18-P-56 Appeals Court

COMMONWEALTH vs. MARIO SANCHEZ.

No. 18-P-56.

Suffolk. December 14, 2018. - September 5, 2019.

Present: Meade, Agnes, & Englander, JJ.

Evidence, Cross-examination, Hearsay, Spontaneous utterance, Cumulative evidence. Witness, Cross-examination, Credibility. Practice, Criminal, Cross-examination by prosecutor, Argument by prosecutor, Harmless error. Error, Harmless.

Complaint received and sworn to in the Dorchester Division of the Boston Municipal Court Department on July 28, 2016.

The case was tried before James M. Stanton, J.

Meredith Shih for the defendant.
Tucker Bugbee (Colby M. Tilley, Assistant District Attorney, also present) for the Commonwealth.

AGNES, J. It is a cardinal rule of evidence that a witness cannot be asked to give an opinion about whether another witness should be believed. In this case that rule was violated when the defendant was asked if his accuser was a liar. Such an

error may be so significant that a new trial is required. But not all such errors have the same impact on a trial. The test for prejudicial error requires that we consider the error in the context of the evidence as a whole. An error will not be considered prejudicial if it "did not influence the jury, or had but very slight effect . . . ." Commonwealth v. Peruzzi, 15 Mass. App. Ct. 437, 445 (1983), quoting Kotteakos v. United States, 328 U.S. 750, 764 (1946). When, as in this case, we are confident that there is no reasonable possibility that the error contributed to the verdict, we affirm. Commonwealth v. Alphas, 430 Mass. 8, 23 (1999) (Greaney, J., concurring).

Background. This is defendant Mario Sanchez's direct appeal from his 2017 convictions, after a trial by jury, of assault by means of a dangerous weapon in violation of G. L. c. 265, § 15B (b), and an attempt to commit a crime, namely larceny from a person, in violation of G. L. c. 274, § 6. The defendant raises three issues on appeal: first, whether the judge erred in overruling his objections to certain questions put to him by the prosecutor; second, whether the judge erred in admitting the contents of an unredacted 911 telephone call made by the victim; and third, whether certain statements made by the prosecutor in his closing argument were improper. For the reasons that follow, we affirm.

Facts. The jury were warranted in finding the following facts.[1] On the morning of July 28, 2016, at approximately 5:45 A.M., the victim was walking with her two young daughters, ages eight and five, in the Hyde Park section of Boston. She was following her usual routine by bringing her children to her aunt, who provided daycare so that the victim could then take public transportation in order to arrive to work in Quincy by 6:45 A.M. The victim and her children walked past a man and then heard him say, "Excuse me?" She turned around and said, "Yes." The man, later identified as the defendant, asked, "Can you tell me where Geneva Ave. is?" The defendant then pulled out a "big silver gun with a tan bottom" and told the victim "to give him what [she] had." The victim identified an item as the "gun" pointed at her by the defendant. It was "a replica toy gun," and was later received in evidence. The defendant was very close to her -- "He was in my face." After shielding her children, she "told him that there was nothing here for him, that he's being a coward," and that he should leave. The defendant responded but she could not understand what he said. He then struck himself on the head with the gun a few times, mumbled something, and walked away.

[1] Some additional facts are reserved for the discussion of the specific issues raised on appeal.

The victim made a 911 call to the Boston police and was still talking with the 911 operator when she arrived at her aunt's house. She remained on the line until police officers arrived. After leaving her children with her aunt and giving the officers a description of her assailant, she left for the next leg of her trip to work. The victim identified an audio recording of her 911 call, and that audio recording was played for the jury.[2] In her 911 call, the victim provided the police with the location of the incident, the basic facts as described above, the direction in which her assailant was walking after the incident, and a detailed description of the man who pulled the gun on her: a Hispanic male, thin build, about five feet, two inches tall, wearing blue jeans, a white T-shirt, and "a black Scully,"[3] with a beauty mark or mole on his right cheek, a goatee, and carrying a Corona beer bottle in his pocket.

In response to the victim's 911 call, at approximately 6 A.M., two Boston Police Officers were dispatched to the area of Draper and Longfellow Streets. They were operating an unmarked police cruiser and were dressed in civilian clothes. Because the description they were given by the dispatcher was limited (a man with a gun), they responded to the house where the victim

[2] The recorded 911 call was received in evidence.

