19-P-918 Appeals Court

COMMONWEALTH vs. CARLOS CRUZ.

No. 19-P-918.

Suffolk. May 14, 2020. - September 10, 2020.

Present: Sacks, Wendlandt, & McDonough, JJ.[1]

Indecent Assault and Battery. Enticement of Minor. Evidence, First complaint, Credibility of witness. Practice, Criminal, Instructions to jury, Argument by prosecutor. Witness, Credibility.

Complaints received and sworn in the Dorchester Division of the Boston Municipal Court Department on September 1, 2017, and November 1, 2017.

After consolidation, the cases were tried before James W. Coffey, J.

Joshua M. Daniels for the defendant.
Kathryn Sherman, Assistant District Attorney, for the Commonwealth.

SACKS, J. The defendant, Carlos Cruz, appeals from his convictions, after a jury trial in the Dorchester Division of

[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.

the Boston Municipal Court, of indecent assault and battery of a child under the age of fourteen, G. L. c. 265, § 13B, and enticing a child under the age of sixteen, G. L. c. 265, § 26C. He was acquitted of a second charge of indecent assault and battery of a child under the age of fourteen arising out of the same incident.[2] On appeal, the defendant asserts three errors in admitting first complaint evidence: no first complaint witness testified, evidence of multiple complaints was admitted, and no limiting instruction regarding the use of that evidence was given. We agree that these errors, together with several improper statements in the prosecutor's closing argument, created a substantial risk of a miscarriage of justice. We reject, however, the defendant's argument that the evidence against him was legally insufficient. We therefore conclude that the judgments must be reversed and the verdicts set aside.

Background. We summarize the key evidence at trial, reserving certain points for later discussion. On a Sunday afternoon in August 2017, the victim, a thirteen year old girl for whom we shall use the pseudonym Jan, accompanied her mother, a home-care worker, on a visit to a client who lived in an apartment building in the Dorchester section of Boston. Jan

[2] On a charge of attempt to commit a crime, G. L. c. 274, § 6, the defendant's motion for a required finding of not guilty was allowed.

waited in the first-floor lobby while her mother worked upstairs in the client's apartment. The lobby contained two almost identical couches, to which we shall refer as couch A and couch B, situated perpendicular to each other. A wall-mounted surveillance camera captured video footage (video) of couch A and of the building's elevators and front door, but not of couch B, which was located underneath the camera, just out of its field of view. Because Jan's testimony did not correspond precisely with what the video captured, and because the discrepancy forms the basis of the defendant's sufficiency argument, we describe the testimony and the video in some detail.

1. Jan's testimony. Jan testified that as she sat on couch A (the couch captured in the video), the defendant, an elderly man with whom she had exchanged greetings during her prior visits to the building, got off of the elevator. Because Jan spoke only English and the defendant spoke almost exclusively Spanish, they communicated using hand gestures and a few English words. On this occasion, the defendant sat down next to her and proceeded to touch her breast, making a circular motion with his right hand, and then touched her vaginal area. Both touchings were over her clothes.

Jan testified that she then stood and moved to sit on couch B. The defendant followed her and stood next to couch B. He

grabbed her jaw, pulled her toward him, and tried to kiss her, but she pushed him away. The defendant took money out of his pocket, including ten-, fifty-, and hundred-dollar bills, and pointed upstairs, which Jan interpreted as him "try[ing] to have sex with [her] or something." Jan told him to get away from her and put her head down.

A minute later, as the defendant began to walk toward the building's front door, the elevator door opened. Jan's mother emerged, looked at her, and angrily asked the defendant what he had done to her daughter. After further conversation (facilitated by a passerby who translated), the defendant left the building. Police were summoned; emergency medical personnel also arrived and took Jan and her mother via ambulance to a hospital. Jan was "not physically injured in any way."

