COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1435

COMMONWEALTH

vs.

JOSE L. RIVERA.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a jury trial in the Superior Court, the defendant, Jose L. Rivera, was found guilty on three indictments charging rape of a child, aggravated by a ten-year age difference, in violation of G. L. c. 265, § 23A (b), and one indictment charging indecent assault and battery on a child, in violation of G. L. c. 265, § 13B. On appeal, he claims that the evidence was insufficient to establish the ten-year age difference, that the nurse who examined the victim was improperly permitted to give expert testimony, and that the prosecutor's cross-examination of one of the defendant's witnesses created prejudicial error. We affirm.

1. Sufficiency of the evidence of age difference. In reviewing the sufficiency of the evidence, we consider "whether after viewing the evidence in the light most favorable to the

prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979). "Questions of credibility are to be resolved in the Commonwealth's favor, and circumstantial evidence is sufficient to establish guilt beyond a reasonable doubt." Commonwealth v. Miranda, 458 Mass. 100, 113 (2010). A conviction may not rest upon conjecture, speculation, or piling inference upon inference. See Commonwealth v. Swafford, 441 Mass. 329, 343 (2004).

The evidence at trial established the victim's date of birth in 2003. She was fifteen years old at the time of trial, but only thirteen years old when the crimes occurred. The defendant was her godfather, and she considered him a father figure. The victim was a close friend of the defendant's stepdaughter, who was "way older" than her. She testified that the defendant's birthday was September 22,[1] and when asked roughly how old he was, she answered, "Thirty, forties."

[1] Because the defendant orally moved for a required finding of not guilty at the close of the Commonwealth's evidence, "we consider only the evidence introduced up to the time that the Commonwealth rested its case." Commonwealth v. Kelley, 370 Mass. 147, 150 (1976). Thus, we cannot consider the testimony of the defendant's mother, called later by the defense, that his birthday was September 22, 1979, making him almost twenty-four years older than the victim.

The victim's estimate of the defendant's age, which the jury were entitled to credit, together with the strong circumstantial evidence that the defendant and the victim were a generation apart, "was sufficient for the [jury] to find beyond a reasonable doubt that there was at least a ten-year differential between the defendant's age and the age of the . . . victim." Commonwealth v. Galazka, 84 Mass. App. Ct. 907, 910 (2013). In light of this evidence, the jury could also consider the defendant's physical appearance. See Commonwealth v. Pittman, 25 Mass. App. Ct. 25, 27-28 (1987). The evidence satisfied the Latimore standard.

2. Examining nurse's testimony. The Commonwealth called as a witness nurse examiner Rachel Niemiec, who had conducted a "specialized genital and anal examination" of the victim about one year after the last sexual assault and found no evidence of injury; the examination was "within normal limits." Before trial, the defendant had filed a motion in limine to exclude any expert opinion offered by Niemiec because the Commonwealth had not disclosed her as an expert as required under Mass. R. Crim. P. 14 (a) (1) (A) (vi), as amended, 444 Mass. 1501 (2005). Relying on the prosecutor's representation that she would not elicit expert testimony from Niemiec, the defendant withdrew the motion.

The defendant argues that, despite the Commonwealth's promise, Niemiec impermissibly offered expert testimony when she discussed the "Adams Classification" system for rating examination results, and that she improperly offered an expert opinion vouching for the victim's credibility when she stated that out of the hundreds of examinations she had conducted on patients who reported allegations of sexual assault more than seventy-two hours after the event, all but one were within normal limits.

The defendant's argument has some force. Niemiec's testimony about the Adams Classification, which she described as "very strict criteria that allows us to call an exam either normal, indeterminate, or abnormal," and the examples she gave of abnormal examinations, sounded in the type of scientific, technical, or specialized knowledge usually reserved for expert testimony. See Commonwealth v. Canty, 466 Mass. 535, 541 & n.5 (2013); Mass. G. Evid. §§ 701-702 (2021). Likewise, her testimony concerning the infrequency of finding evidence of physical injury during examinations of sexual assault victims is regarded as a proper subject for expert testimony. See, e.g., Commonwealth v. Alvarez, 480 Mass. 299, 314-315 (2018); Commonwealth v. Quincy Q., 434 Mass. 859, 872-873 (2001); Commonwealth v. Colon, 49 Mass. App. Ct. 289, 292-293 (2000).

