COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

FAR NO. _____

APPEALS COURT
2020-P-1029

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE

V.

MICHELLE TIERNEY,
DEFENDANT-APPELLANT

ON APPEAL FROM JUDGMENTS OF THE WORCESTER DIVISION OF THE SUPERIOR COURT DEPARTMENT

APPLICATION FOR FURTHER APPELLATE REVIEW OF MICHELLE TIERNEY

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September 2021

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COMMONWEALTH OF MASSACHUSETTS,
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V.

MICHELLE TIERNEY,
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Application for Further Appellate Review

Pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure, Michelle Tierney, the defendant in the above-captioned action, applies for leave to obtain further appellate review.

A. Statement of the Issues with Respect to Which the Defendant Seeks Further Appellate Review

I. Whether the defendant was entitled to an instruction on self-defense and the court's failure to give this instruction upon request resulted in an unfair trial.

II. Whether the defendant was entitled to contemporaneous and final limiting instructions on the use of her prior convictions and the court's failure to give these instructions resulted in an unfair trial.

III. Whether the prosecutor improperly commented on the defendant's ability to watch the trial testimony and "tailor" her

testimony to what she had heard and the court's failure to provide a curative instruction resulted in an unfair trial.

B. Statement of Prior Proceedings

On August 25, 2017, indictments were returned in Worcester Superior Court Docket No. 1785CR00336 charging the defendant, Michelle M. Tierney, with larceny of a motor vehicle in violation of G. L. c. 266, § 28(a), assault and battery with a dangerous weapon in violation of G. L. c. 265, § 15A(b), resisting arrest in violation of G. L. c. 268, § 32B, assault and battery on a police officer in violation of G. L. c. 265, § 13D, and leaving the scene of a property damage accident in violation of G. L. c. 90, § 24(2)(a) (R.14-18).[1]

The defendant was tried by jury (Campo, J., presiding) from November 26 to November 29, 2018 (R.9-12). The jury found the defendant guilty of resisting arrest and assault and battery on a police officer but not guilty of the remaining charges (R.11-12; Tr. IV/14-16). On November 30, 2018, the court sentenced the defendant to two and one-half years in the house of corrections (R.12; Tr. V/14). The same

[1] The record appendix filed in the Appeals Court is cited as "(R.)." The transcripts of the jury trial and sentencing are in five volumes and are cited by volume and page number as "(Tr./)".

day, the defendant filed a timely notice of appeal of her convictions (R.12, 19).

On September 16, 2020, the case entered the Appeals Court. On August 23, 2021, the Appeals Court upheld the defendant's convictions in a memorandum of decision pursuant to its Rule 23.0 (see post). The defendant seeks further appellate review.

C. Statement of Evidence

A. The Car Crash and Pursuit

At 1:42 A.M. on July 16, 2017, Worcester police officer Michael Lahair was dispatched to the area of 491 Lincoln Street in Worcester for a report of a single-car accident (Tr. II/110-112). Officer Lahair found the vehicle: a four-door green Honda Civic bearing license plate 812LK5; its tires were flat, and its airbags had deployed (Tr. II/113).

A group of people were standing around the damaged vehicle (Tr. II/114). The people "pointed" and said, "she's running there" (Tr. II/116).[2] Officer Lahair observed a woman, later identified as the defendant, running up Lincoln Street; he described her as white, with

[2] The statement "she's running there" was struck on hearsay grounds (Tr. II/116).

dirty blonde hair, about 5'8", and weighing 140 pounds (Tr. II/116-117).[3]

Officer Lahair followed the defendant in his cruiser and ordered her to "stop" (Tr. II/118). The defendant said "no" then ducked under a guardrail and fence and descended a rocky slope into Lincoln Plaza (Tr. II/118-119). Officer Lahair followed to Lincoln Plaza in his cruiser when he observed the defendant running towards and then climbing atop a large yellow box truck (Tr. II/120).

