

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-1272

COMMONWEALTH

vs.

CAMERON E. HILL.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant was convicted of two counts of rape of a child, aggravated by a five-year age difference. The victim was the defendant's ten year old stepdaughter, and both rapes occurred inside the family home. On appeal the defendant argues that (1) the Commonwealth improperly focused its evidence and arguments on the emotional state of the victim's mother (the defendant's wife), who was not only the first complaint witness but also a percipient witness to events shortly after the second rape, (2) the prosecution improperly bolstered its case with evidence regarding the criminal investigation, and (3) defense counsel was ineffective due to his cross-examination of a key prosecution witness. The arguments presented here were not presented at trial. We discern no substantial risk of a miscarriage of justice, and accordingly affirm.

Background. The evidence at trial showed the following. In April of 2016, the defendant and his wife lived with her four children in an apartment in Brockton. The children ranged in age from five to ten. The victim was the oldest. On the evening of April 24, the defendant entered the victim's room, offered her one dollar to "play[] a game," and told her to close her eyes and open her mouth. The defendant then put his penis in the victim's mouth for about thirty seconds. While this was happening, the victim's mother was taking a bath in the bathroom on the other side of the apartment, and began calling out for the victim.¹ The defendant accordingly withdrew from the victim, after which the victim went to see the mother in the bathroom, where the victim eventually told the mother what the defendant had just done.

The mother immediately left the bathtub and confronted the defendant in the living room. The confrontation was both verbal and physical. The mother testified that she said something like "[h]ow could you do that," and that the defendant responded by "pleading," and saying "he's sorry," and "I've never been like that before." The mother also testified that she punched and hit the defendant, and at one point, stabbed the defendant with

¹ While in the bathtub the mother checked a live feed from a video camera in the home, from which she could see that the defendant was in the victim's room, because she could see his shoes.

a kitchen knife when he blocked her from moving past him. The next morning the victim told the mother about a second assault by the defendant that had occurred in October or November of the previous year.

The mother did not immediately advise the police or anyone else about what had occurred on April 24. The defendant remained in the home for several days after April 24, although he stayed in a room separate from the mother and the children; the mother testified that she repeatedly asked the defendant to leave but he refused. Two days later, on April 26, the mother and the defendant went to an appointment with a couples' therapist. The mother had scheduled the appointment prior to April 24, at the suggestion of the Department of Children and Families (DCF), in connection with an open DCF case regarding the mother and the children. The therapist had never previously met either the defendant or the mother. During this appointment the defendant told the therapist about the rapes of the victim.

The therapist notified the authorities about the defendant's disclosures approximately two days later, on April 28. That afternoon the police and DCF came to the family's home and removed the children from the mother's care. The mother was not cooperative. For example, in response to police questioning, she denied seeing the therapist, and denied that the defendant had made any admissions to the therapist. It was

not until several weeks later, on May 20, that the mother told the police and prosecutors what the victim had told her.

The defendant was indicted on two counts of rape of a child, aggravated by a five-year age difference. The therapist, the victim, and the mother each testified at trial. The mother testified at length about the events of April 24, and was asked, and answered, specific questions about her emotions that evening. The prosecutor also referenced the emotional state of the mother in his arguments.

The defendant took the stand and denied the rapes. The defense argued that the events never happened, but instead had been fabricated by the mother, and that the mother had also influenced the victim to testify as she did. The defense emphasized, in particular, that neither the mother nor the victim had told anyone about the events of April 24 until several weeks after the children had been removed from the mother.

The defendant was convicted of both counts, and this appeal followed.

Discussion. The defendant first argues that the prosecutor caused reversible error by focusing, "to a degree that can fairly be described as over-the-top, on [the mother's] emotional and physically violent reaction to [the victim]'s complaint." The defendant argues that this evidence was "irrelevant," and

highly prejudicial because it improperly appealed to the jurors' emotions and sympathy -- not only for the victim, but for the mother as well. For example, the defendant points to the mother's testimony that she was "just crazy," and that she told the defendant "to kill himself" and "to jump in front of a train." The defendant also highlights a question by the prosecutor that was directed specifically at the mother's emotional state:

Q.: "And what was your emotional state throughout that evening in the locked room?"²

A.: "Mad, confused, not sure what to do, upset, scared. I don't know. Probably every emotion you could think of, I felt that night."

