

## Commonwealth v. Dasilva

Appeals Court of Massachusetts

November 20, 2020, Entered

19-P-571

### Reporter

2020 Mass. App. Unpub. LEXIS 985 \*; 98 Mass. App. Ct. 1120; 158 N.E.3d 888; 2020 WL 6816397

COMMONWEALTH vs. FERNANDO E. DASILVA.

**Notice:** Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See *Chace v. Curran*, 71 Mass. App. Ct. 258, 260 n.4, 881 N.E.2d 792 (2008).

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**Subsequent History:** Appeal denied by *Commonwealth v. Dasilva*, 486 Mass. 1111, 2021 Mass. LEXIS 32 (Mass., Jan. 14, 2021)

**Judges:** Milkey, Blake, Henry, JJ. [\*1]

### Opinion

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#### *MEMORANDUM AND ORDER PURSUANT TO RULE 23.0*

A Superior Court jury convicted the defendant of sixteen counts of sexual misconduct and one count of witness intimidation all involving his minor daughter, and acquitted him of sexual assault and witness intimidation charges involving his

minor son. There is only one disputed issue on appeal: whether the prosecutor's closing statement impermissibly bolstered the credibility of the children's mother, who is the defendant's ex-wife and who testified against him. We find no error. However, we reverse and remand for a new trial on one charge, as the Commonwealth concedes we must.

*Background.* We summarize the trial evidence as follows, reserving additional facts for later discussion.

The defendant and his wife met and were married in Brazil. Together, they moved to the United States, where they had a son, Alex,<sup>1</sup> and began living in Plymouth, Massachusetts. They separated around 2002, but both continued to live in Plymouth afterwards. At the time, they had a newborn daughter, Beth.<sup>2</sup> Alex and Beth lived mainly with their mother, and stayed with the defendant most weekends. In 2006 or 2007, the defendant began regularly sexually abusing [\*2] Beth. Aside from physical acts, the abuse involved both taking photos of her naked and showing her pornography.

In 2011, the mother, Alex, and Beth moved away. The defendant remained in Plymouth, and visited less often. The abuse diminished after the move, and the children eventually stopped sleeping over with the defendant. The last act of abuse occurred during a visit in 2014.

Beth made her first complaint to her mother in March of 2015. About one week later, the mother told Alex about what Beth had revealed. Alex told his mother the defendant had also sexually abused him when he was between the ages of four and seven.

In 2016, the mother was diagnosed with breast cancer, as well as another unspecified illness. She sought treatment in Brazil, rather than the United States, because it was more affordable and because her own mother could help her through the treatment there. At the time of trial, she had been in Brazil for nearly six months. She had planned to be present for the beginning of trial, but Hurricane Irma had interfered with her flights. She arrived the morning of the third day of trial.

During direct examination, the mother testified about her relationship with the defendant [\*3] and their children, and Alex's and Beth's first complaints. On cross-examination, defense counsel asked her about time she spent in Brazil and Haiti. Then, in a brief redirect, the mother provided a few more details about her travel,

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<sup>1</sup> A pseudonym.

<sup>2</sup> A pseudonym.

including the reasons she sought breast cancer treatment in Brazil rather than the United States, and the reasons that she had only arrived at trial that day.

During closing argument, defense counsel argued at length that the mother was an absent parent, and Alex's and Beth's allegations of sexual abuse were simply ploys for attention. He argued that the mother had a "habit of leaving her kids for months at a time,"

"the most galling example of [which wa]s what happened at this trial, itself. Her original plan was to arrive in the United States . . . so that she could be in attendance on Monday morning. . . . Why not come the week before?"

In her closing, the prosecutor responded that the mother

"flew in from Brazil for this, to testify, and I suggest to you[,] you could ask yourself or think about the same things I asked you to do with [Alex] and [Beth]: her demeanor on the stand. I think you all were watching her demeanor on the stand, and mother of two [\*4] children and she came to talk about the things that they told her.

"I suggest to you a mother's worst nightmare. Both her kids. Both her kids. And she came in and she told you about how much she worked. Although defense counsel in his opening you might recall referenced how this was a cry for help, that's why [Beth] made this up, because mom was never there. Well, the evidence was clear. The trips to Brazil happened recently, within the last few years. One time a year, she would say, when they were little, they'd go and they'd come with her. So that's out the window."

The prosecutor also made comments about Alex's and Beth's respective credibility. Immediately after the prosecutor finished her closing argument, defense counsel objected on the ground that the prosecutor had suggested that Alex and Beth should be deemed credible because they came to court to testify. He did not specifically object to the prosecutor's statements about the mother in this regard.

In response to the defendant's objection, the judge gave a curative instruction. After specifically addressing Alex's and Beth's credibility, the judge made more general comments: "[a] witness is compelled to come into court and to [\*5] provide testimony. They don't have any choice about it. So, the fact that a witness testifies in court is not direct proof that in fact the crime about which they testify actually occurred." The judge then reminded the jury of all the "tools [available to them] in assessing a witness and determining whether to believe what a witness said, [and] not to speculate about whether any witness had any motivation . . . to the extent that speculation would be outside the evidence."

