19-P-1487 Appeals Court

COMMONWEALTH vs. PAUL FAHEY.

No. 19-P-1487.

Norfolk. December 11, 2020. - March 15, 2021.

Present: Vuono, Milkey, & Ditkoff, JJ.

Homicide. Practice, Criminal, Cross-examination by prosecutor, Argument by prosecutor, Conduct of prosecutor. Malice. Evidence, Cross-examination.

Indictments found and returned in the Superior Court Department on May 27, 2015.

The cases were tried before Thomas A. Connors, J.

Barbara A. Munro for the defendant.
Michael McGee, Assistant District Attorney, for the Commonwealth.

MILKEY, J. The defendant and the victim, Keith Boudreau, did not know each other. By happenstance, they both were at the Home Ice Sports Bar (Home Ice) in the city of Quincy on the night of March 23, 2015. There, the defendant punched Boudreau in the head, causing him to fall to the bar's tiled floor. The defendant then stomped on Boudreau while he was lying on the

floor and, eleven days later, Boudreau died of a head injury. The defendant was indicted for murder in the first degree, and a Superior Court jury found him guilty of murder in the second degree. On appeal, he argues, among other things, that the evidence was sufficient to convict him only of manslaughter, not murder. We disagree. However, we agree with the defendant that a new trial is warranted based on the cumulative effect of the prosecutor's improper cross-examination and inflammatory closing argument. We therefore vacate the conviction.

Background. We summarize the trial testimony and other evidence, reserving certain details for later discussion. At 2 P.M. on the date in question, Boudreau was at a bar "around the corner" from Home Ice, celebrating his fiancée's birthday. At one point, his fiancée's brother, Erik Manley -- while seated in his wheelchair -- hit Boudreau by either slapping him in the jaw or punching him in the nose. Eventually, Boudreau was escorted out of the bar, and he and his fiancée went to Home Ice. While drinking at Home Ice, Boudreau began arguing with his fiancée to the point that they were asked to leave that bar as well. The defendant and his girlfriend were present when Boudreau was asked to leave, but they did not interact with him.

A half-hour or so later, Boudreau came back to Home Ice alone. At that time, the defendant and his girlfriend were seated at the bar counter, drinking beer. Boudreau, who was

exhibiting signs of intoxication, stood directly over the defendant's shoulder, asking if anyone had seen his fiancée. There was evidence that Boudreau was staring at the defendant or the defendant's girlfriend, either directly or as reflected in the mirror behind the bar counter. The defendant then -- seemingly "out of the blue" -- punched Boudreau in the side of the head, causing him to fall and to hit his head on the tiled floor. At this point, the bartender heard the defendant say "something about [Boudreau's] staring at him and that he was sick of the junkies in Quincy."[1] The defendant approached the now-prone Boudreau and stomped once with his foot. It was uncontested that, at the time, the defendant weighed well more than 200 pounds and was wearing heavy work boots that had a patterned sole. One witness, Home Ice's owner, Gerard DeLuca, testified that he saw the boot come down on the side of Boudreau's head. The other witnesses saw the defendant stomp, but they did not see what part of Boudreau's body, if any, was hit. The witnesses at the scene described the sound that the boot made when it came down as a "thud" or a "crack."

According to DeLuca, after the incident, the defendant told him not to call 911 and to "keep [his] mouth shut." DeLuca then helped the defendant drag Boudreau's unconscious body through

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[1] There was no evidence that Boudreau was in fact a drug user.

Home Ice's kitchen to a rear parking area. At some point, Boudreau vomited, but he otherwise was "motionless." The defendant splashed some water on Boudreau's face, but Boudreau did not regain consciousness.

The defendant then left Home Ice, but he paused just outside the bar to speak with another bar patron and a passing friend, Patrick Dugan. Dugan testified that during this conversation, the defendant acted out what just had occurred inside Home Ice, and admitted that he both punched "a guy staring at him" and "stepped on him." The interaction among the defendant, Dugan, and the third person was also captured on a video surveillance camera, albeit without sound. The video recording corroborated Dugan's testimony by showing the defendant at one point using his left fist to reenact the punch that had felled Boudreau. Moreover, as the defendant was leaving the conversation to get into a car, he can be seen apparently stomping his foot on the ground. The defendant ultimately left and stopped "at another bar and had a quick drink . . . to calm [his] nerves."

