COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1510

COMMONWEALTH

vs.

KEITH M. GRACE.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant, Keith M. Grace, was convicted after a jury trial in the Superior Court of rape, trafficking a person under eighteen for sexual servitude, kidnapping, assault and battery, and delivering liquor to a person under twenty-one. The crimes involved a single victim over the course of a two-day episode in January 2017. Two codefendants, Doriane Sylvester and Chinier Bennett, were tried separately. On appeal, the defendant contends that the judge abused his discretion by preventing the defendant from impeaching the victim with allegedly false allegations of sexual abuse she had made against others, and that certain statements of the defendant, the codefendants, and the victim were erroneously admitted in evidence. We affirm.

1. Evidence of prior false allegations. The victim, who was eighteen years old at the time of trial, was the principal

witness against the defendant. At the time of the crimes she was sixteen, in the custody of the Department of Children and Families (DCF), and living in a group home in Fitchburg. The defendant filed a motion in limine to introduce evidence that the victim had made prior false allegations of sexual abuse against her stepfather's brother (uncle) and a classmate. The motion was supported primarily with reports from DCF describing the victim's various allegations, made when she was twelve to thirteen years old, regarding prior abuse by her uncle. The allegation concerning the classmate was contained in a single paragraph of defense counsel's affidavit in which he summarized a police report. The defendant claims that the trial judge erred by prohibiting defense counsel from impeaching the victim with this evidence of false allegations.

"In general, evidence of prior false allegations has been excluded as a consequence of the rule that evidence of prior bad acts may not be used to impeach a witness's credibility." Commonwealth v. Sperrazza, 379 Mass. 166, 169 (1979). However, a narrow exception to the general rule, based on Commonwealth v. Bohannon, 376 Mass. 90 (1978), permits a defendant accused of sexual assault to cross-examine the victim with certain prior false allegations of sexual assault. Whether to permit such cross-examination is within the discretion of the trial judge. See Commonwealth v. Martin, 467 Mass. 291, 311 (2014).

In exercising his discretion, the judge considered the relevant factors discussed in Bohannon and the cases applying it. See Commonwealth v. LaVelle, 414 Mass. 146, 151 (1993). The judge found that consent was not a central issue in the case (defense counsel conceded this point); that the records offered by the defendant did not show "that the prior accusations of the same type of crime were patently false"; and that the "weight and relevance of the proffered evidence" did not outweigh its prejudicial effects.

"[T]o open the gate to cross-examination, the evidence of falsity of an accusation must be solid . . . ." Commonwealth v. Costa, 69 Mass. App. Ct. 823, 831 (2007), quoting Commonwealth v. Wise, 39 Mass. App. Ct. 922, 923 (1995). We agree with the judge's assessment that the proffered evidence did not demonstrate that the victim's prior allegations were patently false. With respect to the uncle in particular, many of the victim's allegations were deemed "supported" by DCF, and they appear to have been a factor in DCF's being awarded permanent custody of the victim. Moreover, the allegations of kidnapping, rape, and sexual servitude in this case were different in nature and kind from the allegations against the uncle, which concerned child abuse by an adult family member. The same is true of the allegations against the classmate, which involved an isolated incident of an attempt to force the victim to perform oral sex

after school in the school parking lot. See Commonwealth v. Hicks, 23 Mass. App. Ct. 487, 490 (1987). While not every aspect of Bohannon must be present, the evidence of the prior false allegations must be "exceptionally probative so far as the credibility of the victim witness is concerned." Commonwealth v. Nichols, 37 Mass. App. Ct. 332, 337 (1994). The judge acted within his discretion in concluding that the defendant's proffer did not warrant application of the narrow Bohannon exception.[1]

Nor do we discern an abuse of discretion in the judge's decision to deny the defendant's motion for a continuance, filed on the day of the final pretrial conference, to further investigate the victim's false allegations and competency to testify. Attorneys representing the defendant diligently pursued evidence of the victim's counselling, therapy, and DCF records to support the Bohannon motion, and the defendant was granted several motions for discovery and continuances of the trial to do so. When trial counsel received a batch of responsive documents in March 2019, he filed another motion to

