COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-762

COMMONWEALTH

vs.

JAVIER ZUNIGA.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a jury trial in the Superior Court, the defendant was convicted of numerous sex offenses, all involving his niece, who was between the ages of five or six and fourteen at the time of the assaults.[1] The defendant's motion for a new trial -- which was heard by a different judge -- was denied after a nonevidentiary hearing. On appeal, the defendant contends that the trial judge erred by incorrectly identifying the first complaint witness, playing a recording of the victim's trial testimony for the deliberating jury, admitting bad act evidence, and improperly limiting his cross-examination of the victim. He also claims that the motion judge erred in denying his motion for a new trial because the trial judge erred in identifying the

[1] The defendant was acquitted of one count of intimidation of a witness.

first complaint witness, and because he received ineffective assistance of counsel. We affirm.

1. Direct appeal. a. First complaint witness.[2] The defendant's first trial ended in a mistrial as the jury could not reach a unanimous verdict. Prior to the first trial, the Commonwealth filed a motion in limine to allow the victim's counselor and a police detective to testify as first complaint witnesses. The judge did not conduct a voir dire hearing, but allowed the Commonwealth's motion as to the counselor only. At the retrial, the defendant did not renew his objection, but he now contends that the objection at the first trial preserved the issue for appeal. The Commonwealth claims that this claim is unpreserved. For the reasons that follow, we conclude that there was no error under either standard of review.

The defendant claims that the victim's mother was the "true" first complaint witness, and therefore it was error to allow the counselor to testify without the benefit of a voir dire hearing.[3] The Massachusetts first complaint doctrine is not

[2] The defendant contends that he was entitled to a new trial because the trial judge erred in identifying the first complaint witness. For the reasons explained infra, we conclude the motion judge did not err in denying the motion on this ground.

[3] The Commonwealth represented to the judge at the first trial that the victim was approximately five years of age when she told her mother that the defendant "touched" her, but the victim provided no additional detail. Both attorneys also told the judge that the victim's mother denied that the victim had told her of any sexual assault.

a strict rule of evidence, but rather a "body of governing principles" guiding trial judges on admissibility of testimony about a victim's first disclosure of a sexual assault. Commonwealth v. Aviles, 461 Mass. 60, 73 (2011). See Mass. G. Evid. § 413 (2021). We review a judge's ruling to admit first complaint testimony for an abuse of discretion. See Aviles, supra. The Supreme Judicial Court recognized that trial judges needed "greater flexibility to deal with the myriad factual scenarios that arise in the context of purported first complaint evidence." Id. at 72.

At the retrial, the attorneys had the benefit of the counselor's testimony from the first trial.[4] Because of this, a voir dire hearing was unnecessary. The issue of who would be permitted to testify as the first complaint witness was fully vetted at the first trial. Evidence at the first trial confirmed that the victim's counselor was the first person to whom the victim disclosed a sexual assault by her uncle. It also confirmed that the victim's mother -- who the defendant claimed was the true first complaint witness -- denied that the victim had disclosed the sexual abuse to her.[5]

[4] The judge, prosecutor, and the defense counsel from the first trial were the same as those in the retrial.

[5] Notably, at the second trial, defense counsel highlighted the Commonwealth's failure to call the victim's mother as a witness during his closing argument.

Moreover, the decision to conduct a voir dire examination of a witness rests in the sound discretion of the trial judge, Commonwealth v. Rodriguez, 425 Mass. 361, 370 n.5 (1997), and the ruling will not be disturbed unless it constitutes "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). We are not persuaded by the defendant's reliance on Commonwealth v. Stuckich, 450 Mass. 449 (2008), as the facts are readily distinguishable from the evidence here. In Stuckich, the Supreme Judicial Court observed that "[a]lthough the witnesses were not called to recount the details [of the complaint], the fact that the [victim] reported to them is the equivalent of saying that she repeated her account of the incident, i.e., it allows fresh complaint testimony through the back door. Repetition of the narrative tends to enhance the credibility of the complainant to the prejudice of the defendant." Id. at 457. Here, there was no difficult, unresolved issue in the identification of the first complaint witness, the "narrative" was not repeated, and there was no back door admission of first complaint evidence.[6]

[6] Even assuming error, there was no prejudice to the defendant as he cannot show that the mother's proposed first complaint

b. Replaying the victim's testimony. During their deliberations, the jury requested the stenographer's transcripts of the victim's trial testimony. The transcripts, however, were not readily available; the judge informed the jury that he would consider playing an audio recording of a witness's testimony if they requested it. The jury then requested an audio recording of the victim's direct examination and cross-examination. The judge allowed the jury's request, over the defendant's objection. The judge gave a cautionary instruction to the jury, and then the recording of the entirety of the victim's testimony was played once for the deliberating jury in open court. Given the defendant's objection "to the [play]-back of the testimony . . . we consider whether the judge committed error and, if so, whether the error was prejudicial." Commonwealth v. Bacigalupo, 49 Mass. App. Ct. 629, 635 (2000).

