19-P-1167 Appeals Court

COMMONWEALTH vs. GARNELL GONSALVES.

No. 19-P-1167.

Bristol. March 5, 2021. – May 27, 2021.

Present: Vuono, Hanlon, & Shin, JJ.

Intimidation of Witness. Witness, Intimidation. Stalking. Abuse Prevention. Due Process of Law, Abuse prevention. Practice, Criminal, Motion in limine, Instructions to jury, Assistance of counsel. Evidence, Authentication.

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

The cases were tried before Raymond P. Veary, Jr., J.

James E. Methe for the defendant.
Stacey L. Gauthier, Assistant District Attorney, for the Commonwealth.

SHIN, J. A jury convicted the defendant of intimidation of a witness, see G. L. c. 268, § 13B, and stalking in violation of a G. L. c. 209A abuse prevention order (209A order), see G. L. c. 265, § 43 (b). The convictions stemmed from a barrage of text messages that the defendant sent to the victim, his former

girlfriend. On appeal the defendant argues that the Commonwealth failed to prove that he knowingly violated the 209A order because there was no evidence that it was served on him. We disagree and conclude that the evidence was sufficient to show that the defendant knew of the existence of the 209A order and had actual or constructive knowledge that his sending of the text messages violated its terms. We are also unpersuaded by the defendant's arguments that the trial judge erred by admitting the text messages in evidence, that the reasonable doubt instruction created a substantial risk of a miscarriage of justice, and that trial counsel was ineffective. Accordingly, we affirm.

Background. After dating for around one year, the victim ended her relationship with the defendant on December 30, 2016. On January 4, 2017, the victim obtained the 209A order, which prohibited the defendant from, among other things, contacting her.

From January 5 to January 11, 2017, while the 209A order was in effect, the defendant sent the victim over one hundred text messages. Some of the messages called the victim derogatory names, some threatened her with physical violence, and some did both. For example, at 5:06 P.M. on January 5, the defendant sent a message that read, "So you put papers on me bitch lol . . . trust me that's not going to stop me believe me

my nieces well be seeing u 'real soon."[1] Three minutes later, the defendant messaged, "They don't mean shit tell they give them to me I'm not new to this bitch." At 6:34 P.M., and six messages later, the defendant warned the victim, "Who gave you the idea that a peace a paper is going to stop you from getting your ass kick from my nieces lol." At 7:12 P.M. the defendant threatened, "[T]here going to brake your face up so bad that when you look in the mirror your not going to recognize who you are." After continuing to send threatening messages throughout the evening, the defendant sent a message the next morning that warned, "Just because I'm gone don't mean that it's safe to go outside their well be watching you I'll get the report don't stray to far away from the house Rat bitch lol."

Other text messages communicated that the defendant was aware that police were trying to serve him with the 209A order. In a message sent at 7 P.M. on January 5, the defendant told the victim, "Well I'm in Boston right now tell the cops to stop looking for a ghost it was a waste of your day sitting at the court house for that shit anyways." And the next day, the defendant told the victim, "Tell the cops to stop going by because I'll be away for awhile."

[1] We quote the text messages verbatim.

Discussion. 1. Sufficiency of the evidence. The defendant contends that the evidence was insufficient to support his conviction of stalking in violation of a 209A order, see G. L. c. 265, § 43 (b), because the Commonwealth failed to prove that he had knowledge of the terms of the 209A order obtained by the victim. To establish a violation of a 209A order, the Commonwealth must show, among other things, that "the defendant had knowledge of the order." Commonwealth v. Silva, 431 Mass. 401, 403 (2000). Where, as here, there is no evidence of service, the Commonwealth can still meet its burden by presenting other evidence sufficient to prove "that the defendant had actual knowledge of the terms of the order or was put on sufficient notice to make reasonable inquiry concerning the issuance and terms of the order." Commonwealth v. Welch, 58 Mass. App. Ct. 408, 410 (2003). See Commonwealth v. Tiernan, 96 Mass. App. Ct. 588, 590 (2019) ("Evidence that the defendant received actual or constructive notice can be used to meet the knowledge element"). The judge instructed the jury on the duty of reasonable inquiry, with no objection from the defendant.