[1] The judge also did not abuse his discretion in determining that a voir dire hearing on the issue was unnecessary. See Commonwealth v. Pina, 481 Mass. 413, 431 (2019) ("The decision to conduct a voir dire examination of a witness rests in the sound discretion of the trial judge"). At the hearing on the motion in limine, defense counsel did not press the request for voir dire included in his written motion or make any offer of proof as to the witness or witnesses he wished to examine or what their testimony would show.

continue the trial date to allow him to review the records and consult with a forensic psychologist or psychiatrist with respect to the victim's competence. The trial judge allowed the motion over the Commonwealth's objection; defense counsel agreed to a final pretrial conference date of May 1, 2019, with a trial date of May 13, 2019. On the day of the final pretrial conference, however, defense counsel filed a motion for a further continuance of the trial that was almost identical to the previous motion. The judge denied the motion and wrote a detailed memorandum explaining his reasoning. The judge's memorandum demonstrates a careful understanding and balancing of the competing interests and not, as the defendant argues, a "myopic insistence upon expeditiousness." Commonwealth v. Cavanaugh, 371 Mass. 46, 51 (1976), quoting Ungar v. Sarafite, 376 U.S. 575, 589 (1964).

2. Coconspirator statements. The defendant contends that certain statements admitted at trial -- the victim's testimony that Bennett texted her that "he would set [her] up a ride" to the defendant's apartment, an officer's statement that he learned that a white Samsung cell phone seized from the apartment belonged to the defendant, and data extracted from Sylvester's cell phone -- were erroneously admitted against him as coconspirator statements without a preliminary finding by the judge and an independent determination by the jury, based on

evidence other than the statements, that a conspiracy existed. See Commonwealth v. Winquist, 474 Mass. 517, 520-521 (2016); Mass. G. Evid. § 801(d)(2)(E) (2021).

We discern no error. Had the issue of coconspirator statements been raised at trial,[2] the judge and the jury could have justifiably concluded by a preponderance of the evidence that a conspiracy existed among the defendant, Bennett, and Sylvester to confine the sixteen year old victim and to compel her to engage in sexual acts against her will. The victim's testimony independently established that as a result of communications with Bennett, she agreed to go to a party at the defendant's apartment in Brockton where the defendant, Bennett, and Sylvester were all present. Bennett provided the victim alcohol and marijuana. The defendant and Sylvester took the victim into a bedroom where the defendant told her to take off her clothes, and they took photographs of her in just her underwear. The defendant then forced the victim to perform fellatio "[f]or money" on a "random guy" who had arrived at the apartment. When the victim refused to complete the act, Sylvester "finish[ed] the person" while the defendant berated the victim for being rude to "customers." The defendant then

[2] Although the defendant contemporaneously objected to the statements in question, he did not raise his current claim at trial. As we discern no error, the standard of review is immaterial.

raped the victim, as did Bennett later that evening. The victim remained with the three of them, against her will and under their watch, until the police arrived and she ran out of the apartment saying, "Help, get me the fuck out of here." To the extent any of the challenged statements were the statements of coconspirators, they were properly admitted as such.

3. Defendant's statement to Bennett. Over the defendant's objection, the judge allowed the arresting officer to testify that when he was transporting the defendant and Bennett to the police station after their arrest, he overheard the defendant tell Bennett that Bennett "should take the blame because [the defendant] was about to have a baby and he wanted to be able to see that baby." The defendant argues that the judge abused his discretion in admitting the statement because it had little probative value and was highly prejudicial.[3] Cf. Commonwealth v. Lewin (No. 2), 407 Mass. 629, 631 (1990).

The defendant's statement was not ambiguous. It tended to show that he was aware that he and Bennett were both responsible for the events for which they had just been arrested, and that he wanted Bennett to take full responsibility -- presumably covering up the defendant's involvement -- so that the defendant

[3] Contrary to the defendant's contention in his brief, at the conclusion of the voir dire hearing on whether to admit this testimony, the judge specifically found it "to be more probative than prejudicial."