[3] Also described as a "black beanie, knit style hat."

had dropped off her children. There they met the victim who repeated the detailed description she had given in her 911 call. The officers returned to the area where the incident occurred, and as they turned right onto Ditson Street from Arcadia Park, they saw a Hispanic male wearing a black knit hat, blue jeans, and a white T-shirt. The man appeared to be unsteady on his feet. They exited their cruiser, drew their weapons, and asked the man to show his hands. The man, later identified as the defendant, did not comply, and instead was reaching for something as the officers put him to the ground. A patfrisk revealed a replica firearm tucked inside his briefs, which matched the description given by the victim, and a Corona beer bottle in his right pocket. When he was handcuffed, the defendant stated in English, "[I]s this about that lady and her kid."[4]

A showup identification procedure was arranged.[5] Another police officer picked up the victim at the train station as she was on her way to work. He drove through Dorchester and

[4] The defendant filed a pretrial motion to suppress the fruits of the police stop, which was denied. The defendant also filed a pretrial motion in limine to exclude his statement to the police, which also was denied. These matters are not the subject of this appeal.

[5] The defendant filed a pretrial motion to suppress this identification as unnecessarily suggestive. The motion was denied. The defendant does not challenge this ruling on appeal.

eventually came through Arcadia Park. The victim was seated in the rear seat of the cruiser. The police officers who were with the defendant had relocated to a different position. When the police cruiser in which the victim was seated turned the corner to the street where the defendant stood, she immediately said, without any prompting, "that's him, that's him."

Discussion. 1. Improper cross-examination of defendant. The defendant testified at trial that on July 27, 2016, he was living in Dorchester and working at a restaurant called "Tray" near South Station in Boston from 3 P.M. until 11 P.M. On that evening, he left work at 11:15 P.M. and took a train home. Sometime thereafter, a friend came by and drove the defendant to the friend's house where the two men smoked and drank beer for about three hours. At approximately 6 A.M., the defendant left his friend's house and began to walk to his uncle's house on Geneva Avenue. He recalled walking through Ronin Park where he picked up a toy handgun from a trash barrel. The defendant testified that he was lost. He saw the victim walking ahead of him and approached her to ask for directions to Geneva Avenue. He said he never raised the gun above his waist and never demanded money from the victim. He said he spoke to the victim in Spanish, trying to explain that the item in his hand was a toy. He then said he turned around, distanced himself from the victim, and apologized in English. The next thing he knew, he

encountered police officers who had their guns drawn and who detained him.

On cross-examination, the prosecutor, over objection, asked the defendant if the victim had "lied" when she testified during the Commonwealth's case. There were a total of five such questions. On four occasions the defendant replied, "yes," and in one instance he explained what he had done during the brief encounter with the victim.[6]

The prosecutor's questions were improper and the judge should have sustained the defendant's objections. Commonwealth v. Long, 17 Mass. App. Ct. 707, 708-710 (1984). A witness should not be asked and is not permitted to comment on the credibility of another witness because "[t]he fact finder, not the witness, must determine the weight and credibility of testimony." Commonwealth v. Triplett, 398 Mass. 561, 567 (1986). Accord Commonwealth v. Dickinson, 394 Mass. 702, 706 (1985). "Such questioning transforms the interrogation stage of the trial into the phase traditionally reserved for argument and summation." Long, supra at 709-710. Further, this tactic "implies to the jury that differences in the testimony of the

[6] Because the judge overruled the defendant's objections to this line of questioning, it is not surprising that there was no request for a curative or cautionary instruction. The prosecutor did not refer to this testimony in his closing argument.

witness and any other witness could only be the result of lying and not because of misrecollection, failure of recollection or other innocent reason" (quotation and citation omitted). Commonwealth v. Ward, 15 Mass. App. Ct. 400, 402 (1983).

We apply the standard of review applicable to preserved, nonconstitutional error. Under this standard, an error will be regarded as nonprejudicial only if we are convinced that it "did not influence the jury, or had but very slight effect . . . ." Commonwealth v. Graham, 431 Mass. 282, 288 (2000), cert. denied, 531 U.S. 1020, quoting Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994). See Peruzzi, 15 Mass. App. Ct. at 445 (reversal required only if error had substantial and injurious effect or influence in determining the jury's verdict). We apply this test by assessing the impact of the error in the context of the evidence as a whole. See Commonwealth v. Blackwell, 44 Mass. App. Ct. 804, 807-808 (1998).

