

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

19-P-402

COMMONWEALTH

vs.

TIMOTHY M. RODERICK.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant appeals from his convictions by a Superior Court jury of two counts of rape, claiming that the judge's instructions on incapacity to consent created a substantial risk of a miscarriage of justice. We affirm.

Background. A woman, whom we shall call Monica, testified that she considered the defendant a friend when, on June 2, 2016, she left a bar with him, went to the house where he resided with his sister, and stayed the night. Monica had stayed at the defendant's house in the past. She and the defendant would "hang out," and Monica would drink alcoholic beverages. Although the defendant had expressed an interest in dating and having sex with Monica many times in the past, Monica "had made it clear that [she] didn't want to be anything more than friends." On the night in question, Monica took her

prescription anxiety medication and went to a bar where she consumed alcoholic beverages. The alcohol made Monica's medication "feel more potent." Monica recalled leaving the bar with the defendant, arriving at his residence, changing into a nightshirt, eating part of an apple, and going to sleep on the floor in the defendant's bedroom while the defendant, still awake, was seated across the room on his bed.

The next morning, when Monica awoke, the defendant said to her, "I just want to let you know that I had sex with your body last night." Monica became angry and argued with the defendant before leaving, walking to a nearby hospital, and reporting that she had been raped. The defendant, in turn, walked into the Wareham Police Department and stated that "[h]e wanted to speak with an officer regarding a report that could potentially be filed by his girlfriend." The defendant told an officer that he and Monica had sex the night before, but that "she forgot what had happened" and became "angry when he refreshed her memory." He handwrote a statement asserting, among other things, that Monica was "very drunk" at the bar, so he took her to his house, where they "in my opinion made love, but she did not remember it happening."

The following Monday, the defendant spoke with Wareham Police Detective Sergeant Michael Smith, who was investigating Monica's complaint. The defendant told Smith that Monica

vomited in his car on the way home from the bar so "[t]he first thing he had to do was wash her outside," and then he "brought her inside," where they took a shower together and had sex. The following morning, the defendant told Monica over coffee, "I fucked you twice last night." When Smith asked the defendant "why he would have to tell her that . . . [i]f she was there," the defendant responded, "[s]ometimes she's there and she isn't there."

The defendant proceeded to tell Smith about his other interactions with Monica. On one occasion, the defendant asked Monica "if he could lay down with her," and "[s]he told him she preferred not." After Monica "passed out," the defendant stated, he "didn't even cross the line. [I] didn't even put [my] hands down her pants." Three other times, the defendant touched Monica's nipples, vagina, and anus, but "[I] didn't even put [my] dick in her." When Smith asked the defendant whether Monica was "aware of this," the defendant said, "[s]he had to have been because she was moaning."¹

The defendant's sister testified for the defense that she noticed that Monica and the defendant were in a good mood when they returned from the bar that night. Although Monica was

¹ At trial, the judge allowed the defendant's motion for required findings of not guilty on three charges of indecent assault and battery on a person over the age of fourteen that had been based on these same alleged touchings.

obviously intoxicated and was not wearing a shirt, the sister testified that Monica was coherent. The sister heard Monica and the defendant laughing and talking loudly as they went into the bathroom to shower. She then saw them go together to the defendant's bedroom.

After resting his case, the defendant requested that the judge give the instruction on incapacity to consent set forth in Commonwealth v. Blache, 450 Mass. 583, 595 n.19 (2008). In pertinent part, that instruction provides:

"If, because of the consumption of drugs or alcohol or for some other reason (for example, sleep, unconsciousness, mental retardation, or helplessness), a person is so impaired as to be incapable of consenting to sexual intercourse, then intercourse occurring during such incapacity is without that person's consent.

"If you find that the Commonwealth has proved beyond a reasonable doubt that the complainant was so impaired as to be incapable of consenting as I have just described, and if you further find that the Commonwealth has proved beyond a reasonable doubt that the defendant knew, or reasonably should have known, that the complainant's condition rendered her [or him] incapable of consenting, then the Commonwealth has proved the element of lack of consent."

The judge agreed to give the requested instruction and did so nearly verbatim, stating:

"If, because of some condition or reason, such as sleep or unconsciousness, helplessness or intoxication, a person is so impaired as to be incapable of consenting to sexual intercourse, then intercourse during such incapacity is deemed to be without that person's consent.

