

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-116

COMMONWEALTH

vs.

HERVE TABOIS.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant, Herve Tabois, appeals from his conviction, after a jury trial in Superior Court, of aggravated child rape, G. L. c. 265, § 23A (b). Concluding that there was sufficient evidence of aggravated child rape and that the prosecutor's closing argument was proper, we affirm.

1. Sufficiency of the evidence. When reviewing the denial of a motion for a required finding of not guilty, "we consider the evidence introduced at trial in the light most favorable to the Commonwealth, and determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Oberle, 476 Mass. 539, 547 (2017). "The inferences that support a conviction 'need only be reasonable and possible; [they] need not be necessary or inescapable.'" Commonwealth v. Quinones, 95 Mass. App. Ct. 156,

162 (2019), quoting Commonwealth v. Waller, 90 Mass. App. Ct. 295, 303 (2016). To obtain a conviction for aggravated child rape where the victim is at least twelve years old, the Commonwealth was required to prove "that the defendant (1) had sexual intercourse or unnatural sexual intercourse with (2) a child between twelve and sixteen years of age, and (3) there [was] more than a ten-year gap between the ages of the defendant and the victim." Scione v. Commonwealth, 481 Mass. 225, 228 (2019). The defendant contests only the first element.¹

Here, the jury could reasonably have found that the defendant raped the victim. At trial, the victim testified that, after the defendant "put his hand over [her] shoulder, and [went] inside [her] shirt," he began "touching [her] boobs." She testified that the defendant then put his hand "down below, underneath [her] pants, and that's when he start[ed] fingering [her]." Although portions of the victim's testimony were inconsistent with other witnesses' testimony and her initial statement to investigators, "the jury were free to believe the victim[]." Commonwealth v. Franceschi, 94 Mass. App. Ct. 602, 606 (2018). See Commonwealth v. Gonzalez Santos, 100 Mass. App. Ct. 1, 3 (2021) ("Notwithstanding the defendant's argument to

¹ At trial, the parties stipulated that there was more than a ten-year age difference between the victim and the defendant. The victim testified that, when the defendant sexually assaulted her in November 2017, she was fifteen years old.

the contrary, the victim's testimony, as credited by the jury and evidenced by their verdict, suffices to support the defendant's [rape] convictions"). Accordingly, the trial judge properly denied the defendant's motions for a required finding of not guilty.

2. Prosecutor's closing argument. The defendant challenges several portions of the prosecutor's closing argument. Because the defendant did not object at trial to the portions of the closing argument that he challenges on appeal, we review for a substantial risk of a miscarriage of justice. See Commonwealth v. Hubbard, 69 Mass. App. Ct. 232, 241 (2007). "We review the statements in the context of the entire closing, the jury instructions, and the evidence introduced at trial." Commonwealth v. Martinez, 476 Mass. 186, 198 (2017).

a. Placing the jury in the victim's shoes. "The invitation to the jury to put themselves in the position of the victim is usually improper." Commonwealth v. Grinkley, 75 Mass. App. Ct. 798, 809 (2009), quoting Commonwealth v. Jordan, 49 Mass. App. Ct. 802, 816 (2000). Here, defense counsel argued that that the victim should be disbelieved because "she was totally flat" and "devoid of any emotion" while testifying. In response, the prosecutor asked, "How would she be feeling up there talking about her vagina and how she was sexually

assaulted by this Defendant? . . . Would it be fair to expect her to testify a certain way?"

The "prosecutor [was] entitled to respond to an argument made by the defense at closing," Commonwealth v. Sun, 490 Mass. 196, 217 (2022), quoting Commonwealth v. Mason, 485 Mass. 520, 539 (2020), and, in doing so, did not improperly ask the jury to put themselves in the victim's shoes. Rather, the prosecutor asked the jury to consider the victim's demeanor in light of the fact that she was seventeen years old and testifying about a sensitive subject while sitting near the defendant. Cf. Commonwealth v. Camacho, 472 Mass. 587, 608 (2015) (prosecutor's closing remarks improperly "arouse[d] sympathy and invite[d] the jury into the victim's position"). "Although the prosecutor may have been close to the line in asking the jury to put themselves in the victim's position . . . [i]n the context of the arguments in their entirety, considering the judge's full instructions to the jury, and considering the absence of any objections from defense counsel, there was no substantial risk of a miscarriage of justice." Commonwealth v. Thomas, 400 Mass. 676, 684 (1987).