would not suffer any consequences. If not an admission of guilt, the statement was at the very least evidence of consciousness of guilt. See Commonwealth v. Martinez, 476 Mass. 186, 196-197 (2017), quoting Commonwealth v. Vick, 454 Mass. 418, 424 (2009) ("Evidence 'susceptible of a finding' that a defendant 'embarked on a series of actions consciously designed to deflect attention from himself' may indicate consciousness of guilt"); Mass. G. Evid. § 1110(a) (2021). That the statement evinced the defendant's consciousness of guilt is far more likely than the interpretation the defendant offers for the first time on appeal: that he had done nothing wrong, but was worried that merely being charged with a crime would result in the revocation of probation.[4] Contrast Lewin (No.2), 407 Mass. at 631-632 ("little unambiguous probative value" when equally likely that statement was "irrational outburst" due to "defendant's despondency"). In addition, the statement was not prejudicial, other than to properly show consciousness of guilt.[5]

[4] Indeed, at defense counsel's request, the defendant's reference to being on probation was redacted from his statement, and the prosecutor was permitted to lead the witness to ensure that the officer did not mention that the defendant was on probation at the time.

[5] Even if the statement "could be vigorously urged to the jury at trial as constituting the equivalent" of a confession, Lewin (No. 2), 407 Mass. at 632, the prosecutor did not even mention the statement in closing argument.

The judge did not abuse his discretion in admitting the statement.

4. Victim's Facebook messages. The victim's sometime boyfriend testified that he received a Facebook message from the victim stating, "I went to a party. They won't let me leave," and "They want to make me a prostitute." The judge allowed the testimony, over the defendant's objection, finding "sufficient indicia of spontaneity and sufficient indicia to meet the requirements of the excited utterance exception." The defendant argues the statements were not made under the influence of an exciting event and that the victim had ample time to reflect, thereby disqualifying her statement under the heightened requirements for reliability applicable to written statements. See Commonwealth v DiMonte, 427 Mass. 233, 239 (1998) ("Because a writing is more suspect as a spontaneous exclamation than is an oral statement, the circumstances of the writing would have to include indicia of reliability even more persuasive than those required for an oral statement before we could conclude that the writing qualified as a spontaneous exclamation"). But see Commonwealth v. Mulgrave, 472 Mass. 170, 178 (2015) ("The cellular technology that allows for the sending and receiving of a text message instantly, often as a substitute for oral expression, diminishes the concern about spontaneity that might

arise with other more deliberative modes of written communication").

An excited or spontaneous utterance is not excluded as 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." Mass. G. Evid. § 803(2) (2021). "The relevant factors to consider include whether the statement was made in the same location as the startling event; the amount of time between the startling event and the making of the statement; and the age, spontaneity, and degree of excitement of the declarant." Commonwealth v. Wilson, 94 Mass. App. Ct. 416, 421 (2018). We review the judge's decision to admit an excited utterance for abuse of discretion, and "[w]e defer to the judge's decision unless we conclude that he failed to weigh properly the relevant factors with the result that the decision was outside the range of reasonable alternatives." Id. at 423.

The ordeal the victim underwent qualifies as a sufficiently starting event. Although a substantial period of time passed between when the victim first contacted the boyfriend, at 4:55 A.M., and when she sent the messages in question, at 6:36 P.M., she was still being held against her will in the defendant's apartment. See Mulgrave, 472 Mass. at 178 ("This sequence of

events closely resembles a scenario mentioned in DiMonte, 427 Mass. at 239, where we observed that a writing may be admissible 'when a victim is held hostage and is unable to communicate in any way other than writing or when a person's vocalization is impaired'"). The victim explained that she could not leave the defendant's apartment because she was "scared" and "didn't know the area"; that her only means of communicating was when she had WiFi access inside the defendant's apartment, where "[t]he signal wasn't very strong" and the connection was "on and off"; and that at the moment she sent the message in question she was "[s]cared" and "didn't want to be there and . . . didn't want to do the things that was happening." The judge considered the appropriate factors and did not abuse his discretion in admitting the statements.

Moreover, even if the Facebook messages were admitted in error, they were cumulative of the victim's testimony, and defense counsel had the opportunity to cross-examine her about the statements. Indeed, defense counsel questioned the victim at length and in detail about all of her messages with the boyfriend. See Commonwealth v. Davis, 54 Mass. App. Ct. 756, 764 (2002) ("the prejudicial effect of cumulative spontaneous utterance evidence is mitigated where the person who made the out-of-court statements testifies at trial and is subject to

cross-examination about her prior statements").

Judgments affirmed.

By the Court (Blake,
Massing & Ditkoff, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: January 21, 2022.

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