

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-27

COMMONWEALTH

vs.

DANE D., a juvenile.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a jury trial in the Juvenile Court, the juvenile was adjudicated delinquent of two counts of rape of a child by force, in violation of G. L. c. 265, § 22A, and one count of indecent assault and battery on a child under fourteen, in violation of G. L. c. 265, § 13B. Finding no reversible error, we affirm.

Discussion. 1. Standard of review. We review the judge's evidentiary rulings for an abuse of discretion. See Commonwealth v. Driscoll, 91 Mass. App. Ct. 474, 476 (2017). Because the juvenile failed to preserve his present challenges, to the extent we discern error in the judge's rulings, our review is only for a substantial risk of a miscarriage of justice. See Commonwealth v. McDonagh, 480 Mass. 131, 137 (2018) ("Only a timely and precise objection to the admission of

evidence, or a judge's ruling, will preserve a claimed error for appellate review").

2. SANE nurse's testimony. The juvenile first asserts that Sexual Assault Nurse Examiner (SANE) nurse's testimony was not probative of any relevant issue. We disagree. At a minimum, the SANE nurse's testimony that the physical examination of the victim was "normal" and that it revealed "no acute injuries" was relevant to the allegation of forcible sexual assault. See Commonwealth v. Clayton, 52 Mass. App. Ct. 198, 201 (2001), quoting Commonwealth v. Pare, 43 Mass. App. Ct. 566, 572-573 (1997) (to be relevant, "evidence 'need not establish directly the proposition sought; it must only provide a link in the chain of proof'"). Indeed, the juvenile's trial counsel commented on these facts in his opening statement and highlighted them during cross-examination, and the prosecutor was entitled to maintain his credibility with the jury by eliciting them first.

The juvenile also argues that the SANE nurse's explanation regarding the lack of physical evidence of sexual assault improperly "bolstered [the victim's] credibility."¹ However, the SANE nurse did not opine whether the victim suffered abuse, nor

¹ Trial counsel objected to the relevancy of this testimony; his challenge to the evidence as improper vouching was not preserved at trial.

did she comment on his truthfulness. Her testimony that the absence of acute physical injury "in no way suggests that abuse did or did not occur" was properly admitted. See Commonwealth v. Alvarez, 480 Mass. 299, 314-315 (2018) (expert testimony negating inference that sexual abuse necessarily causes physical injury "does not implicitly comment on the complainant's truthfulness"); Commonwealth v. Colon, 49 Mass. App. Ct. 289, 292-293 (2000).

The juvenile further contends that the SANE nurse's testimony constituted improper "back door" first complaint evidence.² See Commonwealth v. Stuckich, 450 Mass. 449, 457 (2008) (prohibiting multiple complaint testimony "through the back door"). Yet, his argument that the SANE nurse's description of the victim's medical examination was "the equivalent of saying that [the victim] repeated his account of the incident" misses the mark. Nothing in the SANE nurse's testimony indicated that the victim even mentioned the sexual assaults, let alone conveyed the substance of his complaint. See Commonwealth v. Murungu, 450 Mass. 441, 446 (2008) (disclosure of act of sexual assault is necessary to constitute first complaint).

² Although the judge allowed the Commonwealth's motion in limine to present first complaint evidence through the victim's mother, the Commonwealth did not offer that evidence at trial.

Finally, the juvenile contends that the SANE nurse's testimony that the victim reported trouble sleeping was inadmissible hearsay. "Hearsay statements made [to medical care providers] for purposes of medical diagnosis or treatment are admissible in Massachusetts." Commonwealth v. Michalski, 95 Mass. App. Ct. 520, 524 (2019). The SANE nurse testified that she reviews physical and neuro-behavioral symptoms with patients during her forensic examination. The victim's statement about having nightmares was relevant to the SANE nurse's medical assessment of him and thus admissible. We discern no error in the SANE nurse's testimony that created a substantial risk of a miscarriage of justice.

3. Police testimony. The lead detective testified that she was assigned to a sexual assault investigation involving the juvenile and the victim, observed a forensic interview of the victim, followed up with witness interviews, spoke to the juvenile's mother at her apartment in Brockton (where the assaults were perpetrated against the victim), and wrote a report memorializing her work. The juvenile did not object to the detective's testimony at trial and did not cross-examine her. On appeal, he contends that he was unfairly prejudiced by this testimony because it was irrelevant, vouched for the victim, and was improper first complaint evidence. We disagree.

