19-P-542 Appeals Court

COMMONWEALTH vs. ANDRES ANDRADE.

No. 19-P-542.

Middlesex. February 11, 2020. - September 11, 2020.

Present: Rubin, Kinder, & McDonough, JJ.[1]

Indecent Assault and Battery. Minor. Evidence, First complaint, Conflicting statements of witness, Prior inconsistent statement, Credibility of witness, Failure to produce witness, Argument by prosecutor. Constitutional Law, Witness, Assistance of counsel. Witness, Child, Expert, Credibility, Impeachment. Practice, Criminal, Witness, Argument by prosecutor, Instructions to jury, Assistance of counsel. Due Process, Assistance of counsel.

Indictments found and returned in the Superior Court Department on April 27, 2016.

The cases were tried before Thomas P. Billings, J.; and a motion for a new trial, filed on October 9, 2018, was heard by C. William Barrett, J.

Richard J. Shea for the defendant.
Emily Walsh, Assistant District Attorney, for the Commonwealth.

[1] Justice McDonough participated in the deliberation on this case while an Associate Justice of this court, prior to his reappointment as an Associate Justice of the Superior Court.

RUBIN, J. The defendant was indicted for rape of a child aggravated by more than a five-year age difference, G. L. c. 265, § 23A, and rape of a child by force, G. L. c. 265, § 22A. The defendant was convicted on each indictment of the lesser included offense of indecent assault and battery on a child under the age of fourteen. G. L. c. 265, § 13B. The Commonwealth entered a nolle prosequi on the second indictment, and the judge sentenced the defendant to from two to three years in prison on the first conviction of indecent assault and battery on a child under the age of fourteen. The defendant's direct appeal was stayed pending the consideration of a motion for a new trial. That motion was denied, and we now have before us the defendant's consolidated appeal from his conviction and from the order denying his motion for a new trial.

1. Ineffective assistance of counsel. The defendant argues that defense counsel was ineffective for failing to call an expert witness to testify about the suggestibility of child witnesses.

This case arose when on December 26, 2015, the child victim, then five years old, saw a dog licking his genitals and asked his mother what the dog was doing. She said he was "licking on his privates," and the child said, "Well Andres [the defendant] asked me to lick on his privates too." When his

parents, both present, asked him what he meant, the child said, "But I didn't do it." The child also indicated that he was three years old when this occurred.

The defendant is the child's paternal uncle. At the time that the child made these statements, he was living with his parents, his grandmother, and the defendant in the grandmother's house, as they all had been since January of 2014. The child, his parents, and his grandmother all had bedrooms on the second floor of the house, while the defendant lived in the basement. Even a year before the child moved into his grandmother's house, he had been staying with his grandmother on Thursdays and Fridays while his parents worked.

The child testified that when he was "three or four" and at his grandmother's house, he went downstairs and encountered the defendant, who "showed his private" to the child. He then testified that the defendant told him to "lick it," and that he did so.[2] He testified that the defendant asked him to do this again and he refused. Afterwards, the defendant pulled up his pants and ran away.

The child testified at trial to telling his mother and father about this incident. The child's mother testified as his

[2] The child drew a picture of what he meant by "his private" indicating the penis. He testified that he licked a part of the defendant's penis.

first complaint witness, relating his disclosure on December 26, 2015. The mother also testified to a second disclosure on January 10, 2016.[3] The child called her into his bedroom and he told her that he did "suck" the defendant's penis. When the mother asked the child if he had done it, he began to cry. The mother then brought the father and the grandmother to the room to hear the child's account. Both the mother and the grandmother testified that the child had said that he had touched or licked the defendant; the grandmother's testimony was elicited by defense counsel. The parents reported the incident to the police after this second disclosure.

At trial, defense counsel attempted to introduce evidence that the child's second disclosure had been influenced by parental questioning and suggestion. The grandmother, a defense

[3] At some points the mother testified that the child's second disclosure occurred on January 9, 2016, and at other points she testified that the second disclosure occurred on January 10, 2016. She testified that she and the father had taken the child to the police department on the same day that he made his second disclosure. The mother testified only to a single disclosure after the first disclosure. However, defense counsel impeached her with her prior statement to the Westford Police Department, dated January 10, 2016, indicating that the child disclosed some details on the night of January 9 and others on the following morning: she wrote that "[l]ast night [the child] brings up the situation again and tells me directly that he also pulled down his pants, and today he tells me that he did suck on" the defendant's penis. The judge, ruling on the defendant's new trial motion, found that the mother's mixing of these dates was not the result of her remembering different disclosures, but a result of her inability to remember the exact date of the second disclosure.