Officer Lahair ordered the defendant down from the truck several times and each time the defendant, who appeared to be under the influence, replied "no" (Tr. II/121). Officer Lahair climbed onto the truck (Tr. II/122). The defendant momentarily disappeared behind the "boom area" of the truck and emerged holding a steel pipe (Tr. II/122). Officer Lahair told the defendant to drop the pipe and she said "no" (Tr. II/122).

Officer Lahair took a step towards the defendant and she swung the pipe at him, striking him above the knee (Tr. II/122-123).[4] The

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[3] For this, the defendant was found ***not guilty*** of leaving the scene of a property damage accident (R.12; Tr. IV/16).

[4] For this, the defendant was found ***not guilty*** of assault and battery with a dangerous weapon (R.11; Tr. IV/14).

defendant attempted another strike but Officer Lahair was able to block the strike and take the defendant to the ground (Tr. II/123). Throughout the attack, Officer Lahair told the defendant she was under arrest (Tr. II/123). Officer Lahair kept his bodyweight on the defendant, who continued to struggle, until back-up arrived (Tr. II/124, 162).

Officer Prizio arrived and he and Officer Lahair worked together to get the defendant off the truck (Tr. II/125). Officer Lahair took hold of the defendant's upper body while Officer Prizio tried to control her legs (Tr. II/125). The defendant kicked Officer Prizio's chest and arm area[5] as he yelled "stop kicking" (Tr. II/125, 162). Eventually, the officers were able to get the defendant off the truck (Tr. II/125, 163). On the ground, the defendant continued to struggle, but the officers were able to handcuff her and bring her to rest (Tr. II/126, 163-164).[6]

Officer Prizio accompanied the defendant to the hospital while Officer Lahair continued his investigation (Tr. II/127, 165). Officer

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[5] For this, the defendant was found ***guilty*** of assault and battery on a police officer (R.12; Tr. IV/15).

[6] The defendant was found ***guilty*** of resisting arrest (R.11; Tr. IV/16).

Lahair was informed by dispatch that the vehicle may have been reported stolen from "Hurricane Betty's" earlier that night (Tr. II/127).

B. Earlier at Hurricane Betty's

Kevin Morgan is the general manager of Hurricane Betty's, a "gentleman's club" (club) located at 350 Southbridge Street in Worcester, about six miles from where the defendant was arrested (Tr. II/146, 174, 177). Mr. Morgan was working security when, at approximately 1:20 A.M. (thirty or so minutes before the defendant was arrested), a woman caught his attention (Tr. II/175). Mr. Morgan described this woman as white, 5'5", and no more than 150 pounds.[7] Mr. Morgan saw this woman exit the women's restroom and enter the entertainers' changing room (Tr. II/175). Mr. Morgan entered the changing room to remove the woman when the woman exited onto the dancing stage, walked off the stage, and exited the building (Tr. II/175).

Mr. Morgan walked outside and saw the woman enter an older, green Honda (Tr. II/176). The woman entered through the passenger side door and crawled into the driver's seat (Tr. II/176). The woman drove the Honda at a high rate of speed, without headlights, towards

[7] Mr. Morgan's identification was suppressed so he was not able to identify the defendant as the woman he saw inside the club (R.8).

Mr. Morgan (Tr. II/176). Mr. Morgan had to jump out of the way (Tr. II/176). The woman proceeded at a high rate of speed, without headlights, onto Lafayette Street towards Kelley Square (Tr. II/177). Mr. Morgan relayed what he saw to his detail officer, Nicholas Riggieri[8] (Tr. II/177).

Vinicius Queiroz testified that he parked his green, 2000 Honda Civic, license plate 812LK5, in the club's parking lot at 9:00 P.M. the night of the defendant's arrest (Tr. II/185). Mr. Queiroz left his keys in the car but kept his key "fob" (which opens the car doors) with him (Tr. II/185-186). Mr. Queiroz then entered the club where he remained until 2:00 A.M. (Tr. II/185). At 2:00 A.M., Mr. Queiroz exited the club to find his car missing (Tr. II/186). Mr. Queiroz called 911 (Tr. II/187).

