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-1044

COMMONWEALTH

vs.

MICHAEL CHEN.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant was convicted of trafficking marijuana, one hundred pounds or more but less than 2,000 pounds. G. L. c. 94C, § 32E (a). On appeal, he raises two issues concerning the prosecutor's closing.

The defendant was arrested at Cape Cod Express, a regional transportation facility in Wareham with trucking terminals and warehouses, when he arrived to pick up two large crates. He consented to a police search of the crates, which revealed marijuana. His defense was that he thought the crates, which came from California, contained shark fins and/or Chinese herbs. The defendant is the operator of an American Chinese restaurant, and he testified that he bumped into a man named Pat in Brooklyn whom he had met at the Twin Rivers Casino in Rhode Island. The man asked him if he would like to make some easy money, and

offered him $500 per crate for picking up crates at the Cape Cod Express and driving them to New York. There was evidence he had picked up crates at Cape Cod Express about twelve times before the attempted pick up at which he was arrested. He claimed to have looked at the contents of the crates "three times," and to have seen shark fins and other Chinese food products. He testified that he was subsequently instructed not to open the crates anymore by a person with whom Pat had put him in touch, and that he then stopped opening the crates.

Although his defense was that he lacked knowledge that the crates contained marijuana, there was forensic evidence taken from his cell phone that included a photograph of a marijuana bud and a photograph of a one-pound vacuum sealed package of marijuana similar to approximately one hundred such packages contained in the two crates. The defendant testified that he was a marijuana user who lawfully grew twelve plants in his home, as apparently permitted by Rhode Island law. He asserted that the photograph shown to him while testifying was of a package of marijuana from his annual "grow," that, he asserted, he kept frozen. He did, however, also testify that he had purchased a $4,000 commercial grade trimmer for cultivating marijuana.

There was also a photograph of a bundle of money found on the defendant's cell phone, as well as several documents in

Chinese that the Commonwealth did not have translated. On the stand, the defendant testified that one four-page document was a promissory note to someone named Tim Chen, to whom, the defendant testified, he was not related, and from whom, he testified, he had borrowed $50,000 in order to renovate one of his restaurants. There were also three notations the defendant translated, one stating that Tim Chen would be coming by the restaurant to pick up $2,000, one saying he would come by to pick up $3,000, and another acknowledging receipt of $3,000. The defendant was born in China and came to the United States when he was ten. He was adopted by a Chinese family, and the record reflects that he continues to speak English to some degree imperfectly, and with a Chinese accent. When asked why he used a Chinese lender for the renovation loan, he responded, "That's how Chinese people does. We don't deal with the bank."

The defendant's first argument on appeal is that the prosecutor erred when stating in closing, "Oh, we don't use banks. You cannot hide behind culture to explain criminal activity. I think that's shameful." The argument in context was:

> "[H]e just happened to have the same type of quantity of marijuana, the same type of vacuum sealing on his phone, sending it to a friend where there's also images of clipped money coming in from this guy that meets him at his business to pick up $3,000 at a time, $2,000 at that time?

> "Oh, we don't use banks. You cannot hide behind culture to explain criminal activity. I think that's shameful.
>
> "This isn't about culture. This is about whether or not he committed a crime. And when you take the fact that he's borrowing money from people who aren't licensed vendors, who aren't licensed brokers, he's taking $50,000 from them? Is that something that sounds like legitimate business or is that something that sounds like it's more consistent with being wrapped up in everything that you see here before you?"

As the argument was not objected to at trial, we must review to determine whether there is an error, and if so, whether it created a substantial risk of a miscarriage of justice. See Commonwealth v. Alphas, 430 Mass. 8, 13 (1999).

For a prosecutor even to touch on the cultural practices of an ethnic minority group in closing argument is a sensitive matter. Of course, depending on facts and circumstances, it is not that such comments are per se impermissible. However, anything that might invite or induce a juror to bring racial or ethnic bias or prejudice into his or her deliberations, whether intentional or not, is problematic.

In this case, the prosecutor's words did not by their terms denigrate the defendant's culture or background. On its face, it appears that the comment was intended to suggest that the false invocation of cultural practices in order to explain conduct that was in fact criminal is shameful. There was no suggestion, for example, that the defendant was trying to

justify criminal behavior by claiming that it was permissible within Chinese culture.