witness, testified to changes in the household dynamics after the child's first disclosure, which defense counsel suggested in closing argument could have influenced the child's account. The grandmother also testified that after the father heard the first disclosure on December 26, he was so angry that she feared that he may be a threat to the defendant's safety. Defense counsel argued in closing that "if the parent was particularly angry, particularly hostile towards the person being accused[, their] questions may escalate in intensity and in suggestiveness" leading the child's account to become unreliable. The grandmother further testified to changes in the parents' behavior during this period that may have affected the child. Family photographs of the father with the defendant disappeared from the walls of the home. The parents no longer allowed the child to be alone with the grandmother in her room, despite her close relationship with him. The grandmother noticed that the child would spontaneously burst into tears, a departure from his usual behavior, and that his parents would grab him and usher him away when he did so. Defense counsel suggested that the child was under "parental pressure" and was influenced by his father's bias against the defendant.

Defense counsel also repeatedly examined the mother about whether she questioned the child or had any further suggestive conversations with him about the defendant or the incident

during the time between the child's first and second disclosures. Defense counsel raised the possibility that the father may have questioned the child about the incident as well, asking the mother if she was aware if the father had encouraged the child to tell the father about the situation. Throughout her testimony, the mother maintained that she had neither questioned the child nor spoken to him about the incident. To her knowledge, the father likewise never questioned the child between disclosures. She testified that she knew from college child psychology classes that she should not question the child further about the incident because there was a danger in repeatedly asking a child about such a disclosure.

Defense counsel then impeached the mother with her prior inconsistent statement to the Westford Police Department from January 10, 2016, in which she wrote, "We did question [the child] more about the situation and he said it happened when he was three, but didn't remember much." Defense counsel also read this statement in full during her closing argument to demonstrate that the child may have been subject to further suggestive questioning from his parents, causing him to change his account of the incident between December 26 and January 10. Defense counsel argued that young children, like the child in this case, are vulnerable to suggestion from their parents: "[Children] may assume that if they're asked the same question

again and again that they have given the wrong answer. Children may in fact change their answers and even change their memories if asked again and again in an improper way about what happened."

On appeal, the defendant argues first, as he did in his motion for a new trial, that defense counsel was ineffective for failing to call an expert witness on the suggestibility of child witnesses. In support of this argument, the defendant provided an affidavit by Dr. Maggie Bruck, who had been qualified by many courts as an expert on cognitive and developmental psychology, specializing in the accuracy and distortion in children's autobiographical memories. According to Dr. Bruck, an expert such as herself could have testified, based on her expertise, about the aspects of the evidence against the defendant that might have indicated that some of the child's statements inculpating the defendant were the products of suggestion. Specifically, she testified in her affidavit that an expert witness could have explained the role of an adult's preexisting beliefs on a child's statement and an adult's memory of that statement, and the effects of repeated interviewing and other suggestive techniques.

In support of his motion for a new trial, the defendant also included an affidavit by trial counsel, in which she testified that she had considered hiring such an expert, had

read articles on suggestibility, including one coauthored by Dr. Bruck, and had decided that she, counsel, was competent to cross-examine on suggestibility and that the jurors could understand it without an expert. To her, it made tactical sense not to utilize an expert since, in revealing that she intended to do so, she would have given the Commonwealth many months to prepare its witnesses for her cross-examination.

Because the decision not to call an expert witness was a tactical one, in order to find ineffective assistance of counsel we must find that that decision was "manifestly unreasonable" when made. Commonwealth v. Acevedo, 446 Mass. 435, 442 (2006), quoting Commonwealth v. Adams, 374 Mass. 722, 728 (1978). Although an expert like Dr. Bruck might well have been useful to the defense, we cannot conclude that the determination by trial counsel, that the cost of giving the Commonwealth notice of her intent to call such an expert would outweigh the benefits of the expert's testimony in this case, was manifestly unreasonable. The defendant now contends that the Commonwealth would have known that suggestion was likely to be the defense in this case and that no benefit was to be obtained from not using an expert witness. However, defense counsel only sought a so-called "taint hearing" to determine whether the child's statements were affected by parental suggestion five days before trial. See Commonwealth v. Allen, 40 Mass. App. Ct. 458, 462 (1996). That

hearing was held only four days later, one day before trial. When asked, the father testified that he understood the purpose of this hearing to be "talking about what happened, what [the defendant] did to my son" rather than determining if the child was subjected to suggestive parental questioning.