"If you find that the Commonwealth has proved beyond a reasonable doubt that the complainant was so impaired as to be incapable of consenting as I've just described, and if

you further find that the Commonwealth has proved beyond a reasonable doubt that the defendant knew or reasonably should have known of the complainant's condition, that it rendered her incapable of consenting, then the Commonwealth has proved the element of nonconsent."

Standard of review. Because the defendant did not object to the jury instructions, we must determine whether there was error, and, if so, whether the error created a substantial risk of a miscarriage of justice. See Commonwealth v. Alphas, 430 Mass. 8, 13 (1999). "In making that determination, we consider the strength of the Commonwealth's case against the defendant . . . , the nature of the error, 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, and whether it can be inferred from the record that counsel's failure to object was not simply a reasonable tactical decision" (citations and quotations omitted). Id.

Discussion. The defendant claims that the judge's instruction, quoted above, was erroneous and created a substantial risk of a miscarriage of justice because, by listing intoxication alongside sleep, unconsciousness, and helplessness, jurors might have believed that the mere fact of Monica's intoxication rendered her incapable of consenting. "It is a matter of common knowledge that there are many levels of intoxication, and the fact of intoxication, by itself, does not

necessarily mean that the individual in question is incapable of deciding whether to assent to a sexual encounter." Blache, 450 Mass. at 590. Thus, where, as here, a defendant is on trial for rape and "the Commonwealth seeks to satisfy the element of lack of consent by proof that the complainant lacked the capacity to consent, the jury must find not just that [the victim] was intoxicated, but that her degree of intoxication was such that it rendered her incapable of consenting to intercourse." Commonwealth v. Urban, 450 Mass. 608, 613 (2008). To emphasize this point, judges presiding over such trials must instruct the jury of the Commonwealth's burden to prove "that the complainant was so impaired as to be incapable of consenting." Blache, supra at 595 n.19.

The judge in this case did so. His slight variation from the wording set forth in Blache did not change the substance of the instruction, and does not constitute error.² "We do not require that judges use particular words" when instructing juries. Commonwealth v. Kelly, 470 Mass. 682, 697 (2015). The judge's instructions as a whole correctly conveyed the relevant legal concepts, which is all that is required. Id.

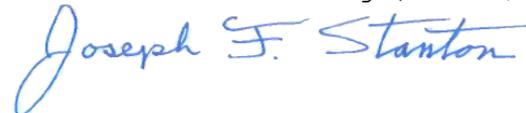
² The judge's omission of the term "mental retardation" from the instruction was entirely appropriate. See Commonwealth v. St. Louis, 473 Mass. 350, 351 (2015) (noting Legislature's intention to remove term "mental retardation" from General Laws); Tartarini v. Department of Mental Retardation, 82 Mass. App. Ct. 217, 217 n.1 (2012) (same).

The judge's instructions could not have created a substantial risk of a miscarriage of justice in any event, because Monica also testified that she was asleep and unconscious at the time of the assaults. The jury therefore did not have to rely on evidence of intoxication to conclude that Monica lacked the capacity to consent. Moreover, evidence that the defendant knew that Monica neither could nor did consent to sexual intercourse was overwhelming. See Alphas, 430 Mass. at 15 (error could not have created substantial risk of miscarriage of justice where evidence of guilt was overwhelming). The defendant told Detective Sergeant Smith that Monica was so intoxicated that he took her home from the bar and "had to wash her outside" because she had vomited. The defendant apparently felt that Monica was intoxicated to the point where "she's there and she isn't there," because that was the reason he gave for having to tell Monica that he had "fucked [her] twice last night." Taken together, the defendant's statements do more than "suggest [that the defendant] actually had appreciated [Monica's] incapacity to consent" to sexual intercourse. Commonwealth v. Mountry, 463 Mass. 80, 93 (2012). They show that the defendant: "had sexual designs" on Monica long before that night, id. at 88; was "capable of understanding and accepting her lack of any romantic interest in him," id. at 93; knew that Monica was intoxicated to the point where she could

not clean vomit off herself; and "waited until [Monica] passed out" to have intercourse with her, knowing that she could not resist, id. at 88. Where the defendant's statements and conduct after Monica left his house the following morning suggest that "he knew exactly what he had done, [and] that he knew it was wrong," id. at 94, we are persuaded that any error in the judge's instructions "did not 'materially influence[]" the guilty verdict." Alphas, 430 Mass. at 13, quoting Commonwealth v. Freeman, 352 Mass. 556, 564 (1967).

Judgments affirmed.

By the Court (Milkey,
Lemire & McDonough, JJ.³),



Clerk

Entered: May 6, 2020.

³ The panelists are listed in order of seniority.