COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1366

COMMONWEALTH

vs.

TYRON CONEY.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After trial, the defendant was convicted of manslaughter, G. L. c. 265, § 13. He now appeals. The facts and testimony in this matter are well known to the parties and we will not recite them in their entirety; to the extent particular pieces of evidence are relevant to our discussion, we address them in the course of our discussion.

1. Closing argument. The defendant initially raises a series of objections to statements made by the prosecutor during closing argument. Because the defendant preserved the issues at trial, we review for prejudicial error. See Commonwealth v. Cruz, 445 Mass. 589, 591 (2005).

With respect to the first claim of error, viewing the evidence and all reasonable inferences therefrom as we must, in the light most favorable to the Commonwealth, the jury could

have found the following. See Commonwealth v. Niemic, 483 Mass. 571, 573 (2019). As the victim and two companions approached the area in front of the Mainspring Shelter where the defendant and Adrian Gonsalves (Gonsalves or Ace) were sitting, Gonsalves said, "[T]here's that white motherfucker," after which he headed toward the victim and his companions with the intent to confront them. The defendant immediately headed in the same direction as Gonsalves. The defendant argues that in closing, the prosecutor, over objection, misstated the evidence with respect to what Gonsalves had said, quoting him as saying, "[H]ere come those white mother fuckers, let's get them."

The defendant is correct that the prosecutor's statement was in error. We conclude, however, that it was not prejudicial. In light of the evidence about how both Gonsalves and the defendant acted immediately upon this statement -- the defendant said, "[O]h shit," and they both headed toward the approaching victim -- it is a reasonable inference that that is the substance of what Gonsalves intended.

Next, the defendant objects to the prosecutor's statement, "The defendant himself admits he's there, he's holding [the victim] when he's stabbed[,] . . . the defendant himself admits to being there when he was stabbed." Again, there was an objection.

The actual statement made by the defendant to two detectives at the Brockton Police Department the day after the incident was that when he released the victim he had been holding, he saw "a little pool of blood" on the ground that had not come from a punch in the face that the defendant delivered on the victim. It is a fair inference from the defendant's statement that he was, indeed, holding the victim at the time he was stabbed. Since he did not admit this in terms, it might have been better for the prosecutor to use a formulation such as "the defendant's statements amount to an admission that. . . ." However, even as phrased, we see no error.

Next, the defendant challenges two related objected-to statements from the prosecutor: "And you know from the way [the defendant] was describing the body position that Ace is in front of him," and "You know from the position of the wounds and from the defendant's own words on how he was holding [the victim] that Ace was in front of him."

Again, we think these are reasonable inferences from the evidence. The defendant described himself as having the victim in a "sloppy chokehold" apparently with the victim's own left arm held by the defendant around the victim's neck. This would place the defendant behind or on the rear left side of the victim. Given the location of the stab wounds inflicted by

Gonsalves, it is reasonable to infer that he was essentially in front of the defendant at the time of the stabbing.

Finally, the defendant argues that a series of statements about his actions while holding the victim were erroneous. Some of these were not in error. The prosecutor said, "And you know from the defendant's statement that he says that he's got [the victim] down, he's got him pinned down so he can't move. So he can't defend himself, so he can't flee." Although the evidence did not support a finding that the victim was so immobilized that he literally could not "move," the essence of this statement is that the victim could not defend himself or flee and it is a reasonable inference from the evidence.

Two other statements, however, might be read to suggest not only that the defendant had rendered the victim defenseless, but that he had deliberately positioned the victim in the way he had so that Gonsalves could stab the victim in the way he did. These included the statement that the defendant "positioned [the victim] to expose the areas that were stabbed," and, more clearly, that the defendant was "basically holding [the victim] down and serving him up on a platter so the defendant [sic] . . . can carve him up." Arguably, a third statement falls into this category: "The attack went a step further when [the defendant] held [the victim] down and allowed Ace to stab him."

We may assume without deciding that the evidence did not support an inference that the defendant was participating in a plan whereby he would hold the victim exposed in order that Gonsalves could stab him. The first of the three statements we quoted, however, was followed after objection by a curative instruction. The judge said, "Members of the jury, as I told you, the closing[] arguments of the attorneys are not evidence. And it is for you to determine what the evidence is. You should not consider this as evidence." The second statement was made immediately after the curative instruction. The third statement was made later, but, because it used the word "allowed," it is not clearly a statement that the defendant intentionally held the victim in a particular way in order to create the opportunity for Gonsalves to stab him.

To the extent these statements improperly suggested the defendant by prior arrangement deliberately held the victim in a way that would facilitate the stabbing, we think that, given the curative instruction and the strength of the case against the defendant, neither individually nor cumulatively, were these statements prejudicial.

2. Sufficiency. The defendant's second argument is that there was insufficient evidence to support the conviction of the defendant for manslaughter. This claim we review under the familiar Latimore standard, under which we ask whether, viewing

the evidence in the light most favorable to the Commonwealth, any rational finder of fact could have found all the essential elements of the crime beyond a reasonable doubt. See Commonwealth v. Latimore, 378 Mass. 671, 677-678 (1979).

The Commonwealth was required to prove beyond a reasonable doubt that the defendant knowingly participated in the commission of voluntary manslaughter and did so with the intent required to commit the crime. See Commonwealth v. Zanetti, 454 Mass. 449, 467-468 (2009). The intent that the defendant must have shared with Gonsalves, who actually stabbed the victim, was the intent to inflict an injury or injuries on the victim likely to cause death. See Commonwealth v. Ware, 53 Mass. App. Ct. 238, 241 (2001), S.C., 438 Mass. 1014 (2003).

Given the evidence that the defendant had previously expressed animosity toward the victim in a verbal confrontation with him just a few days prior to the stabbing, had converged on the victim with Gonsalves after remembering his face from the prior confrontation, had removed his shirt to initiate the confrontation with the victim, had himself beat and kicked the victim alongside Gonsalves and other attackers, and had fled the scene with Gonsalves and the other attackers after Gonsalves stabbed the victim, the evidence was sufficient to permit a jury to find beyond a reasonable doubt that the defendant shared the intent to commit the crime and by agreement was willing and

available to assist if necessary. See Commonwealth v. Deane, 458 Mass. 43, 50 (2010). See also Commonwealth v. Chhim, 447 Mass. 370, 380 (2006) ("The Commonwealth need not prove that the defendant knew that a joint venturer was armed, as long as it proves the [requisite intent] . . . a vicious beating of one man by several assailants creates an inference of intent to do grievous bodily harm or, at least, to do an act which would create a plain and strong likelihood of death").

Judgment affirmed.

By the Court (Rubin, Singh & Hand, JJ.[1]),

Joseph F. Stanton

Clerk

Entered: February 1, 2021.

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