After the defendant left Home Ice, DeLuca called 911. He reported that Boudreau was intoxicated, and did not say anything about the altercation. Paramedics took Boudreau to a local emergency room in Quincy. The attending nurse observed that Boudreau appeared to be intoxicated; she did not see external

signs of trauma to Boudreau's head other than some dried blood around his nostrils. However, when Boudreau's condition did not improve after about one and one-half hours, the nurse suspected that Boudreau had suffered a serious head injury. A computer assisted tomography (CAT) scan revealed bleeding inside Boudreau's head. Boudreau was rushed to Massachusetts General Hospital, where surgery was performed. Boudreau died eleven days later.

A medical examiner, Dr. Robert Welton, conducted the autopsy and opined that the cause of death was "blunt force injury of the head." He explained that the fatal head injury could have been caused by a "punch to the head," by "somebody striking a hard surface on the floor," or "by a boot." The medical examiner also testified that it was "unlikely" that the injury was caused by a "slap to [Boudreau's] jaw." When he examined Boudreau's body, the medical examiner did not "see any visible external injuries on his head," including any "bruising," "scraping," or "swelling" (with the exception of around the incision from the surgery). When asked on cross-examination, "[I]f someone were to stomp on someone's head with a heavy work boot with a pattern, it's likely that there could be some visible external injuries; correct?" the medical examiner answered, "Potentially, yes." On redirect examination, he subsequently added that a boot that came down on someone's

head "without any lateral movement" would "[n]ot always" leave external injuries. The medical examiner did mention, albeit in passing, that "[t]here was some contusions on the torso of [Boudreau's] body."

The defendant testified on his own behalf and admitted that he punched Boudreau on the right side of Boudreau's face with his left hand. He denied that he stomped on Boudreau's head.[2] The defendant claimed that he made a split-second decision to punch Boudreau out of fear that Boudreau was about to attack him. He described how Boudreau, who had been staring at him and had one hand in his pocket, made a sudden movement toward him. There was no evidence to corroborate the defendant's claim that Boudreau had made a sudden movement toward him and, ultimately, the jury found that the defendant had not acted in self-defense and convicted him of murder in the second degree. The jury acquitted the defendant of a witness intimidation charge based on his comments to DeLuca.

Discussion. 1. Sufficiency. The defendant argues that the evidence was insufficient to support a conviction of murder in the second degree. We disagree. A conviction of murder in

[2] The defendant suggested that eyewitnesses may have seen him raise his leg to step over a chair that had fallen during the melee. He also testified that it was the falling chair that made a "thud." None of the other witnesses testified to a chair falling during the incident.

the second degree requires proof, beyond a reasonable doubt, that a defendant committed an unlawful killing with "malice." Commonwealth v. Earle, 458 Mass. 341, 346 (2010). Malice, in turn, can be demonstrated in any of three ways: "(1) the defendant intended to cause the victim's death; (2) the defendant intended to cause grievous bodily harm to the victim; or (3) the defendant committed an intentional act which, in the circumstances known to the defendant, a reasonable person would have understood created a plain and strong likelihood of death." Id.

Viewed in the light most favorable to the Commonwealth, see Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979), the evidence established that, without any provocation, the defendant first punched Boudreau on the side of the head, and then stomped on his head as he lay unconscious on the floor. This evidence was sufficient for a jury to find, beyond a reasonable doubt, that the defendant unlawfully killed Boudreau and did so with malice.