The prosecutor referenced the mother's emotional state in his closing as well:

"Imagine for a moment, ladies and gentlemen, when dealing with possible inconsistencies or the reality behind what was going on, what it must have been like for [the mother], laying in that bathtub relaxing, and having her ten-year-old daughter come to her, looking unlike she had ever looked before, and the one person to blame for it was her own husband, who was still in that home."

It is true that in most cases, evidence of a parent's reaction to a revelation of sexual abuse of her child will not be relevant in the subsequent sexual abuse trial. See Commonwealth v. Montanez, 439 Mass. 441, 448-449 (2003). Moreover, the cases recognize the potential for undue prejudice

² The mother took the children with her into the bedroom, and locked the defendant out.

in such evidence, as a description of the parent's reaction can incite the jurors' emotions and sympathies, and hence divert them from focusing on the evidence of the elements of the crime. See Commonwealth v. Lorette, 37 Mass. App. Ct. 736, 742-743 (1994), S.C., 422 Mass. 1014 (1996).

This case, however, presents unusual facts where much of the mother's testimony regarding her reaction was directly relevant to the issues before the jury. As noted, at trial the defendant denied that he abused the victim, and sought to persuade the jury that the mother fabricated the rape accusations. The mother's testimony, however, described how the defendant made numerous inculpatory statements immediately after the second rape occurred. It was appropriate for the jury to hear not only the defendant's inculpatory statements, but the circumstances under which those statements occurred. The mother's description of the chaotic scene, including the verbal and physical interactions between her and the defendant, was important context for the jury when evaluating the defendant's inculpatory statements. At the least, it was within the judge's discretion to determine that such evidence could be admitted -- and in any event, no objection was raised. See Commonwealth v. Freitas, 59 Mass. App. Ct. 903, 903-904 (2003) (because defense's opening statement took aim at victim's mother's credibility, "the mother's description of her daughter's

revelations and her reactions to them . . . were of some relevance"); United States v. McDowell, 918 F.2d 1004, 1007 (1st Cir. 1990) (collecting cases and stating that "a defendant, having made admissions, [cannot] keep from the jury other segments of the discussion reasonably required to place those admissions into context").

The mother's statements about her state of mind regarding asking the defendant to leave the home, and the defendant's refusal to leave, are likewise relevant under the particular circumstances here. The defense argued that the mother concocted the rape allegations, emphasizing that the mother did not voice those allegations on or immediately after April 24, and did not voice them to the police when they arrived on April 28. The defense also pointed out that the defendant remained in the home for several days after April 24 -- circumstances arguably inconsistent with the mother's testimony about the events that day.³ The prosecution was entitled to respond to the

³ We express no opinion as to whether the mother's testimony should have been allowed on direct examination, on redirect, or in rebuttal. While some of the mother's testimony was perhaps anticipatory, there was no objection to any of it, and the trial judge generally enjoys wide discretion in determining the order in which evidence comes in. See Commonwealth v. Harmon, 410 Mass. 425, 432-433 (1991); Commonwealth v. Michel, 367 Mass. 454, 463 (1975). See also Mass. G. Evid. § 611(a) (2019). We note that defense counsel's opening specifically mentioned that the defendant remained in the home after April 24, and appeared to suggest that the allegations against the defendant were fabricated.

defendant's arguments by explaining the mother's reasons for acting as she did, which would include evidence regarding the mother's state of mind.

In short, much of the evidence of the mother's conduct, and state of mind, during and after April 24 was appropriately adduced in this case. This is not to say, however, that everything the prosecutor presented was proper. Some of the evidence and argument appeared to be directed at improperly inciting the jury's emotions, rather than addressing the factual issues before the jury. For example, it was inflammatory, and not material, that the mother told the defendant to "kill himself," or that she "just wanted him to jump in front of a train." These statements, and similar comments by the mother, should have been identified to the jury as improper, and stricken from the record. See, e.g., Commonwealth v. Auclair, 444 Mass. 348, 357 (2005). Moreover, the prosecutor overstepped in closing argument, when he adverted to the mother's testimony and asked the jury to "[i]magine. . . what it must have been like for [the mother]" when her daughter told her what the defendant had done. The Supreme Judicial Court has stated that it is improper to ask the jury to put themselves in the place of the victim, see Commonwealth v. Bizanowicz, 459 Mass. 400, 420 (2011); it is no less improper to ask the jury to do so with respect to the mother of a sex abuse victim.

