SJC-13150

COMMONWEALTH vs. MARC GIBSON.

Suffolk. November 3, 2021. – January 19, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Wendlandt, & Georges, JJ.

Rape. Evidence, Photograph. Consent. Jury and Jurors. Practice, Criminal, Jury and jurors, Deliberation of jury.

Indictments found and returned in the Superior Court Department on December 18, 2018.

The cases were tried before Kenneth W. Salinger, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Debra Kornbluh for the defendant.
Kathryn Sherman, Assistant District Attorney, for the Commonwealth.

LOWY, J. A jury convicted the defendant, Marc Gibson, of two counts of rape and one count of photographing an unsuspecting nude person. The defendant appeals from his convictions, arguing that there was insufficient evidence to

support the convictions and that the trial judge impermissibly coerced a juror requesting to be dismissed into reaching a unanimous verdict. We affirm.

Facts. Taking the evidence in the light most favorable to the Commonwealth, the jury could have found the following facts. See Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979). A.M.,[1] the victim, traveled to Boston for a business trip. Upon arrival, she and her coworkers checked into a hotel. After attending a business meeting with her coworkers that evening, A.M. went to the hotel restaurant and ordered soup and a cocktail. She ate alone but was later joined by some coworkers, including the defendant -- with whom A.M. had worked briefly once before -- and had a second drink. The group then went to another bar in the hotel, where A.M. ordered a third drink.

After smoking a cigarette with the group, A.M. began to feel dizzy and as if she were going to vomit. She told her coworkers that she was going to her room, and the defendant offered to help her. A.M. and the defendant took an elevator up to A.M.'s room, and A.M. vomited in the bathroom while the defendant held her hair and rubbed her back. A.M. then changed and lay in bed. The defendant left A.M.'s room to use the bathroom in his own room. He returned soon after using one of

[1] A pseudonym.

A.M.'s room keys, which he had picked up before leaving her room.

During this time, the defendant had been sending text messages to another coworker about A.M.'s condition. In doing so, he lied about his whereabouts. He sent a text message to the coworker stating that A.M. was "puking again" and did not want the defendant "to go," but at that time the defendant actually was in his own hotel room rather than with A.M. The coworker asked for A.M.'s room number to check on her. The defendant told him and let the coworker into A.M.'s room. The coworker found A.M. sleeping in bed, and he tried waking her up by snapping his fingers in front of her face. He asked if she were all right, and she opened her eyes and responded affirmatively. The coworker and the defendant then left the room together to smoke a cigarette.

When the coworker and the defendant parted ways, the defendant still had A.M.'s room key. He returned to A.M.'s room. A.M. woke up and saw the defendant standing at the foot of the bed. The defendant pulled A.M.'s blanket off her and got on top of her. He put his fingers and his penis into her vagina. A.M. testified that she did not want the defendant to put his fingers into her vagina, that she did not consent to his doing so, and that his doing so made her scared.

At one point, A.M. tried to move away by turning over and moving her legs. The defendant stopped for a few seconds, then tried again to put his fingers inside her vagina. He also repositioned A.M. She was unable to "do anything physically" when the defendant put his penis into her vagina because he was on top of her at that time and considerably bigger and heavier than she was. A.M. did not tell the defendant to stop because she felt weak, incoherent, and dizzy, and hardly knew what was going on. The defendant continued trying to have sex with A.M. even after losing his erection. The defendant's continued intercourse physically "hurt" A.M. "really bad."

During this incident, the defendant took sixteen explicit photographs of A.M. A.M. testified that she did not know about or consent to the photographs being taken. Some photographs depict A.M. with her eyes closed and face turned away from the camera. None of the photographs shows A.M.'s hands or body engaged with the defendant.

A.M. went to a hospital and agreed to an examination by a sexual assault nurse examiner. A toxicology report estimated that A.M.'s blood alcohol concentration at midnight, around the time of the alleged rape, was between .08 and .20 percent. An expert testified that individuals with blood alcohol concentrations in this range may experience a negative impact on

memory and decision-making, as well as a negative impact on the ability to move their bodies.

After a jury trial, the defendant was convicted of penile and digital rape under G. L. c. 265, § 22, and photographing an unsuspecting nude or partially nude person under G. L. c. 272, § 105.[2] The defendant appealed, and we transferred the case to this court on our own motion.