Although we cannot be certain that any advantage would have been lost by providing the Commonwealth notice that Dr. Bruck was going to testify as an expert, which the defendant would have to have done months before trial, it at least appears that defense counsel had the opportunity to probe the father, and perhaps both parents, about any actions they had taken that might have suggested to the child that he should change his story, without their having undertaken any substantial preparation by the Commonwealth for this line of questioning. See Mass. R. Crim. P. 14 (a) (1) (B), as amended, 444 Mass. 1501 (2005). In light of this, we cannot conclude that the decision made by trial counsel was manifestly unreasonable.

2. Missing witness issues. The defendant argues that the judge erred in refusing to give a missing witness instruction with respect to the father. See Commonwealth v. Williams, 475 Mass. 705, 720-721 (2016). At trial, the mother was called as the child's first complaint witness, and neither the Commonwealth nor the defendant called the father.

We review a judge's determination that a missing witness instruction is inappropriate for abuse of discretion. Williams, 475 Mass. at 721. To be entitled to a missing witness instruction, the defendant must show that the Commonwealth "has knowledge of a person who can be located and brought forward, who is friendly to, or at least not hostilely disposed toward, the party, and who can be expected to give testimony of distinct importance to the case," and yet, without explanation, failed to call that person as a witness. Commonwealth v. Schatvet, 23 Mass. App. Ct. 130, 134 (1986). A missing witness instruction permits the jury to infer that this person would have given unfavorable testimony. Williams, supra at 720. "Because the inference, when it is made, can have a seriously adverse effect on the noncalling party" the judge should only give a missing witness instruction "in clear cases, and with caution." Schatvet, supra. Such an instruction should not be given if the testimony of the person would be "merely corroborative of, or merely cumulative upon, the testimony of one or more witnesses who have been called," id., or if the Commonwealth had "legitimate tactical reasons for not calling the witness," Commonwealth v. Saletino, 449 Mass. 657, 668 (2007).

The defendant was not entitled to a missing witness instruction in this case. Of course, the primary value of either parent's testimony was in recounting what the child had

disclosed to them. The Commonwealth, however, was allowed only a single first complaint witness to testify to the child's statements about the incident. See Commonwealth v. King, 445 Mass. 217, 242-243 (2005), cert. denied, 546 U.S. 1216 (2006). As a consequence, had the father been called, he could not testify as to what he was told by the child. Given the limited value of his testimony about other facts, some of which certainly would have been cumulative of what was testified to by the mother, we cannot say that the Commonwealth would have been expected to call the father. Therefore, there was no basis for instructing the jury to draw a negative inference from the Commonwealth's failure to call him. Schatvet, 23 Mass. App. Ct. at 134.

Likewise the judge was correct to foreclose the defense from arguing that the jury should draw such an inference from the Commonwealth's failure to call the father. The missing witness instruction and such argument rise and fall together. See Saletino, 449 Mass. at 671 ("counsel should not be permitted to encourage the jury to draw the adverse inference after the judge has determined that the inference is not appropriate and he will not instruct on it"). Although the defendant urges us to overrule Saletino, as it is a decision of the Supreme Judicial Court we are, of course, without authority to do so

even were we so inclined. See Commonwealth v. Healy, 26 Mass. App. Ct. 990, 991 (1988).

3. Prosecutor's closing argument. The defendant next argues that the trial judge erred in overruling defense counsel's objection to the statement of the prosecutor in closing that "you've heard no evidence" that the father pushed for the child to claim sexual abuse. Although the defendant argued that, based on some circumstantial evidence presented at trial, the jury should infer that the child changed his story to add touching by the defendant based on parental pressure, there was no direct evidence of any conduct by the father to get the child to change his story. We think the prosecutor's statement was fair. Consequently, we see no error.

4. Jury instruction. Finally, the defendant argues that the judge erred when, although not requested to do so by the Commonwealth, he instructed the jury on the limited way in which the mother's prior inconsistent statement to the police that she and the father "did question [the child] more about the situation," with which she had been impeached, could be used. The judge instructed: "When you consider the testimony of a witness given here in the courtroom you may also consider whether or not that witness has made any earlier statement that differs from or contradicts the statement or statements that he or she made from the witness stand. If you determine that the

witness has made an earlier contradictory statement that may or may not cause you to discount or disbelieve the testimony of that witness given here in Court[,] . . . [w]hether and to what degree you discount a witness's testimony on the basis of a prior inconsistent statement, that's for you to determine as part of your function of assessors of the credibility of the evidence that's been presented to you."

We do not see, and the defendant does not claim, that there was any error in the judge's instruction. We know of no rule prohibiting a judge from properly instructing on the law with respect to the proper, limited use of evidence, even in the absence of a contemporaneous request for a limiting instruction.

Judgment affirmed.

Order denying motion for a new trial affirmed.