Defense counsel objected to this instruction because it did not make clear that it was the prosecution that had erred. The judge overruled this objection, but invited defense counsel to make a written request for a further curative instruction. Defense counsel later submitted a proposed instruction that singled out the prosecution, which the judge rejected. At no point did defense counsel contend that the prosecutor's statements about the mother were improper.

The jury ultimately convicted the defendant of most of the counts relating to his abuse of Beth, but none of the counts relating to his alleged abuse of Alex.

*Discussion.* 1. *The closing argument.* According to the defendant, the prosecutor impermissibly argued [\*6] at closing that the mother was credible simply because she testified.<sup>3</sup> See *Commonwealth v. Dirgo*, 474 Mass. 1012, 1014, 52 N.E.3d 160 (2016) (prosecutor's repeated suggestions, without evidentiary support, that victim was credible because she testified, were error). He takes particular issue with three statements: "[she] flew in from Brazil for this, to testify . . ."; "[a] mother of two children and she came to talk about the things that they told her"; and "[a] mother's worst nightmare. Both her kids. Both her kids. And she came in and she told you about how much she worked."

Because the defendant did not object to these statements at trial, our review is limited to whether there was error and, if so, whether the error caused a substantial risk of a miscarriage of justice. See *Commonwealth v. Lugo*, 89 Mass. App. Ct. 229, 233, 47 N.E.3d 41 (2016), quoting *Commonwealth v. Alphas*, 430 Mass. 8, 13, 712 N.E.2d 575 (1999). For at least two reasons, we do not perceive any such error.

First, read in context, the prosecutor's statements addressed the mother's parenting, not her credibility. In his own closing, defense counsel had proposed that the mother was absent and that Alex and Beth had lied for attention. "Where, as here, defense counsel in closing argument challenges the credibility of the [victim], it is proper for the prosecutor to . . . identify evidence that demonstrates that [\*7] the complainant's testimony is reliable." *Dirgo*, 474 Mass. at 1014. Also, the prosecutor's statements were brief and limited. This is not a case where the prosecutor made "repeated suggestions that the [victim] was credible because of her willingness to testify and to subject herself to the scrutiny of the jury." *Id.*

Second, the judge's instructions to the jury cured any concern caused by the prosecutor's remarks. After defense counsel objected to the prosecutor's

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<sup>3</sup> In his appellate brief, he also contended that the comments the prosecutor made at closing about Alex's and Beth's respective credibility required reversal. In his reply brief, however, he conceded this issue.

comments about Alex's and Beth's credibility, the judge gave a thorough curative instruction. Although that instruction began with a discussion of Alex and Beth, it quickly became general enough that a reasonable juror would have understood it to apply to each witness. See *Commonwealth v. Claudio*, 405 Mass. 481, 484, 541 N.E.2d 993 (1989) ("To determine the correctness of a jury instruction, it is appropriate first to consider how a reasonable juror could have understood it"). We presume the jury followed the judge's instructions. See *Commonwealth v. Johnston*, 467 Mass. 674, 692, 7 N.E.3d 424 (2014).<sup>4</sup>

2. *The child pornography charge.* The seventeenth indictment against the defendant charged him with dissemination of child pornography. The trial judge, however, instructed the jury on a different crime under a different statute: disseminating to a minor material harmful to a minor [\*8] (that is, pornography). The clerk's polling of the jury with regard to each indictment appears to indicate that the jury found the defendant guilty of the seventeenth indictment as charged, not as instructed.<sup>5</sup>

Because the jury were instructed on the elements of a different crime than the one for which the defendant was charged, the Commonwealth concedes that his conviction cannot stand.<sup>6</sup> See *Commonwealth v. Mills*, 436 Mass. 387, 398, 764 N.E.2d 854 (2002) (conviction must be reversed if jury not instructed as to elements of crime). The parties agree that we should vacate the conviction, leaving the Commonwealth the option of retrying the defendant. See *id.* at 399.

*Conclusion.* The judgment on indictment seventeen is vacated and the verdict on that indictment is set aside. The remaining judgments are affirmed.

*So ordered.*

By the Court (Milkey, Blake, Henry, JJ.<sup>7</sup>),

Entered: November 20, 2020.

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<sup>4</sup> It also bears noting that the judge later instructed the jury that they were "the sole and exclusive judges of the facts," that they should "determine the facts based solely on a fair consideration of the evidence," and that "the closing arguments of the attorneys are not evidence or a substitute for the evidence."

<sup>5</sup> The verdict slips themselves were not included in the record appendix, raising some possibility that the jury found the defendant guilty of the charge on which they were instructed, but for which he was not indicted. Such a conviction could not stand for independent reasons. See *Commonwealth v. Garrett*, 473 Mass. 257, 267 n.12, 41 N.E.3d 28 (2015).

<sup>6</sup> Because the two crimes have quite different elements, this is not a case where the indictment on one can support a conviction on the other. See *Commonwealth v. Bright*, 463 Mass. 421, 445, 974 N.E.2d 1092 (2012), quoting *Commonwealth v. Vick*, 454 Mass. 418, 430-432, 910 N.E.2d 339 (2009) ("an indictment on one crime may support a conviction of another where the two crimes are not distinct 'statutory offenses' for the purposes of the double jeopardy clause").

<sup>7</sup> The panelists are listed in order of seniority.

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