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19-P-229

Appeals Court

COMMONWEALTH vs. KARY M. ROGERS.

No. 19-P-229.

Barnstable. November 6, 2019. - December 31, 2019.

Present: Hanlon, Lemire, & Shin, JJ.

Assault and Battery. Practice, Criminal, Required finding, Instructions to jury, Argument by prosecutor. Evidence, Leading question. Words, "Strangulation," "Suffocation."

Complaint received and sworn to in the Falmouth Division of the District Court Department on April 25, 2018.

The case was tried before Christopher D. Welch, J.

William A. Korman for the defendant.
Laura Marshard, Assistant District Attorney, for the Commonwealth.

LEMIRE, J. Following a jury trial in the District Court, the defendant, Kary M. Rogers, was convicted of assault and battery upon a family or household member, in violation of G. L. c. 265, § 13M, and of strangulation or suffocation, in violation of G. L. c. 265, § 15D. On appeal, the defendant challenges the

sufficiency of the evidence to support his conviction of strangulation, the adequacy of the jury instruction on strangulation, the propriety of the prosecutor's direct examination of the victim, and the prosecutor's closing argument. We affirm.

Background. We summarize the facts the jury could have found. On April 24, 2018, the defendant and the victim were at their home in Bourne.¹ At approximately 5:30 P.M., the defendant, having consumed four or five beers and eight shots of vodka, began arguing with the victim. During the argument, the victim, who was seated on a couch, told the defendant that he had had enough alcohol and that he should stop drinking. In response, the defendant grabbed the victim by her sweatshirt with one hand and around the neck with his other hand. The defendant, while applying pressure to the victim's neck, stood her up from the couch and threw her onto the floor.² While the defendant had his hand around the victim's neck the victim felt

¹ The victim and defendant had been in a dating relationship for ten years.

² During her testimony, the victim initially said that the defendant had his hand around her jaw line and the record indicates that she demonstrated the location of the defendant's hand to the jury. At other times in her testimony, the victim referred to the defendant having his hand on her "throat" and "neck."

pain and almost "peed [her] pants." When the defendant released his hand from her neck the victim coughed.

Upon getting up off the floor, the victim grabbed her cell phone (phone) and told the defendant that she was going to call the police. The defendant knocked the phone out of the victim's hand and slapped her on the face. The victim then grabbed the defendant's phone from a table and called the police to report that she had been "assaulted." After the victim called the police, the defendant threatened to kill her. The victim then ran into the bathroom and called the police a second time to report that the defendant had threatened to kill her. The victim remained in the bathroom until the police arrived at the house. While speaking with the victim, the police noticed marks on her neck and scratches on her chest and took photographs of the injuries.³

Discussion. 1. Sufficiency of evidence. The defendant argues that there was insufficient evidence to support his strangulation conviction. Strangulation is defined as "the intentional interference of the normal breathing or circulation of blood by applying substantial pressure on the throat or neck

³ The photographs were introduced as exhibits one, two, and three at trial.

of another." G. L. c. 265, § 15D (a).⁴ The defendant claims that the evidence does not suggest that he touched the victim's throat or neck, and further contends that there is no basis to conclude that his conduct interrupted the victim's breathing.

On a challenge to sufficiency, we review to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979). "[P]roof may be made by inference, and inferences drawn from the evidence 'need only be reasonable and possible and need not be necessary or inescapable.' Commonwealth v. Casale, 381 Mass. 167, 173 (1980)." Newman v. Commonwealth, 437 Mass. 599, 602 (2002).

The record shows that during her testimony, the victim demonstrated how the defendant had his hand around her jaw line. Furthermore, the victim testified that when she called the police she reported that the defendant had grabbed her by the throat, and on cross-examination she indicated that the defendant had one hand on her sweatshirt and one hand on her neck. The victim said it felt "scary" when the defendant had his hand on her neck. Also, a police witness provided testimony

⁴ The prosecutor's closing argument only advanced the theory of interference with normal breathing.

of marks he had observed on the victim's neck, and photographs of the marks on the victim's neck were introduced in evidence. This evidence was more than sufficient to establish that the defendant had his hand on the victim's neck or throat.

Moreover, we are satisfied that there was sufficient evidence presented by the Commonwealth to permit the jury to infer that the defendant's intentional grabbing of the victim's neck interfered with the victim's breathing. Strangulation is achieved by "the intentional interference of the normal breathing or circulation of blood." G. L. c. 265, § 15D (a). Where, as here, the word "interference" is not defined, we ordinarily give the word its usual and accepted meaning, derived "from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions." Commonwealth v. Matta, 483 Mass. 357, 372 (2019). Merriam-Webster's Collegiate Dictionary 652 (2003) defines "interfere" as follows: "to interpose in a way that hinders or impedes." Although the victim never testified directly that her breathing was hindered or impeded, she did demonstrate the actions of the defendant's hand on her neck. Furthermore, the victim described how the defendant, while grabbing her neck and applying pressure, stood her up from the couch, dragged her, and threw her. She testified that when the defendant applied pressure to her neck she felt pain and that she coughed when he

released his hand from her throat. In addition, the defendant's grasping of the victim's neck was with sufficient force to leave marks on her neck. Based on these facts, it was a reasonable inference for the jury to conclude that the defendant interfered with the victim's "normal breathing." G. L. c. 265, § 15D (a).

