COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-90

COMMONWEALTH

vs.

OSVALDO OTERO.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant appeals from his conviction by a Superior Court jury of sexually abusing three victims, whom we shall call Ana, Junie, and Noelle.[1] Ana and Junie are the defendant's granddaughters, while Noelle is Ana's best friend. The defendant claims that his convictions must be reversed because evidence of an out-of-county rape erroneously was admitted and the prosecutor's closing argument was improper. We affirm.

Background. 1. Facts. Based on the evidence at trial, the jury could have found that the defendant rekindled a previous relationship with Ana's mother, who is the defendant's daughter, when Ana was four or five years old. The defendant frequently babysat Ana at his apartment in Brockton, and Ana's

[1] The defendant was also convicted of intimidation of a witness (Noelle).

mother would "let" the defendant "take her" overnight beginning in 2011, when Ana was eight years old. It was around this time that the defendant began sexually abusing Ana. That abuse included anal rapes, which caused Ana to bleed.

In June, 2012, Ana was sleeping over at the defendant's apartment along with her five year old cousin, Junie, and a male cousin.[2] Ana and the male cousin slept on an air mattress in the defendant's bedroom while Junie slept in the defendant's bed, in between the defendant and his girlfriend. During the night, the defendant grabbed Junie's hand and forced her to touch his exposed penis. Junie pulled her hand away and bumped the defendant's girlfriend, causing her to stir. Junie managed to crawl off the bed, and she immediately reported the incident to Ana.

On June 1, 2014, the defendant was babysitting eleven year old Ana at his apartment in Brockton. The defendant made Ana take off her pants and sit on his lap, then he used his fingers to apply Vaseline to Ana's vagina and anus. The defendant digitally penetrated Ana, then he vaginally and anally raped her with his penis. Ana stated that the anal rape "hurted" because the defendant's penis "was up in my inside." Two weeks later, on June 15, 2014, Father's Day, the defendant begged Ana's

[2] The male cousin was either nine or twelve years old.

mother to allow Ana and her twelve year old best friend, Noelle, to sleep over at his apartment. The defendant gave Ana and Noelle marijuana and told them to smoke it in his minivan while he drove to the apartment. Once there, the defendant told the girls to shower, then he took turns orally and vaginally raping them in the other's presence.

The defendant had given Ana and Noelle marijuana on an earlier occasion that same summer. That time, the defendant asked Ana's mother if Ana and Noelle could go with him to the store to get candy. Instead of going to a store, however, the defendant parked his minivan near a field in Brockton, ordered Ana and Noelle to remove their pants, and orally raped each girl. On another occasion "in close proximity" to Father's Day, the defendant parked the minivan in Fall River, moved into the rear passenger seat of the minivan where Noelle was seated, anally raped Noelle while Ana remained seated in the front, and ejaculated onto the seat.

Noelle disclosed the rapes to Ana's mother about two weeks after Father's Day, in July, 2014. Around that same time, Brockton police detectives investigating the 2012 assault on Junie met with Ana to discuss Junie's disclosure. Ana then disclosed to the detectives that the defendant had been abusing her. The detectives contacted officers with the Fall River police department, who, in turn, obtained a search warrant for

the defendant's minivan. In August, 2014, the van was examined by a Massachusetts State Police forensic scientist who discovered the presence of semen in the area of the rear passenger seat where Noelle and Ana stated the defendant had anally raped Noelle. Deoxyribonucleic acid (DNA) testing of the semen revealed a very high statistical probability that it belonged to the defendant.[3] The defendant was indicted in Plymouth County for indecent assault and battery on Junie and Ana in Brockton, the rape of Ana and Noelle in Brockton, and for intimidation of a witness based on comments he made to Noelle after the Father's Day rapes. The Fall River rape of Noelle was the subject of a separate indictment in Bristol County.

