SJC-12717

COMMONWEALTH vs. JAMES WITKOWSKI.

Suffolk. January 8, 2021. - June 18, 2021.

Present: Budd, C.J., Gaziano, Lowy, Wendlandt, & Georges, JJ.

Homicide. Felony-Murder Rule. Rape. Practice, Criminal, Argument by prosecutor, Instructions to jury, Question by jury, Capital case.

Indictment found and returned in the Superior Court Department on October 1, 2015.

The case was tried before Mitchell H. Kaplan, J.

Theodore F. Riordan for the defendant.
Cailin M. Campbell, Assistant District Attorney, for the Commonwealth.

GAZIANO, J. In 2017, the defendant was convicted of murder in the first degree, on a theory of felony-murder, with aggravated rape as the predicate felony. The victim, Lena Bruce, was found dead in her Boston apartment in 1992; the case went unsolved until the defendant became a suspect in 2015 on the basis of deoxyribonucleic acid (DNA) evidence. In his

direct appeal, the defendant raises issues concerning the sufficiency of the evidence to support a conviction of felony-murder; the propriety of certain statements in the prosecutor's closing argument; the wording of a Tuey-Rodriquez charge;[1] and the judge's answer to a jury question. We affirm the conviction and discern no reason to exercise our authority under G. L. c. 278, § 33E, to reduce the verdict or to order a new trial.

1. Background. We recite the facts the jury could have found, viewing the evidence in the light most favorable to the Commonwealth, see Commonwealth v. Copeland, 481 Mass. 255, 256 (2019), and reserving some details for later discussion of specific issues.

a. Circumstances of the victim's death. At the beginning of June 1992, the victim, who had just graduated from college, moved into a new apartment in Boston with her friend Barbra Eden. Eden left the city for a weekend trip on the evening of Friday, July 10, 1992, returning on Sunday, July 12, 1992, at around 8 P.M. When Eden entered the apartment on her return, she found that it had been ransacked. Soda cans, a beer bottle, empty glasses, and half-eaten fruit had been left lying around. A television set and an answering machine were missing, and an

[1] See Commonwealth v. Rodriquez, 364 Mass. 87, 101-102 (1973) (Appendix A); Commonwealth v. Tuey, 8 Cush. 1, 2-3 (1851).

intercom that allowed communication with someone at the front door had been ripped from the wall. Although the door to the apartment was locked, a window leading onto a fire escape overlooking a back alleyway was open. The victim was lying face down on her bed, dead. She was naked below the waist, and her hands were tied behind her back with a telephone cord. The cause of death later was determined to be suffocation.

Of the witnesses who testified at trial, Eden was the last to have seen the victim alive, on Friday evening before Eden's departure from Boston. Joe Sullivan, a friend of the victim, testified that he had spoken with her by telephone on Friday evening and on Saturday at around 1:30 P.M. The victim agreed to call him back that evening but did not. Laurence Grant, the man whom the victim was dating at the time of her death, testified that he had called the victim's apartment several times on Sunday, beginning in the morning, and got no answer; he noted that it was unusual that the answering machine had not "picked up" if no one was home.

b. Investigation. Decomposition of the victim's body suggested that at least one day had elapsed between the time of her death and the autopsy, which was conducted in the early morning hours of Monday, July 13, 1992. A high number of intact sperm cells were detected on a vaginal swab taken at that time; semen was not detected on oral or anal swabs. The director of

the Boston police crime laboratory, who had worked at the laboratory for some three decades and had been assigned to the original case, testified that the sperm on the vaginal swab likely had been deposited within twenty-four hours of when the autopsy was conducted, sometime in the early morning hours of Sunday, July 12, 1992, or thereafter.[2] Blood group typing was performed on the vaginal swab in 1992, but no further testing to identify the source of the sperm was possible at the time.

