COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-40

COMMONWEALTH

vs.

HARVEY H., a juvenile.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a one-day jury-waived trial, a Juvenile Court judge adjudicated the juvenile as delinquent by reason of threatening to kill his sister in violation of G. L. c. 275, § 2, and committed the juvenile to the custody of the Department of Youth Services until age eighteen. We affirm.

Background. We review the evidence presented at trial in the light most favorable to the Commonwealth. See Commonwealth v. Gonzalez, 452 Mass. 142, 146 (2008), citing Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). At trial, Probation Officer Bonnie Vonasek testified that at approximately 5:30 P.M. on June 12, 2019, she and Police Detective Jimmy Cronshaw conducted a curfew check on the juvenile and found him outside his home in violation of his 5 P.M. curfew. The situation escalated over the next several minutes and Vonasek testified

that the scene was "chaotic." In the course of the encounter, the juvenile threatened to kill his sister and was arrested.

Discussion. 1. Hearsay. The juvenile first contends that the judge erred in allowing Vonasek to testify to statements that the juvenile made to Cronshaw. Those statements were that the juvenile "was mad that his sister had told us that he had hit her with a rock prior to us being there" and that he was angry that his sister and mother had talked to Vonasek and Cronshaw about the juvenile's behavior. Because the juvenile objected to this testimony at trial, we review for error and if there was an error, whether it was prejudicial. See Commonwealth v. Hobbs, 482 Mass. 538, 558 (2019). The juvenile argues this testimony constituted inadmissible layered hearsay. See, e.g., Commonwealth v. Caillot, 449 Mass. 712, 721 (2007). We discern no error.

"[D]eterminations as to the admissibility of evidence lie 'within the sound discretion of the trial judge.'" Commonwealth v. Bins, 465 Mass. 348, 364 (2013), quoting Commonwealth v. Jones, 464 Mass. 16, 19-20 (2012). The evidence was that Vonasek was standing right next to the juvenile and Cronshaw when the juvenile made the statements. The judge could infer that, standing where she was, Vonasek heard the juvenile's statements herself. "It is an accepted evidentiary rule that '[a]ny extrajudicial statement by a party may be admitted in

evidence against [him] by an opponent, and will not be excluded on the ground that it constitutes hearsay.'" Commonwealth v. Lester, 70 Mass. App. Ct. 55, 61 (2007), quoting Commonwealth v. Cutts, 444 Mass. 821, 834 (2005). Therefore, we discern no abuse of discretion in the admission of this testimony.

2. The juvenile's motions for a required finding of not delinquent. The juvenile also claims that the judge erred by denying the juvenile's motions for a required finding of not delinquent, which the juvenile made at the close of the Commonwealth's case and again at the close of evidence. In these circumstances, "[w]e [first] consider the state of the evidence at the close of the Commonwealth's case to determine . . . whether the Commonwealth [had] presented sufficient evidence of the defendant's guilt to submit the case to the jury" (citations omitted). Commonwealth v. Alden, 93 Mass. App. Ct. 438, 444 (2018). We evaluate the sufficiency of the Commonwealth's evidence presented in its case-in-chief in the light most favorable to the Commonwealth, see Latimore, 378 Mass. at 676-677, and conclude that the Commonwealth met its burden of proof.

To establish a violation of G. L. c. 275, § 2, the Commonwealth must establish three elements beyond a reasonable doubt: "[1] an expression of intention to inflict a crime on another and [2] an ability to do so [3] in circumstances that

would justify apprehension on the part of the recipient of the threat." Commonwealth v. Robicheau, 421 Mass. 176, 183 (1995). The juvenile challenges the sufficiency of the evidence on the third element only.

Apprehension is assessed under an objective standard; the "threat [must] be made in circumstances that would reasonably justify apprehension on the part of an ordinary person." Commonwealth v. Sholley, 48 Mass. App. Ct. 495, 497, S.C., 432 Mass. 721 (2000), cert. denied, 532 U.S. 980 (2001). The relevant inquiry permits consideration of the context and surrounding circumstances leading up to and during the threat, including the juvenile's disciplinary history and demeanor at the time the threat was made. See Commonwealth v. Milo M., 433 Mass. 149, 155-158 (2001) (fear justifiable and reasonable response to threats depicted in drawings, especially "when considered in light of the 'climate of apprehension' . . . in which this incident occurred"). It is not necessary that the juvenile had the present ability to carry out the threat; the juvenile's future ability to carry out the threat can be sufficient to give rise to the threatened person's reasonable apprehension. See id. at 156. See also Sholley, 48 Mass. App. Ct. at 499 (presence of court officer and others in hallway did not undermine lawyer's fear because defendant could have carried out threat at later time).