2. Uncharged conduct. The Commonwealth filed a motion in limine to admit evidence of several uncharged acts of abuse by the defendant, including the Fall River rape of Noelle.[4] After

[3] A DNA analyst testified that the suspected frequency of that profile occurring in another person "is approximately in the African American population one in 20.20 sextillion, the Asian population, one in 73.91 quintillion, in the Caucasian population, one in 3.247 sextillion, and in the Hispanic population, one in 238.8 quintillion."

[4] The Commonwealth also sought permission to introduce evidence that the defendant (1) gave Ana and Noelle marijuana and alcohol and let them drive his van, (2) raped Ana in the basement of his apartment building, (3) touched Ana's and Noelle's breasts while he was raping them on Father's Day, (4) sexually abused Ana more than fifty times over the course of four years, when she was between eight and twelve years old, (5) came into Ana's bedroom in Fall River beginning when Ana was eight years old and digitally, orally, vaginally, and anally raped her while telling

hearing extensive argument on the motion, the judge held that "the Commonwealth c[an] introduce evidence of a pattern or a course of conduct, to put in context the charges that the defendant is accused of," "so long as it's done in a summary fashion." In his ruling, the judge did not delineate which prior bad acts were admissible and which were not; however, Ana and Noelle testified without objection that the defendant provided them with marijuana; Ana testified over objection that the defendant would "do things" to her "like three times a week" beginning when she was eight years old; Ana and Noelle testified without objection that the defendant touched Noelle's "boobs" while he was raping her on Father's Day; both victims testified over objection about the Fall River rape of Noelle; and a DNA analyst testified over objection that sperm collected from the defendant's minivan likely came from the defendant.

The judge instructed the jury before Noelle testified to the Fall River rape that "[t]he defendant is not charged with any offense in Fall River." The judge continued, "I am, however, allowing some testimony about this to be introduced for a limited purpose, which I'm going to explain to you a little bit later when we have some more -- when I expect to have some

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her to "shut-up and not tell," and (6) parked his minivan, raped, and indecently assaulted Ana and Noelle when Ana was eleven years old.

more evidence on its relevance." The defendant did not object to this instruction. Despite stating his intention to do so, the judge did not give a further limiting instruction immediately after Ana's testimony about the Fall River rape of Noelle, nor did the defendant request one. However, before the DNA analyst testified that the sperm collected from the defendant's minivan likely came from the defendant, the judge again instructed the jury that the defendant was not charged with committing any offenses in Fall River. Rather, the judge instructed that evidence of that offense was being introduced "for the very limited purpose of assisting you in evaluating the credibility of the children who had testified here." The defendant raised no objection to this instruction.

In his final instruction, the judge repeated that "[t]he defendant is not charged with committing a sexual assault in Fall River in this case." He instructed the jury that evidence of the Fall River rape of Noelle cannot substitute as proof "that the defendant committed the crimes charged here in Brockton." Rather, that evidence was admissible "for the sole purpose of helping you to evaluate the credibility of the alleged victims concerning the offenses that were alleged to have occurred in Brockton." The defendant objected to this instruction on the ground that witness credibility is not a

permissible ground for admitting evidence of a defendant's other bad acts.

Discussion. 1. Other bad acts. Evidence of the defendant's uncharged, criminal acts was admissible to show the defendant's pattern of operation and course of conduct with all three victims. See Commonwealth v. Almeida, 479 Mass. 562, 568 (2018); Commonwealth v. King, 387 Mass. 464, 471 (1982). See also Commonwealth v. Hanlon, 44 Mass. App. Ct. 810, 818 (1998); Mass. G. Evid. § 404(b)(2) (2019). It was also admissible to show that the nature of the defendant's relationships with Ana and Noelle "was one of continuous sexual abuse." Commonwealth v. Childs, 94 Mass. App. Ct. 67, 71-72 (2018). Indeed, the only reason the Fall River rape of Noelle is uncharged conduct "is the fortuity that [it] happened in a different county from the beginning and ending acts [of abuse]." Id. at 72-73.

