COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1360

COMMONWEALTH

vs.

DOMINICK J. GALVAO.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant appeals his convictions, after a jury trial, of armed assault with intent to murder, aggravated assault and battery on a pregnant woman by means of a dangerous weapon, unlawful possession of a firearm as a subsequent offense, unlawful possession of a loaded firearm, assault by means of a dangerous weapon, unlawful discharge of a firearm within 500 feet of a building, and assault and battery on a family or household member.[1] The defendant raises the following issues on appeal. First, he argues that the motion judge abused his discretion in excluding hearsay third-party culprit evidence. Second, he contends that the trial judge erroneously admitted the recording of the victim's 911 call. Finally, the defendant

[1] The defendant pleaded guilty to the subsequent offense portion of the firearm charge, G. L. c. 269, § 110 (n). The Commonwealth dismissed a charge of open and lewd conduct.

argues that the cumulative effect of these errors warrants reversal of his convictions.[2] We affirm.

The evidence permitted the jury to find the following. The victim (who was married to another man) and the defendant had been in a romantic relationship for several months and were expecting a child together. Their relationship, however, had been marked with violence; two months earlier, the defendant had assaulted the victim, breaking one of her teeth and leaving a bite mark on her arm. On that occasion, she was treated at a hospital. At the time, the victim was one month pregnant, a fact the defendant knew.

The victim continued to date the defendant despite this history. On the evening of October 8, 2015, the victim went to the defendant's house, where he lived with his mother, grandmother, uncle, and brothers. The defendant's mother did not want the victim to stay the night and asked that she leave. The defendant texted his mother that the victim had nowhere to go. The defendant's grandmother permitted the victim to stay in the basement, where the victim and the defendant talked about life in general and the future baby. Around 1:30 A.M., they began to argue and the defendant became violent. He pressed the barrel of a gun against the victim's head and tried to rip her

[2] Deciding each claim of error as we do, infra, it follows that the defendant's claim of cumulative error fails.

contact lenses out by gouging at her eyes. Eventually, the defendant's grandmother and uncle intervened, and the victim asked the uncle to drive her home. The uncle and his girlfriend prepared to do so and, despite the victim's request that the uncle not let the defendant into the car because he was trying to shoot her, the defendant also got in the car. By this point, the defendant had taken the victim's cell phone away and refused to return it to her.

When the group arrived at the victim's home, she left the car and went to the house. The defendant called her back to the car, saying he would return her cell phone. The victim was wary, but the defendant held the phone out the window to her. When she approached the window, however, he retracted the cell phone and shot her through the open window from a distance of less than four feet. The victim was shot in the back of her arm. The uncle screamed and drove quickly away.

The victim's husband eventually opened the door to the house and the victim said, "Hurry, call the police. Dominick [the defendant] shot me." The husband handed the victim his cell phone to call 911. Police responded, and found the victim hunched over, crying, panicky, in pain, and vomiting. She was taken to a hospital, where it was determined a bullet had entered her arm, and fractured her shoulder blade. Doctors were unable to remove the bullet fragments, which were around the

victim's shoulder blade, had traveled toward her spine, and had crossed her spine to her right side.

The defendant moved pretrial for leave to introduce a police report containing hearsay statements that one month after the events described above, the victim's husband was charged with discharging a weapon at another woman. In the defendant's view, this was third-party culprit evidence he was entitled to introduce. The judge disagreed, ruling that the evidence was not "sufficient to rise to the level of third-party culprit evidence" and was "too remote and way too speculative to be put before a jury." The defendant now argues the judge erred in so ruling.

"A defendant may introduce evidence that tends to show that another person committed the crime or had the motive, intent, and opportunity to commit it." Commonwealth v. Smith, 461 Mass. 438, 445 (2012), quoting Commonwealth v. Silva-Santiago, 453 Mass. 782, 800-801 (2009). See Mass. G. Evid. § 1105 (2016). "If the evidence is of substantial probative value, and will not tend to prejudice or confuse, all doubt should be resolved in favor of admissibility" (quotation omitted). Smith, supra at 445. Presenting third-party culprit evidence is of "constitutional dimension . . . because it is rooted in the right of criminal defendants to a meaningful opportunity to present a complete defense" (quotations and citations omitted).

Commonwealth v. Scott, 470 Mass. 320, 327 (2014). Therefore, we "examine a judge's decision to exclude third-party culprit evidence independently, . . . under a standard higher than that of abuse of discretion" (quotation and citation omitted). Id.