Mr. Queiroz next saw his car after it had been towed to a tow lot; it had been totaled (Tr. II/187). Inside the car, Mr. Queiroz found a purse, the defendant's ID, and a prescription bottle with the defendant's name and address on it (Tr. II/189-191). Mr. Queiroz never gave the defendant permission to drive his car (Tr. II/193).

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[8] Officer Riggieri testified that he saw a white woman, 5'7" or 5'8" tall, 130-140 pounds, with dirty blonde hair acting erratically inside the club (Tr. II/209). Officer Riggieri's identification was suppressed so he was not able to identify the defendant as the woman he saw inside the club (R.8).

C. The Defendant Testifies

The defendant testified that she arrived at Hurricane Betty's with a few friends at 10:00 P.M the night of her arrest (Tr. III/28). While at the club, she had a few mixed drinks (Tr. III/28). She left the club with Peter, a tall, bearded man with an accent, at approximately 12:30 A.M. (Tr. III/30). Although she was planning on going to Peter's apartment, she felt uncomfortable and wanted to go back (Tr. III/31). Peter started screaming at her, was driving erratically, and scared her (Tr. III/31-32). Eventually, Peter crashed the car (Tr. III/33).

The defendant feared Peter, so she got out of the car and ran, dropping her purse behind (Tr. III/33-34). She ran down the street, then down an embankment (Tr. III/33). She did not know she was being followed until she was on top of the truck; she thought she was being followed by Peter so she hid from him at the back of the truck (Tr. III/35-36).

While hiding in the back of the truck, the defendant heard someone yelling, "get the fuck down off the truck" and that he if had to go up and get her, that he would "fucking kill her" (Tr. III/36-37). She thought the man yelling at her was Peter (Tr. III/37). The man yelling

at her climbed atop the truck; he held a flashlight which blinded her; she was unable to see who he was (Tr. III/37).

The man started kicking and punching the defendant; he was on top of her and she could not breathe (Tr. III/38). She denies that she ever swung a steel pipe at the man (Tr. III/38). She was screaming and asking the man to stop but the man would not stop; she was afraid for her life (Tr. III/38).

A second man arrived; he grabbed the defendant's legs and began pulling her off the truck while the first man kicked, punched, and screamed at her that he was going to "fucking kill her" (Tr. III/39-40). Scared that she was going to be pulled off the truck and hit the ground, she grabbed on to the side of the truck (Tr. III/41). The two men yanked her off the truck and she struck the ground (Tr. III/41). She suffered injuries including scratches and bruises up and down her body; she felt pain in her back and neck and was taken to the hospital at UMASS for treatment (Tr. III/41).

D. Arguments

I. The defendant was entitled to an instruction on self-defense. The court's failure to give this instruction denied the defendant a fair trial.

At the charge conference before the defendant testified, counsel requested a self-defense instruction (Tr. III/17-18). The Commonwealth objected to a self-defense instruction because the defendant did not provide notice, in advance of trial, of her intent to pursue self-defense (Tr. III/18). Counsel stated, for the record, that he was the third defense attorney on the case and believed that notice had been given by a prior attorney (Tr. III/18). The court found that the evidence, at that juncture, showed that there was a "serious wrestling match" but that it would not give the instruction because "self-defense was not raised as a defense in this case" (Tr. III/19). The court concluded:

> "I'll provide the instruction, supplemental instruction that a police officer may not use unreasonable or excessive force in effecting an arrest. But in terms of anything that trips into language that triggers a self-defense, that just wasn't raised before so I'm not going to go that far" (Tr. III/20).[9]

