19-P-722 Appeals Court

COMMONWEALTH vs. DAVID J. CONDON.

No. 19-P-722.

Barnstable. October 15, 2020. - December 18, 2020.

Present: Milkey, Blake, & Henry, JJ.

Rape. Misleading a Police Officer. Practice, Criminal, Witness. Witness, Impeachment. Evidence, Impeachment of credibility, Prior inconsistent statement, Relevancy and materiality.

Indictments found and returned in the Superior Court Department on June 2, 2017.

The cases were tried by Robert C. Rufo, J.

James Haynes for the defendant.
Laura Marshard, Assistant District Attorney, for the Commonwealth.

MILKEY, J. A Superior Court jury found the defendant guilty of rape, G. L. c. 265, § 22 (b), and of misleading a police officer, G. L. c. 268, § 13B. On appeal, he argues that reversal of the rape conviction is required principally because the judge improperly excluded certain text messages that the

victim had sent to a friend with respect to the incident in question. We disagree and therefore affirm the rape conviction. The defendant also argues that the evidence was legally insufficient to support the conviction of misleading a police officer, and on that point, we agree. We therefore reverse that conviction and order the entry of judgment for the defendant on that charge.

Background. 1. The offense. At around midnight on January 24, 2017, the defendant invited the victim to "hang out" with him and his friend, David Rodrigues, at Rodrigues's studio apartment in Harwich. At the time, the victim was nineteen years old. The defendant and the victim previously had dated for approximately two years, and at one point they had lived together. Their romantic relationship ended approximately one year before the defendant extended his invitation.

Once at the apartment, the victim, the defendant, and Rodrigues began playing a card game in which the loser of a round had to consume alcohol. The victim was drinking an orange juice and vodka mixture that she had brought with her, and she also was given a shot of vodka or tequila infused with marijuana leaves. After a while, the participants in the card game altered the rules so that the loser had to remove an item of clothing. At one point, the victim took photographs or "video clips" of the two men in a state of at least partial undress and

sent the images to friends using the social media application known as "Snapchat."

At around 2 A.M., the victim felt sick, which she attributed to the taste of the marijuana-infused alcohol. She therefore rushed to the bathroom and began to vomit. The defendant followed her there, which she acknowledged at trial may have been in response to her requesting help because at that point she "wasn't able to walk." According to the victim, the defendant then professed that he wanted to renew his relationship with her. The next thing the victim remembered was waking up naked on the sofa with the defendant's penis in her vagina.[1] The victim testified that she told him to stop and tried to push him away but was unable to do so. She remembered being awake only for "a minute or two" at this time, after which she "passed out [and] was unconscious." After the victim awoke again later that morning, Rodrigues drove her and the defendant to their respective homes. At one point, she told the two men, "This never happened."

2. Text message exchanges. Later that morning, Brandon Pavlakis, whom the victim referred to at trial as her best friend, viewed the Snapchat images that the victim had sent of the defendant and Rodrigues playing the card game. In response,

[1] Rodrigues testified that he heard what was characterized as "sex noises" or "moaning noises" emanating from the bathroom.

Pavlakis began exchanging text messages with the victim that morning, and they resumed doing so again in the afternoon. We summarize those two exchanges, while highlighting that -- for reasons that will be explained -- only the afternoon text exchange was admitted in evidence.

At 9:57 A.M., Pavlakis sent the victim the following text message: "Wtf did I just see on my Snapchat." The victim responded to Pavlakis at approximately 11:39 A.M., and over the course of the next seven minutes, the two exchanged several text messages about the partying at Rodrigues's apartment and about the victim's concern that she would be fired from her job for being late to work. During that exchange, the victim three times used the common, shorthand expression "lol."[2] For present

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[2] The full morning text message exchange was as follows:

Pavlakis: "Wtf did I just see on my Snapchat"

The victim: "Idk lol"

Pavlakis: "Naked ass guys"

The victim: "lol I'm done"

The victim: "We were playing card and they lost"

Pavlakis: "Where was that and who tf was that"

The victim: "Lol"

Pavlakis: "It was like 4 am [three emojis depicting faces with tears of joy]"

The victim: "Ik I'm fucked"

purposes, we accept the defendant's interpretation that "lol" stands for "laughing out loud."[3]

The victim: "I'm not at work"

Pavlakis: "Where did you go you idiot"

Pavlakis: "Omg you're fucked"

The victim: "Yup"

Pavlakis: "What did [the victim's boss's daughter] say"

Pavlakis: "Fuckin hoe"

The victim: "Isk"

The victim: "Idk"

Pavlakis: "Ummmmm"

Pavlakis: "She hasn't called you?"

