

NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCRReporter@sjc.state.ma.us

19-P-568

Appeals Court

COMMONWEALTH vs. WILLIAM WHITSON.

No. 19-P-568.

Bristol. March 3, 2020. - July 6, 2020.

Present: Wolohojian, Massing, & Wendlandt, JJ.

Animal. Dog. Practice, Criminal, Instructions to jury, Motion in limine, Required finding. Witness, Refreshment of recollection. Evidence, Present recollection refreshed, Self-defense. Self-Defense. Necessity.

Indictment found and returned in the Superior Court Department on March 2, 2017.

The case was tried before Raymond P. Veary, Jr., J.

James E. Methe for the defendant.
Alysia V. Sanchez, Assistant District Attorney, for the Commonwealth.

WENDLANDT, J. As told by the Commonwealth's witnesses, three year old Smokey (a 110-pound, gray blue-nose pit bull) is a gentle giant. Smokey was stabbed repeatedly by the defendant, William Whitson, outside the defendant's Fall River barbershop.

Smokey survived. After a jury trial in the Superior Court, the defendant was convicted of animal cruelty, pursuant to G. L. c. 272, § 77.

On appeal, the defendant maintains that the trial judge committed structural error when he deviated from the instruction prescribed by the Supreme Judicial Court in Commonwealth v. Russell, 470 Mass. 464, 477 (2015), regarding the Commonwealth's burden to prove guilt beyond a reasonable doubt. In particular, the judge omitted the following portion of the Russell charge defining "moral certainty":

"When we refer to moral certainty, we mean the highest degree of certainty possible in matters relating to human affairs -- based solely on the evidence that has been put before you in this case."

Id. We hold that, in the context of the entire jury charge, which otherwise adhered to Russell and to which the defendant did not object, the error does not mandate reversal. Concluding that the defendant's remaining arguments lack merit, we affirm.

Background. We summarize the evidence in the light most favorable to the Commonwealth. Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979). While on their daily walk, Smokey and his then-owner, Heather Lemieux, passed the defendant's Fall River barbershop. Smokey was well-trained, docile, and leashed. Travis, an unleashed small white Maltese-Cocker Spaniel mixed breed, ran at Smokey and began biting Smokey's ankles; Smokey

responded playfully and was not aggressive. The defendant, who was in his barbershop at the time the canines engaged, responded to calls for assistance from Janine Ainsworth, Travis's owner. The defendant helped separate the dogs, and Travis ran across the street.

The defendant returned briefly to his barbershop. When he came back outside, he grabbed Smokey in a headlock with his left arm. As he held Smokey, the defendant reached into his pocket with his right hand, drew out a knife and flicked it several times to open it. When the knife finally opened, the defendant plunged it repeatedly into Smokey, using his right hand, while restraining Smokey with his left arm. All told, the defendant stabbed Smokey five times.

Smokey slumped down on his side, bleeding profusely. He was transported to a nearby veterinarian urgent care where he was treated for his extensive injuries and massive internal bleeding.

Fall River Police Department officers responded to the scene after receiving several 911 calls. The defendant surrendered the knife to the officers. The knife had a curved tip and no guard; it was covered in hair and blood. The defendant was transported to the hospital for treatment of a laceration on his right hand, running between his thumb and pointer finger. Hospital records report the injury was caused

by a dog bite; the defendant declined treatment. While at the hospital, the defendant was very animated and yelled, "I'm glad I killed the [expletive] dog." As mentioned, Smokey survived.

Defense. At trial, the defense was that the defendant was justified in stabbing Smokey. The defendant alleged that Smokey bit him and that he stabbed Smokey in an effort to free his hand from the dog's grip. No witness testified that Smokey bit the defendant. However, Ainsworth testified that Smokey had been the aggressor in the dogs' altercation; Travis had a small red spot behind his ear that officers found unremarkable. Two other defense witnesses confirmed that Smokey grabbed Travis with his mouth.