Taken in the light most favorable to the Commonwealth, the evidence at the close of the Commonwealth's case established the following: the juvenile knowingly violated his curfew; was swearing, pacing, and agitated; was yelling at his mother and sister; "threatened to kill his sister" in an "angry" tone of voice in front of law enforcement; was standing only ten feet from his sister when he made the threat; and remained "very agitated" throughout the encounter. The juvenile also told Vonasek and Cronshaw that he was mad that his sister told them he hit her with a rock. Therefore, at the end of the Commonwealth's case, a rational trier of fact could have found beyond a reasonable doubt that the circumstances were sufficient to justify the sister's reasonable apprehension, and there was no error in denying the juvenile's first motion for a required finding of not delinquent. See Latimore, 378 Mass. at 676-678. See also Milo M., 433 Mass. at 157-158.

We next consider the juvenile's motion at the close of the evidence. Deterioration occurs only where a defendant has presented "contrary evidence . . . so overwhelming that no rational jury could conclude that the defendant was guilty" (citation omitted). Commonwealth v. Ross, 92 Mass. App. Ct. 377, 381 (2017). The judge did not credit the juvenile's sole witness, his mother. "Where, as here, the evidence at trial turns solely on the credibility of [the juvenile's] witnesses,

the Commonwealth's case cannot deteriorate" (quotation and citation omitted). Commonwealth v. Gomez, 450 Mass. 704, 710-711 (2008). See Alden, 93 Mass. App. Ct. at 445-446.

The judge properly denied the juvenile's motions for a required finding of not delinquent.

3. Ineffective assistance of counsel. Finally, the juvenile argues that his trial counsel was unconstitutionally ineffective. Although a motion for a new trial is the preferred method to raise this challenge, a reviewing court may resolve a claim of ineffective assistance on direct appeal when the factual basis for the claim appears "indisputably" on the trial record. Commonwealth v. Despasquale, 86 Mass. App. Ct. 914, 914-915 (2014). The juvenile must therefore show the following: (1) counsel's conduct fell "measurably below that which might be expected from an ordinary fallible lawyer"; and (2) this conduct "likely deprived the defendant of an otherwise available, substantial ground of defence." Id. at 915-916, quoting Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). Under the second prong, "there ought to be some showing that better work might have accomplished something material for the defense." Ogden O., 448 Mass. 798, 806 (2007), quoting Commonwealth v. Satterfield, 373 Mass. 109, 115 (1977). The same standard applies to juvenile proceedings. See Ogden O., supra.

The juvenile argues counsel undermined the defense when he misstated two pieces of evidence and the law in his closing argument.[1] Assuming without deciding that the challenged statements were in fact misstatements, the juvenile has failed to establish that counsel's closing argument rose to the level of unconstitutional ineffectiveness under the Saferian test. Review of the closing argument as a whole, see Commonwealth v. Espada, 450 Mass. 687, 699 (2008), suggests counsel sought to undermine the Commonwealth's case by strategically focusing on the third element of the charged offense. Counsel's alleged misstatements did not undermine this strategy, nor did he "abandon[] a viable defense in favor of a trial strategy that was manifestly unreasonable." Commonwealth v. Sarvela, 16 Mass. App. Ct. 934, 934 (1983). Thus, even if counsel made mistakes in his closing argument, he did not "deprive[] the defendant of an otherwise available, substantial ground of defence." Saferian, 366 Mass. at 96. Further, nothing in the record

[1] Counsel stated, "Briefly, there's evidence that he threatened to kill the family." Counsel also stated, "It is a situation where it's looking like [the juvenile] is going into custody." The juvenile argues these statements were erroneous because there was no evidence that the juvenile threatened anyone other than his sister, nor that the juvenile would have been taken into custody absent the juvenile's threat. The juvenile also argues counsel misstated the law by focusing his closing argument on the fact that the juvenile had not previously attempted to kill his sister, which is not an element of G. L. c. 275, § 2.

indicates that the trial judge would have reached a different outcome had counsel taken a different approach in his closing argument, and the juvenile has not established that "better work would have accomplished something material for the defense." Ogden O., 448 Mass. at 808.

Adjudication of delinquency affirmed.

By the Court (Massing, Henry & Ditkoff, JJ.[2]),

Joseph F. Stanton

Clerk

Entered: June 23, 2021.

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