NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as 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 23.0 or 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-365

COMMONWEALTH

vs.

JOHN F. FALANDYS.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a jury trial, the defendant, John Falandys, was convicted of operating a motor vehicle while under the influence of intoxicating liquor (OUI), G. L. c. 90, § 24 (1) (a) (1),[1] and negligent operation of a motor vehicle, G. L. c. 90, § 24 (2) (a). We reverse the judgment on the charge of negligent operation and affirm the judgment on the charge of OUI.

Discussion. 1. Negligent operation. We review the denial of a motion for a required finding of not guilty to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"

[1] The defendant waived his right to a jury trial on the subsequent offense portion of the OUI charge and was found guilty of committing his sixth OUI offense.

(citation omitted). Commonwealth v. Latimore, 378 Mass. 671, 677 (1979).

To sustain a conviction of negligent operation, the Commonwealth must prove that the defendant (1) operated a motor vehicle, (2) on a public way, (3) negligently, so that the lives or safety of the public might be endangered. See G. L. c. 90, § 24 (2) (a). Only the third element is at issue in this appeal. The statute requires proof that the defendant's conduct might have endangered the safety of the public, not that it, in fact, did. See Commonwealth v. Duffy, 62 Mass. App. Ct. 921, 923 (2004). Operating a motor vehicle without the lights illuminated is a civil infraction. See G. L. c. 90, §§ 7, 20.

In Commonwealth v. Zagwyn, 482 Mass. 1020 (2019), the Supreme Judicial Court reversed a negligent operation conviction where the defendant operated a motor vehicle with a faulty headlight and rear license plate light while under the influence of alcohol when there was no other evidence of negligent operation. Id. at 1020-1021. The court reasoned that while the "operator's intoxication is relevant to a charge of negligent operation, a conviction of negligent operation requires something more than just operating a motor vehicle while under the influence of alcohol. The two crimes are separate." Id. at 1022. In Zagwyn, "the scant evidence of [one unilluminated headlight and an unilluminated rear license plate light], even

when coupled with proof of intoxication, is insufficient to warrant a finding that the defendant actually operated his vehicle in such a way as to endanger the lives or safety of the public when there is no other evidence of negligent operation." Id. See Commonwealth v. Teixeira, 95 Mass. App. Ct. 367, 370 (2019) (civil infraction "is not [alone] sufficient to constitute negligent operation").

The reasoning in Zagwyn applies here. The evidence consisted of the defendant's intoxication and the civil infraction of failing to illuminate the car's headlights. After cutting through a hotel driveway, the defendant drove only one hundred yards on the street before he was pulled over. The police officers who testified explained that the area was well illuminated by businesses and street lamps. The first officer testified that he signaled for the defendant to stop because his headlights were not illuminated. The defendant maintained his lane and pulled over in an appropriate time. There was no testimony as to the defendant speeding or otherwise driving erratically. As in Zagwyn, this evidence is insufficient to warrant a finding that the defendant actually operated his vehicle in such a way as to endanger the lives or safety of the public where there is no other evidence of negligent operation.

2. Closing argument. The defendant challenges three of the prosecutor's statements in her closing argument: that the

defendant had two glasses of wine "every day"; that he told the booking officer that he had "no injury" when he actually said he had not "been injured lately"; and that he stood on his injured leg for a field sobriety test "because wouldn't that be funny" when the defendant had testified at trial, making a joke about his national origin and the wisdom of his decision, that he tried that leg "just out of curiosity to see how long" he could stand. Because the defendant did not object to these statements at trial we consider whether any error created a substantial risk of a miscarriage of justice. Commonwealth v. Jones, 471 Mass. 138, 148 (2015).

The first of the challenged remarks was error because there was no testimony that the defendant drank every day. The difference between no injury and no recent injury had some basis in the record and at most was a slight misstatement. The third was grounded in the record. "[W]e assume that the jury . . . are capable of sorting out hyperbole and speculation." Commonwealth v. Marquetty, 416 Mass. 445, 451 (1993).

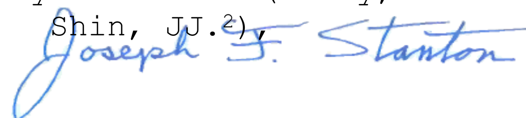
Here, the question was whether the defendant was intoxicated that evening while operating his car. The misstatement about the defendant's drinking went to a collateral issue that is not criminal. See Commonwealth v. Perez, 444 Mass. 143, 150-151 (2005) (considering whether misstatement in closing was limited to collateral issue). The judge in this

case instructed the jurors not to credit statements made by counsel if such statements did not coincide with the jurors' recollection of the evidence, and that closing arguments are not evidence. See Commonwealth v. Kozec, 399 Mass. 514, 517 (1987). There was ample evidence presented from which the jury could have found that the defendant was intoxicated, including his admission to drinking alcohol, the odor of alcohol, the defendant's bloodshot and glassy eyes, that the defendant was unsteady on his feet, had difficulty walking and maintaining his balance, and his inability to perform two field sobriety tests. We discern no substantial risk of a miscarriage of justice.

On the charge of negligent operation, the judgment is reversed, the verdict is set aside, and judgment shall enter for the defendant. On the charge of operating a motor vehicle while under the influence of intoxicating liquor, the judgment is affirmed.

So ordered.

By the Court (Henry, Lemire & Shin, JJ.[2]),



Clerk

Entered: October 14, 2020.

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