COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-34

COMMONWEALTH

vs.

ANTHONY C. OLIVEIRA, SR.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a jury trial, the defendant was found guilty of two counts of aggravated rape of a child by force in violation of G. L. c. 265, § 23A (b). On appeal, the defendant claims that the motion judge improperly denied his motion to dismiss for violation of his right to a speedy trial. Furthermore, the defendant argues that the trial judge abused his discretion in admitting statements made by the defendant to the victim's mother. We affirm.

1. Right to a speedy trial. Given the near four-year delay between the issuance of the five indictments and the date of his arraignment, the defendant claims that his motion to dismiss for violation of his right to a speedy trial was improperly denied. We disagree.

For the first time on appeal, the defendant argues that the Commonwealth failed to provide him with sufficient notice of both the charges against him, and his right to demand a speedy trial. Under Mass. R. Crim. P. 36 (d) (3), as appearing in 378 Mass. 913 (1979), such notice is required for any person detained outside the Commonwealth, following the Commonwealth's filing of a detainer. Here, the defendant claims that the failure to provide him with such notice warranted the dismissal of the charges against him.[1] However, because the defendant's argument under Mass. R. Crim. P. 36 (d) (3) was not presented to the motion judge, the argument is waived.[2] See Mass. R. Crim. P. 13 (a) (2), as appearing in 442 Mass. 1516 (2004) ("Grounds not stated which reasonably could have been known at the time a motion [to dismiss] is filed shall be deemed to have been waived . . ."). See also Commonwealth v. Johnston, 60 Mass. App. Ct. 13, 17 (2003) (Mass. R. Crim. P. 13 [a] [2] requires defendant to state grounds for motion to dismiss with particularity).[3]

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[1] In his affidavit in support of his motion to dismiss, the defendant did admit, however, to being "aware" of a "warrant out of Brockton Superior Court" at the time his Federal sentence in Hazelton, West Virginia was set to end.

[2] The Commonwealth, in its brief, was actually first to raise Mass. R. Crim. P. 36 (d) (3), stating that the defendant had not claimed any violation of rule 36 (d) in this case.

[3] Even were we to review the rule 36 (d) (3) claim for a substantial risk of a miscarriage of justice, cf. Commonwealth v. Holley, 476 Mass. 114, 119-120 (2016), we would conclude on

In addition to his argument under Mass. R. Crim. P. 36 (d) (3), the defendant claims a violation of his right to a speedy trial under both the Federal and State constitutions, as well as a violation of Mass. R. Crim. P. 36 (c), as appearing in 378 Mass. 913 (1979).[4] When reviewing a defendant's speedy trial claim on appeal, we accept the motion judge's findings of fact absent any clear error, but then make an independent determination whether the motion judge correctly applied the constitutional principles to the facts as found. See Commonwealth v. Dirico, 480 Mass. 491, 496 (2018).

"Both the Sixth Amendment, incorporated through the Fourteen Amendment, and art. 11 guarantee criminal defendants the right to a speedy trial. We interpret art. 11 through the lens of Sixth Amendment analysis." Dirico, 480 Mass. at 505.

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this record that the defendant has shown no such risk. The record evidence suggests, and the defendant's affidavit does not deny, that in September of 2012 he received notice of a detainer lodged against him based on his five indictments for aggravated rape of a child in Massachusetts. See Commonwealth v. Petroziello, 22 Mass. App. Ct. 71, 77 (1986) (Interstate Agreement on Detainers "requires that the prisoner's custodian shall promptly inform him of detainers lodged against him and of his right to make a request for final disposition of the underlying charges").

[4] The defendant also claims a violation of Mass. R. Crim. P. 36 (b), 378 Mass. 909 (1979). However, rule 36 (b) is inapplicable to defendants who are detained outside of the Commonwealth. When detained outside the Commonwealth, a defendant's circumstances are controlled by rule 36 (d) (3). See Commonwealth v. Ferreira, 26 Mass. 67, 71-72 (1988).

The Sixth Amendment analysis for a violation of a defendant's right to a speedy trial concerns primarily the four-factor test set forth in Barker v. Wingo, 407 U.S. 514 (1972).[5] Under the Barker test, a court must weigh the following four factors to determine whether the defendant's right to a speedy trial has been violated: "the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker, 407 U.S. at 530.

Here, the delay between the time the criminal indictments were issued, and the time the defendant filed his motion to dismiss, was almost four years. Such a delay may give rise to a presumption of prejudice, see Dirico, 480 Mass. at 504-505, but that is only part of the mix of relevant facts for the defendant's speedy trial claim. See Doggett v. United States, 505 U.S. 647, 655-656 (1992).

The defendant further contends that the reason for the delay was the "deliberate choice" of the Commonwealth to not prosecute him for a period of almost four years. We disagree.

[5] Under Mass. R. Crim. P. 36 (c), in order to receive a dismissal for prejudicial delay, a defendant must prove that the conduct of the prosecuting attorney in bringing forth the trial has been unreasonably lacking in diligence, and that such conduct has prejudiced the defendant. See Mass. R. Crim. P. 36 (c). "Rule 36 (c) is consistent with constitutional principles." Commonwealth v. Roman, 470 Mass. 85, 95 (2014). Therefore, our review of the defendant's claim under rule 36 (c) is the same as our analysis of the defendant's argument on his rights under the Sixth Amendment and art. 11.