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[9] Note: the court did not find that the trial evidence did not support the self-defense instructions; rather, the court found that the defendant was not entitled to the instructions because she did not give notice, prior to trial, of her intent to pursue self-defense. However, the defendant was under no obligation to disclose her trial strategy to the Commonwealth or to the court prior to trial. See M.R.C.P. Rule 14(b)(4)(A) (the only duty of a defendant asserting self-defense is to notify the Commonwealth if she intends to produce extraneous evidence of the alleged victim's history of violence). See Commonwealth v. Adjutant, 443 Mass. 649 (2005). No rule requires a defendant to disclose in advance of trial that she is pursuing self-defense.

The court provided the standard instruction on the elements of assault and battery on a police officer and resisting arrest but did not provide a self-defense instruction or an instruction on the unreasonable use of police force (Tr. III/67-70). The court erred when it failed to deliver these instructions as requested. The failure to provide theses instructions denied the defendant a fair trial.

The defendant was convicted of two crimes (assault and battery on a police officer and resisting arrest) based on her interactions with Officers Lahair and Prizio while she was acquitted of all other charges including striking Officer Lahair with a steel pipe, stealing Mr. Queiroz's motor vehicle, and leaving the scene of the accident (R.12; Tr. V/14). That the jury acquitted the defendant of these charges indicates that they, at least to some extent, credited her trial testimony.

This is especially true where Officer Lahair gave direct, eyewitness testimony that the defendant struck him with a steel pipe and Mr. Queiroz gave direct testimony that the defendant did not have permission to take his car. The defendant testified that she was acting in self-defense and, as the court stated, the testimony of Officers LaHair

and Prizio indicate that a struggle took place. Based on the evidence at trial, the defendant was entitled to the self-defense instruction.[10]

A defendant is entitled to an instruction on the use of non-deadly force in self-defense "if the evidence, viewed in the light most favorable to the defendant without regard to credibility, supports a reasonable doubt that (1) the defendant had reasonable concern for his personal safety; (2) he used all reasonable means to avoid physical combat; and (3) `the degree of force used was reasonable in the circumstances, with proportionality being the touchstone for assessing reasonableness.'" Commonwealth v. King, 460 Mass. 80, 83 (2011). If, however, the evidence was insufficient to allow a reasonable doubt to be raised, no self-defense instruction would be necessary. See Commonwealth v. Maguire, 375 Mass. 768, 772 (1978).

Additionally, "if there is some evidence that the police used unreasonable or excessive force, the Commonwealth must prove beyond a reasonable doubt that the defendant did not act in self-defense." Model Jury Instruction 7.460 (2009).[11] In cases where there

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[10] See Model Jury Instruction 9.260 (2009).

[11] This instruction states: "A police officer may not use unreasonable or excessive force in making an arrest. A person is allowed to use reasonable force to protect himself from physical harm

is "some evidence" that the police used unreasonable or excessive force, the jury is instructed as follows:

"To prove that the defendant did not act in self-defense, the Commonwealth must prove at least one of the following three things beyond a reasonable doubt:

> "First: That the defendant did not reasonably believe that the police officer was using unreasonable and excessive force and putting the defendant's personal safety in immediate danger; or
>
> "Second: That the defendant did not do everything that was reasonable in the circumstances to avoid physical combat before resorting to force; or
>
> "Third: That the defendant used more force to defend himself than was reasonably necessary in the circumstances."
>
> Model Jury Instruction 7.460 (2009).