This is a case in which the Commonwealth's evidence was compelling, if not overwhelming. For example, there is no evidence of any prior relationship between the victim and the defendant that may have supplied a motive for her testimony. Also, the victim had an opportunity to closely observe the defendant during the encounter. Additionally, in the victim's 911 call immediately following the incident, she described the perpetrator in great detail, including his facial features, his

clothing, the toy gun, and the Corona beer bottle that he was carrying in his pocket, and the statements he made to her. The defendant was then found near the location of the encounter matching that description and carrying those items. When approached by the police, the defendant asked, "[I]s this about that lady and her kid?" and, when the victim was taken by police to identify the defendant, she immediately said, "that's him, that's him," without any prompting when the defendant came into view.

In assessing the impact of the error in this case the defendant argues that it requires that we reverse because it went to the heart of his defense. However, notwithstanding the defendant's characterization of his defense as a claim that there must have been a misunderstanding, it was functionally a claim that the victim, who testified that she was assaulted by means of a handgun and told to give up "what [she] had," was not telling the truth. We are hard pressed to imagine how the victim's account of what the defendant did and said to her on the street could be explained by a misunderstanding. In these circumstances, based on the limited number of improper questions that were put to the defendant and the substantial and corroborated evidence of the defendant's guilt, we do not believe that the jury's verdict was "substantially swayed" by the improperly admitted evidence. Peruzzi, 15 Mass. App. Ct. at

445. See Commonwealth v. Colon, 64 Mass. App. Ct. 303, 308-309 (2005); Commonwealth v. Snow, 58 Mass. App. Ct. 917, 918 (2003); Commonwealth v. Rather, 37 Mass. App. Ct. 140, 149 (1994); Commonwealth v. Flanagan, 20 Mass. App. Ct. 472, 477-478 (1985); Ward, 15 Mass. App. Ct. at 402.

This case is distinguishable from other cases in which a new trial has been ordered when a prosecutor improperly asked a defendant to express an opinion on another witness's testimony. See Long, 17 Mass. App. Ct. at 708-710 (prejudicial error where prosecutor asked defendant at least 100 questions regarding inconsistencies between his own testimony and that of other witnesses, and there was not overwhelming evidence of defendant's guilt). See also Triplett, 398 Mass. at 566-567 (reversible error where improper questions permeated cross-examination of defendant). Unlike those cases, here, the number of improper questions asked did not permeate the Commonwealth's theory of the case and there was other compelling evidence of the defendant's guilt. Moreover, the prosecutor did not refer to the testimony in his closing argument.

2. Admissibility of 911 call. The defendant claims that the judge abused his discretion when he admitted the victim's 911 call as an excited utterance. Where the defendant objected to the admission of the 911 call both in limine and as the evidence was being introduced at trial, we review to determine

whether such error, if any, was prejudicial. Commonwealth v. Martinez, 476 Mass. 186, 190 (2017).[7]

Here, the victim called 911 immediately after her encounter with the defendant. The 911 recording shows that the victim was still under the stress of the event, as she was speaking in a frantic manner and began to cry. Such an event is likely to impair a person's normal reflective thought process, and it can be inferred from the 911 recording that the victim was still under the influence of the event when she made the call. See Commonwealth v. Beatrice, 460 Mass. 255, 258-259 (2011) (911 call qualified as spontaneous utterance where "victim's voice on the telephone reflected that she was very upset and breathing heavily, and she reported that she had 'just' been assaulted by the defendant"); Commonwealth v. Simon, 456 Mass. 280, 296 (2010), cert. denied, 562 U.S. 874 (victim's tone during 911 call immediately following shooting indicated spontaneous

[7] "A judge has broad discretion in determining whether a statement qualifies as a spontaneous utterance, and that determination will only be disturbed on such an abuse of discretion." Commonwealth v. Ruiz, 442 Mass. 826, 832 (2004). An out-of-court statement qualifies as a spontaneous utterance "if (1) there is an occurrence or event sufficiently startling to render inoperative the normal reflective thought processes of the observer, and (2) if the declarant's statement was a spontaneous reaction to the occurrence or event and not the result of reflective thought" (quotations and citation omitted). Commonwealth v. Santiago, 437 Mass. 620, 623 (2002). See Mass. G. Evid. § 803(2) (2019). See also Commonwealth v. Baldwin, 476 Mass. 1041, 1042 (2017) (essential that spontaneous utterance be made under stress of event with no time for reflective thought).

utterance). See also Commonwealth v. Santiago, 437 Mass. 620, 623 (2002) (exciting event must be sufficient to impair witness's thought processes). Accordingly, the judge did not abuse his discretion in admitting the 911 recording as a spontaneous utterance.