Jan, who had turned fourteen by the time of trial, testified that she had not seen the video. When the prosecutor asked her to watch it at trial, she answered, "Do I have to watch it? 'Cause if I watch it, I'm going to cry. I don't want to do that." The Commonwealth did not press her further to watch the video or ask her about any discrepancies between her testimony and the video. Jan had already become upset when first asked to describe the assault, saying, "I can't do this." She later expressed irritation when challenged on cross-examination, asked for a break, and began to cry, leading the

judge to suspend her testimony for one-half hour, and to instruct the jury, "Sometimes things get heated in these cases . . . please don't draw any adverse inference against either side."[3]

2. Video. The video, played for the jury, corroborated many details of Jan's account, but with a significant difference: the video showed that, while Jan sat on couch A, the defendant touched only her thigh, not her breast or vaginal area. Three minutes later, Jan stood up, walked toward couch B, and seated herself. Although couch B itself was not visible, Jan's feet could be seen at the bottom edge of the screen. The defendant, after briefly stepping outside, returned and resumed his position on couch A. He then reached toward Jan and, using his left hand to grasp her right hand, pulled her toward him, at one point bringing her hand, arm, and the top of her head into view. As he did so, the defendant briefly held his right hand to his lips. He then reached toward her body with his right arm and could be seen moving that arm -- first higher, then lower -- for about eight seconds before withdrawing it. Neither his right hand nor her body could be seen in this segment of the video. The video then showed the defendant standing in front of

[3] Out of the presence of the jury, the judge stated that defense counsel was conducting himself as a "professional and a gentleman" and agreed that counsel was not being "particularly aggressive" or "offensive in any way."

couch B, taking money out of his pocket, showing it to Jan, and gesturing upstairs. The defendant then moved to the side of couch B and leaned over Jan for more than ten seconds, sometimes bending low enough to move completely out of the video. The defendant then stood upright but continued to reach down toward Jan with his right arm. The elevator door then opened, the defendant walked quickly away from Jan, and Jan's mother stepped out of the elevator and began speaking to the defendant.

3. Other evidence. Although the judge had allowed the Commonwealth's motion in limine to allow Jan's mother to testify as the first complaint witness, and Jan described the accounts of the assault she had related to her mother in the building lobby and in the ambulance, her mother did not testify.[4] Records of Jan's hospital visit, which included accounts of the incident related by Jan and her mother, were admitted in evidence.

The defendant did not testify or offer other evidence. His defense, presented through cross-examination and argument, was that he had not touched Jan's breast or vaginal area or offered her money to go upstairs with him, and that she had asked him for money. The defendant argued that, although Jan was firm in her testimony that the alleged assaults had occurred on couch A, the video proved that no assaults occurred there.

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[4] The prosecutor offered no explanation for not calling the mother as a witness.

The jury returned verdicts of guilty on the indecent assault and battery charge based on the breast touching and the enticement charge, but they found the defendant not guilty on the indecent assault and battery charge involving touching of the vaginal area.

Discussion. 1. First complaint issues. a. Lack of first complaint witness. A victim of a sexual assault is permitted to testify about her first complaint to another person, including the details of the complaint. See Commonwealth v. King, 445 Mass. 217, 240-244 (2005), cert. denied, 546 U.S. 1216 (2006). The victim may do so, however, only if the person to whom she complained is also "produced at trial [and] testifies regarding the complaint." Id. at 245 n.24. See Commonwealth v. Aviles, 461 Mass. 60, 68 & n.6 (2011); Commonwealth v. Peters, 429 Mass. 22, 30 n.8 (1999) (victim may not "bootstrap her testimony solely with her own account of statements made to others"); Commonwealth v. Haggett, 79 Mass. App. Ct. 167, 171 (2011). Here, although Jan's mother was intended to be the first complaint witness, the mother did not testify, and thus Jan's two accounts of what she told her mother were inadmissible. The Commonwealth concedes this point.

b. Evidence of multiple complaints. Under King, only the very "first" complaint is admissible.[5] King, 445 Mass. at 243. "The testimony of multiple complaint witnesses likely serves no additional corroborative purpose, and may unfairly enhance a complainant's credibility as well as prejudice the defendant by repeating for the jury the often horrific details of an alleged crime." Id. See Aviles, 461 Mass. at 73. Limiting the Commonwealth to a single first complaint witness prevents "any prejudicial 'piling on' of such witnesses." King, supra at 245.