The defendant argues that jurors could not find beyond a reasonable doubt that he caused Boudreau's death, because it is possible that Boudreau died from the injury he sustained earlier in the day when he was struck by Manley. However, the evidence, viewed in the light most favorable to the Commonwealth, established that Manley only slapped Boudreau in the jaw, rather

than punched him in the nose. As noted, the medical examiner stated his opinion that it was "unlikely" that a "slap to the jaw" caused Boudreau's internal bleeding. In any event, the fact that the medical examiner acknowledged the theoretical possibility that Manley's hitting Boudreau might have caused his death did not preclude the jury from finding that the defendant's actions were the proximate cause of the death. See Commonwealth v. McLeod, 394 Mass. 727, 746-748, cert. denied sub nom. Aiello v. Massachusetts, 474 U.S. 919 (1985) (even where Commonwealth's expert was unable to say whether victim died from blows inflicted by defendant or those inflicted by others, there was sufficient over-all evidence to support jury's finding that defendant's actions were proximate cause). See also Commonwealth v. Rhodes, 482 Mass. 823, 825, 829 (2019) (even in face of conflicting expert testimony whether victim would have died from defendant's slamming her head onto concrete floor, had she not subsequently been run over by tow truck, "the jury would have been justified in finding that the defendant's actions caused the victim's death").

Next, the defendant argues that the evidence was insufficient because it was not definitively established whether Boudreau's death was caused by the defendant's punching his head (either by the punch itself, or by Boudreau's hitting his head on the floor as a result of the punch), or instead by the

defendant's subsequently stomping on Boudreau's head with a heavy work boot. The defendant argues that if it was the punch that killed Boudreau, then, as a matter of law, this could not support a finding that he (the defendant) acted with the requisite malice because of the inherent unlikelihood that a single punch would kill an otherwise healthy person.

We are skeptical about the defendant's premise that -- as a matter of law -- a jury could not find beyond a reasonable doubt that a defendant who killed someone with a single punch had acted with malice.[3] We need not resolve that issue here, however, because the evidence of injury did not consist solely of a single punch. Rather, the jury reasonably could have found that after knocking Boudreau unconscious, the defendant, a heavy

[3] The defendant cites several cases that recognize that where a defendant killed someone with a punch, such facts can support a charge of manslaughter. See Commonwealth v. Sheppard, 404 Mass. 774, 777 (1989); Commonwealth v. Mahnke, 368 Mass. 662, 701-702 (1975), cert. denied, 425 U.S. 959 (1976); Commonwealth v. Fox, 7 Gray 585, 588 (1856); Commonwealth v. Hadley, 78 Mass. App. Ct. 405, 408-409 (2010). Those cases provide little help to the defendant, however. Sheppard and Hadley did not address whether such facts could also have supported a guilty finding of murder. The court's conclusion in Mahnke, supra at 702, that the defendant felt no malice relied in part on the "almost-reflexive" nature of the attack, a circumstance missing here. Finally, leaving aside Fox's age, the court in that case made clear that regardless of the killer's methods, "[t]he real question is, whether the circumstances of the homicide are such as to satisfy the jury that the party charged acted from an unlawful and evil design with an intent to do grievous bodily harm, and that his acts were of a nature calculated to endanger life." Fox, supra.

man wearing heavy boots, stomped on Boudreau's head while it lay against the tiled floor. Such actions unquestionably are sufficient to support a finding that the defendant acted with malice. See Commonwealth v. Costa, 18 Mass. App. Ct. 956, 957 (1984) ("evidence that the victim's death was caused by multiple blunt trauma inflicted with deliberate force upon the victim[] . . . together with the evidence that the defendant slapped the victim, wrestled with her and kicked her several times with his booted foot, was sufficient to permit a jury . . . to infer the existence of all the elements of second degree murder beyond a reasonable doubt"). Cf. Commonwealth v. Lopez, 80 Mass. App. Ct. 390, 395-396 (2011) (on review of dismissed indictment for felony-murder, finding that "sucker punch" of particularly vulnerable victim was committed with conscious disregard for life). In short, there was ample evidence for the jury to find that Boudreau died as a direct result of two blows that the defendant inflicted in short succession and with malice. Nothing more was required. See Costa, supra.