The victim: "I was sleeping"

Pavlakis: "Oh shit"

[3] The Commonwealth has attributed no alternative meaning to the expression, either at trial or on appeal. It appears uncontested that "lol" derives from "laughing out loud." We note, however, that common usage of the term may have strayed from its linguistic roots, rendering it more of a functional term serving to punctuate text message exchanges, rather than an expression of laughter. For an illuminating perspective on the use of such terminology, see J.H. McWhorter, Words on the Move: Why English Won't -- and Can't -- Sit Still (Like, Literally) 42-44 (2016) ("'Laughing out loud' now applies to LOL only as an origin story; anyone who used LOL to signal actual laughter would now be misunderstood: it would be, quite simply, a mistake. . . . [T]oday one uses other acronyms such as LMAO ['laughing my ass off'] to indicate actual laughter, because LOL has moved on").

At 1:48 P.M., the victim resumed communicating with Pavlakis by text messages. After first reporting that she indeed had gotten fired, the victim informed Pavlakis that she "got raped last night," and then went on to discuss the circumstances.[4]

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[4] The full afternoon text message exchange was as follows:

The victim: "Yo"

Pavlakis: "Hey"

The victim: "Yup I got fired wtf"

The victim: "[Thumbs up emoji]"

Pavlakis: "What the fuck"

Pavlakis: "Sooooo now what"

Pavlakis: "Did you hear from [a potential future employer]?"

The victim: "Dude"

The victim: "I got raped last night"

Pavlakis: "WHAT"

The victim: "We were playing a drinking card game"

The victim: "And I was so fucked up and I was throwing up at the end"

Pavlakis: "Who . . ."

The victim: "Then I payed [sic] on the couch and I don't really remember what happen after that I just remember having sex there and I was saying stop and no"

Pavlakis: "With who"

During her own trial testimony, the victim referenced the afternoon text message exchange during which she informed

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The victim: "Dave Condon"

The victim: ":("

The victim: "Can you please say something"

Pavlakis: "Dude what the fuck"

Pavlakis: "What do you mean say something?"

The victim: "Ugh"

The victim: "I'm just not okay"

Pavlakis: "Yeah like holy shit"

Pavlakis: "Like why did you go outlast [sic] night ?"

The victim: "I don't know !!"

Pavlakis: "Like fuck"

Pavlakis: "Especially to his house"

Pavlakis: "Obviously it's not your fault but shit"

The victim: "I feel like it is"

The victim: "He has a girlfriend"

Pavlakis: "Okay who put the moves on who"

The victim: "Him 100%"

The victim: "Nothing from me I was fucked up"

Pavlakis: "Yeah so fuck him"

Pavlakis: "He took advantage of you"

Pavlakis: "I'd call him out"

Pavlakis about the rape. The afternoon text message exchange was admitted without objection. On cross-examination, the victim acknowledged that there had been an earlier text message exchange (the morning text message exchange), although there is nothing in the transcript that documents that she was asked about the substance of that exchange.[5]

Later in the trial, Pavlakis testified as the first complaint witness. On direct examination, he testified about the afternoon text message exchange without drawing an objection. On cross-examination, Pavlakis acknowledged the existence of the morning text message exchange, which he indicated had begun around 10 A.M. when he asked the victim about the Snapchat images of the card playing. However, when defense counsel tried to inquire into the substance of the morning text message exchange, the prosecutor objected on the ground that it was hearsay that did not fit any exception. During a lengthy sidebar discussion, defense counsel argued that

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[5] One portion of the transcript that was marked as "indiscernible" appears to have been a cross-examination question that drew an objection from the prosecutor that the judge sustained. On appeal, the defendant makes no claim as to what the question may have been, and in any event, the defendant did not attempt to correct the record as to what that question may have been. See Mass. R. A. P. 8 (e), as appearing in 481 Mass. 1611 (2019). See also Commonwealth v. Best, 50 Mass. App. Ct. 722 (2001), citing Commonwealth v. Woody, 429 Mass. 95, 98-99 (1999) (appellant has burden to settle record as to material omissions).

