

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-517

COMMONWEALTH

vs.

MARK A. LARSON.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a jury trial, the defendant, Mark A. Larson, who was charged with two counts of open and gross lewdness, was found guilty of two counts of the lesser included offense of indecent exposure. The defendant appeals from his convictions and from an order denying his motion for a new trial. On appeal, he argues that the Commonwealth failed to disclose inconsistent statements made by two Commonwealth witnesses in the Commonwealth's possession prior to trial, that the trial judge erroneously allowed impermissible hearsay, and that if none of the errors on their own require reversal, then the combination of errors does. We affirm.

Background. a. Facts at trial. The jury could have found the following facts. On July 1, 2017, John Rego and his son-in-law, Michael Clark, and their families attended a town-sponsored

fireworks event in Onset. At trial, Rego testified that at approximately 8 P.M., he went to the public bathroom. He heard a stall door open, and when he looked at the source of the sound, he saw the defendant standing with his pants around his ankles with "a hard on." The defendant said, "[H]ey," to which Rego replied, "[A]re you f'ing kidding me, there's kids around here." The defendant said he was sorry, but did not pull up his pants, and then shut the stall door. Rego returned to his family and made a passing comment to Clark about the "creep" in the bathroom. Shortly thereafter, Clark also went to the bathroom. Clark testified that while he was in the bathroom, the defendant opened the stall door with his pants down to his ankles and his fully erect penis cupped in his hands. Clark asked the defendant, "[W]hat the fuck are you doing," but received no response, at which point Clark left the bathroom. Clark returned to Rego and said what had happened; Rego's wife, who was very alarmed and upset, went and found the nearest police officer.

At trial, the defendant did not contest that he exposed his penis to both Rego and Clark, but argued that it was an accident. The defendant testified that he was vomiting in the bathroom stall when he knocked over his bag, which contained \$500. In a hurry to find the money, the defendant claimed that he zipped his pants too quickly, catching his scrotum in the

zipper, at which point he doubled over in pain and accidentally exposed himself to Rego. The defendant testified that he was still doubled over when Clark entered the bathroom.

b. Motion for new trial. The defendant, through a new attorney, filed a motion for a new trial arguing that the prosecution failed to disclose discrepancies between statements made by Rego and Clark in the police report and what they told the assistant district attorney before the trial. In the police report, Rego stated he was washing his hands when the incident occurred, but testified at trial that it occurred while he was using the urinal. Similarly, in the police report, Clark stated he had just entered the bathroom when the incident occurred, but testified at trial that he was washing his hands. The prosecutor's opening argument mirrored the witnesses' trial testimony.

The parties stipulated that the trial prosecutor reviewed the police report on the first day of the trial, which was the day of empanelment, and spoke with Rego and Clark for the first time before opening statements. They also stipulated that the prosecutor did not realize that there were any discrepancies in the statements, so he did not mention them to defense counsel. The defendant agreed that the Commonwealth provided defense counsel with the police report prior to trial. Instead, he argued that the discrepancies between the witnesses' statements

in trial preparation and the police report were exculpatory and that the prosecutor should have provided supplemental discovery to defense counsel reflecting those changes.

The motion judge, who was also the trial judge, found that the prosecutor had the police report and spoke with the witnesses before trial but did not realize that their positions in the bathroom were different. The judge concluded that the failure to disclose the discrepancies was unintentional and immaterial, as the defense was based on accidental exposure. Further, the judge noted that defense counsel was still able to impeach the witnesses by exploring the inconsistencies between the statements at trial. As a result, the judge held that the defendant was not prejudiced by the failure to disclose the inconsistent statements and denied the motion.<sup>1</sup>

Discussion. a. Failure to disclose exculpatory information. The defendant argues that the trial judge erred in denying his motion for a new trial where the prosecutor failed to disclose that Rego and Clark changed their statements, which was exculpatory evidence and subject to mandatory disclosure.

"The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been

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<sup>1</sup> The defendant does not challenge the motion judge's order denying his motion for a new trial to the extent the order rejected his ineffective assistance of counsel claim.

done." Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). The decision to deny a motion for a new trial rests within the sound discretion of the trial judge and will not be disturbed unless it is manifestly unjust, or the trial was infected with prejudicial constitutional error. Commonwealth v. Imbert, 479 Mass. 575, 581 (2018). Further, special deference is accorded when the motion judge was also the trial judge. Commonwealth v. Forte, 469 Mass. 469, 488 (2014). Where the basis for the new trial motion is the Commonwealth's failure to disclose exculpatory evidence, the defendant must establish "(1) that the evidence [was] in the possession, custody, or control of the prosecutor or a person subject to the prosecutor's control; (2) that the evidence is exculpatory; and (3) prejudice" (quotation and citation omitted). Commonwealth v. Sullivan, 478 Mass. 369, 380 (2017).