The defendant's principal argument is that the judge erred because the recorded 911 call was irrelevant and cumulative, and, therefore, its prejudicial effect outweighed any probative value it had.[8] See Mass. G. Evid. § 403 (2019). We disagree. A judge has broad discretion when determining whether evidence is relevant to a particular case and whether the evidence's probative value outweighs any prejudicial effect. Commonwealth

[8] The defendant also argues, for the first time on appeal, that even if the 911 call were relevant, the judge should have redacted the second portion of the call, including the victim's statements to the 911 operator that she feared others could be assaulted and the operator's characterization of the encounter as a "robbery," among other statements, because they were not relevant. We review the issue for a substantial risk of miscarriage of justice. See Commonwealth v. Johnson, 46 Mass. App. Ct. 398, 400 (1999) ("A defendant is not permitted to raise an issue before the trial court on a specific ground, and then to present that issue to this court on a different ground" [quotations and citation omitted], and such decisions will be reviewed for substantial risk of miscarriage of justice). Here, the defendant did not request any redactions, nor did he direct the judge to what specific part he wanted excluded. Given these facts, combined with the totality of the evidence, we conclude there was no substantial risk of a miscarriage of justice. See Commonwealth v. Dargon, 457 Mass. 387, 397-398 (2010) (considering all evidence, no substantial risk of miscarriage of justice where defendant did not request redaction of evidence at trial).

v. Tobin, 392 Mass. 604, 613 (1984). Such decisions "will be upheld on appeal absent palpable error." Commonwealth v. Dunn, 407 Mass. 798, 807 (1990). Evidence is relevant, and therefore admissible, if it "has a 'rational tendency to prove an issue in the case,' . . . and renders 'the desired inference more probable than it would have been without [the evidence].'" Commonwealth v. Filos, 420 Mass. 348, 356 (1995), quoting Commonwealth v. Fayerweather, 406 Mass. 78, 83 (1989). See Mass. G. Evid. § 401 (2019). Here, the 911 recording was relevant to show the victim's state of mind immediately following the incident, a material issue the defendant raised at trial when he suggested that the victim was under a tremendous amount of stress at the time, causing her to misunderstand the events. See Commonwealth v. Arana, 453 Mass. 214, 225 (2009) ("Evidence of a victim's state of mind or behavior following a crime has long been admissible if relevant to a contested issue in a case"); Dunn, supra at 807 (evidence is relevant if it helps prove material issue). Thus, the judge acted within his discretion in determining that the 911 recording was relevant to a material issue in the case.

Although the 911 recording was cumulative of other evidence presented at trial, the judge did not abuse his discretion in

admitting it in evidence.[9] See Commonwealth v. Bart B., 424 Mass. 911, 915 (1997) (mere admission of cumulative evidence does not generally require reversal). Moreover, "the prejudicial effect of cumulative spontaneous utterance evidence is mitigated where the person who made the out-of-court statements testifies at trial and is subject to cross-examination about her prior statements." Commonwealth v. Davis, 54 Mass. App. Ct. 756, 764 (2002). Here, the 911 recording in which the victim recounted the incident and gave a detailed description of the defendant, although cumulative of the victim's testimony at trial, did not create a risk of unfair prejudice because the victim was subject to cross-examination about those statements. See id. See also Commonwealth v. Arroyo, 442 Mass. 135, 144 (2004) (trial judges given broad discretion in weighing probative value of evidence against any prejudicial effect).