Discussion. 1. Sufficiency of the evidence. The defendant argues that there was insufficient evidence to support his convictions of rape and photographing an unsuspecting nude person. Based on these arguments, the defendant moved unsuccessfully for a required finding of not guilty at the close of the Commonwealth's case and at the close of all the evidence. We conclude that there was sufficient evidence to support the defendant's convictions.

a. Standard of review. We affirm the denial of a motion for a required finding of not guilty if the Commonwealth's evidence, "together with reasonable inferences therefrom, when viewed in its light most favorable to the Commonwealth," is sufficient to persuade a rational jury of the defendant's guilt

[2] He was sentenced to from two to three years in State prison for each rape charge to be served concurrently, and one additional year in a house of correction for the nude photographs charge.

beyond a reasonable doubt. Commonwealth v. Copeland, 481 Mass. 255, 259 (2019). See Latimore, 378 Mass. at 676-677.

b. Rape. To prove the defendant guilty of rape, the Commonwealth had to show that the defendant compelled the victim to submit to sexual intercourse by force or threat of force and against the victim's will. G. L. c. 265, § 22 (b). Commonwealth v. Sherman, 481 Mass. 464, 471 (2019). The defendant argues that the Commonwealth provided insufficient evidence of force. We disagree.

Force can be actual physical force, nonphysical constructive force, or threat of force. Sherman, 481 Mass. at 471, citing Commonwealth v. Lopez, 433 Mass. 722, 727 (2001). In situations where a victim lacks the capacity to consent, the Commonwealth "has no obligation to prove the use of force by the defendant beyond what is required for the act of penetration." Commonwealth v. Blache, 450 Mass. 583, 594 (2008). Rather, in addition to the act of penetration, the Commonwealth must prove that the defendant knew or reasonably should have known that the victim lacked the capacity to consent. Id. The Commonwealth argued at trial that the defendant used actual and constructive force and that the victim was unable to consent.

The jury could have found that the defendant used actual force when he entered A.M.'s room, uninvited, while she was asleep by using her room key that he had taken without

permission, pulled the blanket off of her, removed her clothes without her consent, lay on top of her such that she could not resist, repositioned her body to penetrate her, continued trying to penetrate her after she moved away, and caused her pain by trying to have sex with her after he lost his erection. See Commonwealth v. Oquendo, 83 Mass. App. Ct. 190, 191-193 (2013) (sufficient actual force where defendant entered bathroom while victim was weak from vomiting, pulled down her pants, and turned her onto her back to continue rape).

The jury also could have found that the defendant used sufficient force simply by penetrating A.M. with his fingers and penis because A.M. lacked the capacity to consent due to intoxication.[3] See Blache, 450 Mass. at 594. At the time of the sexual intercourse, A.M. had a blood alcohol concentration between .08 and .20 percent.[4] After consuming three alcoholic

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[3] The defendant points to evidence suggesting that A.M. did not lack the capacity to consent due to intoxication. However, we "do not weigh supporting evidence against conflicting evidence when considering whether the jury could have found each element of the crime charged." Commonwealth v. Copeland, 481 Mass. 255, 260 (2019), quoting Commonwealth v. Martin, 467 Mass. 291, 312 (2014).

[4] For context, it is a crime to operate a motor vehicle with a blood alcohol concentration at or above .08 percent. G. L. c. 90, § 24. The Commonwealth's expert explained at trial that "[b]lood alcohol concentration is an expression of the amount of alcohol present in someone's blood. It's typically in the units of gram-percent, which means the amount by weight in grams of how much alcohol is in a deciliter or a hundred milliliters of blood. It's typically just described as . . . a percent."

drinks, A.M. returned to her hotel room to vomit, which she did before the defendant reentered her room and had sexual intercourse with her. She remembered only bits and pieces of her sexual encounter with the defendant because, at the time, she felt incoherent and hardly knew what was going on. See Commonwealth v. Moran, 439 Mass. 482, 490-491 (2003) (sufficient evidence to warrant instruction on incapacitation where victim "felt 'drugged' and unable to act" during sexual assaults). The photographs taken by the defendant, many of which show A.M. with her eyes closed, reasonably could lead the jury to conclude, when considered along with the rest of the evidence, that A.M. was unconscious during parts of the sexual encounter. See Commonwealth v. LeBlanc, 456 Mass. 135, 139 (2010) (sufficient evidence of incapacitation where victim faded in and out of consciousness during rape).

