APPENDIX "A"

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-512

COMMONWEALTH

vs.

JAMAIL D. HAIRSTON.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a bench trial in the Superior Court, the defendant was convicted of the lesser included offense of assault and battery, G. L. c. 265, § 13A, on an indictment charging him with indecent assault and battery, G. L. c. 265, § 13H.[1] On appeal, he argues that it was error to permit the officer who questioned him about the incident to testify at trial that he "refused to answer any questions" after receiving his Miranda warnings.[2] Because there was no objection (and no motion to strike the officer's testimony), "we must determine

[1] The judge allowed the defendant's motion for a required finding of not guilty on an additional charge of open and gross lewdness stemming from the same series of events and the defendant was acquitted of two counts of indecent assault and battery.

[2] See generally Miranda v. Arizona, 384 U.S. 436, 471 (1966).

whether the error created a substantial risk of a miscarriage of justice." See Commonwealth v. Alphas, 430 Mass. 8, 13 (1999).

Background. In June 2018, the defendant and the victim, whom we shall call Ed, were incarcerated at the Massachusetts Treatment Center (MTC). The two struck up a friendship and initially enjoyed visiting and doing things together. However, within a few weeks, the defendant's conduct changed. At first, he touched Ed on his "front private area" and his "butt." He then became more aggressive and on one occasion he pinned Ed to the floor of his cell and put his hand inside Ed's pants from behind. Following this incident, Ed reported the defendant's conduct to two fellow inmates, Thomas McMahon and Derek Gaughan. Both McMahon and Gaughan testified at trial, McMahon as a first complaint witness and Gaughan as an eyewitness to one of the assaults. Ed then reported the incident to Richard Pagan, an internal perimeter security officer. Ed sustained a bruise during the incident, which was observed by Officer Pagan and a nurse who examined Ed at the health services unit. After speaking with Ed, Officer Pagan initiated an investigation, which included conducting interviews and viewing video surveillance tapes. During the course of his investigation, Officer Pagan questioned the defendant. The interview was conducted in an "interrogation room." Officer Pagan testified that he "Mirandized" the defendant, which we understand to mean

that the defendant was given his Miranda warnings, and the defendant would not answer his questions.[3] The exchange between the prosecutor and Officer Pagan was as follows:

> Q.: "And who did you speak to other than [Ed]?"
>
> A.: "I also spoke with the defendant, which he refused to answer any questions."
>
> Q.: "All right. Not what he said, but just who you spoke to."
>
> A.: "As far as witnesses: Derek Gaughan, McMahon -- I don't remember his first name -- and [Ed]. That was it."

The defendant testified on his own behalf and denied the allegations. He acknowledged that he was friendly with Ed and went to his cell on a number of occasions, although doing so was against the rules of the facility, so that Ed could fix his electronics.

Discussion. As the Commonwealth properly concedes, Officer Pagan's testimony that the defendant "refused to answer any questions" was improper. It is well settled that "a defendant's silence after [receiving Miranda] warnings will carry no penalty." Commonwealth v. Peixoto, 430 Mass. 654, 657 (2000). Here, Officer Pagan's response implied that if the defendant had not engaged in the conduct on which the charges were based, he would have denied the allegations when Officer Pagan interviewed

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[3] We note that the testimony regarding the giving of Miranda warnings was solicited during cross-examination, but that does not affect our analysis.

him, as the defendant later did at trial. Although we conclude the testimony was admitted in error, we agree with the Commonwealth that the error did not create a substantial risk of a miscarriage of justice. See Alphas, 430 Mass. at 13.

To begin with, we note that the defendant was tried without a jury. Even in the absence of an objection, we are confident that the trial judge was aware of the legal principles implicated by the testimony at issue and would have disregarded it. We further note that the prosecutor immediately sought to clarify Officer Pagan's testimony and never mentioned the defendant's post-Miranda silence during the remainder of the trial. Contrast Commonwealth v. Rendon-Alvarez, 48 Mass. App. Ct. 140, 142 (1999) (defendant entitled to new trial where prosecutor highlighted improper testimony regarding post-Miranda silence during closing argument). More fundamentally, the evidence of guilt was strong. In addition to Ed's testimony and that of the first complaint witness, the video surveillance tapes showed the defendant entering Ed's room on multiple occasions during the relevant time period. The Commonwealth also introduced a photograph depicting a bruise on Ed's upper arm that corroborated Ed's testimony that the defendant had pinned him to the ground, and Gaughan testified that he saw the defendant wrestling with someone in Ed's room. Given this evidence, we conclude that the challenged testimony had very

slight, if any, effect and did not create a substantial risk of a miscarriage of justice. See Alphas, 430 Mass. at 14.

Judgment affirmed.

By the Court (Vuono, Rubin & Sullivan, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: February 16, 2021.

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

APPENDIX "B"

FAR-28124 - Notice: FAR denied

From: SJCCommClerk@sjc.state.ma.us (sjccommclerk@sjc.state.ma.us)

To: jcox@jennifer-cox.com

Date: Thursday, April 15, 2021, 06:00 PM EDT

Supreme Judicial Court for the Commonwealth of Massachusetts

RE: Docket No. FAR-28124

COMMONWEALTH
vs.
JAMAIL D. HAIRSTON

Plymouth Superior Court No. 1983CR00048
A.C. No. 2020-P-0512

NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW

Please take note that on April 15, 2021, the application for further appellate review was denied.

Francis V. Kenneally Clerk

Dated: April 15, 2021

To: Carolyn A. Burbine, A.D.A.
Patricia Jardim Reilly, A.D.A.
Jennifer J. Cox, Esquire
C. Raye Poole, Esquire

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