Commonwealth v. Harris

Appeals Court of Massachusetts

April 1, 2016, Entered

15-P-186.

Reporter
2016 Mass. App. Unpub. LEXIS 368 *; 89 Mass. App. Ct. 1116; 47 N.E.3d 702

COMMONWEALTH *vs.* KEVIN J. HARRIS.

Notice: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS 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 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. Harris, 2016 Mass. LEXIS 839 (Mass., Nov. 4, 2016)

Disposition: Judgment affirmed.

Judges: Wolohojian, Carhart & Kinder, JJ. [*1]

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant appeals from his conviction of indecent assault and battery on a child under fourteen, arguing that the judge's jury instructions require reversal. We affirm.

Background. On May 9, 2013, a criminal complaint issued against the defendant charging him with indecently assaulting and battering ten-year-old Mary[1] on July 7, 2012. Mary, her mother, and the defendant testified at trial. Mary testified that she was attending a Narcotics Anonymous meeting with her mother and listening to an iPod on July 7, 2012, when the defendant engaged her in conversation. As she took out an earphone to speak with the defendant, the defendant touched her on her breast.

In the charge conference, defense counsel asked for "the standard instructions." While instructing the jury on direct and circumstantial evidence, the judge gave the following example:

> "Let's say one morning you're in your kitchen. And let's say you have a daughter. Your daughter's a witness and you have to decide. You're the judge. You have to decide in your kitchen whether or not the [sic] has come to your [*2] mailbox that day.
> "Daughter walks in, the witness. She says she saw the mailman put the mail in the mailbox. That's direct evidence. Did you believe your daughter? She said she saw the mailman place the mail there.
> "But what if your daughter doesn't say she saw the mailman. She just says that she saw mail in the mailbox. Okay? From that, if you believe your daughter you can infer — there can be other inferences, but you can reasonably infer that the mailman did come and put the mail in the mailbox."

There was no objection to the charge.

Discussion. On appeal, the defendant claims that the judge's failure to adhere to the Model Jury Instructions, and his insertion of the words "Did you believe your daughter?" improperly shifted the burden of persuasion and requires reversal. "As the defendant made no objection at trial to the jury instructions," we review to determine whether they "created a substantial risk of a miscarriage of justice." *Commonwealth* v. *Newell*, 55 Mass. App. Ct. 119, 131, 769 N.E.2d 767 (2002).

The judge's instructions on direct and circumstantial evidence deviated from the Model Jury Instructions for Use in the District Court, which do not refer to the daughter as a witness or to the jurors as judges.[2] While "[t]he use of an illustration

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[1] A pseudonym.

to explain [*3] an inference in connection with the concept of circumstantial evidence is permissible," *Commonwealth* v. *Shea*, 398 Mass. 264, 271, 496 N.E.2d 631 (1986), we agree with the defendant that, in this case where a mother and daughter were the only prosecution witnesses and the defendant was the only defense witness, the judge should have chosen another example.

However, the judge's instructions regarding circumstantial evidence could not have created a substantial risk of a miscarriage of justice in this case, where the only evidence offered at trial was direct evidence in the form of witness testimony. We do not think the fact that the complainant [*4] in this case was a daughter rendered the judge's use of the well-known "daughter sees the mailman" example so similar that "the jury reasonably [could] believe that the judge was expressing his belief in the Commonwealth's theory of the case or was favoring a particular inference propounded by the prosecutor," and, "[i]f there was any possibility of such confusion by the jurors, the judge's subsequent [instructions regarding the credibility of witnesses and the burden of proof] was more than adequate to dispel it." *Commonwealth* v. *Gil*, 393 Mass. 204, 222, 471 N.E.2d 30 (1984). The judge instructed the jurors that they are "the sole judges of the believability of the witness," and that the Commonwealth bore the burden of providing "proof to a moral certainty — as distinguished from an absolute certainty — that the defendant committed the crime charged." Considering the charge as a whole and the evidence in this case, we do not think that "a reasonable juror could have used the instruction [regarding circumstantial evidence] incorrectly." *Commonwealth* v. *Rosa*, 422 Mass. 18, 27, 661 N.E.2d 56 (1996).

We have considered and find to be without merit the defendant's argument that the judge, sua sponte, should have instructed the jury that the credibility of the witnesses is not determined by the number of witnesses [*5] called by either party. Where there were only three witnesses who testified in a one-day trial, such an instruction was unnecessary.[3]

Judgment affirmed.

By the Court (Wolohojian, Carhart & Kinder, JJ.[4]),

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[2] The Model Jury Instructions for Use in the District Court, Instruction 2.240, provides the following "optional example" of direct and circumstantial evidence: "Your daughter might tell you one morning that she sees the mailman at your mailbox. That is direct evidence that the mailman has been to your house. On the other hand, she might tell you only that she sees mail in the mailbox. That is circumstantial evidence that the mailman has been there; no one has seen him, but you can reasonably infer that he has been there since there is mail on the box. The law allows either type of proof in a criminal trial."

[3] The defendant's argument that the cumulative effect of the judge's errors created a substantial risk of a miscarriage of justice is without merit.

[4] The panelists are listed in order of seniority.

Entered: April 1, 2016.

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