Importantly, the same limitation applies to evidence offered by the victim. See Commonwealth v. Stuckich, 450 Mass. 449, 455-456 (2008). In Stuckich, the victim's testimony "regarding whom she told (in addition to the first complaint witness) [was] essentially the same as permitting those other witnesses to testify" and was held inadmissible. Id. at 457. The Commonwealth had "sought admission of multiple items as the first complaint evidence, namely [the victim's] letter to [her guidance counsellor], [her] initial conversation with [the counsellor], an earlier journal entry, and [her] later conversation with [the counsellor] and the school's principal." Id. at 455-456. The court ruled that "[i]f, in fact, the letter

[5] This principle is subject to certain exceptions not relevant here. See Commonwealth v. Murungu, 450 Mass. 441, 445-446 (2008); King, 445 Mass. at 243-244.

was the first complaint, that is the end of the matter. The letter would be the first complaint evidence and the further disclosures [were] not admissible as first complaint evidence." Id. at 456. "Repetition of the narrative tends to enhance the credibility of the complainant to the prejudice of the defendant." Id. at 457. See Commonwealth v. Monteiro, 75 Mass. App. Ct. 489, 493, 497 (2009) (improper for victim to testify that, after first complaining to father, he also complained to mother and district attorney's office).

That is essentially what occurred here. Jan testified that, while in the apartment building lobby, she told her mother that the defendant had touched her breast and vaginal area. Jan was also permitted to testify to a separate conversation, during the ambulance ride to the hospital, in which she again told her mother the same details. This was impermissible. "In circumstances where a complainant makes successive complaints to the first complaint witness, the initial complaint is the only evidence admissible as first complaint."[6] Commonwealth v. Arana, 453 Mass. 214, 222-223 (2009).

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[6] This case is unlike Commonwealth v. Revells, 78 Mass. App. Ct. 492, 496 (2010), where "the victim's first complaint to her mother consisted of a single, tightly intertwined oral and written communication," including a "letter . . . written at the mother's request after the victim was initially unable to verbally articulate her complaint," with "no meaningful gap in time between the written and oral aspects of the communication of the complaint." Here, in contrast, there is no evidence

Moreover, Jan's hospital records, admitted in evidence, included two additional accounts of the incident. First, they recounted Jan's statement that "[a]n older man approached her and grabbed her breast and vaginal area over her clothes. He then grabbed her chin and pulled her in to kiss her. He then showed her some money and suggested she go upstairs with him." They also recounted the mother's report of "coming off the elevator and seeing the man near her daughter and her daughter appearing upset. When she asked why he was with her daughter, she reported that the man had touched her and tried to kiss her. . . . Mother believes this man is a resident."[7]

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indicating that the victim's two disclosures to her mother, although close together in time, were in any way intertwined.

[7] We reject the Commonwealth's argument that, because some of these statements fell within G. L. c. 233, § 79, as statements made for the purpose of diagnosis and treatment, they were necessarily admissible here. "If independently admissible evidence, other than that specifically and properly designated as first complaint testimony, serves no purpose other than to repeat the fact of a complaint and thereby corroborate the complainant's accusations, it is inadmissible" (quotation and citation omitted). Commonwealth v. Dargon, 457 Mass. 387, 399-400 (2010). Here, the hospital records, even if portions of them fell within the statute, served no other purpose. They did not help establish any element of the Commonwealth's case, cf. id. at 400, nor were they "sufficiently important to a fair understanding of the Commonwealth's case to warrant their admission," id. at 400-401. See Arana, 453 Mass. at 228-229. Compare Aviles, 461 Mass. at 69-71. Jan had already testified that she was not physically injured in any way, no injuries were documented in the hospital records, her only complaint was that the assault had made her feel "very uncomfortable" and "a little bit 'funny' in her stomach and her throat," and the plan when she left the hospital was for follow-up by a social worker.