The detective's barebones testimony was relevant to establish the address at which the offenses at issue took place. Where the jury surely would have understood, with or without the detective's testimony, that the charges against the juvenile were initiated by a report to the police, and where her testimony was both brief and summary, we are satisfied that her testimony did not create an "imprimatur of official belief in the [victim]." Stuckich, 450 Mass. at 457. Finally, because the detective's testimony included neither the fact of the victim's report of the sexual assaults nor its substance, it did not constitute first complaint evidence. See Murungu, 450 Mass. at 446.

4. Jury Instructions. Although there was no contemporaneous request by his trial counsel, the juvenile now claims the judge improperly failed to give a "pointed curative instruction" on two occasions involving struck testimony: when the victim's mother said she was told by the school that the victim said he "wanted to kill himself," and when the victim stated he told his school principal about the oral rape. We are not persuaded. "There is no requirement that, in circumstances like these, a judge must give a curative instruction sua sponte." Commonwealth v. Qualls, 440 Mass. 576, 584 (2003). In her preliminary remarks and final charge, the judge instructed the jury that testimony as to which an objection was sustained

or that she ordered "struck" was not evidence and could not be considered by them. These instructions were adequate, and the absence of a contemporaneous admonition was not error. See Commonwealth v. Silva, 93 Mass. App. Ct. 609, 615 (2018), citing Commonwealth v. Williams, 450 Mass. 645, 651 (2008) ("Jurors are presumed to follow the law as instructed"). See also Commonwealth v. Roberts, 378 Mass. 116, 130 (1979) ("As long as a judge gives adequate and clear instructions on the applicable law, the phraseology, method and extent of the charge are matters within [her] discretion").

Additionally, for the first time on appeal, the juvenile contends that the judge erred by failing to give an instruction on first complaint evidence.³ We are not persuaded. As previously discussed, neither the SANE nurse's nor the detective's testimony was first complaint evidence; thus, no first complaint instruction was required as to that testimony. The victim's testimony that he told the school principal about the oral rape was struck, and so was not in evidence. See Silva, 93 Mass. App. Ct. at 615-616. As we have noted, the judge properly instructed the jury to disregard struck testimony. See Williams, 450 Mass. at 651. Lastly, the victim's mother's testimony that she heard "something" on June

³ No request was made at trial for an instruction on first complaint evidence.

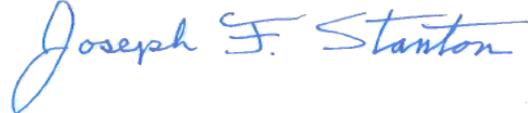
8, 2018, was too vague to amount to first complaint testimony, and thus did not require such an instruction. There was no error and therefore no substantial risk of a miscarriage of justice in the judge's instructions to the jury.

5. Medical records. Prior to trial, the judge issued a written order pertaining to redactions of the victim's medical records. At trial, the defendant objected to the admission of this evidence "for the record, on the grounds of hearsay." Without any significant explanation or development, the juvenile now claims that a "question" remains regarding the SANE nurse's affiliation with a hospital or clinic for purposes of admissibility under G. L. c. 233, § 79, and states in a conclusory manner that "there was no legitimate purpose" for the admission of the medical record. This argument does not rise to the level of adequate appellate argument. See Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019). In any event, the records in this case, which "relate[] directly and mainly to the treatment and medical history of [the victim]," were properly admitted pursuant to § 79. Commonwealth v. Dargon, 457 Mass. 387, 394 (2010), quoting Commonwealth v. DiMonte, 427 Mass. 233, 242 (1998) (liberally construing § 79 to admit records of medical treatment even where records may bear on question of liability).

6. Cumulative error. Because we discern no error in the juvenile's individual claims, there was no cumulative error resulting in a substantial risk of a miscarriage of justice that warrants a new trial.

Adjudications of delinquency affirmed.

By the Court (Ditkoff, Hand & Brennan, JJ.⁴),



Clerk

Entered: September 1, 2022.

⁴ The panelists are listed in order of seniority.