Smokey's prior "bad acts." The defendant filed a motion in limine to permit one prior and three subsequent "bad acts" in evidence regarding Smokey. The judge allowed the motion as to Smokey's prior bad act. Specifically, approximately one week prior to Smokey's stabbing, Lemieux and the defendant exchanged hostile words when Lemieux and Smokey were on their daily walk. As Lemieux and Smokey passed the defendant's barbershop, the defendant's dog (also a pit bull) was unleashed and ran outside. He approached Smokey. As the dogs faced off, the defendant came out with a golf club. Lemieux, who was intoxicated and

belligerent,¹ yelled at the defendant and threatened that Smokey would chew the defendant's dog. Smokey was leashed at the time. While the dogs barked at each other, they did not fight. Parts of this altercation were captured on video recordings played for the jury.

Discussion. On appeal, the defendant challenges the jury charge, the sufficiency of the evidence, several evidentiary rulings, the prosecutor's closing argument, and the judge's failure sua sponte to instruct the jury as to the necessity defense. We address each in turn.

1. Jury charge. Although he raised no objection at trial, on appeal the defendant contends that the jury charge, which we set forth in full in the margin,² violated due process. The

¹ Lemieux was under the influence of alcohol during both incidents.

² The judge instructed the jury as follows:

"Furthermore, the Defendant is not to be found guilty of an indictment based on suspicion of [sic] conjecture, but only on the evidence produced and admitted in this courtroom. In a criminal case, the Commonwealth has the burden of proving the Defendant's guilt beyond a reasonable doubt.

"What is proof beyond a reasonable doubt? The term is often used, probably pretty well understood, although not easily defined. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt or proof to a mathematical certainty, for everything in the lives of human beings is open to some possible or imaginary doubt.

instruction deviated from the charge mandated by Russell by omitting language defining "moral certainty" as "the highest degree of certainty possible in matters relating to human affairs -- based solely on the evidence that has been put before you in this case." Russell, 470 Mass. at 477. In Russell, the court modernized the Webster charge, first set forth in 1850, Commonwealth v. Webster, 5 Cush. 295 (1850), in response to criticism that the language was outmoded and archaic and that the use of the phrase "moral certainty" might suggest that "certainty is based on a feeling, i.e., moral conviction, rather than facts" (citation omitted). Russell, supra at 476. See

"A charge is proved beyond a reasonable doubt if, after you have compared and considered all of the evidence, you have in your minds an abiding conviction to a moral certainty that the charge is true. I have told you that every person is presumed to be innocent until he or she is proved guilty and that the burden of proof is on the Commonwealth.

"If you evaluate all of the evidence and you still have a reasonable doubt remaining, the Defendant is entitled to the benefit of that doubt, and he must be acquitted. It is not enough for the Commonwealth to establish a probability, even a strong probability, that the Defendant is more likely than not to be guilty. Probable or likely guilt is not enough. Instead, the evidence must convince you of the Defendant's guilt to a reasonable and moral certainty, a certainty that convinces your understanding and satisfies your judgment as jurors, who are sworn to act conscientiously, on the evidence. That is what we mean when we say proof beyond a reasonable doubt."

id. at 476 n.8. The court exercised its inherent supervisory power "to require a uniform instruction on proof beyond a reasonable doubt that uses more modern language, but preserves the power, efficacy, and essence of the Webster charge." Id. at 477. Given the uniform instruction's mandatory nature, the judge's deviation here was error. We take the opportunity to reiterate the court's caution that "[w]here issues as important as reasonable doubt are concerned, judges would do well to follow approved models." Id. at 475, quoting Commonwealth v. Riley, 433 Mass. 266, 271 n.9 (2001).

Although the deviation from the Russell instruction was error, it does not necessarily follow that the instruction was constitutionally deficient, thus requiring reversal.³ The Constitution requires no "particular form of words" advising the jury of the government's burden of proof, so long as the words chosen "impress[] upon the [fact finder] the need to reach a subjective state of near certitude of the guilt of the accused" (citation omitted). Russell, 470 Mass. at 468, 474. In assessing whether this standard was met, we look at the charge as a whole. See id. at 474.

³ See Commonwealth v. Pinckney, 419 Mass. 341, 342 (1995) ("A constitutionally deficient reasonable doubt instruction amounts to a structural error which defies analysis by harmless error standards").