Turning to the facts introduced at trial, viewed in the light most favorable to the defendant, the defendant was entitled to these instructions. First, the jury did not credit Officer Lahair's testimony that the defendant struck him with a steel bar as they found the defendant not guilty of this charge. Both Officers Lahair and Prizio

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when unreasonable or excessive force is used. If a police officer uses unreasonable or excessive force to make an arrest, the person who is being arrested may defend himself with as much force as reasonably appears necessary. The person arrested is required to stop resisting once he knows or should know that if he stops resisting, the officer will also stop using unreasonable or excessive force."

testified to a struggle and the defendant testified that she was in fear, that Officer Lahair was threatening to hurt her and was screaming and swearing at her and was striking her while she laid prone, and that she was acting in defense of herself when she resisted the officers and kicked at Officer Prizio with her legs. Taken in the light most favorable to the defendant, this was "some evidence" that the defendant kicked her legs and resisted in defense of herself.

The failure to provide the unreasonable use of force and self-defense instructions denied the defendant a fair trial. The evidence submitted to the jury was largely rejected. As argued earlier, the jury rejected the Commonwealth's theory that the defendant stole a motor vehicle, left the scene of the crash, and struck Officer Lahair with the steel pipe. The jury reported that they were having a hard time resolving "two of the charges" and a Tuey-Rodriguez charge was required to end the impasse (Tr. IV/7, 9-11).

II. The defendant was entitled to contemporaneous and final limiting instructions on the use of her prior convictions. The court erred by not giving these instructions. Failure to give these instructions resulted in an unfair trial.

The prosecutor began her cross-examination of the defendant by asking her about her prior convictions for receiving a stolen credit card, uttering a false check, forgery of a check, forgery of a document,

improper use of a credit card over $250, and sex for a fee (Tr. III/43-46). Later, the prosecutor referenced each of these convictions one by one during her closing argument (Tr. III/98).

Despite this, defense counsel did not ask the court to guide the jury in its use of this evidence nor did the court, on its own, offer any guidance. The defendant was entitled to have the jury instructed on the proper, limited use of this evidence and the court's failure to guide them rendered the defendant's trial unfair.

Under G. L. c. 233, § 21, a witness's prior criminal conviction "may be shown to affect [the witness's] credibility." The theory underlying § 21 is that a witness's "earlier disregard for the law may suggest to the fact finder similar disregard for the courtroom oath." Commonwealth v. Fano, 400 Mass. 296, 302-303 (1987). "One who has been convicted of crime is presumed to be less worthy of belief than one who has not been so convicted." Brillante v. R.W. Granger & Sons, 55 Mass. App. Ct. 542, 545 (2002).

Thus, while the law does not allow a witness to be impeached by evidence of prior bad acts, if those bad acts have resulted in a conviction, the conviction itself may be admissible under § 21. See Commonwealth v. Bregoli, 431 Mass. 265, 275 (2000).

While the court did not err in allowing evidence of the defendant's various prior convictions, the court should have provided the jury with an instruction limiting them to considering the evidence only in assessing the defendant's credibility, and not in assessing her character or her propensity to commit the crimes with which she was charged. See Commonwealth v. Paulding, 438 Mass. 1, 12 (2002) ("The judge twice gave appropriate limiting instructions concerning the jury's use of the evidence, once after the defendant admitted during his direct examination that he had previously been convicted of the offenses, and once during her closing remarks to the jury"); Commonwealth v. Drumgold, 423 Mass. 230, 250 (1996); Commonwealth v. Maguire, 392 Mass. 466, 469-470 (1984) ([w]here the judge decides to allow introduction of a prior conviction under § 21, the potential prejudice may be ameliorated by an appropriate limiting instruction).

III. The prosecutor improperly commented on the defendant's ability to watch the trial testimony and "tailor" her testimony to what she had heard. No curative instruction was given. This was error requiring a new trial.

During cross-examination, the prosecutor asked the defendant "You saw all of the testimony that we heard yesterday; correct?" to

which the defendant replied that she had (Tr. III/48). During her closing argument, the prosecutor stated:

> "I ask you to consider who has an interest in this case. Who has something to lose? Is it Officer LaHair, a Worcester police officer with 21 years on the job, who doesn't know this defendant? Is it Officer Prizio, who has been with Worcester for about two years, has prior law enforcement experience with the Northborough Police Department, who doesn't know this defendant? Is it Kevin Morgan, the strip club manager, who doesn't know this defendant? Is it Vinicius Queiroz, the owner of the stolen car? He also did not know this defendant. Is it Officer Riggieri, the on-duty Worcester police officer at the strip club, who also doesn't know this defendant? Or is it the defendant who has an interest in this case?" (Tr. III/87-88).

