Commonwealth v. Noel

Appeals Court of Massachusetts

October 7, 2021, Entered

20-P-575

Reporter
2021 Mass. App. Unpub. LEXIS 634 *; 100 Mass. App. Ct. 1109; 2021 WL 4598452

COMMONWEALTH *vs.* EVENS NOEL.

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Subsequent History: Appeal denied by Commonwealth v. Noel, 488 Mass. 1108, 2021 Mass. LEXIS 721 (Mass., Dec. 21, 2021)

Disposition: Judgments affirmed.

Judges: Desmond, Sacks & Grant, JJ. [*1]

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant appeals from his convictions, after a Superior Court jury trial, of rape and strangulation. His defense, presented through cross-examination and

closing argument, was that the victim had consented to intercourse. On appeal, the defendant asserts that several unobjected-to portions of the prosecutor's closing argument created a substantial risk of a miscarriage of justice. We are unpersuaded and therefore affirm the judgments.

Background. 1. *Trial evidence*. The victim was an eighteen year old student in her first month of college. The defendant met her on a September night when he came to visit another student living in the same dormitory as the victim. The victim was menstruating and wore a sanitary pad in her underwear. After they socialized in a small group, during which time the victim, at others' urging, tried her first sip of alcohol, the defendant told the victim that he was anxious because of all the people around. The victim then suggested that the two of them go to a nearby athletic field, because that was where she went when she was stressed or anxious, and they did so. The field was dark and the victim [*2] saw no one else there.

The pair sat down and the defendant began to kiss the victim's mouth. She let him do so; she later testified that she was "a little bit nervous" because it was her "first kiss," but she "didn't mind" and was a little bit excited as well. The defendant had the victim lie down and began to kiss her neck, which made her feel uncomfortable, because no one had ever done that to her before. He began to move his hands around her body over her clothes; she tried to keep his hands at her sides. He then positioned himself fully on top of her and tried to unbutton her pants and bodysuit; she continued to try to move his hands back to her sides. She told him to stop, but he "ignored" her and put one hand around her neck and squeezed, making her gasp for air, eventually to the point where she "couldn't really breathe very well at all." He took her pants off — her knee-high boots had also come off at some point — and thrust his penis inside her vagina, causing her pain. She told him to stop, without effect.

Eventually he stopped, the victim put her pants and boots back on, and they walked back to her dormitory. They did not touch or converse during the short walk. The victim [*3] signed the defendant in at the dormitory security desk, saying nothing to the security officer. The victim explained at trial that she was "in shock," "didn't even understand what happened" to her, and was anxious to get back to her room; she "just wanted to sleep" and "didn't want to deal with anything."

When she returned to her room, her roommate and a male student friend were there; she did not remember where the defendant went. She wanted to change her clothes, which were wet and dirty because the field had been wet due to

earlier rainfall. She told her roommate that she had had sex, but "didn't want to" — that she had asked the defendant to stop, but that he did not do so.

The next morning, her roommate noticed marks on the victim's neck. Later that day, her mother came to the campus; they went to the campus police and then to a hospital for an examination by a sexual assault nurse examiner (SANE) nurse, which included taking samples from her vagina.[1]

On cross-examination, the victim stated that she had dressed up and worn makeup that night and was excited to meet people, that she had talked to the defendant for about one-half an hour before suggesting that they go to the field, that [*4] she thought he was cute, that she had a nipple ring, and that she had not called her parents after the incident.

The victim's roommate testified about the victim's first complaint. She added that the victim had appeared upset and was crying. The roommate also testified that, at about this time, she received a "Snapchat" message from another student in the dormitory (the student whom the defendant had originally come to visit); the message stated that the defendant wanted to "go in and cuddle" with the victim. The next day, the roommate took photographs of what she described as "bruising" or "marks" on the victim's neck; the photographs were admitted in evidence.

The male student who was in the victim's room when she returned from the field testified that she looked scared and pale and "kept to herself." On cross-examination, the student testified that it seemed as if the victim had been drinking and that she told him she was "buzzed," although not drunk. He stated that he asked the victim whether she had been raped, and she replied in the negative; she told him that "it kind of happened, they kind of had sex." She further told him that she "tried to get [the defendant] off . . . but [*5] not really." The student agreed that the victim "didn't say no" but added that "she didn't say yes" either.

The victim's mother testified that, when she saw victim the next day, the victim looked disheveled, had bruises on her neck, and was wavering between crying and putting her head down. A police officer who saw the victim at about the same time testified, similarly, that the victim was visibly upset and crying, seeming nervous and embarrassed. The officer remembered the victim stating that the defendant "kissed/bit her neck" and that "she knew what happened was wrong but it didn't click until afterwards."

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[1] A police forensic expert testified that, based on DNA testing, the defendant was a potential contributor of the sperm cells taken from the victim's vagina.