b. Vouching. "Improper vouching occurs where an attorney 'expresses a personal belief in the credibility of a witness, or indicates that he or she has knowledge independent of the evidence before the jury.'" Commonwealth v. Mejia, 463 Mass. 243, 254 (2012), quoting Commonwealth v. Ortega, 441 Mass. 170,

181 (2004). "Where the credibility of a witness is at issue, 'it is certainly proper for counsel to argue from the evidence why a witness should be believed.'" Commonwealth v. Guy, 441 Mass. 96, 113 (2004), quoting Commonwealth v. Raymond, 424 Mass. 382, 391 (1997).

Here, defense counsel suggested in closing argument that the victim's motive for lying was that "she wanted to leave home and try to return to her biological family." The prosecutor, in turn, argued, "The reason why she [the victim] told you all this is because it happened that this Defendant penetrated her." He further argued, "There's no motive for her to come in here and say this. . . . Believe her Find her credible." The prosecutor's arguments properly addressed the credibility of the victim -- a key issue during trial. Cf. Commonwealth v. Beaudry, 445 Mass. 577, 587 (2005), quoting Commonwealth v. Riberio, 49 Mass. App. Ct. 7, 10 (2000) ("The remark that Cathy was presumably credible simply because she testified in court stands on different footing. 'Telling the jury that the victims have no reason to lie is over the line of permissible advocacy'"). Considering the "remarks . . . in light of the entire argument," the jury would have understood that the prosecutor was arguing that the victim was credible based on her detailed account of the defendant's abuse. Commonwealth v. Nee, 83 Mass. App. Ct. 441, 448 (2013). Accord Commonwealth v.

Olmande, 84 Mass. App. Ct. 231, 234 (2013) ("a prosecutor may argue that the jury should believe a witness based upon evidence presented at trial").

Defense counsel argued that the victim's friend's grandmother (whose version of events contradicted both the victim's and the defendant's accounts) "has a pretty poor memory." The prosecutor similarly argued that the grandmother appeared "somewhat tired" while testifying and "[h]er memory seemed somewhat questionable." In light of the prosecutor's statements, "you're the jury," and "couple that with what you witnessed from her on the stand," the prosecutor was not injecting his opinion about the credibility of the grandmother, but rather was trying to convince the jury to discredit her testimony based on her demeanor. See Guy, 441 Mass. at 113 ("given the context in which the prosecutor's statement was made, we do not think that the jury would have understood the statement as an assertion of the prosecutor's personal belief"); Commonwealth v. Lawton, 82 Mass. App. Ct. 528, 542 (2012), quoting Commonwealth v. Freeman, 430 Mass. 111, 118-119 (1999) ("A prosecutor can address, in a closing argument, a witness's demeanor").

The defendant also challenges, as improper vouching, the prosecutor's statements that the victim's friend's mother was "asleep with the baby" and the grandmother was "out cold on the

couch. . . . [without] any memory of the Defendant being in the apartment." The prosecutor's statements were based on testimony that the Commonwealth elicited from the victim, the mother, and the grandmother. There was no substantial risk of a miscarriage of justice.

c. Appeal to emotion. In "closing arguments, prosecutors may not 'play . . . on the jury's sympathy or emotions.'" Martinez, 476 Mass. at 197, quoting Commonwealth v. Kozec, 399 Mass. 514, 517 (1987). "Prosecutorial 'appeals to sympathy . . . obscure the clarity with which the jury would look at the evidence and encourage the jury to find guilt even if the evidence does not reach the level of proof beyond a reasonable doubt.'" Commonwealth v. Niemic, 483 Mass. 571, 591 (2019), quoting Commonwealth v. Bois, 476 Mass. 15, 34 (2016).