The defendant claims that the judge abused his discretion when he allowed testimony and DNA evidence linking the defendant to the Fall River rape of Noelle to be admitted for the purpose of evaluating the victims' credibility. See Commonwealth v. Butler, 445 Mass. 568, 574-575 (2005) ("The question of admissibility of bad act evidence and whether a stated purpose is permissible will largely depend on the circumstances of each case"). While the list of purposes for which other bad act evidence may be introduced does not, per se, include

corroboration of a victim's credibility, it does include evidence "proving [a defendant's] motive, opportunity, intent, preparation, plan, knowledge [or] identity." Mass. G. Evid. § 404(b)(2). The DNA evidence in this case proved the defendant's identity, while the testimony furnished context for and illustrated the escalating trajectory of the defendant's course of conduct: using his position as a trusted caretaker to gain access to his relatives, the defendant would get young females alone, either in his minivan or in his apartment, by offering to take them to the store, to babysit them, or to have sleepovers. Then, the defendant sexually assaulted his victims, often in each other's presence. See Commonwealth v. Robertson, 88 Mass. App. Ct. 52, 55-56 (2015). "Contrary to the defendant's assertion," evidence that the defendant used a pretense to get Ana and Noelle alone in his minivan, which he parked in a secluded area of Fall River before assaulting Noelle in Ana's presence, within the same two-month period that he committed similar acts in Brockton, was admissible "under decisional case law [as] prior bad act evidence showing a pattern of conduct [which] 'can be admitted . . . where it corroborates the victim's testimony.'" Id. at 54 n.6, quoting Hanlon, 44 Mass. App. Ct. at 818 (evidence of uncharged sexual misconduct may be admitted to corroborate victim's testimony when not too remote in time).

Next, the defendant claims that the judge abused his discretion in admitting the other bad act evidence because it was more prejudicial than probative and outweighed the evidence of charged conduct. See Commonwealth v. Dwyer, 448 Mass. 122, 129-130 (2006); Mass. G. Evid. § 404(b)(2). Whether the probative value of relevant evidence is outweighed by the risk of undue prejudice to the defendant is a question "within the sound discretion of the judge," Commonwealth v. Dunn, 407 Mass. 798, 807 (1990), whose decision will be reversed only where we conclude "the judge made a clear error of judgment in weighing the factors relevant to the decision, . . . such that the decision falls outside the range of reasonable alternatives" (quotation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

Here, the judge considered the numerous bad acts set forth in the Commonwealth's motion in limine, balanced the probative value of that evidence against its potential for undue prejudice to the defendant, and held that some evidence of the defendant's other bad acts was admissible to corroborate the victims' testimony regarding the defendant's pattern of abuse. See Commonwealth v. Facella, 478 Mass. 393, 407 (2017). "[I]n the context of the trial," Commonwealth v. McCowen, 458 Mass. 461, 478 (2010), where the defendant was on trial for, among other things, raping Ana and Noelle while his minivan was parked in a

secluded area of Brockton, we cannot say that the judge's decision to admit evidence that the defendant committed a similar act, in or around the same time period, while the minivan was parked in a secluded area of Fall River, falls outside the range of reasonable alternatives.[5]

Any error in admitting the evidence was mitigated by the appropriate, full limiting instruction that the judge gave before the DNA evidence was admitted, and which the judge repeated in his final charge. See Commonwealth v. Watkins, 425 Mass. 830, 840 (1997) ("We presume that a jury follow all instructions given to it"). While "[t]he defendant is correct that this court has looked favorably on contemporaneous limiting instructions," Facella, 478 Mass. at 402, and the better practice would have been for the judge to give the full limiting instruction each time the evidence was introduced, we cannot say that the judge's decision to give the full instruction before the DNA evidence was introduced, when the foundation for the instruction had been laid, constitutes an abuse of discretion.

