COMMONWEALTH vs. MICHAEL W. GRAZIANO.

No. 18-P-384.

Plymouth. September 12, 2019. - November 27, 2019.

Present: Green, C.J., Milkey, & Wendlandt, JJ.

Obscenity, Child pornography. Lewdness. Evidence, Digital image. Statute, Construction. Practice, Criminal, Trial jury-waived, Motion for a required finding, Required finding.

Complaint received and sworn to in the Plymouth Division of the District Court Department on September 20, 2013.

The case was heard by John P. Stapleton, J.

Darren T. Griffis for the defendant.
Johanna S. Black, Assistant District Attorney, for the Commonwealth.

MILKEY, J. While seeking to rid the defendant's computer of a virus, a computer technician discovered two images of a girl wearing lingerie. In at least one of the images, the fabric of the lingerie is sheer enough to expose the girl's breasts to view. Based on the images, the defendant was charged

with possessing child pornography in violation of G. L. c. 272, § 29C (§ 29C). After a jury-waived trial, a District Court judge found the defendant guilty. On appeal, the defendant does not challenge the sufficiency of the evidence that he knowingly possessed the images and that the girl shown in them was under eighteen years old (as the defendant knew or reasonably should have known). Nor does he challenge the sufficiency of the evidence that the images constituted a "lewd exhibition" of the girl's "fully or partially developed breast[s]." G. L. c. 272, § 29C (vii). Rather, the defendant argues only that because the girl is wearing lingerie over her breasts, the Commonwealth cannot prove that her breasts were "unclothed" (as required by the relevant statutory text). Id. For the reasons that follow, we disagree and therefore affirm the conviction.

Background. 1. The images. Given the limited nature of this appeal, we focus our factual recitation on what the two images showed. The images appear to be of the same girl. Although the precise age of the girl is uncertain, the images support the judge's assessment that the "young woman is a lot closer to twelve or thirteen than eighteen."

In each image, the girl is shown kneeling while wearing underpants and a lingerie top. Although the tops she is wearing differ in their color and specific form, both are markedly sheer. In particular, one of the images plainly reveals the

girl's otherwise naked breasts, including one breast that is shown in anatomical detail.[1] Given the clarity with which the girl's breasts can be observed through the diaphanous fabric, it is unsurprising that this was the focus of the Commonwealth's prosecution.[2]

2. The course of the trial proceedings. At the close of the Commonwealth's case, the defendant moved for a required finding of not guilty. He argued that even if the images amount to a "lewd exhibition" of the girl's breasts, the Commonwealth's case still failed as a matter of law because the breasts were "clothed" by the lingerie. In response, the Commonwealth argued in the alternative. First, relying on the Criminal Model Jury Instructions for Use in the District Court (model jury

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[1] As the Commonwealth maintains, the nipple and areola of the girl's left breast are readily visible in one of the images.

[2] On appeal, the Commonwealth argues that the girl's genitals also can be seen, even though the Commonwealth referenced this theory only in passing at trial. At a minimum, the underpants the girl is wearing are more opaque than the tops, and whether a viewer can see through them is at least subject to debate. We additionally note that in one image, the underpants are sufficiently ill-fitting to reveal the skin of an area near the girl's genitals. The Commonwealth did not argue at any point during the trial that this bare area constitutes the girl's "pubic area" within the meaning of the statute. See Commonwealth v. Sullivan, 82 Mass. App. Ct. 293, 313 & n.7 (2012) (Milkey, J., dissenting) (discussing meaning of statutory term "pubic area"). Nor did the Commonwealth maintain at trial that the girl's naked buttocks can be seen in either image (a claim the Commonwealth suggests in passing on appeal). We do not reach these issues.

instructions), the Commonwealth maintained that it had no obligation to prove that the girl's breasts were "unclothed."[3] As discussed below, the Commonwealth has abandoned that argument on appeal. Second, the Commonwealth argued that even if it had to prove that the girl's breasts were "unclothed," it met that standard here because they plainly were visible through the lingerie.

The judge denied the motion for a required finding, but emphasized that his views on these issues were provisional. His informal comments from the bench indicated that his initial inclination was to agree with the defendant that the girl's breasts were "clothed."[4] In nevertheless denying the motion, the judge stated that he was inclined to follow the model jury instructions, which, as noted, provide support for the Commonwealth's initial position that it had no burden to prove

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[3] The model jury instructions state in pertinent part that to make out a violation of G. L. c. 272, § 29C (vii), the Commonwealth must prove "[t]hat there is an image of a person under the age of eighteen who is . . . depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, or buttocks . . . or . . . a female depicted or portrayed in any pose, posture or setting involving lewd exhibition of a fully or partially developed breast of the child" (emphasis added). Criminal Model Jury Instructions for Use in the District Court, Instruction 7.540 (2013).