The case went unsolved for over twenty years. In 1998, the Boston police crime laboratory began using an early form of DNA testing that examined seven locations on the chromosome in a sample tested. This type of DNA testing was performed on the vaginal swab and on samples of skin found under the victim's fingernails.[3] The DNA extracted from the vaginal swab produced a mixed profile composed of a male sperm fraction and a female epithelial fraction, the latter identified as being from the

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[2] The expert's opinion that intact sperm ordinarily could be detected for up to twenty-four hours after deposit was based on his own personal experience; he also discussed several studies, one of which found that the average time that intact sperm could survive was under twenty-four hours, with some surviving between twenty-four and forty-eight hours.

[3] The only other DNA tests performed on crime scene evidence in this case were on swabs from the telephone cord, a stain on the front of the victim's shirt, and a hair recovered from the same shirt. The telephone cord and the stain yielded no conclusive results, and the hair proved to be from the victim herself.

victim. The same mixed profile was found on one of the fingernail samples. Given the limitations of the technology, however, no suspect could be identified.

Around 2000, more advanced DNA testing was performed on the vaginal swab and the fingernail cuttings, and the resulting male DNA profile was submitted to a national database. In 2015, the database produced a match identifying the defendant, who had not previously been connected to the crime, as a possible suspect. In June of 2015, Boston police interviewed the defendant and obtained a DNA sample from him by buccal swab. Subsequent testing, then using fourteen or sixteen chromosome locations, confirmed the defendant as the source of the sperm DNA, with a frequency calculation suggesting that one in twenty-nine quadrillion Caucasians, one in 4.8 quadrillion African-Americans, or one in sixty-two quadrillion Southeastern Hispanics would share the same profile. The male DNA found under the victim's fingernail also matched the defendant's, albeit with a somewhat higher possibility of a random match due to the mixed DNA profiles in the sample.[4]

In 1992, the defendant had frequented the victim's neighborhood. He slept at a homeless shelter and spent his days

[4] Approximately one in 6.5 million Caucasians, one in 1.2 million African-Americans, or one in ten million Southeastern Hispanics could be included as possible contributors to the mixture.

panhandling and drinking, including on the steps of the victim's apartment building. When he was interviewed by police in 2015, the defendant denied having known the victim by name or by sight, but said that he had been drinking heavily at that point in his life and could not remember all of the many women with whom he had had casual sex. He said that if he had known the victim, "it was probably through sex and that was it," and later added, "if I had sex with her it was consensual." After initially denying that he had ever tied up women before having sex with them, the defendant subsequently said that he had bound and gagged "plenty of girls" as part of his sexual activities, including some whom he would leave tied up at the end of the encounter. He also told police that he would do so in the company of his friends "all the time." At trial, the Commonwealth argued that the defendant's varying replies during the interview indicated consciousness of guilt.

The theory of the defense was that a consensual sexual encounter could have taken place between the defendant and the victim, but that the police investigation had been inadequate to rule out other possible killers. The defendant stressed that police had not collected DNA or fingerprint evidence from a variety of objects inside the victim's apartment, and he pointed

out that there was no direct evidence that the defendant ever had been inside the apartment.[5]

c. Trial proceedings. The jury were instructed on all three theories of murder in the first degree, as well as on involuntary manslaughter. After deliberating for two days, the jury sent the judge a note stating, "Currently the jury is split between [six] 'guilty' and [six] 'non-guilty.' We are undecided." The judge consulted with counsel and decided that the jury were deadlocked; he then gave them a Tuey-Rodriquez charge. Slightly more than one hour later, the jury sent another note asking, "Can we make inferences based o[n] the LACK of evidence?" The judge again conferred with counsel, and then sent the jury a written response, "Yes, provided that any inferences you draw are reasonable. Please remember that you cannot guess or speculate, and you may draw no inference from the fact that [the defendant] did not testify."

The jury deliberated for more than two additional hours that day and more than four hours on the next day that the court was in session. They then returned a verdict of guilty of murder in the first degree, on the theory of felony-murder only.

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[5] A fingerprint from the defendant's left thumb eventually was found on a piece of paper inside an empty wallet that police had discovered on the evening of July 12, 1992. The wallet was in a small garden in front of the apartment building where the victim lived, along with two empty condom wrappers, an unwrapped condom, and a bottle of baby oil.