In addition, the jury could have found that the defendant knew or reasonably should have known that A.M. could not consent. The defendant helped A.M. to her room as she was very intoxicated, watched her vomit, sent text messages to A.M.'s coworker about A.M.'s level of intoxication and illness while lying about his whereabouts at the time, checked on her with a coworker, returned to the room alone and gained entrance using her key that he had retained without her permission, and ultimately photographed her while she appeared unconscious.

For all these reasons, there was sufficient evidence that the defendant used force against A.M.[5]

c. Nude photographs. The defendant also argues that the Commonwealth provided insufficient evidence to prove that he photographed an unsuspecting nude person in violation of G. L. c. 272, § 105 (b). We conclude otherwise.

For a conviction pursuant to G. L. c. 272, § 105 (b), first par., the Commonwealth must prove that

> "(1) the defendant willfully photographed, videotaped, or electronically surveilled; (2) the subject was another person who was nude or partially nude; (3) the defendant did so with the intent to secretly conduct or hide his photographing activity; (4) the defendant conducted such activity when the other person was in a place and circumstance where the person would have a reasonable expectation of privacy in not being 'so photographed'; and (5) the defendant did so without the other person's knowledge or consent" (footnote omitted).

Commonwealth v. Robertson, 467 Mass. 371, 375–376 (2014).

The defendant contends that the Commonwealth failed to provide sufficient evidence that the defendant photographed A.M. without her knowledge or consent. However, A.M. testified that she did not know about or consent to the photographs, and that she had never seen the photographs until trial. "This testimony alone was sufficient, under the Latimore standard, to prove that the defendant acted without the victim's knowledge or consent."

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[5] The Commonwealth's proof did not deteriorate after the close of its case. See Copeland, 481 Mass. at 260, citing Commonwealth v. Semedo, 456 Mass. 1, 8 (2010).

Commonwealth v. Castro, 99 Mass. App. Ct. 502, 506 (2021). Furthermore, the photographs themselves show A.M. with her eyes closed and not engaging with the defendant; the jury thus could reasonably conclude that A.M. did not know about or consent to the photographs being taken.

2. Juror note. The defendant argues that the trial judge impermissibly coerced a juror requesting to be dismissed into reaching a unanimous verdict. See Commonwealth v. Guisti, 434 Mass. 245, 251 (2001) ("The Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights guarantee a criminal defendant the right to a trial by an impartial jury"). There was no error.

a. Background. At the end of the second day of jury deliberations, the judge remarked to the jurors that they looked tired. After observing that they had been "hard at work," the judge said that he expected the jury to reach a verdict the next day. He explained that, if they did not, the jury would not be able to resume deliberations the day after, a Friday, because the judge would be out of town. Thus, the judge said, they could resume deliberations only the following Monday.

The next morning, before the resumption of deliberations, juror no. 9 sent a note to the judge stating, "I would like to be excused from the trial. I feel I will be forced to make a decision I do not believe." The judge notified both parties and

proposed bringing the juror into the court room and explaining to her that she could not be excused, while also telling her that nobody was "asking her to make a decision she [could not] agree with," she needed to "continue to participate in jury deliberations with an open mind," and she had to "continue to respectfully consider the views of the other jurors and also to continue to respectfully share her own views with other jurors." Neither counsel objected to the judge's plan. With counsel present, the judge had the following exchange with the juror:

> The judge: "Thank you for your note. I understand a little bit of how you're feeling. Sometimes I decide cases without a jury and I fully appreciate how hard it is to be a juror in a case like this when you've been spending a good amount of time on very serious matters, trying to reach a verdict. I can't excuse you from [the] jury."
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> The juror: "Okay."
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> The judge: "Let me tell you a few more things. First of all, nobody is asking you to make a decision that you cannot agree with in good conscience. You should [indiscernible]. On the other hand, you need to continue to participate in jury deliberations with an open mind. Continue to, as you have been, respectfully consider the views of the other jurors and also continue respectfully to make sure the other jurors understand your views. All right. You can do this; we know you can do this."
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> The juror: "I do feel very intimidated."
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> The judge: "Well, I don't want to know anything about the discussions."
>
> The juror: "Okay."
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> The judge: "I know discussions can get heated but it's not personal. You all are working together as citizens to try

> to resolve this and we very much appreciate your service and work."
>
> The juror: "I take it very seriously, I know that."
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> The judge: "I know you do. I know you do. So, I'm sorry that you need to keep doing something that is very -- very hard."
>
> The juror: "[U]ncomfortable, very uncomfortable."
>
> The judge: "But I cannot excuse you, all right?"
>
> The juror: "Okay."

