

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

21-P-62

COMMONWEALTH

vs.

DOMENIC S. ROMAN.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant was convicted of assault on a family or household member after a jury trial. On appeal he claims that it was error for the judge to allow in evidence his affiliation with a motorcycle club, primarily arguing that the evidence lacked probative value and that, in any event, any relevance his affiliation may have had was outweighed by undue prejudice. Additionally, he contends that four unpreserved errors, alone or in combination, require a reversal of his conviction. We affirm.

Discussion. 1. Motorcycle club affiliation. Here there is no question the defendant was "aggravated" because the victim arrived home much later than the defendant had expected. The victim testified that the defendant was upset because he missed a motorcycle club meeting. On cross-examination the defendant

denied he was a member of a motorcycle club. Following the defendant's denial, the judge allowed the prosecutor to cross-examine the defendant about his membership in the club for the purpose of impeaching the defendant's credibility.<sup>1</sup> Because the defendant timely objected to the relevance of this line of questioning, we review any error in the admission of this evidence under the prejudicial error standard.<sup>2</sup> See Commonwealth v. Flebotte, 417 Mass. 348, 353 & n.2 (1994).

A witness's credibility is a relevant issue in any case and may be inquired into on cross-examination. Mass. G. Evid. § 611(b)(1) (2021). "[T]he scope of cross-examination, including to what extent the accuracy, veracity, and credibility of a witness may be tested, rests largely in the sound

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<sup>1</sup> During the cross-examination of the defendant, the prosecutor showed him a photograph depicting the defendant wearing a vest with the initials "L.O.D." and his nickname, "Dallas," on it. The defendant testified that "L.O.D." stood for "Legion of Doom," which was the name of the motorcycle club. The photograph was not published to the jury and the judge did not allow the photograph to be introduced as an exhibit. Although the prosecutor's repeated reference to the "Legion of Doom" during the cross-examination was not relevant to whether the defendant had intended to attend a club meeting, we see no error, let alone prejudicial error, in the use of the name. The only evidence the jury heard about the nature of the motorcycle club came from the defendant's testimony during his cross-examination. The defendant testified that he was not a member of the club but was a "prospect," and that there were a lot of veterans and police officers in the club. Further, he told the jury that the members of the motorcycle club "do a lot of good work" and he was required to do "certain charity work" to become a member of the motorcycle club.

<sup>2</sup> The Commonwealth agrees that the error was preserved.

discretion of the judge, not subject to revision unless prejudice is shown to a party by reason of too narrow restriction or too great breadth of inquiry." Commonwealth v. Smith, 329 Mass. 477, 479 (1952).

Here, evidence of the defendant's motorcycle club affiliation was relevant to the argument between the defendant and the victim as well as his credibility. "Relevant evidence is admissible unless unduly prejudicial, and, '[i]n weighing the probative value of evidence against any prejudicial effect it might have on a jury, we afford trial judges great latitude and discretion, and we uphold a judge's decision in this area unless it is palpably wrong.'" Commonwealth v. Arroyo, 442 Mass. 135, 144 (2004), quoting Commonwealth v. Sicari, 434 Mass. 732, 752 (2001), cert. denied, 534 U.S. 1142 (2002). We conclude the trial judge was within his discretion in admitting this evidence, where the evidence was relevant to the defendant's credibility.

2. Unpreserved claims of error. The defendant contends that four unpreserved errors, standing alone or in combination, created a substantial risk of a miscarriage of justice requiring reversal. See Commonwealth v. Randolph, 438 Mass. 290, 294 (2002) (unpreserved error must create substantial risk of miscarriage of justice in verdict to warrant new trial).

First, he claims that the officer in the case improperly testified to the defendant's guilt on two occasions: (1) when he said the complaining witness was a victim of domestic assault, and (2) when he testified that the defendant committed assault by waving his finger in the victim's face. While a witness may not comment directly on the defendant's guilt, see Commonwealth v. Woods, 419 Mass. 366, 375 (1995), here, the officer's comment about the complaining witness being a victim of domestic assault did not rise to the level of an opinion on the guilt or innocence of the defendant. See Commonwealth v. Canty, 466 Mass. 535, 539 (2013). The officer's comment made no mention of the defendant or whether the officer believed he was guilty or innocent of any crime. Likewise, the second comment was not offered as an opinion on the guilt or innocence of the defendant. The officer's comment was elicited -- and subsequently clarified -- by defense counsel and solely related to the process used by the officer to apply for a criminal complaint against the defendant.<sup>3</sup> Therefore, there was no error.