Later, the prosecutor continued:

> "This defendant was a one-woman crime wave throughout the city of Worcester and I again point your attention to the path of destruction, all of the evidence that she left in that path of destruction. **And she conveniently, I suggest to you, tailored her testimony today to what we all heard yesterday.** I suggest to you that after hearing the testimony of Mr. Queiroz saying that he was with a friend of his who he only knows by his nickname of Peu, I think it was, or something along those lines, and you heard Mr. Queiroz has an accent. Conveniently, the defendant states she was with someone named Peter who had an accent" (Tr. III/100-101).

The prosecutor concluded:

> "And there's overwhelming evidence by way of officers LaHair and Prizio that she fought with them, she attacks them. She hit Officer LaHair with a steel pipe twice and she kicked Officer Prizio. And as you heard from their testimony, there are no inconsistencies with their testimony. They stated exactly what this defendant did to them, and **there's absolutely no evidence**

whatsoever besides the defendant's ridiculous story that anything different happened (Tr. III/102).

Although counsel requested a curative instruction, which was denied, he did not make the specific argument the defendant now argues on appeal (Tr. III/103). Nonetheless, as the improper statement goes to the heart of the defendant's right to confront the Commonwealth's witnesses and witness credibility was the primary issue at trial, this court must order a new trial.

The defendant has a State and a Federal constitutional right "to hear the Commonwealth's evidence and to confront the witnesses against him." Commonwealth v. Person, 400 Mass. 136, 139-140 (1987). As held in Person, the prosecutor's statement that the defendant was present at trial and therefore had the opportunity to tailor his testimony is error. Whether the error in this case requires a new trial depends on "the context of the entire argument, the facts of the case, and the rationale underlying the *Person* principle."

Commonwealth v. Sherick, 401 Mass. 302, 303 (1987).

This case is indistinguishable from Commonwealth v. Alphonse, 87 Mass. App. Ct. 336 (2015). In Alphonse, the defendant was charged with assault and battery. During closing argument, the prosecutor stated the following:

> "Who does have motivation to lie in this case? The Defendant does. He's — he's the only person that has something to lose from this case. He's got every reason to lie to you. He's got the opportunity to lie to you. Where was everyone else while testimony was going on? All the other witnesses [*sic*] outside the courtroom. Where's the Defendant when all the other evidence, all the other witnesses were coming in? Sitting right here. It's the opportunity to tailor his version of events to what you already know." Alphonse, *supra* at 338.

In Alphonse, the Appeals Court found that "the error went to the heart of the case — the credibility of the witnesses, in particular, the defendant, who testified. Whether the jury convicted the defendant depended entirely on whether the jury believed the testimony of Sandy or the defendant." Id. at 338-339.

E. Conclusion

Based on the authorities cited and the reasons aforesaid, the defendant respectfully requests that his application for further appellate review be allowed.

RESPECTFULLY SUBMITTED,

MICHELLE TIERNEY,
BY HER ATTORNEY:

/s/ Edward Gauthier

_____

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CERTIFICATE OF SERVICE

I, Edward Gauthier, hereby certify that I have e-filed this application for further appellate review with service on the Commonwealth this 10th day of September, 2021.

/s/ Edward Gauthier

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Edward Gauthier, Esq.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1029

COMMONWEALTH

vs.

MICHELLE TIERNEY.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

A jury convicted the defendant of resisting arrest and assault and battery on a police officer.[1] On appeal the defendant argues that the trial judge erred by not providing a self-defense instruction or a limiting instruction about the defendant's prior convictions, and that improper remarks in the prosecutor's closing argument require reversal. We affirm.