[5] There is no merit to the defendant's claim that the other bad act evidence was inadmissible because the defendant was then under indictment in Bristol County for the Fall River rape of Noelle, unconstitutionally placing him twice in jeopardy for that crime. See Choy v. Commonwealth, 456 Mass. 146, 149, cert. denied, 562 U.S. 986 (2010). From all that is before us, the Bristol County charges appear to have been pending at the time of this trial. "In order for a defendant to be placed twice in jeopardy, his original jeopardy must have terminated." Berry v. Commonwealth, 393 Mass. 793, 796 (1985).

See id. (judge has discretion as to timing of instructions). This is especially the case where the defendant did not object to any of the limiting instructions, or to the absence of a limiting instruction during Ana's testimony regarding the Fall River rape of Noelle.

2. Improper closing. In closing, the prosecutor asked the jury to consider what Ana said "about the pain" of being raped: "[s]he felt like someone was ripping out her insides." The defendant did not object to this argument at trial but now claims that it misrepresented Ana's testimony. We review this claim for a substantial risk of a miscarriage of justice, Commonwealth v. Thomas, 400 Mass. 676, 682 (1987), taking the prosecutor's remarks in the context of her entire closing argument, the judge's instructions to the jury, and the evidence produced at trial. Commonwealth v. Lyons, 426 Mass. 466, 471 (1998). We also consider "whether the error was limited to collateral issues or went to the heart of the case." Commonwealth v. Kater, 432 Mass. 404, 422 (2000). See Commonwealth v. Kozec, 399 Mass. 514, 518 (1987).

We agree that Ana did not use the precise words attributed to her to describe how it felt being raped. However, we cannot say the prosecutor's argument "about the pain" of being raped misrepresented Ana's testimony where she stated that the defendant caused her internal pain and anal bleeding. "To the

degree the recitation of the evidence was inflammatory, that was inherent in the . . . nature of the crimes committed." Thomas, 400 Mass. at 683.

Even if the prosecutor's comment did exceed the bounds of permissible argument, we conclude that it did not create a substantial risk of a miscarriage of justice "in the entire context of this case." Commonwealth v. O'Connell, 432 Mass. 657, 660 (2000). The jury were permitted to conclude that Ana, Noelle, and Junie presented as credible witnesses whose testimony was corroborated by the testimony of the other witnesses, and by physical evidence. The prosecutor's comment about pain resulting from rape did not go to the heart of the case where the defense was that the victims had fabricated their accounts of the defendant's actions, and the judge instructed the jury that closing arguments are not evidence. Finally, the absence of an objection is some indication that the defendant did not consider the tone and manner of the argument unfairly prejudicial when it was made. Lyons, 426 Mass. at 471. While the comment would have been better left unsaid, we assume "[a] certain measure of jury sophistication in sorting out excessive claims." Kozec, 399 Mass. at 517.

The defendant did object to what he claims was repeated burden shifting by the prosecutor in her closing, through her use of rhetorical questions to suggest that the victims had no

reason to "make the story up." The judge gave a specific limiting instruction in response to that objection, which the defendant does not challenge on appeal.[6] The judge also instructed the jury before opening statements "that the Commonwealth bears the burden of proof throughout the trial. There is never any burden on the defendant to prove anything." Looking at this aspect of the prosecutor's argument in the context of her entire closing and the judge's repeated instructions regarding the burden of proof, we see no risk that the rhetorical questions "could be perceived by the jury as shifting the Commonwealth's burden of proof to the defendant." Commonwealth v. Habarek, 402 Mass. 105, 111 (1988), S.C., 421 Mass. 1005 (1995). See Commonwealth v. Bregoli, 431 Mass. 265,

[6] The judge stated: "Please keep in mind that the burden of proof is always on the Commonwealth. The defendant has no burden to come in and prove why someone would say something that wasn't true. There is never any burden of proof on the defendant. It's entirely on the Commonwealth. So please don't think that the burden of proof shifted at any point."

279 (2000) (any harm to defendant from prosecutor's improper rhetorical question cured by instruction that burden of proof is never on defendant).

Judgments affirmed.

By the Court (Green, C.J., McDonough & Englander, JJ.[7]),

Joseph F. Stanton

Clerk

Entered: March 5, 2020.

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