mass. App. Ct. 824, 826 (2009). Here, however, the concept of motivation was first introduced by the defendant, who argued that the defendant should be acquitted simply because "he took the stand, he answered questions, he looked you in the eye." Defense counsel

then stated that the prosecutor would ask why the victim would accuse the defendant if it did not happen. In light of the dueling arguments, there is little risk that the jury convicted the defendant simply because the victim testified. Accordingly, we discern no substantial risk of a miscarriage of justice. Commonwealth v. Sanchez, 96 Mass. App. Ct. 1, 11 (2019).

c. Burden shifting. A "prosecutor . . . cannot make statements that shift the burden of proof from the Commonwealth to the defendant." Commonwealth v. Lavin, 94 Mass. App. Ct. 353, 363 (2018), quoting Commonwealth v. Johnson, 463 Mass. 95, 112 (2012). "A prosecutor may marshal the evidence in closing argument, and, in doing so, may urge the jury to believe the government witnesses and disbelieve those testifying for the defendant." Ramos, 73 Mass. App. Ct. at 826, quoting Beaudry, 445 Mass. at 587. In cases where the "defense counsel in closing argument challenges the credibility of the complainant, it is proper for the prosecutor to invite the jury to consider whether the complainant had a motive to lie and to identify evidence that demonstrates that the complainant's testimony is reliable." Commonwealth v. Dirgo, 474 Mass. 1012, 1014 (2016). Accord Sanchez, 96 Mass. App. Ct. at 11.

Here, the prosecutor stated that, "if you heard testimony . . . about some big family blowout," such testimony would suggest the victim had a motive to fabricate. By itself, such a

comment might suggest burden shifting. See Lavin, 94 Mass. App. Ct. at 363. Importantly, however, the prosecutor immediately followed up this comment by pointing out that multiple witnesses, including the defendant, had testified that the family got along prior to the accusations. Accordingly, in context, the statement was merely an inartful reminder that the defendant's own testimony negated this motive to fabricate.

d. Placing the jury in the victim's shoes. "The invitation to the jury to put themselves in the position of the victim is usually improper." Grinkley, 75 Mass. App. Ct. at 809, quoting Commonwealth v. Jordan, 49 Mass. App. Ct. 802, 816 (2000). Here, the prosecutor stated, "Five minutes of your adult cousin doing what he did to her is too long." The reference to "your adult cousin" was improper, but cannot be viewed as an intentional attempt to have the jurors associate themselves with the victim, as the prosecutor repeatedly used "your" when referring to the defendant as well. Moreover, the comment was a fleeting reference in a more than twenty-three page closing argument, and the jury acquitted the defendant of the most serious charge, aggravated rape of a child. See Grinkley, supra at 810-811 ("The jury, apparently able to distinguish between, on one hand, argument and evidence and, on the other, excessive contentions by both parties, convicted the defendant on the sexual assaults and acquitted him on the rape

charges"). The error did not rise to such a level as to create a substantial risk of a miscarriage of justice. See Commonwealth v. Saunders, 75 Mass. App. Ct. 505, 511-512 (2009).

e. Misstatement of the evidence. "[C]losing arguments must be limited to facts in evidence and the fair inferences that may be drawn from those facts." Commonwealth v. Alvarez, 480 Mass. 299, 305 (2018), quoting Commonwealth v. Rutherford, 476 Mass. 639, 643 (2017). "A prosecutor may not 'misstate the evidence or refer to facts not in evidence.'" Rivera, 482 Mass. at 269, quoting Carriere, 470 Mass. at 19.

Here, the prosecutor reiterated the defendant's testimony; "I didn't have the responsibility of taking care of her. . . . She was ten. Old enough to care for herself." The prosecutor then argued that "[h]e didn't think of her as a child She was just a body, I suggest to you, a female body." "Seldom is there direct evidence of a defendant's thoughts, and a prosecutor may argue fair inferences from the evidence that point to what the defendant may have been thinking." Commonwealth v. Moran, 75 Mass. App. Ct. 513, 523 (2009). The argument was a fair inference based on the defendant's testimony. See Commonwealth v. Smith, 450 Mass. 395, 408 (2008).

The prosecutor stated that the defendant put two fingers inside the victim. Even though the victim was unsure how many

fingers were inserted, the victim used the plural noun "fingers." "A prosecutor may 'zealously argue in favor of those inferences favorable to his or her case.'" Commonwealth v. Garcia, 94 Mass. App. Ct. 91, 101 (2018), quoting Rakes, 478 Mass. at 45.