2. Prosecutorial misconduct. The defendant argues that certain questions posed by the prosecutor during cross-examination and certain comments made by the prosecutor during his closing argument were so improper that the defendant is entitled to a new trial even though these claims of error

largely were not preserved. We address each claim in turn before examining whether any errors collectively created a substantial risk of a miscarriage of justice. See Commonwealth v. Alphas, 430 Mass. 8, 13 (1999).

a. Cross-examination of the defendant. As a general matter, trial attorneys are allowed to pursue vigorous cross-examination. However, there are limits. First, it ordinarily is improper for a prosecutor to suggest that a defendant "tailored" his testimony to conform with the evidence he heard at trial. Commonwealth v. Martinez, 431 Mass. 168, 177 & n.9 (2000), quoting Commonwealth v. Person, 400 Mass. 136, 139 (1987). Second, "[i]t is a fundamental principle that 'a witness cannot be asked to assess the credibility of his testimony or that of other witnesses.'" Commonwealth v. Triplett, 398 Mass. 561, 567 (1986), quoting Commonwealth v. Dickinson, 394 Mass. 702, 706 (1985). Third, a prosecutor may not ask a defendant a question for which the prosecutor cannot reasonably expect the defendant to provide an affirmative answer in order "to communicate an impression . . . by innuendo." Commonwealth v. Fordham, 417 Mass. 10, 20-21 (1994). Fourth, it is generally "error for the prosecutor to cross-examine the defendant about his failure to contact police and tell them about his alleged self-defense before his arrest." Commonwealth v. Gardner, 479 Mass. 764, 770 (2018). Finally, a prosecutor

may not subject a defendant to questions that serve "merely to harass, annoy or humiliate." Commonwealth v. Murphy, 57 Mass. App. Ct. 586, 589 (2003), quoting Commonwealth v. Johnson, 431 Mass. 535, 540 (2000). A prosecutor's staying within such boundaries helps to ensure that a defendant receives a fair trial in which the jury dispassionately determine his or her guilt or innocence based on the objective facts. See Murphy, supra at 589-590.

Here, the prosecutor's questions went beyond proper cross-examination in all of the ways described above. For example, the prosecutor asked the defendant to comment on the veracity of other witnesses and suggested that the defendant was tailoring his testimony to that of the other witnesses. In challenging the defendant's testimony on direct that a chair had tipped over during the melee and caused a "thud," the prosecutor asked, "So, you're telling the truth and no one else is?" After the defendant answered, "Absolutely," the prosecutor then asked, "And convenient that it made a thud as two other witnesses described last week; is it not?"

In addition, the prosecutor improperly posed numerous rhetorical questions that assumed a factual premise that the prosecutor knew the defendant denied. For example, the prosecutor asked, "Now, what did it sound like, Mr. Fahey, when you drove this boot down on Mr. Boudreau's head? What did it

sound like?" After the defendant responded that "[i]t didn't sound like anything," the prosecutor asked, "Was it a crack like Mr. DeLuca described?" That follow-up question drew an objection that was sustained but, undeterred, the prosecutor next asked, "Did it sound like a thud like [the bartender] described?" No objection was lodged, and the defendant answered, "No."

The prosecutor asked additional rhetorical questions to badger the defendant, such as, "When . . . did you make the decision you had to kill Mr. Boudreau?" Trial counsel objected, and the objection was sustained. But, again, the prosecutor was not deterred, asking next, "When [Boudreau] was there, with [his fiancée], at that table over there and you were looking over at them, did you say to yourself, aw, I'm going to take this guy out that night?" In fact, over the course of his cross-examination, the prosecutor asked some version of that question twelve times. The prosecutor also asked the defendant if he "underst[oo]d how unbelievable [his testimony] sounds," and queried the defendant whether he really was "going to stick to [his] story." The prosecutor also prodded the defendant to admit that he did not call 911 because "[he] didn't want the police there," thereby improperly questioning him about his failure to contact the police. See Gardner, 479 Mass. at 770-773.

A final improper question came at the beginning of the prosecutor's recross-examination. At the conclusion of redirect examination, the defendant stated how "horrible" he felt about Boudreau's death and how the date of the incident was "the wors[t] day of [his] life." The prosecutor immediately asked, "How often did you rehearse that line, Mr. Fahey?"