The SANE nurse testified that there were marks on the victim's neck, a laceration in her vagina, and "excoriation" (an area of raw tissue) on her cervix.

2. *Closing arguments*. The theme of the defendant's closing argument was that the victim had consented to sex and then became remorseful and embarrassed and decided that she had not consented after all. As counsel put it to the jury:

> "[Y]ou have to start to wonder . . . who takes a boy she's only known for a half an hour down to a dark field? A girl who likes a boy, that's who. A girl who's just come to college. She's lived in [her [*6] hometown] her whole life and this is her first time away from home. She met someone cute, she liked him, they walked down, they talked . . . .
> "Once they started kissing, one thing le[]d to another . . . ."
> ". . .
> "She says that he was biting and kissing her neck. Well we have pictures of that . . . . And the pictures look like a hickey. They don't look like someone who has been strangled . . . ."
> "[W]hy doesn't [the victim] call her parents? Is it because she's so distraught? Yes, she's an [eighteen] year old girl who chose to have sex with a boy she didn't know, she had met him a half hour before she leads him down to this field. Now, we're not here to make judg[]ments as to what she did there, but for rape is not retroactive. You can't do one thing and then take it back. That's . . . what they're trying to do here.
> "[S]he was upset; she was crying, but wouldn't you be? Think about it. If you had sex with someone you knew for a half an hour because you were away at college and it was your first time at freedom, you might regret the choice you make. That's understandable, that's regrettable, that's not rape."

In response, the prosecutor's closing argument emphasized that it was unlikely [*7] the victim would have consented to sex in these circumstances. The defendant now objects to the prosecutor's use of the phrase "first kiss," or its equivalent, a total of nine times. The first seven uses appeared in the following passage:

> "Out on the . . . athletic field, the defendant began to kiss [the victim]. She was kind of excited. She had never kissed a boy before. She had never kissed a boy before. But he didn't stop at kissing her. It was her first kiss. Instead he put his hands on her sides and tried to unbuckle her pants. She pulled his hands away, they kissed some more, and it didn't stop there he tried again to unbutton her pants and put his hands down them. Eventually he puts his hands around her throat. This shows a photo of a bruise that was approximately two

> inches by one inch[]. Is that consistent with a hickey to have a bruise that large?
> ". . .
>
> "She doesn't remember how her pants came off and she doesn't remember how her boots came off but she knows they did and when they come off, she's there on a wet field with her period and a sanitary pad in her underwear. Is that consistent with somebody that would want to have sex? Not only that, this is her first kiss. Is it [*8] consistent that from a first kiss after meeting someone for a half an hour that you would then want them to strangle you, lift your legs up over their shoulders while you're on the ground, on your period, and have sex with them? She's on a wet athletic field with her period after her first kiss, and the whole time while this is happening it goes from light squeezing on her neck to more and more pressure on her neck, so much pressure on her neck that she starts to have trouble to breathe and she can't talk anymore.
> "And then when he finishes they get up. You heard her testimony, she was in shock and she didn't even really realize what had just happened to her. This is a young woman who just had her first kiss. And . . . when they come back from that field they're never touching each other. Is that a sign of someone that wanted to cuddle with her when he doesn't even touch her on the way to and from the field . . . ? She doesn't know what happened to her and she's walking back and she's confused."

The prosecutor also described the victim's SANE examination, depicting it as humiliating and invasive, reminding the jury that the nurse had found a vaginal laceration and a raw area on the victim's [*9] cervix, and concluding, "We're talking about a young woman who went from her first kiss to this." Finally, the prosecutor emphasized that although the victim's memory of the incident was not perfect, she remembered the essential details. "[S]he remembers him holding her neck on the ground. She remembers him putting his penis inside of her vagina. She remembers that it hurt. She remembers that she said stop and that he didn't stop. She remembers that it was her first kiss."

On appeal, the defendant also challenges one other aspect of the prosecutor's closing argument. We defer further discussion of that point until later in this memorandum and order.

Discussion. 1. *First-kiss theme*. Because the defendant did not object to the first-kiss theme at trial, on appeal we review his challenges to it to determine whether any errors created a substantial risk of a miscarriage of justice. See *Commonwealth* v. *Kozec*, 399 Mass. 514, 518 n.8, 505 N.E.2d 519 (1987). "In making that determination, the cumulative effect of all the errors must be

considered in the context of the arguments and the case as a whole" (quotation and citation omitted). *Commonwealth* v. *Niemic*, 472 Mass. 665, 673, 37 N.E.3d 577 (2015), *S.C.*, 483 Mass. 571, 134 N.E.3d 1107 (2019).[2]

a. *Misstating evidence*. The defendant argues that the first-kiss theme misstated the evidence or referred to facts not in [*10] evidence. He claims that the prosecutor portrayed the victim as "an ultra-virgin unable to consent to intercourse," assertions for which there was no support in the evidence. We are unpersuaded. The prosecutor did not use any such words or make any such suggestions. To the extent the prosecutor sought to depict the victim as sexually inexperienced and therefore unlikely to have consented to intercourse in the circumstances here, it was a fair response to the defendant's effort to depict the victim as someone enjoying her newfound freedom and eager for sexual experimentation.[3] Nor do we see in the prosecutor's argument, as the defendant now claims, any hint that the prosecutor had personal knowledge of facts not in evidence or relied on a supposed "reputation . . . for ultra-virginity" possessed by the victim.