That said, we discern no prejudice. "An error is not prejudicial if it 'did not influence the jury, or had but very slight effect'; however, if we cannot find 'with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error,' then it is prejudicial." Commonwealth v. Cruz, 445 Mass. 589, 591 (2005), quoting Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994).[2]

As an initial matter, we disagree with the defendant's assertion that the Commonwealth's tactics amounted to "trial by ambush." Commonwealth v. Eneh, 76 Mass. App. Ct. 672, 677 (2010). The defendant had Niemiec's examination report and was fully aware that the examination was within normal limits -- a finding favorable to the defense. Indeed, he successfully moved

[2] The defendant did not object to Niemiec's Adams Classification testimony, and it is not clear that his motion in limine preserved the objection. See Commonwealth v. Grady, 474 Mass. 715, 719-720 (2016). It was only when Niemiec began to refer to "the literature" that defense counsel objected, reminding the judge that "expert testimony from this witness was not allowed." The judge sustained the objection and said, "We'll take it question by question." The defendant then objected to Niemiec's testimony concerning the number of examinations she had conducted in which she found no evidence of injury, but did not object when she testified about abnormal examination results. As it makes no difference to our ultimate conclusion, we assume without deciding that the issues regarding Niemiec's expert testimony were preserved and apply the more generous prejudicial error standard rather than the substantial risk of a miscarriage of justice standard. See Commonwealth v. Alphas, 430 Mass. 8, 13 & n.7 (1999).

for funds to hire his own expert witness -- an experienced, board certified obstetrician and gynecologist -- to explain the significance of the examination results.

Niemiec's testimony about examination results that might qualify as abnormal under the Adams Classification -- such as "an acute laceration of the hymenal tissues," "an absence of hymenal tissue," bleeding, or evidence of a sexually transmitted infection, none of which the victim exhibited -- was not harmful to the defendant. See note 2, supra (noting absence of objection to this aspect of Niemiec's testimony). Indeed, the defendant's expert testified that he would expect to see such injury in the case of the painful, forced intercourse that the victim described.

Nor do we detect prejudice arising from Niemiec's testimony concerning the infrequency that she had found evidence of injury in her experience performing sexual assault examinations. "We have recognized on prior occasions that a medical expert may be able to assist the jury by informing them that the absence of evidence of physical injury 'does not necessarily lead to the medical conclusion that the child was not abused,'" Alvarez, 480 Mass. at 314, quoting Commonwealth v. Federico, 425 Mass. 844, 851 (1997), "because '[t]he jury may be under the mistaken understanding that certain types of sexual abuse always or nearly always causes physical injury or scarring in the

victim.'" Alvarez, supra, quoting Federico, supra at 851 n.13. Such testimony does not amount to vouching for the victim. See Quincy Q., 434 Mass. at 872; Colon, 49 Mass. App. Ct. at 293. Indeed, where, as here, such testimony is offered "to negate the inaccurate inference that a child who was sexually abused would have sustained some genital injury, we do not require the Commonwealth to call a nontreating physician expert to offer such an opinion." Alvarez, supra.

To be sure, the judge did not qualify Niemiec as a medical expert. However, her testimony was limited to her personal knowledge. She was not permitted to offer an opinion of what she would expect to find in an examination conducted seventy-two hours or more after a disclosed incident. She did not explicitly vouch for the victim, and the generalized testimony she gave about the results of the many examinations she had performed carried a very small risk of implicit vouching. See Alvarez, 480 Mass. at 314. The prosecutor did not refer to the challenged aspects of Niemiec's testimony in closing argument -- she referred only to Niemiec's testimony that the victim's examination "came back within normal limits."

Moreover, the defense expert both confirmed, and provided a rebuttal to, Niemiec's testimony. He acknowledged that "the hymen doesn't always display injury after a traumatic penetration," that "in many cases" there is no evidence of an

injury, and that given the delay between the victim's reported rape and the examination, he was not surprised that no evidence of physical injury was present. But he also testified that any attempt to quantify the percentages of sexual assault victims who did or did not show signs of injury would be unreliable. Based on the nature and scope of Niemiec's testimony, and the defendant's opportunity to address the subject matter with his own expert witness, we are able to say with fair assurance that the error in permitting Niemiec to give limited, expert-like testimony did not influence the jury, or had but slight effect.

3. Scope of cross-examination. "Parties to litigation are entitled as a matter of right to the reasonable cross-examination of witnesses against them for the purpose of attempting to impeach or discredit their testimony." Commonwealth v. Gagnon, 408 Mass. 185, 192 (1990), quoting Commonwealth v. Underwood, 358 Mass. 506, 513 (1970). However, "the trial judge has considerable discretion to limit such cross-examination when it . . . touches on matters of tangential materiality.'" Commonwealth v. Haggett, 79 Mass. App. Ct. 167, 175 (2011), quoting Mass. G. Evid. § 611(b)(1), (2) note, at 194-195 (2010). The defendant argues that the judge erred by not exercising that discretion when the Commonwealth cross-examined his stepdaughter about her relationship with her biological father. We discern no abuse of discretion. The

cross-examination revealed that following the death of her mother, the stepdaughter's biological father entered her life for the first time and wanted her to come live with him, which she did not want. The Commonwealth had a plausible basis to pursue this line of questioning to show the stepdaughter's bias and motivation to testify favorably for the defendant, with whom she lived, to prevent him from being incarcerated -- as the prosecutor argued in summation. See Commonwealth v. Kindell, 84 Mass. App. Ct. 183, 186-187 (2013).

Judgments affirmed.

By the Court (Massing, Kinder & Neyman, JJ.[3]),

Joseph F. Stanton

Clerk

Entered: November 2, 2021.

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