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testimony would have had an impact on the verdicts. Additionally, the judge gave two limiting instructions to the jury regarding the proper use of this evidence. See Commonwealth v. Lewis, 91 Mass. App. Ct. 651, 664 (2017) (jury presumed to follow judge's instructions in assessing first complaint testimony). The evidence did not come in substantively. Contrast Commonwealth v. Haggett, 79 Mass. App. Ct. 167, 173 (2011). There was "'no piling on' of multiple complaint witnesses," as prohibited by the first complaint doctrine, see, e.g., Commonwealth v. McCoy, 456 Mass. 838, 845 (2010), where the judge allowed only one of two witnesses the Commonwealth sought to call.

The "trial judge has broad discretion whether to permit a jury to review transcripts of trial evidence generally, . . . and such requests must always be treated with caution." Commonwealth v. Richotte, 59 Mass. App. Ct. 524, 530 (2003), citing Bacigalupo, 49 Mass. App. Ct. at 635, and Commonwealth v. Mandeville, 386 Mass. 393, 405-406 (1982). Here, the judge's detailed and careful cautionary instructions spanned four pages, significantly greater than the instructions given in Mandeville, supra at 405 n.8. Moreover it was the trial judge who was in the best position to weigh the risk that the testimony would overemphasize aspects of the case. See Commonwealth v. Stockwell, 426 Mass. 17, 24 (1997). Here, the judge weighed that risk and mitigated it.

c. Bad act evidence. The evidence at trial was that the sexual abuse of the victim spanned multiple years, beginning in Rockland when the victim was five years of age. The abuse then continued in Texas, where the victim, her mother, and the defendant moved. When the parties returned to Plymouth, the abuse continued until the victim was fourteen years of age. Over objection, the judge permitted the Commonwealth to introduce evidence of the uncharged conduct that occurred in Texas.

As a general principle, prior bad act evidence is not admissible to show that a defendant had a propensity to commit

the charged crime. See Commonwealth v. Veiovis, 477 Mass. 472, 481 (2017). It may, however, be admissible "for a purpose other than character or propensity." Id. at 481-482. As was the case here, this evidence was admissible "for a nonpropensity purpose." Commonwealth v. Chalue, 486 Mass. 847, 866 (2021). See Mass. G. Evid. § 404 (b) (2) (2021). The uncharged conduct was relevant and probative on the issues of motive, opportunity, intent, and to establish a pattern of conduct.[7] See Commonwealth v. Bryant, 482 Mass. 731, 734 (2019); Commonwealth v. Centeno, 87 Mass. App. Ct. 564, 567 (2015) ("[i]n sexual assault cases, evidence of similar illicit sexual contacts involving the same parties may be used to show a pattern of conduct, intent, and the relationship between a defendant and a complainant" [citation omitted]). This evidence also corroborated the victim's testimony and countered the defendant's argument that the abuse did not occur. See Commonwealth v. Hanlon, 44 Mass. App. Ct. 810, 817-818 (1998). Finally, this evidence helped to explain to the jury how the sexual abuse developed and continued over time. See Commonwealth v. Childs, 94 Mass. App. Ct. 67, 71-73 (2018).

[7] The sexual assaults in Texas went uncharged because of "the fortuity that [they] happened in a different [State] from the beginning and the ending acts" of abuse. Commonwealth v. Childs, 94 Mass. App. Ct. 67, 72-73 (2018).

The judge has broad discretion to determine whether the probative value of the evidence outweighs the unfair prejudice to the defendant. See Chalue, 486 Mass. at 866, 869. Here, the victim's testimony about the abuse in Texas was brief. It was neither overwhelming nor extremely detailed. The judge instructed the jury on the limited nature of this evidence. The jury are presumed to follow those instructions, see Commonwealth v. Cheremond, 461 Mass. 397, 414 (2012), thereby minimizing the prejudice to the defendant. The judge did not abuse his discretion in admitting this evidence.

d. Limitation on cross-examination. At trial the defendant sought to introduce in evidence a portion of the victim's Facebook profile. He claimed that this evidence demonstrated that the victim lied about her date of birth, marital status, and employment status. The judge excluded the evidence as irrelevant following a voir dire hearing during which the victim testified.[8]

A judge has broad discretion to determine the scope of cross-examination. See Commonwealth v. McGhee, 472 Mass. 405, 426 (2015). Here, the defendant argues that he sought to admit

[8] The victim testified that she posted that she was employed at a retail store because she did not want to leave that portion of her Facebook page blank, used her older brother's date of birth in order to access a Facebook account, and listed that she was "married" to her best friend.

this evidence to prove that the victim "created a false persona," contending that it supported his position that the victim fabricated the allegations against him.[9] "In general, specific instances of misconduct showing the witness to be untruthful are not admissible for the purpose of attacking . . . the witness's credibility" [citation omitted]. Commonwealth v. Lopes, 478 Mass. 593, 606 (2018). See Mass. G. Evid. § 608(b) (2021). Here, the defendant did not make a "plausible showing," and the victim's voir dire testimony did not provide a factual basis for his assertion that the victim fabricated the sexual abuse allegations. See Commonwealth v. Sealy, 467 Mass. 617, 624 (2014). There was also no demonstrable connection between the victim's Facebook profile information and the victim's disclosure of abuse. We conclude that the judge did not abuse his discretion in precluding the defendant from cross-examining the victim about certain information in her Facebook profile that the judge deemed irrelevant. See Mass. G. Evid. § 401 (2021).[10]

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[9] Notably, the defendant was permitted to cross-examine the victim about Facebook conversations that she had with the defendant that included evidence of the victim's alleged motive to lie. See Commonwealth v. Sealy, 467 Mass. 617, 625 (2014) ("evidence of the victim's motive to lie was 'sufficiently aired'" [quotation and citation omitted]).