But, even if viewed in this way, without deeper analysis of the statement's possible implications, suggesting to a jury that one has acted shamefully and disloyally to one's ethnic or cultural heritage in wrongfully invoking it in the way suggested, may well be inflammatory -- particularly in light of some of the various current attitudes toward minority ethnicity that may be held by different jurors. Beyond that, at least arguably, there may be a further implication in the statement that there are "good" Chinese people, respectful of their heritage and culture, and "bad" Chinese people, including the defendant, who might bring shame on their ethnic group by disrespecting its traditions. Even if one might think that that overstates the case, it is clear that the prosecutor's comment was impermissible: not only did it improperly suggest shameful disloyalty by the defendant to his heritage, it improperly injected the prosecutor's personal opinion about the defendant into the case. See Commonwealth v. Chavis, 415 Mass. 703, 713 (1993).

The question then is whether it created a substantial risk of a miscarriage of justice. In assessing that question, we consider the strength of the Commonwealth's case against the defendant, the nature of the error, whether the error was so

significant that the jury's verdict might have been different but for the error, and whether trial counsel's failure to object was not simply a reasonable tactical decision. Alphas, 430 Mass. at 13.

To begin with, the absence of an objection at trial is some evidence -- though not dispositive -- that this comment as delivered and heard by the jury was not sufficiently inflammatory to warrant objection, something one might expect if this was delivered in such a manner that its possible implications about the defendant's own ethnicity were immediately apparent in the court room. See Commonwealth v. Mello, 420 Mass. 375, 380 (1995).

Next, the idea that the defendant falsely claimed that cultural practices explained what was in fact criminal behavior was not the thrust or theme of the closing. The prosecutor certainly made the quoted statement, but it was not emphasized particularly in his argument.

Finally, the evidence against the defendant was overwhelming. He had repeatedly picked up fifty pound crates like the two he was convicted of possessing, in exactly the same way. The two seized crates contained approximately one hundred pounds of marijuana in total. He had purchased grow lights and a commercial trimmer and he had a photograph on his cell phone of a package of marijuana like the ones in the crate.

Consequently, we conclude that even if the prosecutor's statement was error, it did not in this case create a substantial risk of a miscarriage of justice.

The second claim of error is more easily addressed. At the time of the arrest and of the other pickups of crates from Cape Cod Express, the defendant lived at 127 Massachusetts Avenue. In addition, he testified that a family member owned the house across the street, at 118 Massachusetts Avenue. There was testimony at trial that officers had, prior to the day of the arrest, previously surveilled a pickup from Cape Cod Express of two crates like those the defendant was convicted of possessing. Their testimony was that an Asian man, whom they could not identify, driving a pickup truck the same color as the defendant's, drove to 119 Massachusetts Avenue, where he unloaded the crates and put them in the garage. The garage door then closed, and the officers did not observe anyone enter or exit the house during the approximately one hour they waited. The defendant testified that while he had family members who lived at 118 Massachusetts Avenue, he didn't know anyone at 119 Massachusetts Avenue. In closing, the Commonwealth argued that "the [d]efendant is telling you stone faced that he never went to 119 Massachusetts Avenue."

The defendant argues that "the prosecutor essentially argued to the jury that in his opinion, the defendant's

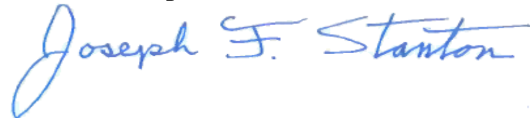
expression was a demonstration of his consciousness of guilt," and that an assertion of consciousness of guilt on the basis of the prosecutor's perception of the defendant's demeanor is impermissible. See Commonwealth v. Kozec, 399 Mass. 514, 523-524 (1987).

A prosecutor is allowed, however, in closing to challenge the credibility of a testifying defendant, and when a prosecutor is doing so, "[t]he defendant's testimony and demeanor [can] be referred to in closing argument." Commonwealth v. Butler, 90 Mass. App. Ct. 599, 607 (2016). Kozec is distinguishable because it involved comment on the facial expression of the defendant during the victim's testimony -- not his demeanor on the stand. See Kozec, 399 Mass. at 523. Indeed, as the cases cited in Kozec in support of its conclusion make clear, see id. at 522, Kozec is about a prosecutorial comment suggesting "knowledge of matters not in evidence." Commonwealth v. Hoppin, 387 Mass. 25, 30 (1982). The prosecutor's comment thus was not

error.

Judgment affirmed.

By the Court (Rubin,
Wolohojian & Sacks, JJ.[1]),



Clerk

Entered: October 21, 2020.

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