3. Improper vouching. The defendant's final claim is that the prosecutor improperly vouched for the credibility of the

[9] This case bears no resemblance to Boston v. United States Gypsum Co., 37 Mass. App. Ct. 253, 260 (1994), upon which the defendant relies. There, the plaintiff sought to introduce over 120 documents of cumulative evidence. Id. In such a "mammoth case" where the trial spanned over forty days and the transcript was 10,000 pages long, it was necessary to carefully limit the introduction of cumulative evidence to properly manage the trial. Id. at 254, 256, 261.

victim in his closing argument, specifically when the prosecutor stated:

> "When assessing whether she was telling the truth, consider the fact that they're strangers. They had never met before in their lives. What motivation, this is a question that you have to ask, what motivation does she have to go up there and tell you a random stranger pointed a gun at her and demanded everything she had with her kids and that they were crying and traumatized as you probably remember? What motivation, ladies and gentlemen, does the defendant have? Sitting there accused of a crime? What motivation does he have? That's a question you have to ask yourself."

The defendant did not object so we review to determine if the statements were error, and, if so, whether they created a substantial risk of a miscarriage of justice. Commonwealth v. Sanders, 451 Mass. 290, 296 (2008).

Closing arguments are "viewed in the context of the entire argument, and in light of the judge's instructions to the jury and the evidence at trial." Commonwealth v. Koumaris, 440 Mass. 405, 414 (2003), quoting Commonwealth v. Allison, 434 Mass. 670, 687 (2001). An attorney is not permitted to vouch for a witness's credibility. Commonwealth v. Chavis, 415 Mass. 703, 713 (1993). Improper vouching occurs when "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. Wilson, 427 Mass. 336, 352 (1998). See Commonwealth v. Nicholson, 20 Mass. App. Ct. 9, 17 (1985) (improper vouching in closing argument where

prosecutor stated, "[I]n my years of experience, [the victim] is one of the most truthful, sincere, candid witnesses that I have seen in any courtroom"). However, a prosecutor is permitted to argue on the basis of the evidence. "The jury are presumed to understand that a prosecutor is an advocate, and statements that are '[e]nthusiastic rhetoric, strong advocacy, and excusable hyperbole' will not require reversal." Martinez, 476 Mass. at 199, quoting Wilson, supra at 350. It is not considered improper vouching if a prosecutor draws inferences about a witness's credibility from the evidence. See Commonwealth v. Ortega, 441 Mass. 170, 181 (2004) (no improper vouching where prosecutor asked jury to weigh witnesses' interests in testifying with those of defendant). See generally Mass. G. Evid. § 1113(b)(2) (2019). Moreover, if defense counsel comments on a government witness's credibility during closing argument, it is proper for a prosecutor, "within the limits of the evidence," to argue why the jury should believe the witness. Sanders, 451 Mass. at 297. See Koumaris, 440 Mass. at 414 (prosecutor may defend witness's credibility when defense counsel attacks witness's credibility during cross-examination and closing argument).

The present case is unlike those cases involving improper vouching because the prosecutor did not state or imply that he had knowledge independent of the jury, or assert any personal

beliefs about the victim's credibility. See Commonwealth v. Beaudry, 445 Mass. 577, 587 (2005), quoting Commonwealth v. Riberio, 49 Mass. App. Ct. 7, 10 (2000) ("Telling the jury that the victims have no reason to lie is over the line of permissible advocacy"); Commonwealth v. Ramos, 73 Mass. App. Ct. 824, 826 (2009) (improper vouching where prosecutor argued that victim was credible because she testified about embarrassing details of sexual assault). Here, the prosecutor appropriately urged the jury to consider whether the victim or the defendant had a motive to testify as they did based on the jury's consideration of the evidence. See Martinez, 476 Mass. at 199 (no improper vouching where prosecutor urged jury to draw inferences from evidence presented at trial and offered "logical reasons based on inferences from the evidence why a witness's testimony should be believed"); Commonwealth v. Ahart, 464 Mass. 437, 445 (2013) (no improper vouching where prosecutor "placed the issue of the [witness's] credibility squarely in the domain of the jury"). When, as in this case, the victim's credibility is attacked by the defendant during closing argument, it is not improper vouching for the prosecutor to defend the victim's credibility based on the evidence presented at trial. See Sanders, 451 Mass. at 297. Considering the evidence and arguments as a whole, there was no improper vouching in the

prosecutor's closing argument, and, therefore, no substantial risk of a miscarriage of justice.

Judgments affirmed.