[10] For the first time on appeal, the defendant claims his right to confrontation was violated because the judge limited his cross-examination. Because he did not raise a constitutional objection at trial, "we decline to address the constitutional

2. Motion for a new trial -- ineffective assistance of counsel. The defendant claims that defense counsel was ineffective for failing to object to a juror and to the trial judge's sua sponte amendment to the dates of offense of two indictments. To prevail on a claim of ineffective assistance of counsel, "the defendant must show that the behavior of counsel fell measurably below that of an ordinary, fallible lawyer and that such failing 'likely deprived the defendant of an otherwise available, substantial ground of defence.'" Commonwealth v. Prado, 94 Mass. App. Ct. 253, 255 (2018), quoting Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).

a. Juror 19. The defendant contends that defense counsel was ineffective for failing to exercise a peremptory challenge of this juror because she was not impartial. The judge's "determination of a juror's impartiality 'is essentially one of credibility, and therefore largely one of demeanor.'" Commonwealth v. Philbrook, 475 Mass. 20, 30 (2016), quoting Commonwealth v. Alicea, 464 Mass. 837, 849 (2013). Here, the trial judge was in the best position to assess juror 19's credibility, and to determine whether additional questions of

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argument he made on appeal." Commonwealth v. Houston, 430 Mass. 616, 619 n.4 (2000). In any event, we discern no merit in the defendant's confrontation clause argument.

her were warranted. See Commonwealth v. Lattimore, 396 Mass. 446, 450 n.6 (1985).

Specifically, the defendant contends that juror 19 was biased because she went to law school with and was Facebook "friends" with the trial prosecutor. The mere fact that juror 19 knew the trial prosecutor does not disqualify her from service or show bias. See Commonwealth v. Duran, 435 Mass. 97, 106-107 (2001) (that juror was correctional officer where defendant was held did not create presumption of bias); Commonwealth v. Amazeen, 375 Mass. 73, 83 (1978) (no error in refusing to dismiss juror who knew prosecutor from high school and church); Commonwealth v. Murphy, 59 Mass. App. Ct. 571, 581 (2003) ("mere fact that a juror knows a police officer or prosecutor, or is related to them, does not disqualify a juror from service or show any bias"). Here, the trial judge conducted a detailed colloquy of juror 19, during which he had the ability to evaluate her answers and to assess her demeanor. The record demonstrates that juror 19 was unequivocal in her statements that she could be fair and impartial, and thus the defendant's claim to the contrary is unsupported.

The defendant also claims that defense counsel should have exercised a peremptory challenge to juror 19 because she was the victim of a sexual assault when she was nineteen years of age. This claim fails, as here the allegation was of child sexual

abuse, and not the sexual assault of an adult. Cf. Commonwealth v. DiRusso, 60 Mass. App. Ct. 235, 237 (2003) (when requested, trial judge to inquire whether prospective juror had been victim of childhood sexual offense).

b. Amendment to the indictments. Prior to trial, the judge sua sponte, and without objection, amended the dates of offense on two indictments. He struck "October 2013" from the indictments that read "on or about September 2013, to October 2013." The amendment was not material, as the date of the offense is not an essential element of the crime of aggravated rape of a child, "and need not be precisely alleged" (citation omitted). Commonwealth v. Montanino, 409 Mass. 500, 512 (1991). See G. L. c. 277, § 20. The jury were instructed that an indictment is not evidence.

Moreover, an amendment is permissible if it does not prejudice the Commonwealth or the defendant. See Mass. R. Crim. P. 4 (d), 378 Mass. 849 (1979). The defendant claimed that the amendment precluded him from impeaching the victim because it was undisputed that he was in Texas beginning September 20, 2013. But defense counsel cross-examined the victim on this point and therefore has failed to demonstrate prejudice.

For the first time on appeal, the defendant claims that the amendment impacted his alibi defense. Although this claim does

not rise to the level of adequate appellate argument,[11] see Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019), we note that the defendant cross-examined the victim about her prior statements to the police that he raped her in October 2013. While ultimately unsuccessful, defense counsel in fact used this discrepancy in the victim's testimony to impeach her during trial.

Judgments affirmed.

Order denying motion for a new trial affirmed.

By the Court (Milkey, Blake & Grant, JJ.[12]),

Joseph F. Stanton

Clerk

Entered: February 9, 2022.

[11] The defendant's motion for a new trial and affidavit of counsel submitted in support thereof do not reference an alibi defense.

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