COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1178

COMMONWEALTH

vs.

LINANEL BROWN-MADISON.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a jury trial, the defendant was convicted of voluntary manslaughter,[1] unlawful possession of a firearm, and unlawful possession of a loaded firearm.[2] In this consolidated appeal from his convictions and the order denying his new trial motion, the defendant claims the prosecutor's closing argument and the judge's self-defense instruction created a substantial risk of a miscarriage of justice, and that he received ineffective assistance of counsel. We affirm.

1. The prosecutor's closing argument. For the first time on appeal, the defendant claims that the prosecutor misstated

[1] The defendant was tried on an indictment charging murder in the first degree.

[2] The defendant was found not guilty of two counts of attempted armed robbery.

the evidence in her closing argument. "Because the defendant lodged no objection to the argument, we review to determine if the argument was erroneous, and if so, whether that error created a substantial risk of a miscarriage of justice." Commonwealth v. King, 77 Mass. App. Ct. 194, 202 (2010), S.C., 460 Mass. 80 (2011).

Here, the defendant finds fault in the prosecutor's argument when she said, "In his own words on the stand today, [the defendant] said that [the victim] was taking off and he pulled the trigger." According to the defendant, it was a misstatement of the evidence to argue that the defendant was aware the victim was fleeing when he pulled the trigger. We disagree.

On cross-examination by the prosecutor, the defendant testified that when the victim realized the defendant had the gun, the victim "tried to go"; was "trying to take off"; and "that's when he took off." The defendant was aware that the victim was shot in the back. However, the defendant later testified that he did not know where the victim was shot, and he denied that the victim was running away when he shot him.

Thus, contrary to the defendant's claim, the defendant on three occasions stated that the victim attempted to, or did flee, when the victim realized the defendant had the gun. What the prosecutor did not argue was that the defendant backtracked

or contradicted his earlier testimony about the victim fleeing when he was shot. Even if we shared the defendant's view of the evidence, i.e., his backtracked testimony controls what occurred, neither the prosecutor nor the jury were required to share that view. See Commonwealth v. Martinez, 98 Mass. App. Ct. 545, 551 (2020) (jury are "free to believe or disbelieve the testimony of each witness in whole or in part" [citation omitted]). Rather, the prosecutor was entitled to marshal the evidence in favor of a conviction, which included using the defendant's earlier testimony to urge the jury to reject the self-defense claim. See Commonwealth v. Kozec, 399 Mass. 514, 516 (1987). There was no error, and thus, no risk that justice miscarried.

2. Self-defense instruction. Also, for the first time on appeal, the defendant claims that the judge's self-defense instructions failed to include instruction that: (1) an individual could have a reasonable but mistaken belief that he was in immediate danger of death or serious bodily injury, and (2) that an individual need not place himself in danger or use every means of escape short of death before resorting to self-defense. As the defendant did not object to the trial judge's instructions, we review the instructions to determine if there was error, and if so, whether it created a substantial risk of a

miscarriage of justice. Commonwealth v. Alphas, 430 Mass. 8, 13 (1999).

Here, the judge instructed the jury pursuant to the 2013 Model Jury Instructions on Homicide. We evaluate the jury instructions "as a whole, [and] looking for the interpretation a reasonable juror would place on the judge's words" (citation omitted). Commonwealth v. Glacken, 451 Mass. 163, 168-169 (2008). We do not scrutinize isolated language that has been removed from its context, and the adequacy of instructions must be determined in light of their overall impact on the jury. Id. at 169. Here, we are satisfied that the jury were correctly instructed on the law. See Commonwealth v. Sosa, 79 Mass. App. Ct. 106, 116 (2011) ("In general, when a judge employs the Model Jury Instructions on Homicide . . . which have been approved by the Supreme Judicial Court, there is no need to instruct further on the concepts contained therein").

Contrary to the defendant's claim, the judge was not required to sua sponte instruct the mistaken belief concept described above. The concept was adequately covered when the judge instructed that:

> "In considering whether or not the defendant actually believed that he was in immediate danger of death or serious bodily harm, and the reasonableness of that belief that he was in such danger, you may consider all the circumstances bearing on the defendant's state of mind."

See Commonwealth v. Glass, 401 Mass. 799, 809 (1988).[3] See also Commonwealth v. Pike, 428 Mass. 393, 396 (1998) (mistaken belief must be reasonable). In any event, immediately following the above instruction, the judge told the jury that:

> "You may consider the defendant's mental condition at the time of the crime, including any credible evidence of mental impairment or the effect on the defendant of his consumption of alcohol or drugs in determining whether the defendant actually believed that he was in immediate danger of serious bodily harm and death . . . ."

These additional instructions also assisted in explaining the concept of a mistaken but reasonable belief. Accordingly, there was no error, and thus, no risk that justice miscarried.