The motion judge found "no deliberate, bad faith attempt at delay but rather, at most negligence." And while such negligence is certainly a consideration to be weighed against the Commonwealth, it is to be weighed less heavily than any deliberate attempts at delay. See Commonwealth v. Wallace, 472 Mass. 56, 61 (2015) (deliberate, bad faith attempts to delay trial weigh most heavily against Commonwealth).

Furthermore, while the Commonwealth's negligence certainly contributed to the delay, so did the defendant's own delay in asserting his right to a speedy trial. "While it is not necessary that 'a defendant must storm the courthouse and batter down the doors to preserve his right to a speedy trial,' [a reviewing court does] require some affirmative action." Wallace 472 Mass. at 66, quoting Commonwealth v. Butler, 464 Mass. 706, 716 (2013). Here, the defendant did assert his right to a speedy trial, but failed to do so until January of 2016. The defendant contends that he was unable to demand a speedy trial earlier because the Commonwealth failed to notify him of his right to do so. However, contrary to the defendant's argument, in order for the defendant's delay in asserting his right to weigh against him, the Commonwealth need not affirmatively prove that the defendant was aware of either the charges against him, or his right to demand a speedy trial on those charges where, as

here, there is evidence of the defendant's actual knowledge. See note 3, supra. See also Wallace, supra at 67.

Next, we analyze the prejudice suffered by the defendant as a result of the near four-year delay. Of the most serious forms of prejudice is the inability of a criminal defendant to adequately prepare his defense. See Barker, 407 U.S. at 532. The defendant claims that he suffered actual prejudice when defense counsel had difficulty obtaining records and statements from witnesses. However, in his affidavit, defense counsel could identify only one potential witness in particular who was unable to recall details relevant to the defendant's case. That witness was Dianna Barbossa, the victim's social worker. Because Barbossa could not exactly recall the accusations made by the victim during her therapy sessions, the defendant argues he was prejudiced by the delay. He claims that Barbossa's inability to recall the details of those therapy sessions prevented him from adequately preparing his defense. We disagree. Barbossa did not regularly keep records of what was said during her therapy sessions. Therefore, without an affidavit from Barbossa, there is no evidence that Barbossa's memory loss was a direct result of the delay, as opposed to her failure to memorialize her therapy sessions in writing.

Ultimately, while the defendant claims to have suffered actual prejudice from the delay in his arraignment, any proof of

such prejudice rises only to a level of speculation at best. As a result, we are satisfied that the motion judge did not err in ruling that neither the defendant's constitutional right to a speedy trial, nor his rights under Mass. R. Crim. P. 36 (c), have been violated.

2. Prejudicial statements. The defendant also claims that the judge abused his discretion in admitting "out-of-context" statements made by the defendant to the victim's mother in a 2008 telephone conversation, approximately three years before the victim's first complaint. Specifically, the defendant argues that the prejudicial effect of such statements substantially outweighed their probative value. We disagree.

"[R]elevant evidence is inadmissible if 'its probative value is substantially outweighed by its prejudicial effect.'" Commonwealth v. Gray, 463 Mass. 731, 751 (2012), quoting Commonwealth v. Sylvia, 456 Mass. 182, 192 (2010). Such a determination is "committed to the sound discretion of the trial judge and will not be disturbed by a reviewing court absent 'palpable error.'" Gray, supra at 751-752, quoting Commonwealth v. Rosario, 460 Mass. 181, 193 (2011).[6]

[6] In the circumstances here, we would see no abuse of discretion even if the defendant had argued that the statements were evidence of prior bad acts and that their probative value was outweighed by the risk of unfair prejudice. See Commonwealth v. Crayton, 470 Mass. 228, 249 n.27 (2014).

Here, the statements in question arise from a phone conversation between the defendant and the victim's mother, in which the defendant told her that he did not rape the victim, but instead, that it was his brother who had done so. The defendant then threatened to kill the victim's mother, if she were to bring charges against him.[7]

It is well-settled that a defendant's own statements may be admissible as evidence of consciousness of guilt. See Commonwealth v. Carapellucci, 429 Mass. 579, 583 (1999) ("[e]vidence, including statements by the defendant, showing consciousness of guilt are admissible to prove that the defendant committed the crime charged"); Commonwealth v. Fernandes, 427 Mass. 90, 94 (1998) (defendant's threat to kill potential witness out of fear of going to jail admissible as evidence of consciousness of guilt).

Contrary to the defendant's claim that the vulgar statements were irrelevant and without context, the statements were made three years before the victim's first complaint, rendering them highly probative of the defendant's state of mind and consciousness of guilt, as properly noted by the judge. Furthermore, the defendant's statements also demonstrate the

[7] Upon learning that the victim had begun to receive counseling after having "shut down," the defendant also made vulgar remarks about not only the victim, but also the victim's counselor.

hostile nature of his relationship with both the victim and the victim's mother. As a result, we are satisfied that the judge did not abuse his discretion in admitting such statements. See Commonwealth v. Spencer, 465 Mass. 32, 48 (2013), quoting Commonwealth v. Bys, 370 Mass. 350, 360-361 (1976) (defendant who claims "abuse of discretion assumes heavy burden" that "is not met by merely arguing that on a debatable question of admissibility the judge ruled against the defendant while another judge could and might have ruled in his favor").

Judgments affirmed.

By the Court (Meade, Sullivan & Sacks, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: November 5, 2020.

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