the substance of the morning text message exchange was fair game for two reasons. First, focusing on the victim's use of "lol" in the morning text message exchange, counsel argued that the victim's statements constituted prior inconsistent statements that could be used for impeachment. Second, counsel argued that the morning text message exchange was necessary to provide the full context of the afternoon text message exchange. The judge agreed with the Commonwealth and cut off this line of questioning.[6]

3. The course of the investigation. The Harwich police first interviewed the victim at her home on the day of the events in question. That same day, the victim was taken to a hospital where a rape kit was completed. The nurse who examined the victim observed that her vaginal area was raw, swollen, and red looking. A vaginal swab taken from the victim revealed the presence of sperm cells. The major deoxyribonucleic acid

[6] Although the trial transcript indicates that the defendant never formally asked that the morning text message exchange be admitted in evidence, the Commonwealth appears to acknowledge in its appellate brief that this was defense counsel's intent and that the judge thwarted such efforts. Moreover, although the morning text message exchange was never marked as an exhibit for identification, the Commonwealth stipulated to its inclusion in the appellate record. For purposes of this appeal, we assume arguendo that the morning text message exchange is properly before us, and that the judge effectively ruled that it was inadmissible.

profile from the sperm fraction almost certainly came from the defendant.

At the start of their investigation, the Harwich police were concerned about whether they had jurisdiction. That was because, even though the victim told them that Rodrigues's apartment was in Harwich, her specific description of its location led them to believe that it might have been in Brewster. Effective police work quickly dispelled those concerns. With the assistance of the State police, who went through the contents of the victim's cell phone with her permission, the Harwich police located Rodrigues's apartment. Then, the next day, the police drove to the location with the victim to confirm that it was the site that she had reported. In addition to following up with the victim, the police interviewed -- among others -- Rodrigues, Pavlakis, and the victim's roommates.

In the week that followed, Detective Paul Ulrich was not able to physically locate the defendant. On January 31, 2017, Ulrich called the defendant at a telephone number provided by the victim. In answering his telephone, the defendant readily identified himself to Ulrich, even confirming for the detective the last four digits of his Social Security number. After Ulrich told the defendant that he wished to discuss an incident that the defendant was involved in, but before Ulrich gave any

more details, the defendant denied that he had been involved in any incident. Once Ulrich provided details about the victim's allegations, the defendant denied that he had seen the victim in recent weeks, that he knew anyone named Rodrigues, or that he was familiar with the street on which Rodrigues lived.

At the end of his telephone conversation with the defendant, Ulrich asked the defendant where he currently was living. When the defendant asked why Ulrich wanted that address, Ulrich responded that it was just so that the police had accurate, updated records. The defendant then stated that he lived at 1017 Massasoit Road in Eastham. Ulrich looked up the address on the Internet service known as "Google Maps." That search called into question whether the supposed address existed. By checking town tax records and by driving by where the putative address should have been, Ulrich confirmed that the defendant had given him false information. On February 3, 2017, Ulrich searched for the defendant at various other locations, such as his father's home at 1740 Massasoit Road, Eastham (which was the address that the Registry of Motor Vehicles had on file for the defendant). The police spoke to the defendant's father, employer, and current girlfriend about the defendant's whereabouts, but were unable to physically locate him. The following business day, which was "as soon as [the police]

exhausted [their] efforts to physically locate" the defendant, the police pursued an arrest warrant for him.

4. Bill of particulars. After the defendant was indicted for rape and for misleading a police officer, the defendant requested a bill of particulars regarding the charges. In the bill of particulars, the Commonwealth clarified that the indictment for misleading a police officer was based on the defendant's having "falsely told Detective Paul Ulrich that he resided at 1017 Massasoit Road, Eastham, when in fact no such residence existed." Notwithstanding this, the Commonwealth has vacillated since then on what theory the misleading a police officer indictment relied. In her opening statement, the prosecutor told the jury that the indictment was based on the defendant's other falsehoods (e.g., his telling Ulrich that he had not seen the victim recently), while during her closing argument, the prosecutor raised the defendant's providing a false address as an alternative ground. Then, in its appellate brief, the Commonwealth focused exclusively on the false address, while switching positions one more time at oral argument by suggesting that any of the false statements would support a conviction.