Where, as here, the third-party culprit evidence is hearsay, "because the evidence is offered for the truth of the matter asserted -- that a third party is the true culprit -- we have permitted hearsay evidence that does not fall within a hearsay exception only if, in the judge's discretion, the evidence is otherwise relevant, will not tend to prejudice or confuse the jury, and there are other substantial connecting links to the crime. . . . [T]he evidence, even if it is not hearsay, must have a rational tendency to prove the issue the defense raises, and the evidence cannot be too remote or speculative" (quotation omitted). Smith, supra at 445-446. See Mass. G. Evid. § 1105.

Here, the defendant's argument founders on the requirement that there be other substantial links between the victim's husband and the crime. Neither here nor below has the defendant pointed to anything linking the victim's husband to the shooting other than the hearsay contained in the police report.[3] There was, simply put, no evidence that the victim was shot by her

[3] The judge specifically asked defense counsel during the motion hearing whether there were any links between the husband and the crime.

husband rather than the defendant. And, given the way the events of the evening before the shooting unfolded, no reasonable inference could be drawn that the husband was the shooter rather than the defendant. No one placed the husband on the scene until after the victim had been shot. Moreover, the "not particularly distinguishing" features, Commonwealth v. Harris, 395 Mass. 296, 301 (1985), of the subsequent incident involving the husband, namely that it involved a female victim and the discharge of a gun, did not substantially link the husband to the shooting of the victim here, especially considering that the subsequent event did not involve the same victim, took place in a different location, and was separated in time. See id. (characterizing following as nonunique similarities: both incidents involved black men in their twenties, of same height, who wore leather jacket, used knife, and threatened to kill victims). Finally, the victim's fear of her husband was not enough to tie him to the shooting. See Smith, supra at 447 (affirming exclusion of third-party culprit evidence that victim feared unknown individual); Commonwealth v. Ruell, 459 Mass. 126, 133-134 (2011) (affirming exclusion of evidence that victim was "nervous" around neighbor with criminal record); Commonwealth v. O'Brien, 432 Mass. 578, 588-589 (2000) (affirming exclusion of evidence that victim feared brother-in-

law, even though victim's brother-in-law appeared at scene of murder and crossed crime scene tape).

In short, the judge did not err in denying the defendant's request to admit the hearsay in the police report.

The defendant next argues that the judge erroneously admitted the recording of the victim's 911 call because it contained an inadmissible prior consistent statement.[4] See Commonwealth v. Morales, 483 Mass. 676, 678 (2019) ("A witness's prior statement that is consistent with that witness's trial testimony is usually inadmissible"). See Mass. G. Evid. § 613(b)(1) (2016). Specifically, the victim stated during the 911 call that she had "been shot or my boyfriend just shot me." Although it is true that this statement was consistent with the victim's testimony at trial, the 911 call was neither offered nor admitted as a prior consistent statement, but rather as an excited or spontaneous utterance. See Commonwealth v. Williams, 56 Mass. App. Ct. 337, 341 n.5 (2002) ("the ruling of the trial judge [on the admission of evidence] is affirmed if it is supportable on any ground").

On the record before us,[5] we discern no error in the judge's ruling. "A statement qualifies as a spontaneous utterance and,

[4] The defendant did not object to the 911 recording as a prior consistent statement.

[5] The defendant did not include a copy of the 911 recording in the record. The clerk's office has attempted to obtain a copy

therefore, an exception to the traditional prohibition on hearsay, if '(A) there is an occurrence or event sufficiently startling to render inoperative the normal reflective thought processes of the observer, and (B) the declarant's statement was a spontaneous reaction to the occurrence or event and not the result of reflective thought.'" Commonwealth v. Gomes, 475 Mass. 775, 788 (2016), quoting Mass. G. Evid. § 803(2) (2016). In determining whether a statement qualifies under the spontaneous utterance hearsay exception, "the question is not simply whether the declarant shows any particular form of 'excitement' but, rather, whether the declarant was acting spontaneously under the influence of the incident at the time the statements were made, and not reflectively." Commonwealth v. Baldwin, 476 Mass. 1041, 1042 (2017).

Here, the startling event was that the victim had been shot, which was enough to permit "a reasonable finding that [the victim] was sufficiently startled to render inoperative [her] normal reflective thought processes." Gomes, supra at 788. See Commonwealth v. Middlemiss, 465 Mass. 627, 631 n.4 (2013) ("there is no doubt that the victim's statements to the 911 operator qualified as excited utterances, where the statements

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through counsel, with no success. As a result, we have not been able to listen to the 911 call ourselves. However, we have carefully reviewed the portions of the transcript concerning the 911 call, as well as the circumstances surrounding it.

were made immediately after the victim had been shot five times and was calling for assistance"). Even when police arrived after the 911 call, the victim remained upset, and was crying, vomiting, and panicky.

Judgments affirmed.

By the Court (Wolohojian, Maldonado & Ditkoff, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: June 10, 2020.

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