2. Discussion. The defendant challenges the sufficiency of the evidence to support the conviction of felony-murder; the propriety of certain statements in the prosecutor's closing argument; the wording of the Tuey-Rodriquez charge; and the judge's response to a jury question. We address each issue in turn.

a. Sufficiency of the evidence of felony-murder. The defendant argues that the evidence was insufficient to prove that the homicide and the aggravated rape were parts of one continuous event. He also argues that the evidence was insufficient to support a conviction of aggravated rape because there was insufficient evidence of a kidnapping, distinct from the rape itself, that could have served as the aggravating factor.

Challenges to the sufficiency of the evidence are evaluated under the Latimore standard, that is, 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" (citation omitted). Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). "[T]he inferences a jury may draw from the relevant evidence need only be reasonable and possible, not necessary or inescapable" (quotation omitted). Copeland, 481 Mass. at 259–260, quoting Commonwealth v. Martin, 467 Mass. 291, 312 (2014). In

determining whether the evidence was sufficient to have allowed a reasonable jury to find the defendant guilty beyond a reasonable doubt, we "do not weigh supporting evidence against conflicting evidence when considering whether the jury could have found each element of the crime charged." Copeland, supra at 260, quoting Martin, supra.

i. Continuous event. The defendant argues that the homicide and the rape could have occurred at separate points over the roughly thirty hours between Sullivan's last telephone call with the victim on Saturday afternoon, July 11, 1992, and Eden's return to the apartment on Sunday evening, and that therefore the evidence of a connection between the two crimes was insufficient to support a conviction of felony-murder. See G. L. c. 265, § 1 (felony-murder in first degree is murder "committed . . . in the commission or attempted commission of a crime punishable with death or imprisonment for life" [emphasis added]).

To support a conviction of felony-murder in the first degree, the killing need not have occurred during the course of the predicate felony itself, but only "as part of one continuous transaction," a standard which is met if the two "took place at substantially the same time and place." Commonwealth v. Morin, 478 Mass. 415, 422 (2017), quoting Commonwealth v. Ortiz, 408 Mass. 463, 466 (1990) (robbery and killing took place within

thirty minutes of each other). See Commonwealth v. Rogers, 459 Mass. 249, 256, cert. denied, 565 U.S. 1080 (2011) (connection to predicate felony was sufficient where homicide was committed during escape or flight); Commonwealth v. Osman, 284 Mass. 421, 425 (1933) (evidence was sufficient for felony-murder where testimony suggested that rape, killing, and concealment of body occurred within forty-five minutes). Where rape is the predicate felony, it is "not necessary that the homicide occur while the rape is in progress nor that it be caused by the rape." Commonwealth v. Tarver, 369 Mass. 302, 316 (1975), quoting People v. Medina, 41 Cal. App. 3d 438, 451 (1974). In addition, "[i]n the circumstances of one continuous event, it does not matter whether the victim's death preceded or followed the sexual attack." Commonwealth v. Waters, 420 Mass. 276, 280 (1995).

Here, in the light most favorable to the Commonwealth, the forensic evidence suggested that the killing occurred at least twenty-four hours before the autopsy, and the rape not much more than twenty-four hours before the autopsy. There was expert testimony to the effect that the fact that semen was detected on the vaginal swab taken from the victim at the autopsy, but not on the anal swab, suggested that the victim had not gotten up or walked around after the semen was deposited. This would have allowed the jury reasonably to infer that the victim had not

moved from the position in which she was raped, and thus that the sexual intercourse did not occur long before her death. See Commonwealth v. Perkins, 450 Mass. 834, 837-838 (2008) (that victim was found on her back, and no sperm was found on her underwear, supported finding that death occurred after intercourse and before victim could pull up her clothing). That the victim was discovered face-down on the bed and naked, having died from suffocation, further supported the reasonable inference that she had been smothered in the course of, or shortly after, sexual intercourse. Indeed, "the jury could have found that the killing was causally related" to the rape. Morin, 478 Mass. at 422. See Commonwealth v. Alcequiecz, 465 Mass. 557, 566 (2013) (causal relationship between burglary and killing made them parts of single transaction). In sum, the evidence was sufficient for a reasonable jury to have found that the rape and the suffocation were part of a single, continuous transaction.[6]