The admission of a victim's testimony about multiple complaints "create[s] the same risk of prejudice that [the court] sought to prevent by the limitations . . . imposed in King," that is, the piling on of complaint evidence that unfairly enhances the victim's credibility. Commonwealth v. Asenjo, 477 Mass. 599, 605 (2017). See id. at 606; Haggett, 79 Mass. App. Ct. at 173 (even where no first complaint witness testified, victim's "credibility was improperly enhanced by her own testimony" about her disclosures to others).

We reach the same conclusion here. "In a case such as this one, which turned on credibility, there is a particularly high probability of prejudice from the admission of duplicative complaint evidence." Monteiro, 75 Mass. App. Ct. at 497. See Commonwealth v. Ramsey, 76 Mass. App. Ct. 844, 851 (2010); Commonwealth v. Lyons, 71 Mass. App. Ct. 671, 673-674 (2008).

This case is unlike Commonwealth v. DiMonte, 427 Mass. 233 (1998), relied upon by the Commonwealth, an assault and battery case in which hospital records recounting the victim's statements that she had been struck in the face with a fist and kicked in the thigh, id. at 241, were held admissible as "fact-specific references to the reported cause of the [victim's] injuries [that were] part of her medical history and [were] relevant to treatment," id. at 242. Even if the records here had served some minimal independent purpose, the requisite "careful balancing of [their] probative and prejudicial value" should have led to their exclusion. Arana, supra at 229. See Commonwealth v. Ramsey, 76 Mass. App. Ct. 844, 849-850 (2010). We recognize that, in this case, defendant's trial counsel failed to seek exclusion or redaction of the portion of the records at issue.

As in Asenjo, 477 Mass. at 605, "[t]he admission of multiple disclosures in the circumstances of this case was error."[8]

c. Lack of limiting instruction. "First complaint testimony may be admitted for a limited purpose only, to assist the jury in determining whether to credit the complainant's testimony about the alleged sexual assault. The testimony may not be used to prove the truth of the allegations. The jury must be so instructed." King, 445 Mass. at 219. "[T]hese instructions should be given to the jury contemporaneously with the first complaint testimony, and again during the final instructions." Id. at 248. See Haggett, 79 Mass. App. Ct. at 172-173 (although no first complaint witness testified, error to refuse limiting instruction after victim herself testified about her first complaint). A limiting instruction is required "[w]henever first complaint evidence is admitted, whether through the complainant or the first complaint witness." Mass. G. Evid. § 413(a) note (2020).

Here, trial counsel did not request, nor did the judge deliver, the limiting instruction required by King -- either

[8] We reject the Commonwealth's argument that, "because no first complaint witness testified," we "ought to consider the evidence as simple hearsay" and conclude that the multiple erroneously-admitted accounts of the assault were merely cumulative and nonprejudicial. The argument ignores the particular danger of prejudice posed by repetitive complaint evidence in sexual assault cases, as recognized in King and many other cases.

when Jan testified about her two complaints to her mother, or when the hospital records containing Jan's and her mother's accounts of the assault were introduced, or during the judge's final charge. This left the jury free to consider those four hearsay accounts of the assault as additional evidence that the assault occurred, rather than on the limited issue of Jan's credibility. See King, 445 Mass. at 219.

d. Effect of first complaint errors. In this case, Jan's credibility was the central issue. In these circumstances, the three violations of the first complaint doctrine, combined with impermissible statements in the prosecutor's closing argument, discussed infra, leave us with "a serious doubt whether the result of the trial might have been different had the error[s] not been made."[9] Commonwealth v. LeFave, 430 Mass. 169, 174 (1999). We conclude that there was a substantial risk of a miscarriage of justice on both charges of which the defendant was convicted.[10]

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[9] It cannot be inferred from the record that counsel's failure to object was simply a reasonable tactical decision. Commonwealth v. Alphas, 430 Mass. 8, 13 (1999).

[10] The Commonwealth's theory on the enticing charge, on which the judge instructed the jury, was that the defendant had enticed Jan to remain in the building (and go to his apartment) with the intent that he would indecently assault and batter her. Because proof of that intent was, on this record, dependent on the conclusion that he had indecently touched Jan in the lobby -- a conclusion that was infected by the first complaint errors -- the enticing verdict was likewise infected.