b. Closing argument. The prosecutor also made numerous improper remarks during his closing argument. The over-all theme of the closing was that the defendant was a "cowardly bully" who had "victimize[d] a more vulnerable person[,] . . . a forty-two year old father of two." In fact, during the course of his closing, the prosecutor labeled the defendant a "bully" thirteen times. "It is improper for a prosecutor to use insulting names designed to evoke an emotional, rather than a rational, response from jurors." Commonwealth v. Lewis, 465 Mass. 119, 129-130, 132-133 (2013) (convictions reversed in part because prosecutor repeatedly referred to defendant as "street thug[]" in closing). See Commonwealth v. Rosario, 430 Mass. 505, 515 (1999) (calling defendant "monster" was "wholly inappropriate and should not have occurred").[4] The Commonwealth argues that it is unlikely that the prosecutor's calling the

[4] The Massachusetts Guide to Evidence provides a succinct summary of the boundaries of proper closing argument. Mass. G. Evid. § 1113(b) & note (2021).

defendant a bully had an inflammatory effect because the prosecutor's use of the term was supported by the evidence.[5] This argument misses the mark. The problem with such name-calling is not whether the labels are accurate, but instead is whether it amounts to an improper appeal for sympathy that risks "obscur[ing] 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. Bois, 476 Mass. 15, 34 (2016), quoting Commonwealth v. Santiago, 425 Mass. 491, 501 (1997), S.C., 427 Mass. 298, and 428 Mass. 39 (1998).

The problem with the prosecutor's focus on portraying the defendant as a bully was exacerbated at the conclusion of the closing when the prosecutor displayed photographs of the defendant and the victim to the jury. The photograph of the defendant was his booking photograph; unsurprisingly, that mugshot portrayed him in a particularly unflattering light. By contrast, the photograph of Boudreau was an exceptionally flattering close-up of his face that depicted him smiling. When Boudreau's mother was asked to identify the man in the

[5] In fact, at the time of the incident, the defendant was wearing a hat that included the word "bully" on it.

photograph, she said that the person was her "beautiful son."[6] To be sure, despite their limited probative value, the photographs had been admitted in evidence, and it is generally acceptable to refer to and display exhibits during closing argument.[7] Nevertheless, we agree with the defendant that by asking the jury to draw a contrast between the photograph of the "bully" and the curated photograph of the vulnerable victim, the prosecutor improperly sought to invoke the sympathy of the jury.

The prosecutor also crossed the line by excessively mocking the defendant's defense. For example, he urged the jury to "cast aside this ridiculous, ridiculous notion that the defendant did not stomp on Mr. Boudreau's head." Although a

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[6] Boudreau's mother testified about her son's education and employment, the children he left behind, how she learned of the incident, how she felt both when she first saw her son's condition and as his condition deteriorated (when he could not even squeeze her hand), and the painful choices the family faced with regard to his medical treatment. The defendant lodged objections at a few points -- such as when the mother started to testify about the "torturous" procedures being used to test her son's tolerance to pain -- and the objections were largely sustained.

[7] The photograph of Boudreau was the subject of a pretrial motion in limine in which the Commonwealth argued that it was entitled to introduce the photograph to "humanize the proceedings" (citation omitted). Commonwealth v. Degro, 432 Mass. 319, 323 (2000). The judge allowed the motion after the defendant stated that he had no objection to it. The mugshot was not the subject of a pretrial motion in limine, and the defendant did not object to its admission. Although the identity of Boudreau's attacker was never in dispute, the Commonwealth maintains that the defendant's photograph was probative of his appearance at the time of the incident.

prosecutor is free to marshal the evidence in the Commonwealth's favor and to explain why the defendant's arguments are unfounded, he should avoid mocking such arguments with the type of excessive rhetoric employed here. See Commonwealth v. McCravy, 430 Mass. 758, 765 (2000) (improper, and "particularly disturbing," for prosecutor to label entire defense "sham").

c. Prejudice. The defendant did not object to most of the instances of prosecutorial misconduct that he now claims collectively warrant a new trial.[8] Our review therefore is limited to whether the errors created a substantial risk of a miscarriage of justice. Commonwealth v. Cancel, 394 Mass. 567, 576 (1985). See Commonwealth v. Dirgo, 474 Mass. 1012, 1016 (2016); Alphas, 430 Mass. at 13. For the reasons that follow, "[b]ecause we are left with a serious doubt whether the result of the trial might have been different had the prosecutor's errors in [cross-examination and] closing argument not been made, we conclude that there was a substantial risk of a miscarriage of justice." Dirgo, supra at 1017.