[4] The judge commented as follows: "Does that negligee type of garment, is that clothed or unclothed? First blush I would say that would be clothed."

that the girl's breasts were unclothed.[5] Notably, the judge emphasized that he would continue to look at the case law and think about the issues as the case moved forward. When the trial resumed after a two-week hiatus, the judge, without elaboration, confirmed that he had denied the motion for a required finding.

At the close of all the evidence, the defendant renewed his motion for a required finding, and he argued that motion as part of his summation. The defendant once again argued that the Commonwealth had to prove that the girl's breasts were "unclothed" and that, in light of the lingerie she was wearing, the Commonwealth could not do so here as a matter of law. After the Commonwealth's closing, the judge indicated that he would look at the exhibits one more time and "think about the [model] jury instruction." Back on the record, the judge stated that he had "thought about the arguments, the evidence in this case [a]nd based upon the evidence [he was] going to find the defendant guilty of the charge of the possession of child

[5] Specifically, the judge commented that "my experience is, and I think it's best from any District Court judge's point of view, is to rely upon the District Court [model] jury instructions."

pornography." He did not elaborate further, and the second motion for a required finding simply was annotated "denied."[6]

Discussion. The first six subsections of § 29C criminalize the possession of images that depict children performing certain enumerated sex acts. G. L. c. 272, § 29C (i)-(vi). This is not such a case. Rather, this prosecution is based on the seventh subsection, which generally criminalizes the possession of images of a child "depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks or, if such person is female, a fully or partially developed breast of the child." G. L. c. 272, § 29C

[6] Approximately one week after the defendant was convicted and sentenced, trial counsel filed a postjudgment motion for a required finding of not guilty. Because the rules do not contemplate the filing of such a motion in a jury-waived case, see Mass. R. Crim. P. 25, as amended, 420 Mass. 1502 (1995), the motion in effect was a postjudgment motion to reconsider the judge's earlier denial of the motions for a required finding that were filed during the trial. Although neither the postjudgment motion nor the action taken on it was properly docketed, it appears that on September 25, 2017, the judge issued an order denying the motion, setting forth his reasoning as follows: "The sheer clothing garment worn by the young female, like a fishnet stocking type garment would, was the practical equivalent of 'unclothed.'" The defendant did not appeal from the denial of the postjudgment motion, but the Commonwealth filed a motion to include the judge's ruling on it in the appellate record. The defendant opposes that motion, arguing, inter alia, that the postjudgment motion was argued by trial counsel after his motion to withdraw had been allowed. As explained below, because we are ruling in the Commonwealth's favor without relying on the judge's order denying the postjudgment motion, the Commonwealth's motion to add that order to the appellate record is denied as moot.

(vii). As noted, the issue on appeal is whether the presence of the see-through lingerie over the girl's breasts meant that, as a matter of law, the Commonwealth could not prove that her breasts were "unclothed."

At oral argument, the Commonwealth expressly abandoned its earlier position that it did not have to prove that the girl's breasts were unclothed. That concession is appropriate, because read naturally, the adjective "unclothed" as it appears in the statute modifies all of the listed body parts that follow it. Of course, such a reading could be rejected if there were good reason to believe the Legislature intended a different result. See Commonwealth v. Hourican, 85 Mass. App. Ct. 408, 411 (2014) ("These canons are advisory, not mandatory; we do not apply them mechanically or dogmatically; and we inspect the results of their application for rationality and practicality"). But no such reason appears here. Indeed, the notion that the Legislature intended to criminalize the lewd exhibition of a child's genitals only if they were unclothed, but intended to criminalize the lewd exhibition of a girl's breasts even if clothed, would make no sense.[7] To the extent that the model jury

[7] The Commonwealth acknowledged throughout this case that the term "unclothed" modified the first three body parts listed (genitals, pubic area, and buttocks), but nevertheless initially took the position that it somehow did not modify the fourth listed body part.

instructions support that counterintuitive interpretation, they are erroneous and should be corrected.

The question then is what it means for the listed body parts to be "unclothed" within the meaning of § 29C (vii). Where, as here, a statutory term is undefined, we look first to its "ordinary and common meaning[]." Taggart v. Wakefield, 78 Mass. App. Ct. 421, 425 (2010). As the parties agree, "unclothed" means "not clothed," and "clothe," in turn, is commonly defined to mean "put garments on" and "cover with clothes." Webster's Third New International Dictionary 428, 2485 (2002). In essence, the defendant argues that if a child is wearing an article of clothing over a body part, then that body part is "covered" and hence "clothed" by definition. In the alternative, the defendant argues that even if the word "unclothed" is considered ambiguous, then the statute still must be interpreted in his favor under the rule of lenity. See Commonwealth v. Williamson, 462 Mass. 676, 679 (2012).