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[6] The defendant argues that the evidence was consistent with the alternative possibility that the victim was killed and her body then was raped only after a considerably longer interval had elapsed. In general, when "conflicting inferences are possible from the evidence, 'it is for the jury to determine where the truth lies.'" Commonwealth v. Garuti, 454 Mass. 48, 55 (2009), quoting Commonwealth v. Wilborne, 382 Mass. 241, 245 (1981), S.C., 448 Mass. 1010 (2007). See Commonwealth v. Gordon, 422 Mass. 816, 851 (1996) ("although there may have been other inferences possible, under the sufficiency of the evidence standard, we need only consider whether the inference was "reasonable and possible" [citation omitted]).

ii. Aggravated rape. The defendant contends that the evidence was insufficient to support a conviction of aggravated rape, and thus to find him guilty of murder in the first degree on a theory of felony-murder, because there was no evidence that the victim's freedom of movement was restricted any more than was inherent in the rape itself.

Under G. L. c. 265, § 22 (b), the felony of rape is defined as sexual intercourse or unnatural sexual intercourse with a person who is compelled to submit by force and against his or her will, or by threat of bodily injury. It is punishable by a term of imprisonment for not more than twenty years for a first offense. Aggravated rape, as defined in G. L. c. 265, § 22 (a), is a felony punishable by life in prison or any term of years, and thus can support a conviction of felony-murder. Three possible aggravating factors cause a rape to become an aggravated rape: if the rape is committed (1) with acts resulting in serious bodily injury; (2) by a joint enterprise; or (3) during the commission or attempted commission of a number of enumerated offenses, including kidnapping.[7] Id.

[7] The other aggravating offenses are assault and battery by means of a dangerous weapon, assault by means of a dangerous weapon; armed or unarmed robbery; armed or unarmed burglary; breaking and entering in the nighttime with intent to commit a felony; breaking and entering in the daytime or entering without breaking in the nighttime; entering a dwelling house in the nighttime; and certain firearms offenses. See Commonwealth v. McCourt, 438 Mass. 486, 492 n.8 (2003).

The offense of kidnapping, in turn, is defined as "without lawful authority, forcibly or secretly confin[ing] or imprison[ing] another person within this [C]ommonwealth against his will." G. L. c. 265, § 26. The term "confinement" means "[a]ny restraint of a person's liberty." Commonwealth v. Dykens, 438 Mass. 827, 841 (2003), citing Commonwealth v. Nickerson, 5 Allen 518, 525–526 (1862). See Commonwealth v. Oberle, 476 Mass. 539, 548 (2017) (confinement is "broadly interpreted to mean any restraint of a person's movement" [citation omitted]).

The defendant is correct that "[i]f the confinement of the victim during the rape itself did not exceed the restraint which was incident to the rape, it did not constitute the crime of kidnapping, separate and apart from the rape." Commonwealth v. Kastner, 76 Mass. App. Ct. 131, 141 (2010). But any "confinement, detention, or restraint exceeding the conduct necessary for commission of the other charged offenses constitutes independent, not incidental, conduct." Oberle, 476 Mass. at 548, quoting Commonwealth v. Boyd, 73 Mass. App. Ct. 190, 195 (2008). The fact that a confinement in some way facilitated a rape does not necessarily make it incidental to the rape. See Commonwealth v. Rivera, 397 Mass. 244, 246, 254 (1986), abrogated on another ground by Commonwealth v. Ramirez, 407 Mass. 553 (1990) ("Although the restraint that is an

integral part of rape . . . may be one with the rape," defendant committed separate crime of kidnapping when he dragged victim into dark, secluded area in order to commit rape).