Discussion. 1. Rape. a. Exclusion of evidence. On appeal, the defendant argues that the judge should have admitted the morning text message exchange on any of three grounds.

First, he argues that the victim made statements during that exchange that were inconsistent with those she made later (in the afternoon text message exchange and at trial), and that he therefore was entitled to try to use the earlier statements to impeach her credibility. See Commonwealth v. Niemic, 483 Mass. 571, 581 (2019), quoting Mass. G. Evid. § 613(a)(4) note (2019) ("Although there is discretion involved in determining whether to admit or exclude evidence offered for impeachment, when the impeaching evidence is directly related to testimony on a central issue in the case, there is no discretion to exclude it"). Second, the defendant argues that once the afternoon text message exchange was admitted, the earlier exchange should have been admitted under the doctrine of verbal completeness. See Commonwealth v. Aviles, 461 Mass. 60, 75 (2011). Third, the defendant argues that the earlier exchange should have been admitted as direct evidence of the victim's demeanor following the incident. The defendant raised versions of the first two arguments at trial; he did not raise the third.

Before addressing each of these arguments, we note that little ultimately was withheld from the jury. The jury learned much about the morning text message exchange even though they did not get to read it. First, they heard that the victim and Pavlakis had an earlier text message exchange, and that this exchange began at about 10 A.M. when Pavlakis responded to

having seen the Snapchat images of the "strip" card game that the victim had posted. Second, the jury were able to infer that the topic of the victim's potentially being fired from her job must have been discussed, given that the afternoon text message exchange reads as a continuation of that discussion. Third, because the judge told the jury that Pavlakis's testimony addressed the victim's first complaint, the jury knew that the victim did not tell Pavlakis during their morning exchange that she had been raped. In fact, the only potentially significant thing kept from the jury was the victim's invocation of the "lol" expression. The operative question then is whether the defendant was entitled to have the jury learn of the victim's use of that expression.

The defendant's claim that he was entitled to impeach the victim's testimony with her use of "lol" is based on the premise that her doing so was inconsistent with her later statements and trial testimony. We disagree with that premise. Even if the victim's use of the expression is taken as making light of the card game antics and excessive drinking, this was not at odds with her subsequent claim that she was raped.

To be sure, "[t]o be used for impeachment, it is not necessary that the witness's prior statement be a complete, categorical, or explicit contradiction of [her] trial testimony" (quotation and citation omitted). Commonwealth v. Parent, 465

Mass. 395, 400 (2013). Rather, the prior statement is considered inconsistent "if its implications tend in a different direction." Commonwealth v. Pickles, 364 Mass. 395, 402 (1973). In our view, the victim's use of "lol" with respect to the card playing and drinking at Rodrigues's apartment did not lie in such sufficient tension with her allegations of rape as to deprive the judge of discretion whether it should be admitted. Rather, we conclude that the judge retained discretion whether to admit the morning text message exchange as impeachment evidence, including "sound discretion . . . to exclude marginally relevant or grossly prejudicial evidence [to] prevent the undue exploration of collateral issues." Commonwealth v. Adjutant, 443 Mass. 649, 663 (2005).[7] In declining to admit the morning text message exchange as a prior inconsistent statement, the judge did not abuse that discretion or otherwise commit an error of law.

[7] We recognize that "[i]nconsistencies in [alleged rape victim's] reporting of the sexual assault and her first complaint [shortly] after these events occurred are not collateral matters that a judge has discretion to preclude." Parent, 465 Mass. at 401-402 (judge erred by preventing defense counsel from impeaching alleged assault victim with inconsistent statements she had made to police four days after incident). However, Parent is readily distinguishable from the case before us. In Parent, the potential inconsistencies in the alleged victim's statements were obvious, direct, and related to the concrete facts of the assault and the first report. Id. at 401. Here, the purported inconsistencies are, at best, subtle, indirect, and related to the tone of the first report.