2. Jury instruction. For the first time on appeal, the defendant raises the claim that the jury instruction requiring proof that the defendant applied substantial pressure on the throat or neck of the victim without defining the phrase "substantial pressure" was inadequate and constituted error, because it left the jury without direction as to the meaning of the phrase "substantial pressure." Because the defendant did not object to the instruction at trial, and did not request a specific instruction, we review any error for a substantial risk of a miscarriage of justice. See Commonwealth v. Richardson, 479 Mass. 344, 353 (2018).

"Trial judges are accorded considerable discretion in framing jury instructions, both in determining the precise phraseology used and the appropriate degree of elaboration." Commonwealth v. Newell, 55 Mass. App. Ct. 119, 131 (2002).

"[I]n assessing the adequacy of the language employed in a jury charge, 'we consider the jury charge as a whole, looking for the interpretation a reasonable juror would place on the judge's words' (citation and quotation omitted). Commonwealth v.

Harbin, 435 Mass. 654, 658 (2002)." Commonwealth v. The Ngoc Tran, 471 Mass. 179, 187 (2015).

The judge provided the jury with the elements of strangulation during his final jury instructions, including that it must be shown that the defendant applied substantial pressure to the victim's throat or neck. Additionally, in response to a question by the jury, the judge reinstructed the jury on the elements of strangulation. During the reinstruction, the judge restated that the Commonwealth must prove that the defendant "appl[ie]d substantial pressure on a throat or neck of the alleged victim" and explained that this element relates to "the type of pressure and the location of the pressure." The final instructions and the reinstruction on the elements of strangulation made it clear to the jury that the substantial pressure on the throat or neck of the victim must be intentional and must interfere with the normal breathing of the victim. We discern no basis to determine that the meaning of the phrase "substantial pressure" is so vague that a reasonable jury would be unable to interpret these words to determine whether the defendant applied substantial pressure to the victim's neck or throat. Accordingly, it was not error for the judge to leave the phrase undefined.

3. Direct examination of victim. Next, the defendant argues that the prosecutor used leading questions and innuendo

to create evidence to fill in gaps in the victim's testimony on the elements of the charge of strangulation. The defendant voiced no objection to any of the questions and the defendant acknowledges that the standard of review is whether any error created a substantial risk of a miscarriage of justice.

The defendant essentially argues that the prosecutor's wording of questions were attempts by the prosecutor to provide evidence to support the elements of strangulation. First, the defendant claims that after the victim testified that the defendant wrapped his hand "totally around" her "jaw line," the prosecutor asked the victim what it felt like when the defendant had his hand around her neck. The defendant claims the prosecutor's question provided evidence that the defendant grabbed the victim's neck and not her jaw line. The defendant also maintains that the prosecutor's asking the victim if any pressure was applied to her neck was error, because the question was leading and was an attempt to show by innuendo that the defendant strangled the victim.

We perceive no attempt on the part of the prosecutor to create evidence by using innuendo or leading questions. Even assuming, without deciding, that these questions somehow suggested the answers to the victim, we fail to see any error,

let alone reversible error.⁵ The prosecutor's questions did not function to put forth the Commonwealth's "version of the events without competent evidence." Commonwealth v. Stewart, 454 Mass. 527, 532 (2009). See Commonwealth v. Capone, 39 Mass. App. Ct. 606, 611 (1996) ("Questioning by innuendo is disfavored when there is no evidence to support it"). It is clear that the victim gave her own testimony without undue suggestion from the questions addressed to her by the prosecutor. The challenged questions on appeal were merely an attempt to elicit admissible evidence from the victim. We discern no error.

4. Prosecutor's closing argument. Finally, the defendant contends that certain unobjected-to statements in the prosecutor's closing argument were errors that created a substantial risk of a miscarriage of justice. In particular, he maintains that the prosecutor improperly argued facts that were not supported by the evidence, specifically (1) that the defendant had his hand around the victim's neck, and (2) that the victim could not breathe.

Although prosecutors are not permitted to "misstate evidence or refer to facts not in evidence in a closing

⁵ "[T]he decision whether to allow leading questions 'should be left for the most part to the wisdom and discretion of the trial judge instead of being restricted by the mechanical operation of inflexible rules'" (citation omitted). Commonwealth v. Flynn, 362 Mass. 455, 467 (1972).

argument," Commonwealth v. Goddard, 476 Mass. 443, 449 (2017), they are entitled to "analyze the evidence and suggest what reasonable inferences the jury should draw from that evidence." Commonwealth v. Grimshaw, 412 Mass. 505, 509 (1992). Here, the prosecutor did just that. As discussed supra, the evidence admitted at trial included the victim stating that the defendant grabbed her by the jaw line, had his hand on her neck, and grabbed her by the throat. As such, the prosecutor's reference to the defendant having his hand around the victim's neck was supported by the evidence. Furthermore, the prosecutor's claim that the victim could not breathe was not improper. The prosecutor's complete statement was: "[The victim] couldn't breathe at that point, I would suggest to you, when [she] tells you she was coughing." "The prosecutor has the right to argue inferences from the evidence favorable to [her] case." Commonwealth v. Donovan, 422 Mass. 349, 357 (1996).

Judgments affirmed.