The defendant argues that there was insufficient evidence for the jury to have concluded that he forcibly or secretly confined the victim, beyond any restraint necessary to commit the rape. Considering the evidence in the light most favorable to the Commonwealth, we disagree. The fact that the victim's hands were bound shows a confinement, long established under Massachusetts law as meaning any restraint of a person's liberty or movement. See Oberle, 476 Mass. at 548; Dykens, 438 Mass. at 841. That a telephone cord had been used to bind the victim's hands, thus disabling the telephone, and that the intercom that communicated with the front door had been ripped out of the wall, also tended to show that the defendant secretly confined the victim in the apartment and isolated her from using the devices to call for help. See Commonwealth v. Rivera, 460 Mass. 139, 142 (2011) (confinement is "secret" for purposes of kidnapping when it "serves to isolate or insulate the victim from meaningful contact or communication with the public" [citation omitted]). This evidence clearly went beyond the confinement or restraint that was incident to the rape, and was sufficient to establish aggravated rape. See Commonwealth v. Brown, 66 Mass. App. Ct. 237, 242-244 (2006) (sufficient

evidence of kidnapping for conviction of aggravated rape where victim voluntarily accompanied defendant to secluded location where he poked her with sharp stick, threatened to kill her, and told her she could not leave).

b. Closing argument. The defendant challenges two aspects of the prosecutor's closing argument. First, he maintains that the prosecutor impermissibly encouraged the jury to put themselves in the victim's place -- a so-called "golden rule" argument. Second, he argues that the prosecutor improperly shifted the burden of proof by telling the jury that, in order to acquit the defendant, they had to believe that he and the victim had had consensual sex.

i. "Golden rule" argument. During his closing, the prosecutor repeatedly urged the jury to "think about" the time immediately before the victim's death, including that "she knew exactly what was going to happen next." With respect to the length of time it took for the victim to die by suffocation, he pointed to the minute the medical examiner testified that it would have taken the victim to die, with her nose and mouth covered, and urged the jury to "think about a minute of grasping, gasping for air, wondering if you're going to live or die, and at some point knowing you are going to die." After apparently pausing for forty-five seconds to illustrate the length of time, the prosecutor explained that it was "important

to know that [the victim] felt fear and terror at the hands of her rapist and killer" because the Commonwealth was pursuing a conviction on a theory of extreme atrocity or cruelty. As the defense did not object, we review for a substantial likelihood of a miscarriage of justice. Commonwealth v. Kater, 432 Mass. 404, 423 (2000).

"Prosecutors may 'argue forcefully for the defendant's conviction,'" and the use of "'[e]nthusiastic rhetoric, strong advocacy, and excusable hyperbole' will not require reversal." Commonwealth v. Martinez, 476 Mass. 186, 199 (2017), quoting Commonwealth v. Wilson, 427 Mass. 336, 350-351 (1998). Here, as the prosecutor explicitly noted, the Commonwealth was arguing for a conviction of murder in the first degree on a theory of extreme atrocity or cruelty. "Dramatic description from the prosecutor is more likely in such cases given the nature of the charge . . . ." Commonwealth v. Young, 461 Mass. 198, 205 (2012). At the time of the defendant's trial, moreover, a conviction on the theory of extreme atrocity or cruelty could be based on evidence of the "consciousness and degree of suffering of the victim." See Commonwealth v. Cunneen, 389 Mass. 216, 227 (1983).[8] Accordingly, the prosecutor permissibly could argue

[8] In Commonwealth v. Castillo, 485 Mass. 852, 864-865, 867 (2020), we modified the Cunneen factors prospectively, such that a jury no longer may "find extreme atrocity or cruelty based only on the degree of a victim's suffering, without considering

based "both on the defendant's actions, in terms of the manner and means of inflicting death, and on the resulting effect on the victim." See Commonwealth v. Barros, 425 Mass. 572, 580-581 (1997), quoting Commonwealth v. Gould, 380 Mass. 672, 684 (1980) (approving closing argument in explicit support of conviction of extreme atrocity or cruelty). The prosecutor also permissibly could argue in support of a conviction of extreme atrocity or cruelty by describing the victim's final moments and "emotional response." Commonwealth v. Rakes, 478 Mass. 22, 44 (2017).