2. Prosecutor's closing argument. Two remarks in the prosecutor's closing argument cast further doubt on the fairness of the trial. Both appear in the following passage:

> "It's clear that the only two people who can tell you about [what happened] are [Jan] and the [d]efendant. And it's clear that nobody else was around to tell you that story. But I told you, again, you have several tools to assist you in judging the credibility of a 14-year-old who comes in for no other reason but to tell you about these traumatic events. She has nothing to gain by going through the court process and being on that stand. And it made her emotional. So, I ask that you not forget that when you're deliberating." (Emphasis added.)

Defense counsel objected that the first highlighted remark improperly commented on the defendant's decision not to testify, and he asked that the jury be instructed to disregard that part of the argument. In response, the judge gave a curative instruction that explained the burden of proof was on the Commonwealth rather than the defendant, but that did not address directly the defendant's right not to testify. Because counsel failed to object to the adequacy of that instruction, the issue is unpreserved. See Commonwealth v. Beaudry, 445 Mass. 577, 587 (2005).

On appeal the defendant argues, and we agree, that the prosecutor's remark was improper, because, "[w]hatever [her] intent," her remark was "reasonably susceptible of being interpreted as a comment on the defendant's failure to take the

stand." Commonwealth v. Pena, 455 Mass. 1, 19 (2009). Cf. Commonwealth v. Botelho, 87 Mass. App. Ct. 846, 852 (2015) (under "reasonably susceptible" standard, improper for prosecutor to argue, "[t]he issue was is he intoxicated that night[and t]he only testimony you heard from that night was Officer Strong's"). The Commonwealth's responses on appeal -- that the prosecutor was merely "calling the jury's attention to the facts of the victim's isolation and the circumstances of the assault" and "addressing the fact that the defense theory of the case was that the sexual assault simply did not happen" -- are unpersuasive. The remark focused the jury's attention on the fact that, although both Jan and the defendant could tell the jury what happened, only Jan had done so.

When a prosecutor makes a remark of this nature, "the better practice" is for the trial judge to "interven[e] on his own motion to interrupt and immediately instruct the jury on the defendant's right not to testify." Commonwealth v. Arroyo, 49 Mass. App. Ct. 672, 675 (2000). The judge here did not do so. Although his final charge included a standard instruction about the defendant's right not to testify, we conclude in the circumstances of this case that the instruction did not eliminate the prejudice from the prosecutor's remark.

Also improper was the prosecutor's suggestion that Jan should be believed because she had "come[] in for no other reason but to tell you about these traumatic events. She has nothing to gain by going through the court process and being on that stand. And it made her emotional." This remark ran afoul of the settled rule that "[a] prosecutor may not . . . suggest to the jury that a victim's testimony is entitled to greater credibility merely by virtue of her willingness to come into court to testify." Commonwealth v. Helberg, 73 Mass. App. Ct. 175, 179 (2008). Such a remark may be especially problematic when it specifically calls attention to a witness's having faced the "rigors of trial." Id. at 180 n.7. See Commonwealth v. Ramos, 73 Mass. App. Ct. 824, 826 (2009). See also Mass. G. Evid. § 1113(b)(3)(B) and note (2020). Here the prosecutor did just that, emphasizing that testifying about the traumatic events had made Jan "emotional" and asking that the jury "not forget that when you're deliberating."

Although defense counsel objected to the prosecutor's repeated references to Jan's becoming upset while testifying,[11] counsel did not specifically object to the remark regarding her willingness to testify. The judge gave a curative instruction

[11] Counsel objected that these references were improper appeals for jury sympathy. Because we determine on other grounds that a new trial is warranted, we need not address this issue.

that closing arguments were not evidence, but this did not mitigate the prejudice from the improper argument. Compare Beaudry, 445 Mass. at 586-588 (curative instruction was sufficient where judge told jury to disregard any argument they heard that complaining witness should be believed merely because she showed up and testified).