The defendant also claims, relative to the requirement that the defendant used no more force than was reasonably necessary, the judge failed to sua sponte inform the jury that an individual need not place himself in danger or use every means of escape short of death before resorting to self-defense. We disagree.

On this component of self-defense, the judge instructed as follows:

> "The third proposition is that the defendant did not use or attempt to use all proper and reasonable means under the

[3] In Glass, supra, the Supreme Judicial Court held that where "the judge told the jury on the question of self-defense that they should consider whether the defendant was about to be physically attacked or reasonably believed that he was about to be physically attacked," such instructions covered the concept of a mistaken but reasonable belief.

> circumstances to avoid physical combat before resorting to the use of deadly force.
>
> "Whether a defendant used all reasonable means to avoid physical combat before resorting to use of deadly force depends on all of the circumstances, includes the relative physical capabilities of the combatants, the number of persons who were involved on each side, the weapons used, and the availability of room to maneuver or escape from the area, and the location of the assault."

As the Commonwealth notes, we addressed a similar claim in Commonwealth v. Sosa, 79 Mass. App. Ct. at 116, where we held that "while it is true that a defendant need not retreat when to do so would increase the danger to his own life, see Commonwealth v. Pike, 428 Mass. 393, 398 (1998), the judge's use of the more general language of 'all proper means to avoid physical combat' properly embodies that concept." The same is true here. Commonwealth v. Peloquin, 437 Mass. 204, 211-212 (2002), is not to the contrary. See Sosa, supra. There was no error, and thus, no risk that justice miscarried.

3. Ineffective assistance of counsel. Finally, and again for the first time on appeal, the defendant claims he received ineffective assistance of counsel.[4] In particular, the defendant claims that defense counsel was ineffective when he "conceded guilt" in his closing argument by stating in a single sentence, without any explanation, that there were "some facts" that

[4] The defendant filed a motion for new trial, but it did not address the ineffective assistance claims he now raises on direct review.

supported "[m]anslaughter, excessive force in self-defense." We disagree.

"[O]ur courts strongly disfavor raising claims of ineffective assistance on direct appeal." Commonwealth v. Zinser, 446 Mass. 807, 811 (2006). "A claim of ineffective assistance of counsel should only be brought on direct appeal when the factual basis of the claim appears indisputably on the trial record -- that is, where the issues do not implicate any factual questions more appropriately resolved by a trial judge." Commonwealth v. Keon K., 70 Mass. App. Ct. 568, 573-574 (2007). See Lannon v. Commonwealth, 379 Mass. 786, 788 (1980). Here, although defense counsel's closing argument appears on the appellate record, we neither have a record of what counsel's strategy was (if any), nor do we have findings by the trial judge assessing the impact (if any) the remark would have had.

On the record we do have, we note that defense counsel vigorously argued (over twenty-four pages of the transcript) that the Commonwealth did not prove beyond a reasonable doubt on any of the three theories which would have supported a first-degree murder conviction. Counsel laid out the facts supporting self-defense, how the inebriated defendant was under attack when he dropped his gun, and how he regained control of it before he shot the victim, fearing for his life. Near the end of his argument, counsel stated "[a]rguing alternatively, this is so

far from first degree murder. Manslaughter, excessive force in self-defense, there are some facts, some facts, that support that." Counsel concluded by reiterating that the defendant was in imminent fear of death when he fired the gun he had been struggling to control, and he maintained that the evidence supports a verdict of not guilty.

Contrary to the defendant's claim, there was no outright concession of guilt. In fact, defense counsel did not develop his argument by pointing out any facts supporting manslaughter, nor did he explicitly ask the jury to find the defendant guilty of manslaughter as an alternative to murder. In any event, to the extent there was any concession, the choice was not manifestly unreasonable. See Commonwealth v. Torres, 469 Mass. 398, 409 (2014) (not ineffective assistance in murder trial to argue, at the end of twenty-three page closing argument, that jury must return verdict of not guilty, "[a]nd at the most, at most, the government has proven manslaughter").[5] Indeed, the

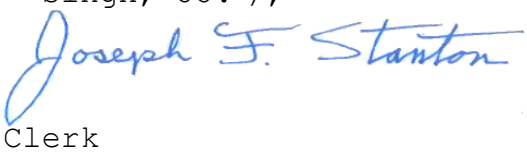
[5] The defendant also claims that counsel was ineffective for not objecting to both the prosecutor's closing argument and the judge's self-defense instructions. Given our resolution of these claims above, they cannot form the basis for an ineffective assistance of counsel claim. See Commonwealth v. Curtis, 417 Mass. 619, 624 n.4 (1994) (if counsel's omission does not present substantial risk of miscarriage of justice, no basis for ineffective assistance of counsel claim under either Federal or State Constitution).

defendant was acquitted of first- and second-degree murder.

Judgments affirmed.

Order denying motion for new trial affirmed.

By the Court (Meade, Henry & Singh, JJ.[6]),



Clerk

Entered: January 24, 2022.

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