b. *Asking jurors to identify with victim*. Similarly unavailing is the defendant's claim that the prosecutor improperly "asked the jury to place themselves in [the victim's] shoes and ask whether they would consent to intercourse with someone they just met, and right after their 'first kiss.'"[4] The defendant relies principally on *Commonwealth* v. *Olmande*, 84 Mass. App. Ct. 231, 234, 995 N.E.2d 797 (2013), where the court held it "improper for the prosecutor [*11] to invite the jury into the victim's position and to attempt to arouse juror sympathy." See *Commonwealth* v. *Bizanowicz*, 459 Mass. 400, 420, 945 N.E.2d 356 (2011) (asking jury to put themselves in shoes of murder victim invited jury to decide innocence or guilt on basis of sympathy). See also Mass. G. Evid. § 1113(b)(3)(D) (2021) (improper in closing argument "to ask the jurors to put themselves in the position of any person involved in the case").

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[2] More specifically, we must consider whether the defendant timely objected, whether the judge's instructions mitigated the errors, whether the errors went to the heart of the issues at trial or concerned collateral matters, whether the jury would be able to sort out the excessive claims, and whether the Commonwealth's case was so overwhelming that the errors did not prejudice the defendant. See *Niemic*, 472 Mass. at 673-674; *Kozec*, 399 Mass. at 517-518.

[3] In addition to the passages of defense counsel's closing argument quoted *supra*, counsel reminded the jury that the victim had a nipple ring.

[4] The defendant apparently refers to the prosecutor's rhetorical question, "Is it consistent that from a first kiss after meeting someone for a half an hour that you would then want them to strangle you, lift your legs up over their shoulders while you're on the ground, on your period, and have sex with them?"

In *Olmande*, however, the prosecutor explicitly and repeatedly asked jurors to imagine how difficult it would be for them to do what the victim had done: discuss and be questioned about the details of their sexual experiences in a room full of strangers. *Olmande*, 84 Mass. App. Ct. at 233-234. There was no comparable appeal to sympathy in the remarks complained of here, which we view more as using a figure of speech — using "you" to refer to a hypothetical person, just as defense counsel had — than as inviting the jurors to imagine themselves in the victim's place. See Webster's Third New International Dictionary 2653-2654 (2002) ("you" may mean "one").

c. *Appeal to juror sympathy*. There is greater force to the defendant's argument that the first-kiss theme improperly "appeal[ed] to the jurors' emotions, passions, prejudices, or sympathies." Mass. G. Evid. § 1113(b)(3)(C) (2021). Specifically, the defendant [*12] claims, the argument was intended to arouse sympathy for the victim (as having lost her innocence) and anger toward the defendant (as the one who had stolen it from her). An appeal to sympathy for the victim risks "swe[eping] the jurors beyond a fair and calm consideration of the evidence" (citation omitted). *Niemic*, 483 Mass. at 598.

After careful consideration, however, we are unpersuaded. The first-kiss theme was firmly grounded in the victim's testimony that she had never been kissed before the defendant did so. We also think it quite telling that, although the phrase "first kiss" or its equivalent was used nine times in the prosecutor's closing argument, and thus could not have escaped defense counsel's notice, counsel did not object — although she did object to other aspects of the argument. The absence of any objection, "[a]lthough not dispositive . . . is some indication that the tone, manner, and substance of the now challenged aspects of the prosecutor's argument were not unfairly prejudicial." *Commonwealth* v. *Toro*, 395 Mass. 354, 360, 480 N.E.2d 19 (1985). This consideration is particularly relevant where the assertedly improper argument was not some fleeting phrase that misstated a minor piece of evidence or violated some subtle rule of law, but instead was, [*13] the defendant now argues, a repeated and powerful emotional appeal. If defense counsel — who was present in the court room and charged with protecting the defendant's interests — did not perceive any such improper emotional appeal, it becomes more difficult for us, on a cold record, to reach a contrary conclusion.

We have considered each of the nine uses of the phrase "first kiss" or its equivalent. We conclude that the first six instances were solidly tied to the permissible argument that it was unlikely that someone in the victim's circumstances would have consented to sex. The seventh instance was solidly

tied to the permissible argument that the victim's emotional state, as she and the defendant returned from the field, helped explain why she acted as she did.