The prosecutor argued,

"If [the victim] goes along with this, the Defendant's feeling her hope, hoping that maybe she won't scream. That she might be into it. That she might like the touching. . . . This happened because the Defendant was lingering in an apartment for no reason with a girl that he didn't know waiting for the opportunity to have nobody see what he was going to try to do . . . that is [to] have sex with her."

At trial, the victim testified that, while the defendant sexually assaulted her, he asked, "does it feel good?" in "a low whisper . . . so nobody else won't hear." Later that evening, the defendant asked the victim if she "wanted to have sex with

him." The prosecutor's statements, therefore, were supported by the evidence. Cf. Commonwealth v. Teixeira, 486 Mass. 617, 634 (2021) ("the prosecutor's statements not only played to the emotions of the jury in inviting them to imagine the victim's last moments, but also were unsupported by the evidence"). In addition, the prosecutor was entitled to argue that the defendant had the opportunity to sexually assault the victim because the friend's mother and grandmother were asleep and hoped to invoke the victim's acquiescence so that she would not wake up the adults. See Commonwealth v. Bannister, 94 Mass. App. Ct. 815, 825 (2019), quoting Commonwealth v. Lyons, 426 Mass. 466, 472 (1998) ("The prosecutor may argue inferences from the evidence favorable to his case"). Accordingly, we discern no substantial risk of a miscarriage of justice.

d. Misstatements of the evidence. "Closing argument must be limited to discussion of the evidence presented and the reasonable inferences that can be drawn from that evidence." Commonwealth v. Rakes, 478 Mass. 22, 45 (2017). "Counsel may, however, zealously argue in favor of those inferences favorable to his or her case." Id.

Here, the prosecutor argued that the defendant "followed [the victim] to the kitchen" and "put his stomach and chest on her bed because it was on the floor." Based on the victim's testimony that she was "inside [her] bedroom . . . when [the

defendant] start[ed] walking around out of the living room, into the kitchen . . . looking for [her]" and an exhibit presented at trial depicting the apartment's layout, the prosecutor could reasonably ask the jury to infer that the defendant traveled through the kitchen to reach the victim's bedroom. Similarly, given the victim's testimony that the defendant was "trying to get on top of [her]," her mattress was on the floor [Tr. 2:175], and the area "[l]ike around, like, his . . . chest" touched her bed, the prosecutor could reasonably ask the jury to infer that the defendant's stomach touched the victim's bed.

The prosecutor further argued, "If there was somebody there to see this or to tell the Defendant to stop or not touch [the victim], this probably wouldn't have happened." "Seldom is there direct evidence of a defendant's thoughts, and a prosecutor may argue fair inferences from the evidence that point to what the defendant may have been thinking."

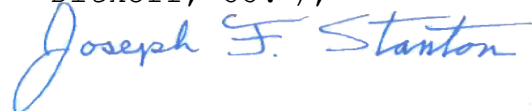
Commonwealth v. Moran, 75 Mass. App. Ct. 513, 523 (2009). The argument was "a fair inference drawn from the evidence at trial." Commonwealth v. Rivera, 482 Mass. 259, 270 (2019).

The defendant also challenges, as a misstatement of evidence, the prosecutor's statement that the grandmother was "heavily medicated." The grandmother, by her own admission, "had taken some medication and then while [she] was watching the movie[,] . . . fell asleep." Once asleep, the grandmother

testified that she "never woke up until [she] had to leave."
This corroborated the victim's testimony that, when the
grandmother fell asleep, her position "never changed," and she
never woke up while the defendant "was still at the house."
Additionally, the friend's mother testified that the grandmother
"takes meds for pain She'd get drowsy and she'd go to
sleep." The prosecutor's statement was a fair inference drawn
from the evidence presented at trial. See Commonwealth v.
Goddard, 476 Mass. 443, 449-450 (2017). There was no
substantial risk of a miscarriage of justice.

Judgment affirmed.

By the Court (Rubin, Shin &
Ditkoff, JJ.²),



Clerk

Entered: November 7, 2022.

² The panelists are listed in order of seniority.