For similar reasons, we conclude that the judge did not abuse his discretion or otherwise err in declining to admit the morning text message exchange under the doctrine of verbal completeness. Simply put, the victim's use of "lol" during the morning text message exchange was not sufficiently at odds with the rape allegations she raised in the afternoon text message exchange as to render the latter misleading or incomplete. See Aviles, 461 Mass. at 75, quoting Commonwealth v. Carmona, 428 Mass. 268, 272 (1998) (describing doctrine of verbal completeness as "evidentiary mechanism [that] helps to ensure that a party does not present 'a fragmented and misleading version of events' to the fact finder").[8] This is especially true in light of the fact that the afternoon text message exchange was admitted not as evidence as to whether the rape occurred, but for limited purposes: "to establish the circumstances in which [the victim] first reported the alleged offense, and then to determine whether that first complaint either supports or fails to support [the victim's] own testimony about the crime." Commonwealth v. King, 445 Mass. 217, 247 (2005), cert. denied, 546 U.S. 1216 (2006).

[8] For the doctrine of verbal completeness to apply, the two statements also must be "on the same subject" and "part of the same conversation." Aviles, 461 Mass. at 75, quoting Commonwealth v. Eugene, 438 Mass. 343, 350-351 (2003). We pass over whether the two text exchanges satisfy these requirements.

Finally, the defendant argues that the victim's use of "lol" should have been admitted as evidence of her demeanor in the aftermath of the events of the previous night. This argument is not without some force given that the Commonwealth itself sought to use demeanor evidence as a significant part of its case. Indeed, the prosecutor solicited evidence from four different witnesses regarding how distraught the victim appeared after the events in question.[9] However, the defendant at no point during the trial argued that the morning text message exchange should have been admitted as demeanor evidence. Where a defendant's effort to seek admission of evidence at trial on one theory is denied, and the defendant puts forward a different theory for the first time on appeal, our review is limited to whether any error caused a substantial risk of a miscarriage of justice. See Commonwealth v. Camacho, 472 Mass. 587, 597 (2015), citing Commonwealth v. Fowler, 431 Mass. 30, 41 n.19 (2000).

In our view, even if the morning text message exchange should have been admitted as demeanor evidence -- a question we do not reach -- its absence did not create a substantial risk of

[9] These witnesses were the responding police officer, the hospital nurse who examined the victim, and the victim's two roommates. It appears that the Commonwealth called the roommates solely for their testimony about the victim's demeanor.

a miscarriage of justice, especially when viewed in context. This was not a case where the Commonwealth was allowed to mask the imperfections in its case. Indeed, the rape charge rested on the victim's having drunk alcohol to the point of becoming unconscious. The jury also heard a great deal of salacious testimony regarding the victim's other actions that night,[10] and it was uncontested that the victim once had a lengthy live-in relationship with the defendant that involved consensual sex. Despite all this, the jury credited the victim's allegations that on January 24, 2017, the defendant raped her. In this context, we find it difficult to imagine that there was a significant likelihood that the jury would have come to a different conclusion if only they had been exposed to the victim's liberal use of "lol" in her text message exchanges with Pavlakis. See Commonwealth v. Azar, 435 Mass. 675, 687 (2002), S.C., 444 Mass. 72 (2005), quoting Commonwealth v. LeFave, 430 Mass. 169, 174 (1999) (no substantial risk of miscarriage of justice absent "serious doubt" that outcome of trial would have been different but for error).

[10] The jury heard that the victim may have accompanied the defendant to Rodrigues's apartment without wearing any underpants; that she freely engaged in a "strip" card game during which she became naked from the waist up; that she proceeded to place ice cubes on her nipples; and that she sent photographs or video clips of the evening's events to at least one friend.

b. References to sexual assault investigation. The defendant also argues that the verdict must be overturned because various police witnesses testified that they were responding to or investigating a "sexual assault." The defendant timely objected to three such references, thereby preserving those claims of error.

The case law recognizes a tension between allowing police witnesses to let the jury understand the background of investigative steps they took,[11] and the risk that gratuitous references to such an investigation could provide undue credence to the underlying allegations. Compare Commonwealth v. Cohen, 412 Mass. 375, 393 (1992), quoting McCormick, Evidence § 246, at 734 (3d ed. 1984) (recognizing that testifying officer need not be placed in "false position of seeming just to have happened upon the scene; he should be allowed some explanation of his presence and conduct"), with Commonwealth v. Stuckich, 450 Mass. 449, 457 (2008) ("fact that the Commonwealth brought its [investigative] resources to bear on this incident creates the imprimatur of official belief in the complainant"). We need not decide whether at least some of the references to the police investigating a "sexual assault" should have been stricken,

[11] This is not a case in which the police investigation was irrelevant. The misleading a police officer charge in fact was based on what transpired during the investigation.

because we conclude that the defendant has shown insufficient prejudice to warrant reversal. The jury hardly would be surprised to learn that the investigation that the police conducted in the case before them was of a sexual assault.[12] We are confident that any error "did not influence the jury, or had but very slight effect." Commonwealth v. Francis, 474 Mass. 816, 827 (2016), quoting Commonwealth v. Vinnie, 428 Mass. 161, 163 (1998).