We also long have emphasized, however, that prosecutors must not use language "calculated . . . to sweep jurors beyond a fair and calm consideration of the evidence." Commonwealth v. Perry, 254 Mass. 520, 531 (1926). In particular, the "jury should not be asked to put themselves 'in the shoes' of the victim, or otherwise be asked to identify with the victim." Commonwealth v. Rutherford, 476 Mass. 639, 646 (2017), quoting Commonwealth v. Bizanowicz, 459 Mass. 400, 420 (2011). It thus usually is "impermissible for the prosecutor to ask the jury to imagine the victim's final thoughts." See Rutherford, supra at 645-646 (improper for prosecutor to ask jury to imagine victim's last thoughts from victim's own perspective). But see Commonwealth v. Raymond, 424 Mass. 382, 389-390 (1997), S.C.,

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whether the defendant's conduct was extreme in either its brutality or its cruelty" (emphasis in original).

450 Mass. 729 (2008) (acceptable for prosecutor to ask jury to "[t]hink about [murder victim's] state of mind" and to "[i]magine . . . what was going through [her] mind" as she was being raped). In general, a "focus on the victim distracts attention from the actual issues, and invites the jury to decide guilt or innocence on the basis of sympathy." Bizanowicz, supra. An argument dwelling on the victim's state of mind is disfavored even where the Commonwealth is seeking "to prove that the killing was committed with extreme atrocity or cruelty, a showing that turns largely on what the defendant has done" (emphasis in original). Id. at 420–421. See Commonwealth v. Castillo, 485 Mass. 852, 862 (2020) (focus in cases of extreme atrocity or cruelty always has been on defendant's conduct).

On balance, we conclude that the prosecutor's argument here was not improper. Crucially, it did not involve speculation about the circumstances of the victim's death beyond what reasonably could be inferred from the evidence. Compare Commonwealth v. Teixeira, 486 Mass. 617, 634 (2021) ("prosecutor's statements not only played to the emotions of the jury in inviting them to imagine the victim's last moments, but also were unsupported by the evidence"). Although his references to the victim's "fear," "terror," and what "she knew" clearly invited the jury to focus on her state of mind, this is not necessarily impermissible. We emphasize, however, that this

type of rhetoric must be used with caution. The repeated exhortation that the jury "think about" the victim's last moments (an imperative repeated some fifteen times) and the direction that the jury contemplate "wondering if you're going to live or die, and at some point knowing you are going to die" came close to "invit[ing] the jury into the victim's position." See Commonwealth v. Camacho, 472 Mass. 587, 608 (2015) (improper for prosecutor to ask jury, with reference to victim, to "think about landing face down on that dirty, beer-stained barroom floor. You are completely helpless . . . you're laying there bleeding, in pain, in terror"). Compare Rakes, 478 Mass. at 44 (no impropriety in "brief reference" to victim's mental suffering that "was presented in a relatively straightforward manner" to show extreme atrocity or cruelty).

Even if the challenged statements had been error, they clearly did not create a substantial likelihood of a miscarriage of justice. "While the statements 'went to the heart' of the matter with respect to the theory of extreme atrocity or cruelty," the jury deliberated at length and ultimately did not convict on that theory, "making these comments collateral," and suggesting that the jury's emotions in fact were not enflamed. Teixeira, 486 Mass. at 635, quoting Commonwealth v. Niemic, 472 Mass. 665, 673 (2015), S.C., 483 Mass. 571 (2019). Moreover, the judge specifically instructed the jury not to decide the

case based on "the sympathy that we may all feel for [the victim] and her family and friends." At the same time, the DNA match provided compelling evidence of the defendant's guilt. See Commonwealth v. Kent K., 427 Mass. 754, 761 (1998) ("Where guilt is clear, improper appeals to sympathy, although troubling, are less crucial . . .").

ii. Consensual sex. At one point in his closing, the prosecutor said, "Let's be very clear about what the defense is asking you to believe. To find the defendant not guilty, you have to actually, don't you have to actually believe that [the victim] had consensual sex with [the defendant]?" The defendant objected, once the argument ended, on the ground that the comment impermissibly shifted the burden of proof; the defendant requested a specific curative instruction addressing this comment, but none was given. Because the defendant timely objected, we review for prejudicial error. See Commonwealth v. Lester, 486 Mass. 239, 247 (2020).