Similarly, the prosecutor summarized the victim's testimony about a physical altercation and argued that "I think she was trying to describe his face looked different. He looked angrier, more serious." This inference was adequately supported by the victim's testimony that the defendant "looked a lot more serious." Finally, the prosecutor asked the jury to make a reasonable inference when she stated that the defendant "grabbed her in between her legs." The victim testified that "he grabbed my legs, like under my thigh area." As this testimony was relevant to the assault and battery charge, we see no error in the prosecutor's paraphrasing of it.

The same, however, cannot be said for the prosecutor's quoting the victim's testimony "what would happen if I didn't say something and then it happened to someone else." These statements had been struck. The defendant immediately objected, the judge immediately stated that the testimony had been struck, and the prosecutor immediately apologized in front of the jury. The defendant did not object to how the error was addressed. "[I]mproprieties in closing argument may be cured by appropriate

and timely curative instructions." Beaudry, 445 Mass. at 585. Moreover, the judge instructed the jury that the closing arguments were not evidence and that they were to follow their own memories if those differed from the attorneys' recollections. See Commonwealth v. Casbohm, 94 Mass. App. Ct. 613, 625 (2018). We discern no substantial risk of a miscarriage of justice.

f. Facts not in evidence. A prosecutor may not "refer to facts not in evidence in a closing argument." Commonwealth v. Goddard, 476 Mass. 443, 449 (2017). A prosecutor, however, "may call on the experience and common knowledge of the jury." Commonwealth v. Ridge, 455 Mass. 307, 330 (2009).

The defendant argued in closing that there was no corroboration for the victim's testimony because she did not have any marks from the alleged abuse. The prosecutor responded by stating that "[t]ouching your breast doesn't leave an injury. Rubbing your buttocks doesn't leave an injury. Pressing your hard penis against a clothed young child doesn't leave an injury, I suggest to you. Putting your fingers inside a child's vagina for a second or two, it's for you to decide."

The likelihood of bruising from the first three examples are well within the jury's common knowledge. Neither side presented expert testimony on whether the brief insertion of fingers would cause an injury to the vagina of an eleven year

old girl. "Where the Commonwealth counters a defendant's argument concerning a lack of evidence of injury to a child sexual abuse complainant by offering a medical or anatomical reason . . . , that reason must be supported by expert testimony." Commonwealth v. Hrabak, 440 Mass. 650, 655-656 (2004). Unlike a claim that anal rape would not cause injury to a child's rectum, as in Hrabak, common sense provides no indication either way whether briefly placing fingers inside an older child's vagina would cause injury. Accordingly, as the prosecutor suggested, the jury was left to decide that question on its own. There was no substantial risk of a miscarriage of justice.

2. Denial of the motion to inquire of a juror. "The Sixth Amendment to the United States Constitution and art. 12 of the Declaration of Rights of the Massachusetts Constitution guarantee criminal defendants trial by an impartial jury." Commonwealth v. Chambers, 93 Mass. App. Ct. 806, 809 (2018). "[A] postverdict inquiry may be appropriate where there is evidence of bias in order to ensure that the defendant received a fair trial." Commonwealth v. Murphy, 86 Mass. App. Ct. 118, 124 (2014), quoting Commonwealth v. Guisti, 434 Mass. 245, 253 (2001). We review the court's decision whether to initiate a postverdict interview of a juror for an abuse of discretion. Murphy, supra.

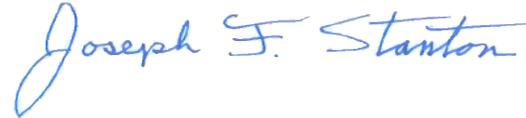
After sentencing, the victim's sister, who was a witness, told the prosecutor, "I think I recognize one of the jurors that just walked out and I hadn't even noticed him before." The witness did not know the juror's name, and she "recognized him as maybe being a friend of a cousin." During jury selection, the judge had read the witness's name, along with all of the other witnesses, aloud to the jury. The judge then spoke with each juror at side bar to confirm that juror's impartiality. There is no indication that the juror recognized the witness, or that there was any relationship "more than just mere acquaintance." Commonwealth v. Ouellette, 58 Mass. App. Ct. 711, 712 (2003). The judge acted within his discretion in concluding that there was not an adequate showing of bias to warrant inquiring of the juror or further inquiring of the sister.

3. Conclusion. The judgments are affirmed. The order

entered June 1, 2018, denying the defendant's motion to inquire of juror and witness is affirmed.

So ordered.

By the Court (Vuono,
Desmond & Ditkoff, JJ.¹),



Clerk

Entered: March 12, 2020.

¹ The panelists are listed in order of seniority.