The judge then brought in the full jury and asked whether anything had happened in deliberations in violation of his instructions. No juror raised any concerns, nor did counsel object to the judge's colloquy with juror no. 9. The judge then asked the jurors to continue their "respectful and collaborative work to reach a verdict in this case." The jury resumed deliberations and around one hour later came back with a unanimous verdict against the defendant on all three counts.

b. Analysis. "The discharge of a deliberating juror is a sensitive undertaking and is fraught with potential for error. It is to be done only in special circumstances, and with special precautions." Commonwealth v. Williams, 486 Mass. 646, 651 (2021), quoting Commonwealth v. Tiscione, 482 Mass. 485, 489 (2019). "A juror properly may be discharged only for reasons personal to that juror, having nothing whatever to do with the issues of the case or with the juror's relationship with his or

her fellow jurors" (alterations and quotation omitted). Williams, supra, quoting Tiscione, supra. "To determine whether good cause exists for dismissal, a judge must hold a hearing with the juror in question" (quotation omitted). Williams, supra, quoting Tiscione, supra at 490.

Here, the judge properly met with juror no. 9 and declined to dismiss her after discerning that her issue pertained to the deliberations. See Williams, 486 Mass. at 654. He also properly interrupted the juror during the colloquy when she started to reveal her relationship with other jurors. See id. at 656 ("the moment a juror suggests that there may be a disagreement among the jurors, the judge must interrupt the juror and firmly reiterate that the juror must not reveal any information regarding deliberations"). Cf. Commonwealth v. Chalue, 486 Mass. 847, 862 (2021) (judge's colloquy with individual juror was impermissibly coercive where judge knew juror's position). Indeed, the judge's colloquy with the individual juror and his instructions to the jury emphasized the jury's core responsibility to be fair and impartial while avoiding statements that could be deemed coercive. The judge told juror no. 9 to deliberate with an open mind yet not make a

decision with which she disagreed, and he told the jury to deliberate respectfully and collaboratively.[6]

The judge's instruction the previous day, in which he told the full jury he expected them to have a decision by the next day, did not make his later colloquy with juror no. 9 rise to the level of coercion. Although the judge would have done better not to make explicit his expectation, that comment appears to have been made to inform the jury about the upcoming schedule, not to coerce them into making a decision. Cf. Commonwealth v. Firmin, 89 Mass. App. Ct. 62, 65-66 (2016) (judge improperly told jury "that the case would have to be retried if they could not reach a verdict and the court was booked until May, that the jurors should do 'whatever voting or whatever they need to do' if they saw a 'ground swell of support' in either direction, and that the court would take the verdict if it was reached within the approximate twenty minutes before the lunch break" [alteration omitted]).

The defendant argues that the jury quickly returning a unanimous verdict after juror no. 9's individual colloquy is

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[6] There was no error in the judge's decision not to give a Tuey-Rodriquez charge to the jury. See Ray v. Commonwealth, 463 Mass. 1, 6 (2012) ("nothing in our cases renders the provision of the Tuey-Rodriquez charge mandatory, even on request of the parties"). See also Commonwealth v. Rodriquez, 364 Mass. 87, 101-102 (1973) (Appendix A); Commonwealth v. Tuey, 8 Cush. 1, 2-3 (1851).

evidence that juror no. 9 felt coerced. However, the hour-long delay shows that juror no. 9 did not concede immediately to the opposing side, and that substantive deliberations continued. See Commonwealth v. Torres, 453 Mass. 722, 729-730, 737 (2009) (unanimous verdict around seventy-five minutes after individual colloquy with problem juror, and thirty minutes after judge told full jury that unanimous verdict was necessary, did not indicate need for mistrial). Moreover, because we do not know for certain the position of the juror before she returned to deliberations or how many other jurors shared her position, we simply cannot say whether she conceded to the other side or more forcefully made her point after the colloquy and convinced others.

In sum, there was no error in the judge's handling of juror no. 9's note.

Conclusion. Because the defendant's arguments are without merit, the judgments are affirmed.

So ordered.