Background. 1. The Commonwealth's case-in-chief. Around 1:42 A.M. on July 16, 2017, police officer Michael LaHair, who was in uniform, responded in a marked police cruiser to the scene of a car accident. When he arrived, bystanders yelled and pointed to a woman running down the street. Officer LaHair

[1] The jury acquitted the defendant of larceny of a motor vehicle, assault and battery by means of a dangerous weapon, and leaving the scene of an accident causing property damage.

continued driving and instructed the woman, later identified as the defendant, to stop. The defendant said, "No," ducked under a guardrail and fence, and ran down a hill. Less than a minute later, Officer LaHair saw the defendant run toward a utility truck and climb onto the back of it. Officer LaHair ordered the defendant several times to get down, but she said, "No," and remained on the truck.

Officer LaHair climbed on the truck, told the defendant that she was under arrest, and attempted to hold her down as he waited for assistance. Officer Michael Prizio, also in uniform, arrived on scene and assisted Officer LaHair in pulling the defendant off the truck. The defendant grabbed onto parts of the truck and kicked her legs. When Officer Prizio tried to control her legs, she kicked him in his "chest and [his] arm area."

Once on the ground, the defendant continued to struggle and refused to put her hands behind her back. The officers handcuffed the defendant and took her into custody. Both officers denied striking the defendant at any point during the encounter.

2. The defense. The defendant testified to the following version of events. On the night in question, the defendant was riding in a car driven erratically by a man named Peter who "had a strong accent." The car crashed, and the defendant got out,

ran from the scene, and hid in the back of a truck because she feared Peter.

The defendant heard a man approach and yell, "[G]et the fuck down off the truck," and that he would kill her if he had to go up there. The defendant thought that the man was Peter and "just stayed silent, in a ball." After the man climbed on the truck, the defendant learned that he was a police officer. The officer kicked, punched, and jumped on the defendant and said that he was going to "fucking kill [her]." The defendant yelled for him to stop while remaining crouched in a ball. Eventually, a second officer arrived and pulled the defendant off the truck, causing her body to hit the ground.

Discussion. 1. Self-defense instruction. At the close of the Commonwealth's case-in-chief, the defendant requested a self-defense instruction. After the defendant agreed that there "[hadn't] been any testimony as to any self-defense claim at [that] point," the judge denied the request. The defendant did not renew her request after she testified or object to the judge's final instructions.

A defendant is entitled to an instruction on the use of nondeadly force in self-defense if the evidence "supports a reasonable doubt that (1) the defendant had reasonable concern for [her] personal safety; (2) [she] used all reasonable means to avoid physical combat; and (3) 'the degree of force used was

reasonable in the circumstances, with proportionality being the touchstone for assessing reasonableness.'" Commonwealth v. King, 460 Mass. 80, 83 (2011), quoting Commonwealth v. Franchino, 61 Mass. App. Ct. 367, 368-369 (2004). In evaluating whether there was a sufficient evidentiary basis for a self-defense instruction, we resolve "all reasonable inferences . . . in favor of the defendant" and treat her testimony as true. Commonwealth v. Pike, 428 Mass. 393, 395 (1998).

Here, the evidence, even viewed in the light most favorable to the defendant, see King, 460 Mass. at 83, did not warrant a self-defense instruction. As the defendant acknowledged at trial, the evidence in the Commonwealth's case-in-chief did not support a claim of self-defense. Both officers testified that they never struck the defendant, and no evidence was offered to the contrary.

