

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-609

COMMONWEALTH

vs.

BERNADIN SYLVESTRE.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a jury-waived trial in 2018, the defendant was convicted of two counts of indecent assault and battery on a child under fourteen, pursuant to G. L. c. 265, § 13B, as a result of an incident that occurred several years before, where he touched his stepdaughter's breasts and vagina. The defendant argues on appeal that even though the victim testified to the touchings at trial, there was insufficient evidence to support the convictions. We affirm.

Background. Sometime during November 2016, the victim reported to a guidance counselor that her stepfather had touched her on one occasion at some point over the summer of 2012. This led to an investigation of the incident, first by the Department of Children and Families (DCF), and then by the district attorney's office.

At trial, the victim testified that during the summer of 2012, her stepfather called her into a bedroom and began touching her. Her mother and her siblings were out at church, but the victim had not been ready for church on time so they had left her behind with the defendant. The victim testified that the defendant touched her breasts over her clothes, and also touched her vagina under her sweatpants but over her underwear. The touching continued for "[n]o more than five minutes," during which the defendant asked her questions about school.

The victim testified that she told her mother about the incident later that day, and that her mother responded by moving the victim into her own mother's (the victim's grandmother) room, to try to prevent situations where the victim would be in her room alone. The mother did not seek to live separately from her husband at that time, nor at any point prior to his arrest, but testified that "ever since, [my husband and I] have not been in any [meaningful] relationship because I was very traumatized by what happened."

On cross-examination, the victim stated that while touching her, the defendant did not threaten her, did not tell her to keep it a secret, did not restrain her or prevent her from leaving, did not remove any of his own clothing or touch himself, did not ask her to touch him, and did not say anything that made her feel uncomfortable.

The victim's mother also testified. Among other things, she confirmed, as a first complaint witness, that the victim told her of the assault on the day that it occurred, although her version of what happened did not exactly match the victim's.

The defendant's theory of the case centered on inconsistencies in the testimony of the victim and the mother, while advancing potential motives for the victim and the mother to fabricate their testimony. Counsel pointed out the delay (four years) in making the allegations. He brought out inconsistencies in the victim's accounts as to whether the defendant had touched her over or underneath her clothing. He also brought out testimony from a DCF interviewer that the mother, in an interview in 2016, had denied ever being told about the incident and that she had "appeared surprised" when informed of the allegations against her husband.

As to motive, the defendant elicited evidence that the victim's allegations only surfaced after an incident where the defendant had disciplined his daughter, the victim's stepsister, with a belt after she had stayed out past curfew one night.

The defendant also brought out, through the mother, that DCF had alleged that she had neglected her child by failing to protect the child adequately. The mother testified that DCF told her that they would take her children into custody if she allowed her husband back into the house, encouraged her to seek

a restraining order against him,¹ and instructed her to call 911 if he returned. In closing, the defendant highlighted the inconsistencies regarding whether the mother was told of the incident on the day it happened, and suggested that the victim was acting in solidarity with her stepsister and that the mother's testimony had been fabricated in an attempt to avoid losing custody of her children.

Following the single-day trial, the judge found the defendant guilty on both counts. This appeal followed.

Discussion. Sufficiency of the evidence. We review a challenge to the sufficiency of the evidence to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (emphasis omitted). Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). Questions of credibility are resolved in the Commonwealth's favor. Commonwealth v. Dilone, 385 Mass. 281, 286 (1982). "[T]he fact 'that contradictory evidence exists is not a sufficient basis for granting a motion for a required finding of not guilty.'" Commonwealth v. Marinho, 464 Mass.

¹ The DCF interviewer denied making the statements regarding the restraining order, but did state that the department had determined that the mother had been neglectful in failing "to take any . . . protective action" following the victim's report on the day of the incident.

115, 118 (2013), quoting Commonwealth v. Merry, 453 Mass. 653, 662 (2009).

The evidence, viewed in the light most favorable to the Commonwealth, established that the defendant touched his stepdaughter's breasts and vaginal area without her consent. That is what the victim testified, and that testimony of the victim was sufficient under the Latimore standard. See Commonwealth v. Peters, 429 Mass. 22, 23-24 (1999). While it is true that there were inconsistencies in the witnesses' testimony, such inconsistencies do not foreclose a guilty finding. See id. at 24 ("[I]t does not matter that some of the evidence could be characterized as equivocal or contradictory" [citation omitted]); Commonwealth v. Brown, 401 Mass. 745, 747 (1988) ("The relevant question is whether the evidence would permit a jury to find guilt, not whether the evidence requires such a finding"). Addressing inconsistencies and resolving questions of credibility is for the trier of fact; the question for us on appeal is only whether the evidence, taken most favorably to the Commonwealth, was sufficient to support a finding of guilt beyond a reasonable doubt. Here, it plainly was.

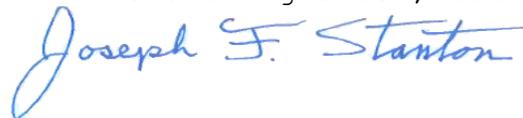
We briefly turn to another line of argument advanced by the defendant -- that the evidence was insufficient to support a conviction for indecent assault and battery on a child under the

age of fourteen because the victim did not testify to any "additional factors" present during the assault. As noted, the victim testified that the defendant did not threaten her or attempt to restrain her, did not tell her not to tell anybody, and did not touch himself or expose himself during the episode.

This argument fails, because while such accompanying behaviors may be relevant to a determination of whether an assault and battery was "indecent," our cases do not hold that such evidence is necessary where the alleged touching is to a "private [area] such as the breasts, abdomen, buttocks, thighs, and pubic area of a female" (quotation and citation omitted). Commonwealth v. Mosby, 30 Mass. App. Ct. 181, 184 (1991). See Commonwealth v. Colon, 93 Mass. App. Ct. 560, 563 (2018). The issue in this case was not whether the touchings were indecent, but whether they happened at all. Here, the evidence established that the touching was of a private area, and no further behavior was necessary to support the convictions.

Judgments affirmed.

By the Court (Rubin,
Desmond & Englander, JJ.²),



Clerk

Entered: November 5, 2020.

² The panelists are listed in order of seniority.