The terms "covered" and "clothed" could be considered ambiguous if they were viewed in isolation. However, "meaning and ambiguity are creatures of context." Downer & Co., LLC v. STI Holding, Inc., 76 Mass. App. Ct. 786, 792 (2010). It is axiomatic that we are to "look to the language of the entire statute, not just [textual snippets], and attempt to interpret all of its terms 'harmoniously to effectuate the intent of the

Legislature.'" Commonwealth v. Mogelinski, 466 Mass. 627, 641 (2013), quoting Commonwealth v. Hanson H., 464 Mass. 807, 810 (2013). See Harvard Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 749 (2006) (when examining statutory terms, we view them in context of statute as whole while seeking "to render the legislation effective, consonant with sound reason and common sense"). Moreover, "[w]e decline to construe [a statute] in a manner that is plainly inconsistent with its central purpose, notwithstanding the susceptibility of the statute's plain language to such a construction." Reade v. Secretary of the Commonwealth, 472 Mass. 573, 584 (2015).

The Legislature's stated purpose for enacting § 29C as a whole is "[t]o protect children from sexual exploitation . . . [by] prohibit[ing] the production of material which involves or is derived from such exploitation and to exclude all such material from the channels of trade and commerce." Commonwealth v. Kenney, 449 Mass. 840, 853 (2007), quoting St. 1997, c. 181, § 1 (1). The obvious intent of § 29C (vii) in particular is to protect children from having their naked private body parts exhibited in a lewd manner. In this context, we conclude that the Legislature intended that whether a relevant body part should be considered "covered" and hence "clothed" should turn on the extent to which that body part can be seen. This reading fulfills the obvious legislative intent while still being fully

consistent with one of the ordinary meanings of "cover": "to protect or conceal (one's body or a part of it) from view typically with an article of clothing or bedding." Webster's Third New International Dictionary 524 (2002). Cf. Commonwealth v. Coppinger, 86 Mass. App. Ct. 234, 239-240 (2014) (affirming conviction for open and gross lewdness based on defendant's wearing "see-through" compression shorts that exposed his genitals and buttocks to view).[8]

By contrast, under the defendant's contrary interpretation, an image that plainly exhibited one of the listed body parts of a child in a lewd manner would not be actionable solely because a whisper of fabric was positioned between the child and the

[8] We recognize that in analyzing whether the defendant in Coppinger exposed his genitals and buttocks through his shorts, we referred to the shorts as constituting a "covering" of his body. See Coppinger, 86 Mass. App. Ct. at 236-237 ("the crux of our inquiry is whether exposure requires a naked display or whether it is possible to expose a body part through a covering"). However, the sense in which the shorts "covered" the defendant's body, and whether he could be considered "unclothed" even while wearing the shorts, were not at issue in that case. Similarly, while various statements included in Commonwealth v. Rollins, 470 Mass. 66, 75, 80 (2014), presuppose that "nudity" is required to make out a conviction under § 29C (vii), that case did not address what nudity means, and whether it encompasses the scenario that we face here, a child wearing see-through clothing that exposes her otherwise naked body parts to view. It bears noting that the term "nudity," as used in certain sections other than § 29C, is defined to include "uncovered or less than opaquely covered human genitals, pubic areas, the human female breast below a point immediately above the top of the areola, or the covered male genitals in a discernibly turgid state." G. L. c. 272, § 31.

viewer, even though the exploitation of the child would be the same. In our view, such a reading is "so at odds with the 'central purpose' and over-all structure of the statute that we cannot ascribe it to the Legislature." Commonwealth v. Cole C., 92 Mass. App. Ct. 653, 661 (2018), quoting Reade, 472 Mass. at 584. Because any textual ambiguity in the word "unclothed" vanishes when it is viewed in context and in light of the obvious legislative purpose, the rule of lenity is not implicated. See Commonwealth v. Carrion, 431 Mass. 44, 45-46 (2000).[9]

Contrary to the defendant's claim, our interpretation does not render the term "unclothed" superfluous. It is not difficult to think of examples of lewd depictions of the forbidden areas of a child's body that nonetheless would remain outside the statute's reach because the body parts were "clothed." See Commonwealth v. Sullivan, 82 Mass. App. Ct. 293, 314 & n.10 (2012) (Milkey, J., dissenting) (describing such photograph).[10]

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[9] Our holding is consistent with the only case from another jurisdiction of which we are aware that addressed the issue in the same context. See People v. Borash, 354 Ill. App. 3d 70, 74-76 (2004) (interpreting "unclothed" -- as used in State statute virtually identical to G. L. c. 272, § 29C [vii] -- to encompass wearing of see-through clothing).