Viewing the evidence in the light most favorable to the Commonwealth, see Commonwealth v. Ayala, 481 Mass. 46, 51 (2018), the jury could have found that the defendant had actual knowledge that his conduct violated the 209A order or, at a minimum, sufficient notice to make reasonable inquiry. There

was evidence that the defendant knew about the 209A order by January 5, 2017, when he acknowledged that the victim "put papers on" him and warned that a piece of paper would not protect her from abuse. By the defendant's own admissions, he was familiar with 209A orders and the concept of service. His text messages also showed awareness that the police were trying to serve him, and he instructed the victim to tell them to stop looking, suggesting that he was trying to evade service. The defendant then continued to send the victim messages until January 11.

This evidence was sufficient to prove that the defendant had actual or constructive knowledge of the terms of the 209A order. Given the defendant's professed familiarity with 209A orders generally, reasonable jurors could have found that he would have known that the terms of the 209A order prohibited the multiple threatening text messages he sent the victim on the evening of January 5 and the next morning. See Commonwealth v. Delaney, 425 Mass. 587, 590-591 & n.5 (1997), cert. denied, 522 U.S. 1058 (1998) (jury could have found that defendant had actual and constructive knowledge of extended 209A order, where temporary order included notice that extension might issue and defendant was familiar with 209A process). Alternatively, the evidence permitted a finding that "a person of reasonable prudence" would have conducted "an inquiry under similar

circumstances." Id. at 592, quoting Commonwealth v. Olivo, 369 Mass. 62, 69 (1975). That is, the jury could have found that knowledge of the existence of the 209A order would have prompted a reasonable person to make inquiry of its terms before sending threatening messages and continuing to send messages for the next six days. Instead, as the jury could have found, the defendant tried to evade service. The defendant could not, in these circumstances, "shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would flow from the notice if it had actually been received." Delaney, supra, quoting Olivo, supra.

2. Admission of text messages. The defendant filed a motion in limine to exclude screenshots of the text messages. After conducting a voir dire of the victim, the judge denied the motion and admitted the messages in evidence. The defendant argues that this was error because the messages were not authenticated and because the victim deleted other, potentially exculpatory messages that she received from the defendant in the same time period. We disagree on both counts.

When assessing the authenticity of evidence, the judge, acting as gatekeeper, must "determine whether there is evidence sufficient, if believed, to convince the jury by a preponderance of the evidence that the item in question is what the proponent claims it to be." Commonwealth v. Purdy, 459 Mass. 442, 447

(2011), quoting M.S. Brodin & M. Avery, Massachusetts Evidence § 9.2, at 580 (8th ed. 2007). The item "may be authenticated by direct or circumstantial evidence, including its '[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics.'" Purdy, supra at 448, quoting Mass. G. Evid. § 901(b)(1), (4).

Here, the judge did not abuse his discretion by concluding that the text messages were sufficiently authenticated. See Commonwealth v. Meola, 95 Mass. App. Ct. 303, 309 (2019). The victim identified the cell phone number from which the messages originated as the defendant's and testified that she had never been contacted by anyone else from that number. The judge appropriately determined that the absence of any prior "mistaken communications" supported a finding of authenticity. See Commonwealth v. Alden, 93 Mass. App. Ct. 438, 440 (2018), cert. denied, 139 S. Ct. 2010 (2019). Furthermore, as the judge found, the contents of the messages pointed to the defendant as the author because they reflected "particular knowledge of contemporaneous events" relevant to the case and contained "recurring spelling errors," which the victim identified as typical in the defendant's communications. See id. at 441. The sheer number of messages that were sent also supported a finding that the defendant authored them. See Commonwealth v. Oppenheim, 86 Mass. App. Ct. 359, 368 (2014) (although nearly

four-hour long instant message exchange could have been manufactured, such an "effort would have been elaborate and generally inexplicable"). This circumstantial evidence was sufficient to permit a reasonable jury to find by a preponderance of the evidence that the defendant authored the messages. See Purdy, 459 Mass. at 450.

Nor did the judge abuse his discretion by concluding that the text messages were admissible despite the victim's deletion of other messages. A defendant seeking remedial action based on lost or destroyed evidence carries the initial burden of "establish[ing] a reasonable possibility that the lost or destroyed evidence was in fact exculpatory." Commonwealth v. Kee, 449 Mass. 550, 554 (2007). This showing must be "based on concrete evidence rather than a fertile imagination." Id., quoting Commonwealth v. Dinkins, 440 Mass. 715, 717 (2004).