As the defendant argues, the evidence would have allowed the jury to conclude that he raped the victim but was not the killer. There also was no need that the jury "actually believe[d]" any particular account of what had occurred in order to have acquitted the defendant. That said, the theory of the defense was that a consensual encounter had occurred, consistent with the defendant's statement to police. Defense counsel

elicited on cross-examination of the defendant's former girlfriend that, at the time of trial, the defendant had been "good-looking" and "charming." In his closing argument, counsel invited the jury to consider the possibility that the defendant and the victim "could have talked on the street and something could have happened." A prosecutor is "entitled to respond to the defense argument and also to comment on the . . . weakness of the defense, 'as long as argument is directed at the defendant's defense and not at the defendant's failure to testify.'" Commonwealth v. Silva, 471 Mass. 610, 623 (2015), quoting Commonwealth v. Garvin, 456 Mass. 778, 799 (2010).

The challenged comments were not akin to those we previously have labeled impermissible burden shifting; the prosecutor did not suggest that the defendant had "an affirmative duty to bring forth evidence of his innocence," for instance, by "calling the jury's attention to the defendant's failure to call a witness or witnesses." See Commonwealth v. Tu Trinh, 458 Mass. 776, 787 (2011). Compare Commonwealth v. Amirault, 404 Mass. 221, 240 (1989) (it was improper burden shifting for prosecutor to state in closing argument that defendant "was unable to point to one single thing in the whole world that would account for why all these [witnesses] have turned against him"). To the extent that the prosecutor's single statement suggested an inaccurate view of the law or of

the evidence, the misstatement was minor. His "brief, isolated statement . . . was not egregious enough to infect the whole of the trial." Commonwealth v. Salazar, 481 Mass. 105, 118 (2018). Accordingly, if there were any error, the defendant was not prejudiced by it.

c. Charge to the deadlocked jury. On the third day of deliberations, after consultation with counsel, the judge delivered a Tuey-Rodriquez charge to the jury. See Commonwealth v. Rodriquez, 364 Mass. 87, 101–102 (1973) (Appendix A); Commonwealth v. Tuey, 8 Cush. 1, 2–3 (1851). The charge is "intended for a deadlocked jury to encourage them to continue deliberating." Commonwealth v. Chalue, 486 Mass. 847, 860 (2021). The judge stated near the beginning of the charge that "[i]n most cases, and perhaps strictly speaking in all cases, absolute certainty cannot be attained, and probably we shouldn't expect that." These words were in substantive accord with the model given in Rodriquez, supra. See P.M. Lauriat & D.H. Wilkins, Massachusetts Jury Trial Benchbook, at 357 (3d ed. 2016) (Appendix 5H) ("In most cases, and perhaps, strictly speaking, in all cases, absolute certainty cannot be attained, nor is it expected"). Before the charge was given, however, the defendant had requested that this language be replaced with a statement to the effect that "[i]n all cases we expect the jury to insist on the highest degree of certainty possible in matters

relating to human affairs before it makes a decision." The defendant objected to the charge being given without his requested modification. On appeal, he argues that such a modification in fact is required by our decision in Commonwealth v. Russell, 470 Mass. 464, 476–477 (2015). We do not agree.

Russell concerned the explanation on reasonable doubt in a judge's final charge. In that case, the court decided to modify the venerable Webster language on reasonable doubt, see Commonwealth v. Webster, 5 Cush. 295, 320 (1850), in part by adding a definition of "moral certainty" as "the highest degree of certainty possible in matters relating to human affairs," Russell, 470 Mass. at 477. The addition was motivated by concern that the phrase "moral certainty," without clarification, could mislead jurors when presented as a synonym for "beyond a reasonable doubt." Id. at 476. See Victor v. Nebraska, 511 U.S. 1, 12 (1994) (explaining that "moral certainty" originally meant certainty "based on general observation of people, . . . rather than on what is demonstrable" [citation omitted]).