The eighth instance, in which the prosecutor described the SANE examination and then asserted, "We're talking about a woman who went from her first kiss to this," is harder to explain as anything other than an appeal for sympathy. The same is true of the ninth instance, in which the prosecutor seemed to characterize the fact that the incident involved the victim's first kiss as one of the essential details of the incident that [*14] the victim should be credited for remembering.

Nevertheless, "enthusiastic rhetoric, strong advocacy, and excusable hyperbole" are not impermissible. *Commonwealth* v. *Costa*, 414 Mass. 618, 629, 609 N.E.2d 465 (1993). "A certain measure of jury sophistication in sorting out excessive claims on both sides fairly may be assumed." *Kozec*, 399 Mass. at 517. "[W]e are confident that the jury took the criticized argument with a grain of salt" (quotation and citation omitted). *Commonwealth* v. *Bishop*, 461 Mass. 586, 598, 963 N.E.2d 88 (2012). We also consider that the judge instructed the jury that they were "not to be swayed by prejudice or by sympathy." Although the improper invocations of the first-kiss theme went to the victim's credibility — which was a central issue, in a case where the Commonwealth's evidence was not overwhelming — the victim's testimony was not the only evidence relevant to consent. The jury could have taken, for example, the victim's reported demeanor immediately after the incident, and the bruises on the victim's neck and the injuries to her vagina and cervix, as additional evidence of lack of consent. In sum, we see no substantial risk of a miscarriage of justice from the prosecutor's use of the first-kiss theme.

2. *Argument that victim's testimony was sufficient*. The prosecutor also told the jury:

> "You'll hear the [*15] [j]udge say, when she's talking about credibility of witnesses and about the evidence in general, that testimony is evidence and if you believe what [the victim] told you, then that is enough to prove beyond a reasonable doubt that this defendant raped her and strangled her."

The defendant objected and asked for a curative instruction to the effect that the jury must consider all of the evidence.[5] The judge agreed to give such an instruction, along with curative instructions addressing other portions of the closing arguments not at issue here, and defense counsel agreed that this would be a satisfactory response. The judge then instructed the jury, before giving her final

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[5] The judge also observed that the prosecutor's formulation suggested that the judge herself would be instructing the jury that if they believed the victim's testimony, that was enough for them to convict the defendant. The prosecutor agreed that her formulation might have been infelicitous, the judge stated that the curative instruction would address this point as well, and the defendant did (and does) not press the issue further.

charge, that "[w]hat you need to do is to evaluate all of the evidence according to the instructions of law that I am going to give you." Defense counsel made no further objection.

In these circumstances, no objection was preserved, and so we review to determine whether any error created a substantial risk of a miscarriage of justice. See *Commonwealth* v. *Beaudry*, 445 Mass. 577, 587, 839 N.E.2d 298 (2005). See also Mass. G. Evid. § 1113(c) (2021). We conclude that any error created no such risk.

First, the prosecutor did not expressly suggest to the jury that if they believed the victim, they need not consider [*16] any other evidence. Such an argument would have misstated the law. Cf. *Commonwealth* v. *Gaeten*, 15 Mass. App. Ct. 524, 531, 446 N.E.2d 1102 (1983) (it would have been error to instruct jury that they did not need to consider all of evidence). Although it was unwise for the prosecutor to venture into legal territory by telling the jury what minimum evidence would be sufficient to convict, the prosecutor did not misstate either the jury's responsibility or the substantive law. See *Commonwealth* v. *Santos*, 100 Mass. App. Ct. 1, 3, 173 N.E.3d 776 (2021) (sexual assault victim's testimony alone was sufficient to support conviction).

Second, the effect of the prosecutor's statement was mitigated by her argument, shortly after the passage to which the defendant now objects, that the jury should consider not only the victim's testimony, but other evidence as well. The prosecutor pointed to the testimony of the victim's roommate, of the male friend present when the victim described what happened, and of the mother, as well as the medical records, as additional evidence of the defendant's guilt. This encouraged the jury not to focus solely on one piece of evidence.

Finally, and most significantly, the judge not only gave the curative instruction quoted above, but also, in the body of her final charge, instructed the jury no less than fourteen [*17] times to consider "all of the evidence." We presume the jury followed these instructions. See *Commonwealth* v. *Gonzalez*, 465 Mass. 672, 681, 991 N.E.2d 1036 (2013). We thus see no risk that the prosecutor's single comment caused the jury to consider any less than the full body of evidence before returning their guilty verdicts.

Judgments affirmed.

By the Court (Desmond, Sacks & Grant, JJ.[6]),

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

Entered: October 7, 2021.

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