[10] At oral argument, the defendant argued that if the Commonwealth's interpretation of "unclothed" were correct, the statute would be void for vagueness. This argument was not

For these reasons, we hold that where a child is depicted wearing clothing that allows a viewer to see the listed body parts to an extent comparable to the child's being naked, a fact finder may deem the body parts "unclothed." In the case before us, a rational fact finder readily could find beyond a reasonable doubt that at least one of the images met that standard, and the defendant's challenge to the sufficiency of the evidence therefore fails.[11]

Having resolved that the evidence was sufficient to affirm the defendant's conviction based on a proper reading of the statute, all that remains is to consider whether a remand or new trial is warranted on other grounds. In arguing that the evidence was insufficient as a matter of law, the defendant repeatedly asserts that the judge misinstructed himself on the

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raised in the trial court or in the defendant's appellate brief and therefore is waived. See Commonwealth v. Horton, 434 Mass. 823, 836 n.15 (2001); Hunt v. Commonwealth, 434 Mass. 1012, 1012 n.1 (2001). Even if the argument were properly before us, it would fare no better. In short, such an argument is no more robust than the one we rejected in Coppinger, 86 Mass. App. Ct. at 238 ("a person of 'common intelligence' would not have difficulty imagining that the statute proscribes displaying one's genitals and buttocks through sheer material").

[11] As noted, the sufficiency of the other elements that the Commonwealth must prove beyond a reasonable doubt is not at issue in this appeal. Lest the import of our opinion be misinterpreted, we note that to be actionable under the statute, an image of a child still must rise to the level of a "lewd exhibition" of the prohibited body parts; nudity alone, even of a child, cannot suffice. See, e.g., Commonwealth v. Bean, 435 Mass. 708, 715 & n.17 (2002).

law. Where a fact finder was misinstructed on applicable legal principles, a defendant typically is entitled to a new determination whether the facts warrant a guilty verdict under proper instructions. See, e.g., Commonwealth v. Liebenow, 470 Mass. 151, 162 (2014). Nevertheless, we conclude that the defendant here is not entitled to a remand (or new trial) for two independent reasons.

First, appellate courts are to apply a presumption that a judge sitting in a jury-waived trial has instructed himself properly on the law, see Commonwealth v. Healy, 452 Mass. 510, 514 (2008), and we disagree with the defendant that he has made a showing sufficient to overcome that presumption. In arguing to the contrary, the defendant specifically relies on the judge's remark that his first inclination was that the girl was "clothed" and his comment that he generally was inclined to follow the model jury instructions. Notably, however, the judge indicated that his initial thoughts were provisional and that he would continue, as the case progressed, to ponder the issues the defendant had raised, including the correctness of the model jury instructions. The record confirms that in the two-week period between the initial comments the judge made during the discussion of the first motion for a required finding and the guilty finding, the judge in fact did consider the issues the

defendant had raised, without giving any further indication that he would apply the model jury instructions.

In our view, the initial comments that the judge made are of a similar nature to those at issue in Commonwealth v. Colon, 33 Mass. App. Ct. 304, 308 (1992) ("Comments made by a judge in colloquy with counsel, particularly when counsel are permitted to carry on for the purpose of persuading the judge, are not taken as tantamount to a ruling of law by the judge"). As we observed there, judges sometimes make casual remarks in colloquy to "test[] propositions argued by counsel," and such remarks should not "be translated into a ruling of law." Id. at 307. We note that the rules recognize that a defendant may request rulings of law in a bench trial, an opportunity the defendant chose not to pursue. See Mass. R. Crim. P. 26, 378 Mass. 897 (1979).[12]

Second, in the appeal before us, the gravamen of the defendant's appeal is that, as a matter of law, a child's body parts cannot be considered "unclothed" if she is wearing clothing over them; for the reasons we have explained, the defendant's challenge to the sufficiency of the evidence based

[12] The Commonwealth argues that the judge's ruling on the postjudgment request for a required finding demonstrates that his thinking evolved over the course of the case and that, in the end, he properly instructed himself. As noted, we do not rely on the judge's ruling on that motion.

on that interpretation of the law is without merit. The defendant makes no argument that -- as a matter of fact -- the girl's breasts cannot plainly be seen through the sheer lingerie.[13] Thus, whether there was sufficient evidence to support the conviction under the proper standard is no longer at issue in this case.

Judgment affirmed.

[13] In fact, the defendant's brief does not even describe what can be seen in the images, and he did not include the images in his record appendix. The absence of argument as to the extent to which the girl's breasts can be seen in the images is unsurprising given what at least one of the images unmistakably shows.