The judge's instruction met this standard. The jury "specifically were instructed that even a 'strong probability' of the defendant's guilt would not support a conviction." Id. at 472 (considering similar "strong probability" language in holding that instruction met constitutional muster). The jury were also instructed that they must have in their "minds an abiding conviction to a moral certainty that the charge is true" in order to convict. See Commonwealth v. Veiovis, 477 Mass. 472, 490 (2017) ("use of the phrase 'abiding conviction' in conjunction with the moral certainty language does much to alleviate any concerns that the phrase 'moral certainty' might be misunderstood in the abstract" [quotation and citation omitted]). Although the instruction omitted the aforementioned definition of "moral certainty," the judge captured much of the missing instruction at the beginning of his charge, instructing the jury that "the [d]efendant is not to be found guilty of an indictment based on suspicion o[r] conjecture, but only on the evidence produced and admitted in this courtroom." In light of the judge's fidelity to the Russell charge in its other aspects, the totality of the judge's instructions "impress[ed] upon the [jury] the need to reach a subjective state of near certitude of the guilt of the accused" (citation omitted). Russell, 470 Mass. at 474. Because the instruction adequately conveyed the Commonwealth's burden of proof beyond a reasonable doubt, there

was no substantial risk of a miscarriage of justice. See Veiovis, 477 Mass. at 489-490 (omission did not present substantial likelihood of miscarriage of justice where instruction otherwise mirrored Webster charge); Commonwealth v. Gonzalez, 426 Mass. 313, 318 (1997) (analyzing unpreserved objection to reasonable doubt instruction for substantial risk of miscarriage of justice).

2. Sufficiency of evidence. The defendant challenges the sufficiency of the evidence. General Laws c. 272, § 77, provides that "[w]hoever . . . cruelly beats, mutilates or kills an animal . . . shall be punished" Cruelty is "[s]evere pain inflicted upon an animal . . . without any justifiable cause."⁴ Commonwealth v. Zalesky, 74 Mass. App. Ct. 908, 909 (2009), quoting Commonwealth v. Lufkin, 7 Allen 579, 581 (1863). The Commonwealth must prove beyond a reasonable doubt that the defendant "intentionally and knowingly [committed] acts [that] were plainly of a nature to inflict unnecessary pain" (citation omitted). Zalesky, 74 Mass. App. Ct. at 909.

Viewed in the light most favorable to the Commonwealth, Latimore, 378 Mass. at 676-677, the defendant inflicted severe

⁴ While the parties both employ the term "self-defense" in describing the defense theory that Smokey was the aggressor, the claim is more properly described as falling within the Commonwealth's burden of showing that the defendant's stabbing was "without any justifiable cause."

pain on Smokey without justification. Specifically, after he separated the two canines, the defendant returned to his barbershop, came back outside, grabbed Smokey in a chokehold with his left arm, made several attempts to open his knife and then plunged it five times deeply into Smokey. See, e.g., Commonwealth v. Daly, 90 Mass. App. Ct. 48, 54 (2016) (once defendant obtained control of small animal, any justification to act in manner that would inflict further pain on dog evaporated). Following the incident, the defendant stated, "I'm glad I killed the [expletive] dog." There were medical records that reported the defendant's right hand laceration was due to a "dog bite"; but, a reasonable jury could conclude, based inter alia on the knife itself and the location of the injury on the defendant's right hand, that the injury was caused by the defendant cutting himself as he used the knife with his right hand.⁵ See Commonwealth v. Walker, 401 Mass. 338, 343 (1987) (jury free to disbelieve defendant's version).

To be sure, the defense witnesses offered a competing narrative of Smokey as the aggressor in the fight with Travis;⁶

⁵ Indeed, it is difficult to figure the physics required to free his right hand from Smokey's jaw while simultaneously using the same hand to plunge a knife into Smokey five distinct times.