Nevertheless, there was no substantial risk of a miscarriage of justice here. A substantial risk of a miscarriage of justice arises "if the evidence and the case as a whole [leave the court] with a serious doubt that the defendant['s] guilt had been fairly adjudicated" (citation omitted). Commonwealth v. Amirault, 424 Mass. 618, 646-647 (1997). To reverse a criminal conviction under this standard requires error that one might reasonably conclude materially influenced the verdict, under circumstances where it does not appear that counsel's failure to object was "a reasonable tactical decision." Commonwealth v. Randolph, 438 Mass. 290, 298 (2002).

As discussed above, much of the testimony and argument that the defendant highlights on appeal was proper. It was proper for the mother to describe the chaotic scene on April 24, and for the prosecutor to argue about the mother's state of mind, in light of a defense that accused the mother of fabrication and asked why the mother had not come forward to the authorities at the time. While there were some excesses in the Commonwealth's presentation, those excesses did not dominate the presentation, and because they were not objected to at the time, the judge was not asked to intervene and to cure them. See Commonwealth v. Starkweather, 79 Mass. App. Ct. 791, 802-803 (2011) (improper

"passing references" in victim's testimony in rape trial did not create substantial risk of miscarriage of justice).

Moreover, the jury were properly advised that opening and closing arguments are not evidence, and that they were "not to be swayed by prejudice, sympathy, or any personal likes or dislikes towards either side." See Commonwealth v. Costa, 414 Mass. 618, 629 (1993). In addition, the case against the defendant was strong, given that a neutral party -- the therapist who met the defendant only once -- testified that the defendant confessed to her exactly the same crimes to which both the victim and the mother testified. There was no substantial risk that justice miscarried here. See Commonwealth v. Letkowski, 469 Mass. 603, 618-619 (2014) (strength of Commonwealth's case key factor in determining no substantial risk of miscarriage of justice).

The defendant's remaining arguments fare no better. The defendant challenges the testimony of the sexual assault nurse examiner (SANE nurse), who examined the victim several weeks after the assault. He argues that since the SANE nurse could only testify that she found no physical evidence of abuse (understandably so), the Commonwealth did not have a legitimate reason to present her testimony and instead was improperly vouching for the victim, by showing that the Commonwealth devoted substantial resources to investigating her claim. We

reject this argument. The Commonwealth does not act improperly by putting on the evidence it gathered in its investigation. See Commonwealth v. Niels N., 73 Mass. App. Ct. 689, 702 (2009) (testimony that "merely described" steps taken in sexual assault examination of victim did not improperly vouch for victim). Moreover, the failure to object may well have been tactical, where the testimony of the SANE nurse did not contradict the defendant's case.

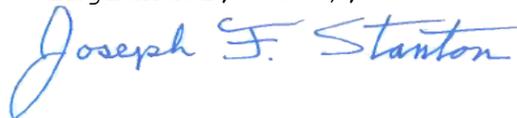
There also was no reversible error arising from the therapist's answer that was given in response to an unobjected-to question about mandatory reporters. While a portion of the therapist's answer was improper, once again the defendant is complaining about an isolated snippet of testimony, not a focus of the prosecution's case. See Starkweather, 79 Mass. App. Ct. at 802-803; Commonwealth v. Davis, 38 Mass. App. Ct. 932, 933 (1995). Moreover, while the therapist strayed in her answer, it is not uncommon for such to occur at trial, and such an improper answer can be cured by an objection and a timely motion to strike. No such motion was made here.

Finally, we are not persuaded that defense counsel's failure to establish that the therapist was unlicensed amounted to ineffective assistance of counsel. See Randolph, 438 Mass. at 295-296 (ineffective assistance claim reviewed under "substantial risk standard in cases where waiver stems from an

omission by defense counsel"). The evidence of a lack of a license to practice mental health counseling would not have significantly undermined the therapist's critical testimony, in which she merely related what the defendant said to her during the session on April 26. The fact that the therapist was unlicensed does not directly impeach her ability to hear and to perceive. Much more important impeachment was that the therapist (1) did not produce any notes of the session, and (2) did not notify the authorities of the defendant's disclosures for forty-eight hours. Both of these points, however, were brought out by defense counsel during cross-examination. Any deficiency accordingly likely would not have "materially influenced the verdict." Id. at 298.

Judgments affirmed.

By the Court (Green, C.J.,
McDonough &
Englander, JJ.⁴),



Clerk

Entered: January 22, 2020.

⁴ The panelists are listed in order of seniority.