[8] As noted, the defendant did raise some objections to the prosecutor's cross-examination, all of which were sustained. The defendant now suggests that his failure to lodge further objections should be excused given that his objections, while sustained, did nothing to curb the prosecutor's abuses. Because we find a substantial risk of a miscarriage of justice in any event, we pass over that issue. As to the prosecutor's problematic closing, it is undisputed that the defendant failed to raise any objections.

This is not a case where the prosecutor's missteps were subtle or isolated. Contrast Commonwealth v. Springer, 49 Mass. App. Ct. 469, 470, 478 (2000) (no substantial risk of miscarriage of justice in case of murder in second degree, where impermissible "reference 'was a vague and fleeting comment'" [citation omitted]). Rather, the problems were pervasive, and many were egregious. Of course, that alone does not necessarily mean that such errors warrant a new trial, especially where, as here, we are limited to reviewing whether the errors created a substantial risk of a miscarriage of justice. As the Supreme Judicial Court has observed, "even grossly improper statements by a prosecutor will not require a new trial when the evidence of guilt is overwhelming." McCravy, 430 Mass. at 765. Cf. Commonwealth v. Pierre, 486 Mass. 418, 434-435 (2020) (multiple errors by prosecutor in murder in first degree case did not create substantial likelihood of miscarriage of justice in light of strength of Commonwealth's evidence).

The Commonwealth appropriately acknowledges that the prosecutor committed a number of errors, but urges us to affirm based on the strength of the evidence. However, the Commonwealth's murder case rested primarily on the theory that the defendant killed Boudreau by stomping on his head. While the evidence that the defendant punched Boudreau and caused him to hit the floor was overwhelming, the evidence that the

defendant stomped specifically on Boudreau's head was not. Only one witness, DeLuca, claimed to have seen the defendant stomp on Boudreau's head, and Deluca previously told police and testified in the grand jury that he was standing behind the bar counter during the incident and did not see where the defendant's foot landed because the bar counter blocked his view.[9] Moreover, although the medical examiner observed some contusions on Boudreau's torso, he did not see any marks on Boudreau's head that were consistent with being stomped there with a heavy work boot.

For these reasons, proof that the defendant had stomped on Boudreau's head was less than overwhelming, and such proof was critical for demonstrating that the defendant acted with the requisite malice to support a conviction of murder in the second degree. Given these circumstances, we are not confident that the jury's verdict would have been the same in the absence of these serious errors.[10]

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[9] DeLuca's earlier statement that the bar counter blocked his view was consistent with the testimony of the bartender, who testified that the bar counter obscured her view. The record suggests several other reasons why the jury could have viewed DeLuca's testimony with skepticism, which we do not enumerate here.

[10] We recognize that the judge provided the standard jury instructions that closing arguments are not a substitute for evidence and told the jurors not to be swayed by appeals to sympathy or emotion. However, "not all errors can be cured by providing proper instructions." Commonwealth v. Niemic, 483

Conclusion. We therefore conclude that these errors created a substantial risk of a miscarriage of justice and that the defendant is entitled to a new trial with respect to the charge of murder in the second degree. See Alphas, 430 Mass. at 13 (error deemed to create substantial risk of miscarriage of justice unless reviewing court is "persuaded that it did not 'materially influence[]' the guilty verdict" [citation omitted]).[11] Accordingly, we vacate the judgment and set aside the verdict.

So ordered.

Mass. 571, 596-597 (2019) (reversing murder in first degree conviction based on multiple improprieties in prosecutor's closing argument even though specific curative instructions had been provided as to those errors to which defendant objected, and standard instructions were generally provided), and cases cited. Indeed, while "[i]t is reasonable for us to be confident that in most cases limiting instructions accomplish their intended purpose," where the potential for unfair prejudice is sufficiently high, appellate courts "have a duty to be skeptical as to the effectiveness of limiting instructions." Commonwealth v. DiMarzo, 364 Mass. 669, 681 (1974).

[11] As the defendant is entitled to a new trial, and the defendant's remaining arguments are unlikely to arise again, at least in their current form, we need not address them here.