Nor did the defendant's testimony raise a reasonable doubt as to self-defense. The defendant did not testify that she used force against the officers; rather, she maintained that she was crouched in a ball as she was being kicked and punched. Thus, while the defendant's testimony, if believed, could have provided a basis for acquittal, it did not support a claim of self-defense either alone or in combination with the Commonwealth's evidence. See Commonwealth v. Hakkila, 42 Mass. App. Ct. 129, 130 (1997) (judge not required to instruct on

self-defense sua sponte where defendant "flatly denied inflicting [victim's] injuries, admitting only to placing her in a bear-hug"); Commonwealth v. Paton, 31 Mass. App. Ct. 460, 464-465 (1991) (similar). "[A] judge is not required to charge on self-defense, either upon request or on his own motion, where a jury would be left to speculate on a hypothesis not supported by the evidence." Paton, supra at 464. See Commonwealth v. Maguire, 375 Mass. 768, 772 (1978).

2. Instruction on prior convictions. The Commonwealth offered evidence that the defendant was previously convicted of receiving a stolen credit card, uttering a false check, forgery of a check, forgery of a document, improper use of a credit card over $250, and sexual conduct for a fee. The defendant argues that the judge erred by failing to instruct the jury that they could consider these convictions only for the purpose of assessing the defendant's credibility. Because the defendant raises this issue for the first time on appeal, we review to determine whether, if error, it created a substantial risk of a miscarriage of justice. See Commonwealth v. Oliveira, 74 Mass. App. Ct. 49, 55 (2009).

We discern no such risk. The potential prejudicial effect of the prior convictions was limited because they were dissimilar to the crimes of resisting arrest and assault and battery on a police officer. Cf. Commonwealth v. Leftwich, 430

Mass. 865, 869 (2000), quoting Commonwealth v. Drumgold, 423 Mass. 230, 250 (1996) ("Generally, in order for the prejudicial effect to outweigh the probative value of prior conviction evidence, the 'prior conviction must be substantially similar to the charged offense'"). The Commonwealth also used the convictions for the proper purpose -- to attack the defendant's credibility -- not for propensity purposes. And importantly, the jury acquitted the defendant of larceny of a motor vehicle, the crime most similar to the prior convictions, demonstrating that the absence of a limiting instruction did not create a substantial risk of a miscarriage of justice.

3. Closing argument. The prosecutor argued in closing:

> "[The defendant] conveniently, I suggest to you, tailored her testimony today to what we all heard yesterday. I suggest to you that after hearing the testimony of Mr. Queiroz saying that he was with a friend of his who he only knows by his nickname of Peu, . . . and you heard that Mr. Queiroz has an accent. Conveniently, the defendant states she was with someone named Peter who had an accent."

The Commonwealth rightly concedes that these remarks were improper. See Commonwealth v. Alphonse, 87 Mass. App. Ct. 336, 338 (2015) ("prosecutor's statement that the defendant was present at trial and therefore had the opportunity to tailor his testimony is error"). Because the defendant did not object to this part of the closing argument at trial, however, our review is limited to determining whether the error created a

substantial risk of a miscarriage of justice. See Commonwealth v. Gaudette, 441 Mass. 762, 768 n.5 (2004).

Viewing the improper comments "in the context of the whole argument, the evidence admitted at trial, and the judge's instructions to the jury," Commonwealth v. Whitman, 453 Mass. 331, 343 (2009), we conclude that they did not create a substantial risk of a miscarriage of justice. The comments were brief and, unlike in Alphonse, were not compounded by an instruction that drew "further attention to the possibility that the defendant had the opportunity to tailor [her] testimony." 87 Mass. App. Ct. at 339. Moreover, the suggestion of tailored testimony was most relevant to the charge of larceny of a motor vehicle; the jury's acquittal of the defendant on that charge, along with two other charges, demonstrates that no substantial risk of a miscarriage of justice resulted. See Commonwealth v. Duffy, 62 Mass. App. Ct. 921, 924 (2004).

Judgments affirmed.

By the Court (Blake, Shin, & Walsh, JJ.[2]),

Joseph F. Stanton

Clerk

Entered: August 23, 2021.

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