2. Misleading a police officer. In assessing the sufficiency of the trial evidence, we must, of course, view that evidence in the light most favorable to the Commonwealth. Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979). Applying that lens, we agree with the Commonwealth insofar as it contends that the jury readily could have concluded that the defendant deliberately gave the police a false address in order to make it more difficult for them to locate him. Moreover, there was uncontested evidence that Ulrich wasted some amount of effort as a result of the defendant's false statement. Nevertheless, we conclude that the evidence was insufficient to establish that the defendant misled police within the meaning of G. L. c. 268, § 13B.

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[12] The defendant himself acknowledges that "the 'nature of the call' [reporting the rape] was . . . one that jurors likely inferred from the preceding testimony . . . ."

"[W]hether a statement is 'mislead[ing]' for purposes of § 13B depends on whether it reasonably could lead investigators to pursue a course of investigation materially different from the course they otherwise would have pursued." Commonwealth v. Paquette, 475 Mass. 793, 801 (2016). At the time that the defendant gave a false address, the police already had conducted an extensive investigation of the victim's allegations, sufficient for them to charge the defendant. In fact, the defendant's statement came only after the police had tried to find him in person, obtained his telephone number from the victim, and taken the opportunity to interview him by telephone. There is no evidence that the defendant's lying about where he lived led the police to investigate, or even think about, the case in a materially different manner, with the possible exception that they could have viewed his lies as evidence of consciousness of guilt.[13] Similarly, given that the police apprehended the defendant through an arrest warrant and that there is no evidence that the police ever intended to apprehend him in a different manner, there is no evidence that the defendant's false statement delayed or impeded his arrest or

[13] It bears noting that at least some of any time spent by Ulrich with respect to determining the defendant's address was to confirm that the defendant had lied so as either to provide consciousness of guilt evidence on the rape charge, or to secure evidence supporting the misleading a police officer charge.

arraignment. In our view, under the circumstances of this case, the defendant's giving the police a fake address did not, and could not, "have led police to pursue a materially different course of investigation."[14] Paquette, supra at 805 ("Given the timing of the defendant's statements and what police already knew, and in the absence of other evidence indicating that the statements reasonably could have affected the police investigation in a material way, the evidence was not sufficient to allow for the conclusion that the defendant 'misled' police, within the meaning of § 13B . . ."). Because there was legally

[14] As noted, although the bill of particulars explained that the misleading a police officer charge was based on the defendant's providing a false address, the Commonwealth strayed from this theory at trial and, in fact, continues to suggest that the defendant's conviction on that charge could be supported by the other false statements he made to Ulrich, such as his claim that he had not seen the victim recently. The defendant has not claimed prejudice from the Commonwealth's vacillation. See Commonwealth v. Pillai, 445 Mass. 175, 188 (2005), quoting Commonwealth v. Amirault, 404 Mass. 221, 234 (1989) ("Even when the bill of particulars and the evidence at trial contrast as to an element or theory of the crime charged, relief is warranted only on a showing that the bill of particulars failed to provide the defendant with 'notice to prepare his defense'"). Regardless, such an alternative theory fails on the merits. The defendant's other falsehoods were largely "exculpatory denial[s], not . . . content-laden fabrication[s] designed to send police off course, thereby interfering with their investigation." Commonwealth v. Morse, 468 Mass. 360, 374 (2014). To the extent the statements affirmatively sought to mislead the police, given the state of the investigation at the time of the telephone interview, we do not believe they could have led the police astray.

insufficient evidence to support a guilty verdict for misleading the police, that verdict cannot stand.

Conclusion. The judgment of conviction of rape is affirmed. On the charge of misleading a police officer, the judgment is reversed, the verdict is set aside, and judgment is to enter for the defendant.

So ordered.