COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-1389

COMMONWEALTH

vs.

RAHEEM R. ABUBARDAR.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A jury convicted the defendant of assault and battery as a lesser included offense of attempted murder.[1] On appeal the defendant argues that the trial judge erred in instructing the jury only on self-defense by means of deadly force, when the evidence supported a finding that the defendant defended himself with nondeadly force. We affirm.

Background. The Commonwealth elicited the following evidence during its case in chief. In November of 2012, the victim gave the defendant a ride in a van owned by the church they both attended. The defendant sat in the front passenger seat. Once the van was parked, the defendant asked the victim

[1] The jury also convicted the defendant of threatening to commit a crime, but he raises no claim of error as to that conviction. The jury acquitted the defendant of rape, intimidation of a witness, and unauthorized use of a motor vehicle.

"when [they] were going to be in a relationship." When the victim replied that she was not looking for a relationship, the defendant became angry, threatened to kill her, and started choking her with both hands around her throat. A passerby saw them fighting and knocked on the window, distracting the defendant and allowing the victim to open the door and escape. The defendant ran after her, threw her to the ground, and threatened to kill her daughter, before driving off in the van.

The defendant, testifying on his own behalf, did not dispute that he and the victim fought, but claimed that she instigated the fight by hitting and scratching him after he asked about her activity on a dating Web site. According to the defendant, he was "just sitting there," "trying to hold [the victim] and contain her . . . so [he] could get away." After the passerby knocked on the window, the defendant looked up and saw two men approaching the van. Fearing that he was about to be robbed, the defendant pushed the victim so that he could get out of the van and confront the two men. The defendant admitted that he "pushed [the victim] too hard" but stated that he did not intend to hurt her.

The judge gave a self-defense instruction at the defendant's request. The instruction was limited, however, to explaining the defendant's right to use deadly force in self-

defense. The defendant did not object to the instruction, nor did he request an additional instruction on nondeadly force.

Discussion. Because the defendant failed to preserve the issue, we review any error for a substantial risk of a miscarriage of justice. See Commonwealth v. St. Louis, 473 Mass. 350, 359 (2015). A defendant is entitled to an instruction on the use of nondeadly force in self-defense "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 from Commonwealth v. Franchino, 61 Mass. App. Ct. 367, 369 (2004). The Commonwealth argues that the second of these requirements is not met because the evidence did not establish that the defendant made efforts to retreat before using force. In particular, the Commonwealth argues, there was no evidence that the defendant could not simply have opened the front passenger door and gotten out of the van.[2] While this argument is not without appeal, we need not

[2] The Commonwealth thus contends that the evidence did not warrant a self-defense instruction at all.

resolve it because, even assuming the defendant was entitled to a nondeadly force instruction, no substantial risk of a miscarriage of justice arose from the judge's failure to give one sua sponte.

Whether an error created a substantial risk of a miscarriage of justice turns on whether we have "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). In making that assessment, we consider among other things "whether the error is 'sufficiently significant in the context of the trial to make plausible an inference that the [jury's] result might have been otherwise but for the error.'" Commonwealth v. Alphas, 430 Mass. 8, 13 (1999), quoting from Commonwealth v. Miranda, 22 Mass. App. Ct. 10, 21 (1986).

Here, considering the entire trial, we have no serious doubt that the jury's verdict might have been different had the judge given a nondeadly force instruction. Contrary to the defendant's assertions, self-defense was not his only defense to the assault and battery charge. The judge properly instructed that an element of the crime of assault and battery is that "the touching was committed without justification or excuse" and that "the Commonwealth must prove the absence of justification or excuse beyond a reasonable doubt." Given these instructions, we think it unlikely that the jury would have convicted the

defendant had they believed his version of the events -- that he did not choke the victim and pushed her only so that he could stop her from hitting him and escape from the van. Thus, there is no substantial likelihood that an additional instruction on self-defense using nondeadly force would have resulted in a different verdict. See St. Louis, 473 Mass. at 359 ("We look to the jury instructions as a whole in order to determine if there was a substantial risk of a miscarriage of justice").[3]

This is especially so given defense counsel's strategy throughout trial to focus almost exclusively on the more serious charges of rape, attempted murder, and intimidation of a witness. Counsel discussed only the rape charge in his opening statement, while admitting that the defendant was involved in an "altercation" with the victim in November of 2012. Similarly, counsel focused his entire closing argument on the three more serious charges. He mentioned assault and battery only once,

[3] We disagree with the defendant's contention, raised at oral argument, that the jury may have conflated the instruction on use of deadly force in self-defense with the concept of justification or excuse. The judge first gave the self-defense instruction and then explained the elements of attempted murder followed by the elements of assault and battery. The judge also gave specific examples of what constitutes justification or excuse: "An example of justification is a physical examination by a doctor. An example of excuse is a situation where a person sees another in danger, reaches out and while removing the other person from an oncoming vehicle touches that person's breast." Considering the sequence of the instructions and the examples the judge provided, there is no substantial risk that the jury conflated the concepts.

when he concluded his argument by stating, "Now, [the defendant] submits to your judgment as a jury . . . [whether,] when he was grabbing [the victim, it] was lawful or an assault and battery; but as to the crimes of rape, intimidation and assault to murder, I ask that you find him not guilty." In light of the defense's strategy -- which was successful, as it resulted in findings of not guilty on all three of the more serious crimes -- we do not think an instruction on nondeadly force would have materially influenced the jury's deliberations on the assault and battery charge.

Judgments affirmed.

By the Court (Vuono, Neyman & Shin, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: August 3, 2018.

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