⁶ Contrary to the defendant's argument, the judge's statements during sentencing, lamenting the failure of both Lemieux and Ainsworth to control their dogs, do not alter our analysis. The test for sufficiency of the evidence requires

however, none testified that Smokey bit the defendant, and perforce none supported the narrative that the defendant stabbed Smokey to release the bite. The Commonwealth's case did not deteriorate.⁷ See Kater v. Commonwealth, 421 Mass. 17, 20 (1995) ("Deterioration would occur not because the defendant contradicted the Commonwealth's evidence . . . but because evidence for the Commonwealth necessary to warrant submission of the case to the jury is later shown to be incredible or conclusively incorrect"). See also Jackson v. Virginia, 443 U.S. 307, 319 (1979) (it is "the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts").

3. Evidentiary rulings. The defendant also contends that the judge abused his discretion in denying the defendant's

viewing the evidence in the light most favorable to the Commonwealth. Latimore, 378 Mass. at 676-677.

⁷ The defendant also claims that Smokey's stabbing was justified under G. L. c. 140, § 156, which provides, in pertinent part: "any person may kill a dog . . . not under [its owner's] immediate care in the act of . . . wounding . . . persons" Viewed in the light most favorable to the Commonwealth, the evidence was that (i) Smokey was leashed and under Lemieux's control, (ii) Smokey was in a tussle with another dog, not a person, and (iii) the defendant's wound was not from a bite, but self-inflicted as he stabbed Smokey. Thus, even if the statute had been presented at trial (and it was not), the evidence would permit a reasonable jury to find the essential elements of the crime nonetheless.

request to admit evidence regarding Smokey's subsequent bad acts, to refresh a witness's recollection with a 911 call, and to confront a different witness regarding a separate 911 call that the witness claimed he did not place.

a. Subsequent bad acts. As set forth supra, the judge allowed the defendant's motion in limine insofar as it concerned Smokey's prior conduct, occurring one week before the stabbing at issue here. On appeal, he maintains that the judge erred in denying his motion regarding Smokey's subsequent "bad acts," which he argues were relevant to the issue whether Smokey was the initial aggressor, thereby justifying the defendant's stabbing. We review the judge's ruling on the defendant's motion in limine for an abuse of discretion. See Commonwealth v. Spencer, 465 Mass. 32, 48 (2013) ("Whether proffered evidence is relevant and whether its probative value is substantially outweighed by its prejudicial effect are matters entrusted to the trial judge's broad discretion and are not disturbed absent palpable error" [quotation and citation omitted]).

The proffered evidence concerned three incidents, occurring respectively approximately eight, ten, and eleven months after Smokey was stabbed by the defendant. In ruling that the subsequent acts would not be admitted, the judge expressed concern about the remote nature of these incidents in view of the potential role of the stabbing itself on Smokey's subsequent

conduct. The reports concerning the latter two incidents do not identify Smokey as the aggressor and thus had limited, if any, probative value.

Moreover, much of the proffered evidence was inadmissible hearsay, and the defendant does not argue that it was subject to any exception.⁸ See Commonwealth v. Rice, 441 Mass. 291, 305 (2004). Even assuming arguendo that subsequent acts of a canine (as opposed to prior acts of a human victim) are admissible under the principle set forth in Commonwealth v. Adjutant, 443 Mass. 649, 660 (2005) (holding that judge has discretion to allow evidence of victim's prior bad acts "for the limited purpose of supporting the defendant's self-defense claim that the victim was the first aggressor"), on this record, the judge did not abuse his discretion. See id. at 663.

b. Refreshing recollection. The defendant maintains that the judge erred when he denied the defendant's request to refresh Officer William Platt's memory by playing a call that Platt had placed to dispatch on the day of the incident in which he stated, "I have a male that was bitten by a pit bull in his hand." We review for an abuse of discretion. See Commonwealth

⁸ Three of the proffered documents were incident reports from the Fall River Animal Control unit, and a fourth was a letter from the Animal Control supervisor, each containing statements of witnesses to the alleged misconduct.

v. McGee, 469 Mass. 1, 14 (2014). The brief exchange⁹ between trial counsel and the witness failed to demonstrate that the witness's memory had been exhausted. See Commonwealth v. Woodbine, 461 Mass. 720, 731-732 (2012) ("In the ordinary circumstance, where a witness has been questioned on the stand and is unable to recall the subject of that questioning, the witness must state that his or her memory is exhausted before counsel may, in the presence of the jury, seek to refresh the witness's memory by means of a document. In this way, the jury have been made aware of the limitations of the witness's memory

⁹ The exchange between defense counsel and the officer was as follows:

Q.: "Okay. And when you asked for the rescue, did someone respond to you?"