The improper portions of the prosecutor's closing argument went to the critical issue of whether the jury should believe Jan. Considered in combination with the first complaint errors discussed above, they strengthen our conclusion that there was a substantial risk of a miscarriage of justice. See Commonwealth v. Cancel, 394 Mass. 567, 576 (1985).

3. Sufficiency. The defendant argues that, because the video conclusively disproved Jan's testimony that he touched her breast while she was on couch A, the evidence that he touched her breast at all was legally insufficient to support his conviction of indecent assault and battery.[12] Noting that Jan denied that the breast touching occurred on couch B, the defendant invokes the principle that, "[w]hile it is true that the jury may believe part of a witness's testimony and reject part or believe all or reject all, the jury's right to selective credibility does not permit [them] to distort or mutilate any

[12] The defendant argues, derivatively, that the evidence on the enticing charge was also insufficient. See note 10, supra.

integral portion of the testimony to permit them to believe an unfounded hypothesis." Commonwealth v. Perez, 390 Mass. 308, 314 (1983), S.C., 442 Mass. 1019 (2004). See Commonwealth v. Lopez, 484 Mass. 211, 217 (2020); Commonwealth v. Zanetti, 454 Mass. 449, 458 (2009). We are unpersuaded. Jan's testimony that the breast touching occurred on couch A and not couch B was not integral to her testimony that that touching occurred, nor did the jury's verdict rest on any unfounded hypothesis.

As with any sufficiency challenge, we ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979). Here, a rational jury could plainly have believed that Jan was simply mistaken about which couch the touching occurred upon -- a detail that was neither an element of the crime nor logically inseparable from proof of an element.

There was no doubt that Jan, who agreed that the couches were "almost identical," testified inaccurately and inconsistently about which couch she was on at certain points.[13]

[13] Compare Zanetti, 454 Mass. at 458 (jury may not "wrest part from a clear and consistent context so as to attribute to a witness a statement which he did not make" [quotation and citation omitted; emphasis added]).

She testified that, while she was on couch B, she had some interaction with the defendant about an injury to her ankle, which was wrapped in a bandage. She later testified that this interaction had occurred on the same couch where the defendant had touched her breast and vaginal area, which she affirmed was couch A. Yet the video plainly depicted the interaction concerning her ankle occurring while she was seated on couch B.

Jan also testified that no touching had occurred on couch B. Yet moments later she testified that the defendant had grabbed her jaw while she was on couch B, and a segment of the video showed the defendant holding her hand and pulling her toward him while she was on couch B. The video contradicted her testimony on numerous other details as well.[14]

The video did not, however, contradict her testimony that the defendant touched her breast. During the video segment just mentioned, the defendant reached his right arm toward her body and could be seen moving that arm for about eight seconds before

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[14] For example, she denied having shaken hands with the defendant when he first got off the elevator, but the video showed her doing so. She also testified that after the defendant had touched her on couch A, the defendant stood up and went outside "for about five minutes," a detail of which she was "sure," during which time she moved from couch A to couch B before he came inside and stood next to where she then sat. The video, however, showed that in a period of less than thirty seconds, the defendant stood up and went outside, Jan moved to couch B, and the defendant returned and seated himself on couch A.

withdrawing it. The jury could rationally conclude that the breast touching occurred at this point. Such a conclusion would not "distort or mutilate" any part of her testimony, nor rest on any "unfounded hypothesis," Perez, 390 Mass. at 314, or on "impermissible surmise and conjecture," Lopez, 484 Mass. at 218. It would rest instead on the jury's permissible decision to credit her testimony that the breast touching occurred, while declining to accept one detail of her testimony that the video contradicted. Accordingly, the evidence was sufficient to support the conviction of indecent assault and battery based on the breast touching, as well as the conviction of enticing. See note 10, supra. Double jeopardy does not bar a retrial on those charges. See Commonwealth v. Merry, 453 Mass. 653, 660 (2009); Commonwealth v. Hanson, 79 Mass. App. Ct. 233, 234-235 (2011).

Conclusion. The judgments of conviction are reversed and the verdicts are set aside.

So ordered.