Passing over the prosecutor's unintentional failure to disclose the change in the witnesses' statements, the defendant has not shown any prejudice. Identity was not at issue. The defendant admitted in his testimony that he was in the bathroom, that he saw Rego when his penis was exposed, and that he heard Clark in the bathroom at that time when his penis was still exposed. The issue at trial was whether the defendant's exposure was accidental; the location of the witnesses did not address that issue. In any event, defense counsel could and did

cross-examine Rego, Clark, and one of the police officers on the discrepancies between Rego and Clark's testimony and their statements in the police report. See, e.g., Commonwealth v. Molina, 454 Mass. 232, 236-237 (2009) (where defendant is able to cross-examine witness, prejudice from late disclosure of exculpatory evidence removed). Indeed, defense counsel was successful in winning acquittals of the greater chargers.<sup>2</sup>

b. Hearsay testimony. The defendant argues first that evidence of his arrest was hearsay which unfairly bolstered the Commonwealth's case. Specifically, he claims that the testimony from Rego and Officer Michael Phinney that the police spoke to the defendant and Clark and Rego before the arrest established that the police not only believed Clark and Rego, but disbelieved the defendant, which created an imprimatur of official belief.<sup>3</sup> We review the unobjected-to challenge to the admission of hearsay for any errors that created a substantial risk of a miscarriage of justice, see Commonwealth v. Dargon, 457 Mass. 387, 397 (2010), and discern none.

Even if the statements should not have been admitted, an issue we do not decide, any error did not create a substantial

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<sup>2</sup> The defendant's reliance on Commonwealth v. Pope, 489 Mass. 790 (2022), is misplaced, as unlike in Pope, here the defendant failed to establish prejudice.

<sup>3</sup> In addition, a second police officer testified that Officer Phinney told him that the defendant "was acting suspiciously in the bathroom exposing himself."

risk of a miscarriage of justice. "In the context of the entire trial," Commonwealth v. McCoy, 456 Mass. 838, 852 (2010), the statements were a passing reference that were unlikely to have materially affected the outcome. For example, this was not a situation where different parties accused each other of a crime and the police sided with one over the other. In addition, defense counsel in his opening used the defendant's conversation with police, his statements to them, and his compliance with their order that he remain in the area while they addressed another matter to advocate for the defendant's innocence.

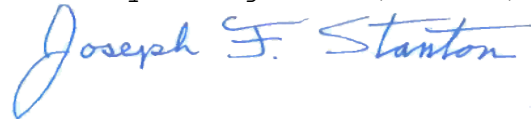
The defendant also claims that unobjected-to testimony that Rego and Clark repeated their allegations, and testimony that Rego's wife was offended upon learning what occurred, was hearsay that was irrelevant, inadmissible, and unfairly prejudicial. As the defendant acknowledges, whether a witness immediately reported the incident is relevant to whether that person experienced the shock and alarm necessary to support an open and gross lewdness conviction. See Commonwealth v. Militello, 66 Mass. App. Ct. 325, 333-334 (2006). Indeed, the defendant was successful in arguing that Rego and Clark were not shocked or alarmed by the encounter, in part by showing that their views -- generally having no impact from the exposure -- contrasted with Rego's wife, who was shocked by the news. The defendant was successful because the jury found him guilty only

of the lesser-included offenses of indecent exposure. See Commonwealth v. Sosnowski, 43 Mass. App. Ct. 367, 372 (1997) ("it is difficult to find that the admission of the evidence caused prejudice where the jury returned not guilty verdicts on two of the three indictments"). We discern no substantial risk of a miscarriage of justice.<sup>4</sup>

Judgments affirmed.

Order denying motion for new trial affirmed.

By the Court (Green, C.J.,  
Henry & Englander, JJ.<sup>5</sup>),



Clerk

Entered: January 20, 2023.

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<sup>4</sup> The defendant also seeks reversal of his convictions based on cumulative errors. We conclude that the defendant's claims of error, considered in combination, do not warrant relief or, alternatively, a new trial.

<sup>5</sup> The panelists are listed in order of seniority.