The words "moral certainty" do not appear in the Tuey-Rodriquez charge. Moreover, the sentence concerning "absolute certainty," which the defendant sought to replace, does not serve to articulate the degree of certainty that a jury must reach, but, rather, a degree of certainty that they need not

achieve. A statement that "absolute certainty" is not required -- as it indeed is not, see Commonwealth v. Costley, 118 Mass. 1, 24 (1875) -- is hardly out of place in a charge that is, after all, intended to help a deadlocked jury reach a decision.

In revising the Webster charge, this court also eliminated the concluding words "if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether." See Russell, 470 Mass. at 469, 477-478, quoting Webster, 5 Cush. at 320. The reason for the elimination of this sentence, however, was its use of the adjective "moral" in an obsolete sense, not the phrase "absolute certainty." The latter words are colloquial and were not "introduced into our jurisprudence from the publicists and metaphysicians," as was the phrase "moral certainty." See Costley, 118 Mass. at 23. We have not expressed concern that "absolute certainty" is a phrase liable to be misleading for modern juries, and we see no need to banish it from the standard Tuey-Rodriquez charge.

The Tuey-Rodriquez charge "has a 'sting' and can, if improperly phrased or improvidently given, risk 'coercion' of the jury to reach a verdict with which they are not fully comfortable." Ray v. Commonwealth, 463 Mass. 1, 6 (2012), quoting Rodriquez, 364 Mass. at 100. The judge in this case

consulted the attorneys before resorting to it, in response to an unsolicited communication from the jury after roughly two days of deliberations. In these circumstances, the use of the charge was not an abuse of discretion. See Commonwealth v. Haley, 413 Mass. 770, 779 (1992) (giving charge was not abuse of discretion after four hours of deliberation in noncomplex case); Commonwealth v. Scanlon, 412 Mass. 664, 679 (1992), overruled on another ground by Commonwealth v. King, 445 Mass. 217 (2005) (risk of premature charge is greatest when judge "recalls the jury on his or her own initiative in order to prompt the jury to reach a decision"). The judge also prudently relied on the standard Tuey-Rodriquez language. See Commonwealth v. O'Brien, 65 Mass. App. Ct. 291, 295 (2005) (judge should be "particularly vigilant that there not creep into the phraseology any suggestion that the jurors are obligated to decide the case one way or another"). There was no error.

d. Response to jury question. The defendant argues that the judge's response to the jury's question about the permissibility of inferences from a lack of evidence violated his right to due process, because the judge only instructed the jury not to draw inferences from the fact that the defendant himself did not testify, and did not provide any instruction that they also should not draw any inferences from the fact that the defendant did not introduce any other evidence. Because the

defendant did not object to the judge's formulation, we review for a substantial likelihood of a miscarriage of justice. See Commonwealth v. Andre, 484 Mass. 403, 416 (2020).

The judge expressed hesitation about how to respond to the question, "Can we make inferences based o[n] the LACK of evidence?" The question indeed was a difficult one to answer in the abstract, given that whether any particular inference is licit "necessarily depends . . . upon the posture of the particular case and the state of the evidence." Commonwealth v. Franklin, 366 Mass. 284, 292–293 (1974), quoting Commonwealth v. O'Rourke, 311 Mass. 213, 222 (1942). The substance of the renewed instruction -- that the jury could make any reasonable inference, as long as they did not guess or speculate or make inferences from the fact that the defendant did not testify -- was accurate. Additionally, in his final charge, the judge instructed that "the defendant never has any burden to prove his or her innocence or to produce evidence." Although it might have been better for the judge to have included a statement to this effect in his response to the jury's question, the fact that they deliberated for more than six hours after having been given the challenged answer suggests that the response itself did not sway their verdict. There was no substantial likelihood of a miscarriage of justice.

e. Review under G. L. c. 278, § 33E. We have reviewed the entire record pursuant to our duty under G. L. c. 278, § 33E, and discern no reason reduce the verdict or to order a new trial.

Judgment affirmed.