The defendant next argues that the Commonwealth sought to appeal to the jury's sympathy by referencing the age of the victim's son. We conclude this argument is without merit because the references to the child's age were minimal and

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<sup>3</sup> The judge's final instructions to the jury made it clear that the complaint was merely an accusation and was not evidence.

relevant to differentiate between the several children present on the night in question.

Thirdly, the defendant claims that the Commonwealth improperly asked the defendant to comment on the credibility of other witnesses. "It is well-established, and we have repeatedly stated, that it is improper to ask a witness at trial to assess the credibility of other witnesses' testimony." Commonwealth v. Colon, 64 Mass. App. Ct. 303, 306-307 (2005). Here, the Commonwealth's questions were not directed at the credibility of the other witnesses, but instead went to whether the defendant agreed with their testimony. See Commonwealth v. Richenburg, 401 Mass. 663, 673 (1988) (no error where prosecutor asked defendant whether he agreed with facts testified to by other witnesses). Moreover, the defendant was not put in a situation where he was required to testify that another witness was lying. He handled the questions intelligently and avoided claiming other witnesses were not truthful. Commonwealth v. Ward, 15 Mass. App. Ct. 400, 402 (1983).

Even if we were to assume, without deciding, that the prosecutor's questions here were error, the inquiry was limited to only four questions to which the defendant offered no objection. Compare Commonwealth v. Flanagan, 20 Mass. App. Ct. 472, 477-478 (1985) (four questions, properly objected to, did not rise to level of prejudicial error), with Commonwealth v.

Long, 17 Mass. App. Ct. 707, 708 (1984) (over 100 questions, properly objected to, were prejudicial and warranted new trial). Furthermore, the judge properly instructed the jury in his preliminary instructions that the jury's function "[was] to determine what evidence to believe" and that "[they were] the sole and exclusive judges of the facts"; and in his final instructions that "[they were] the sole judges of the credibility of a witness." Commonwealth v. Andrade, 468 Mass. 543, 549 (2014) (jury are presumed to follow judge's instructions). Therefore, we discern no substantial risk of a miscarriage of justice that warrants a new trial.<sup>4</sup>

Finally, the defendant claims that the verdict was tainted because Juror No. 3 was biased.<sup>5</sup> The defendant argues that the juror was biased because during voir dire he responded affirmatively that he would believe the testimony of a police officer because of their status as a police officer. However, upon further inquiry the judge determined that the juror could be fair and objective. Commonwealth v. Hinds, 487 Mass. 212,

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<sup>4</sup> The fact that we determine there was no substantial risk of a miscarriage of justice in this case should not be viewed as lessening our concern about the propriety of the questions employed by the prosecutor here.

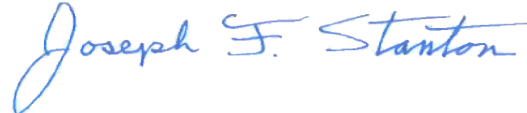
<sup>5</sup> The defendant's claims that the judge instructed Juror No. 3 to view the officer's testimony as corroborative is without merit. The judge did not make such an instruction; the comments by the judge were during voir dire and used to determine if the juror could be impartial, the comments did not amount to an instruction on how to view the testimony.

230 (2021) (determination that prospective juror can fairly evaluate the evidence was supported by the voir dire). The judge did not abuse his discretion in determining this juror to be impartial. See Commonwealth v. Wood, 469 Mass. 266, 292 (2014) (trial judge afforded discretion in assessing jurors).

We are satisfied that none of the defendant's claimed errors, alone or in combination, created a substantial risk of a miscarriage of justice.

Judgment affirmed.

By the Court (Meade,  
Wolohojian & Lemire, JJ.<sup>6</sup>),



Clerk

Entered: April 22, 2022.

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<sup>6</sup> The panelists are listed in order of seniority.