A.: "There was a rescue that responded to our scene."

Q.: "Okay. But the other person on the other side of your mic?"

A.: "Oh, dispatch?"

Q.: "Yes."

A.: "They -- yeah, they would have."

Q.: "Okay. They ask you why you wanted rescue?"

A.: "Nature of the injury, maybe, possibly."

Q.: "Did you tell them?"

A.: "I believe -- if I did, yeah, maybe."

and the areas that could not initially be recalled, and they see that the witness has reviewed a document before asserting that he now has a memory"). Accordingly, there was no abuse of discretion in prohibiting defense counsel from using the call to refresh the witness's recollection.

c. Anonymous 911 call. The defendant argues that the judge abused his discretion by denying defense counsel's request to play a 911 call for a witness whom counsel believed to be the caller. The witness testified that he did not place a call to 911. The record is murky, at best, as to whether the prosecutor stipulated to the authenticity of the 911 call and whether the judge allowed counsel to conduct a voir dire of the witness to establish the call's authenticity. Regardless, the statements in the 911 call were inadmissible hearsay,¹⁰ which the defendant has not shown to fall within any exception. See Rice, 441 Mass. at 305.

4. Closing argument. The defendant maintains that the prosecutor's closing argument created a substantial risk of a miscarriage of justice. In particular, he asserts that there was no evidentiary basis for the prosecutor's argument that the

¹⁰ The defendant sought to admit the call for the truth of the matter asserted. The unidentified caller stated, "[T]he pit bull attacked a dog and then a lady and then a guy came out because he wouldn't release, he stabbed the dog."

defendant's hand injury was caused by the knife.¹¹ The prosecutor's statement was a fair inference from the evidence, which included testimony that the injury on the defendant's right hand was a straight line cut (as opposed to multiple puncture wounds that might be expected from a dog bite), the knife was curved and lacked any guard to protect the defendant's hand from slipping, and the defendant had Smokey in a headlock with his left arm as he flicked the knife repeatedly with his right hand to open it. See Commonwealth v. Simpson, 434 Mass. 570, 585 (2001).

5. Necessity defense. The defendant maintains that the judge should have given sua sponte an instruction on the necessity defense. Because the defendant did not request such an instruction, we review for a substantial risk of a miscarriage of justice. See Commonwealth v. Foster, 48 Mass. App. Ct. 671, 678 (2000). The judge instructed the jury that the Commonwealth needed to prove that the defendant's actions were not taken in defense of himself or another, Travis. These instructions allowed the jury to consider the defendant's

¹¹ The defendant also challenges the prosecutor's statement, "[A]ccording to Mr. Whitson, a single tooth or a single small area of that dog happened to bypass his thumb, pointer finger, and get right into the area in between." This was a rhetorical statement not likely to induce the jury to believe that the defendant made the statement. See Commonwealth v. Beauchamp, 424 Mass. 682, 691 (1997).

personal state of mind whereas the defense of necessity¹² focuses on an objective balancing test that "justifies violation of the law under circumstances where unlawful acts are necessary to prevent far greater harm than would result from compliance with the law." Commonwealth v. Pike, 53 Mass. App. Ct. 757, 762 n.6 (2002). The jury found that the Commonwealth proved beyond a reasonable doubt that the defendant stabbed Smokey five times without proper justification under these more generous instructions. On this record, there was no substantial risk of a miscarriage of justice. See Foster, 48 Mass. App. Ct. at 679.

Judgment affirmed.

¹² In order to be entitled to a necessity defense, the defendant must present some evidence on each of the following circumstances: "(1) the defendant is faced with a clear and imminent danger, not one which is debatable or speculative; (2) the defendant can reasonably expect that his [or her] action will be effective as the direct cause of abating the danger; (3) there is [no] legal alternative which will be effective in abating the danger; and (4) the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue" (citation omitted). Commonwealth v. Hutchins, 410 Mass. 726, 730 (1991).