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

20-P-513

COMMONWEALTH

vs.

JOANNE LOWREY.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a jury-waived trial in the District Court, the defendant was convicted of assault and battery on a police officer in violation of G. L. c. 265, § 13D, and resisting arrest in violation of G. L. c. 268, § 32B.[1] On appeal, the defendant challenges the sufficiency of the evidence supporting the conviction for resisting arrest. Specifically, the defendant claims that the evidence was insufficient to prove beyond a reasonable doubt that the police were acting under color of their official authority at the time of her arrest. We affirm.

[1] A third count, assault and battery on a family or household member, was dismissed by the Commonwealth before trial.

To convict a defendant of resisting arrest, the Commonwealth must prove beyond a reasonable doubt (1) that the defendant prevented or attempted to prevent a police officer from making an arrest, (2) that the police officer was acting under color of his official authority at the time, (3) that the defendant resisted either by using or threatening to use physical force against the police officer or another or by using any other means which created a substantial risk of causing bodily injury to the police officer or another, and (4) that the defendant did so knowingly. See G. L. c. 268, § 32B. See also Instruction 7.460 of the Criminal Model Jury Instructions for Use in the District Court (2009). To establish that the police were acting under color of their official authority, the Commonwealth had to prove that "they were 'called upon to make, and [did] make, a judgment in good faith based upon surrounding facts and circumstances that an arrest should be made by [them].'" Commonwealth v. Urkiel, 63 Mass. App. Ct. 445, 453 (2005), quoting G. L. c. 268, § 32B (b).

The defendant's sole claim on appeal is that the evidence was insufficient to prove that her arrest was undertaken in good faith. Generally, we review such a claim 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."

Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979). Here, however, because the defendant did not move for a required finding of not guilty, we review for a substantial risk of a miscarriage of justice. See Commonwealth v. McGovern, 397 Mass. 863, 867-868 (1986).

The judge could have found the following facts. On January 17, 2018, at approximately 7:30 A.M., Hull police officers responded to a dispatch regarding an "unwanted party" and a "possible domestic." Upon arrival, Officer Steven O'Neill observed the defendant and her spouse, Beverly Beacher, standing outside Beacher's apartment. Both women began yelling in Officer O'Neill's direction. After determining that Beacher had called 911, Officer O'Neill asked the defendant to enter the apartment while he talked to Beacher. Beacher told Officer O'Neill that she wanted him to escort the defendant out of the apartment so that she could feel safe.[2] The defendant was "upset" and "angry."

Officer O'Neill entered the apartment to speak with the defendant. Beacher followed and the two women began "screaming

[2] Because the charge of assault and battery on a family or household member had been dismissed, Officer O'Neill was not permitted to testify regarding what Beacher told him about her interaction with the defendant that morning.

at each other." Beacher told the defendant, "You shouldn't hit me." The defendant responded, "Yeah right. Yeah right." When the defendant was informed that she was being placed under arrest for "A&B domestic," she "leaped into the sink and . . . threw her[] . . . hands into the sink" and then "dropped to the ground." Officers secured the defendant and started to escort her from the property. As they did, the defendant repeatedly kicked one of the officers in the leg.[3]

Even though the charge of assault and battery on a family or household member was dismissed before trial, we look to the elements of that offense to determine whether there was sufficient evidence to support an inference that the police were acting under color of official authority when they arrested the defendant. An assault and battery is an intentional touching that is either physically harmful or offensive. See Commonwealth v. Burke, 390 Mass. 480, 482-483 (1983). See also Instruction 6.140 of the Criminal Model Jury Instructions for Use in the District Court (2019). A touching is offensive if it is without the victim's consent. See Commonwealth v. Colon, 81

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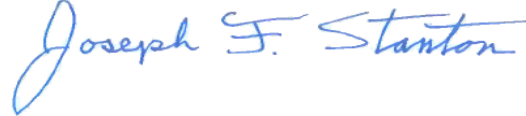
[3] The defendant testified at trial and admitted to going toward the sink and then dropping to the floor. The defendant denied that she struck Beacher or kicked the officer. While the defendant initially testified that she had not communicated with Beacher at all that morning, she later stipulated that she and Beacher "had a yelling, screaming exchange."

Mass. App. Ct. 8, 19-20 (2011). In this case, where (1) the officers responded to a domestic disturbance and discovered Beacher and the defendant arguing outside Beacher's apartment, (2) Beacher stated that she had called for their assistance and wanted the defendant removed from the property so that she could feel safe, and (3) the officers overheard Beacher tell the defendant that "[y]ou shouldn't hit me," the evidence was sufficient to support a reasonable inference that the police had a good faith belief that the defendant touched Beacher without her consent. Although the details of Beacher's statement to the responding officer were not admitted at trial, the evidence of an offensive touching was sufficient to support a reasonable inference that the police believed they had probable cause to arrest the defendant for assault and battery on a family or household member. Therefore, the evidence was sufficient to prove beyond a reasonable doubt that the police were acting

under color of their official authority when they arrested the defendant. We see no substantial risk that justice miscarried.[4]

Judgments affirmed.

By the Court (Meade, Kinder & Hand, JJ.[5]),



Clerk

Entered: June 28, 2021.

[4] Deciding the case as we do, we need not address the Commonwealth's alternative argument, raised for the first time on appeal, that the police had probable cause to arrest the defendant for trespass. We note, however, that where the responding officers learned that Beacher rented the property, that the defendant was an unwanted party, and that Beacher "just wanted [the defendant] out of the house," there was also sufficient evidence to support a good faith belief that the defendant had committed a trespass. See G. L. c. 266, § 120.

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