The defendant's argument centers on the victim's voir dire testimony that she deleted some of the defendant's text messages from January 5, 2017 -- which she described as saying things such as "[o]pen the door" and "[a]nswer me" -- because an officer who was with her that day said that "there were just way too many text messages coming through" and "it would save a lot of time if [she] could get rid of all the extra non-threatening

texts."[2] Even assuming that these deleted messages qualified as lost or destroyed, the defendant failed to establish a reasonable possibility that they would have been exculpatory. As the defendant acknowledges, he did not produce concrete evidence that they were exculpatory; he could only speculate that they might have been, which was insufficient to meet his burden. The judge was therefore within his discretion to deny the defendant's motion. See Commonwealth v. Meas, 467 Mass. 434, 447-448 & n.16, cert. denied, 574 U.S. 858 (2014); Dinkins, 440 Mass. at 718.[3]

3. Jury charge. Although the judge instructed the jury that they must be convinced of the defendant's guilt to a moral certainty, he omitted the language mandated by Commonwealth v. Russell, 470 Mass. 464, 477 (2015), defining moral certainty as "the highest degree of certainty possible in matters relating to

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[2] The defendant also cites the victim's testimony that, in late January or early February 2017, a sergeant told her to take screenshots of certain text messages as "examples." There was no evidence, however, that the sergeant told the victim to delete any messages.

[3] The defendant alternatively argues that the loss or destruction of the text messages was a result of reckless or bad-faith conduct by the police, which "independently entitled [him] to a remedy" without any initial showing that the messages were exculpatory. Commonwealth v. Williams, 455 Mass. 706, 718 (2010). The judge did not abuse his discretion, however, in concluding that the police conduct, assuming it was even improper, did not rise to the level of recklessness or bad faith.

human affairs -- based solely on the evidence that has been put before you in this case." The defendant contends that this created a substantial risk of a miscarriage of justice. As he acknowledged at oral argument, however, the judge's instruction was identical to the one considered in Commonwealth v. Whitson, 97 Mass. App. Ct. 798, 799-803 (2020), where we found no substantial risk of a miscarriage of justice.[4] We decline the defendant's invitation to overrule Whitson.

4. Ineffective assistance of counsel. The defendant raises three ineffective assistance of counsel claims, which we are able to resolve on direct appeal because their factual bases "appear[] indisputably on the trial record." Commonwealth v. Zinser, 446 Mass. 807, 811 (2006), quoting Commonwealth v. Adamides, 37 Mass. App. Ct. 339, 344 (1994).

The defendant first argues that trial counsel should have moved to dismiss the indictments because the Commonwealth did not disclose to the grand jury that the police told the victim to delete some of the defendant's text messages and to preserve others by taking screenshots. But in her testimony before the grand jury, the victim admitted that she deleted some messages and that the screenshots were just "sample[s]." That the victim deleted the messages at the request of police would not have

[4] Whitson was decided after the defendant filed his brief.

affected the grand jury's decision to indict. See Commonwealth v. Silva, 455 Mass. 503, 509-511 (2009). Counsel was thus not ineffective for failing to move to dismiss. See Commonwealth v. Conceicao, 388 Mass. 255, 264 (1983) ("It is not ineffective assistance of counsel when trial counsel declines to file a motion with a minimal chance of success").

Relatedly, the defendant claims that counsel should have requested a missing evidence instruction at trial based on the deleted text messages. The defendant would not have been entitled to such an instruction, however, without establishing a reasonable possibility that access to the messages would have produced exculpatory evidence. See Kee, 449 Mass. at 557-558. As explained above, there was no evidence that the deleted messages were exculpatory. The defendant has therefore failed to show either that counsel's performance was deficient or that it deprived the defendant of a substantial ground of defense. See Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).

Finally, the defendant claims that counsel was ineffective for failing to request an instruction under Commonwealth v. Bowden, 379 Mass. 472, 485-486 (1980), concerning the adequacy of the police investigation. But "the giving of such an instruction is never required," Commonwealth v. Williams, 439 Mass. 678, 687 (2003), and so counsel was not ineffective for

failing to request one.[5] For the same reason, the defendant has not shown that he was deprived of a substantial ground of defense. See Saferian, 366 Mass. at 96.

Judgments affirmed.

[5] Counsel explored the issue of the police investigation through cross-examination and in closing argument.