19-P-1211 Appeals Court

COMMONWEALTH vs. PARKPOOM SEESANGRIT.

No. 19-P-1211

Hampden. September 15, 2020. - January 19, 2021.

Present: Vuono, Sullivan, & Englander, JJ.

Rape. Deoxyribonucleic Acid. Nursing Home. Consent. Incompetent Person, Consent to medical treatment. Constitutional Law, Vagueness of statute. Due Process of Law, Vagueness of statute. Practice, Criminal, Required finding, Admissions and confessions, New trial, Assistance of counsel. Evidence, Admissions and confessions.

Indictment found and returned in the Superior Court Department on June 10, 2014.

The case was heard by Constance M. Sweeney, J., postconviction motions for funds and discovery were heard by her, and a motion for a new trial was heard by her.

A motion for stay of execution of sentence was heard by Shin, J.

Andrew P. Power for the defendant.
Kerry L. Koehler, Assistant District Attorney, for the Commonwealth.

ENGLANDER, J. This case presents issues regarding the application of the rape statute to a medical provider's actions when caring for a patient in a nursing center. In 2014, the defendant was employed as a certified nurse's assistant (CNA) at the East Longmeadow Skilled Nursing Center (nursing center). On the evening of May 6, 2014, he was found in one of the rooms, behind a curtain, with a sixty-nine year old female patient who suffered from dementia, and who was naked from the waist down. The defendant claimed that he had been performing a perineal cleaning of the patient's private area, because she smelled of urine. In an interview with the police that evening, the defendant admitted that he put his fingers inside the patient's vagina, but he maintained that this was appropriate medical procedure for cleaning the patient.

After a bench trial, the defendant was convicted of one count of rape. He appeals from the conviction and from the denial of his motion for a new trial, asserting ineffective assistance of counsel. While he raises a number of issues, the defendant's lead argument is that the rape statute, G. L. c. 265, § 22 (b), is void for vagueness because it fails to distinguish adequately between conduct that constitutes rape, and conduct that constitutes appropriate medical practice. We conclude that there is no such infirmity in the Massachusetts rape law, and that on the facts presented there was sufficient

evidence of rape. Perceiving no other error that could upset the judgment of conviction, we affirm.

Background. On May 6, 2014, a nurse at the nursing center walked into a male patient's room and found the defendant coming out from behind the curtain dividing the two beds in the room. She testified that the defendant's reaction seemed odd, so she pulled back the curtain and found a female resident lying on the bed, naked from the waist down, with her legs spread open. Under the nursing center policies, the defendant, a male, was not supposed to care for female patients. The nurse asked the defendant, "[W]hat did you do?" The defendant didn't respond at first, so she "kept screaming the same, like what did you do, what -- it looks really bad for you, what did you do?" The defendant then responded, "I know, I'm sorry, I know I'm in trouble." The nurse continued "screaming" at him until "finally he said I was changing her, she was wet."

The nurse testified that the patient's pull-up brief was on the floor next to the bed and that the brief was dry. A second nurse also responded to the incident, and the two nurses conducted an examination of the patient. Their accounts differ slightly, but the differences are not material. One nurse testified that she saw a trace amount of blood in the patient's vagina, while the other testified that she observed only slight irritation and no blood. In the meantime, the brief had been

replaced on the patient; both nurses testified that when they removed the brief to examine the patient, there was some blood on the brief.

Someone called the East Longmeadow Police Department. The defendant, who had been sent home, was called back to the nursing center where he met Police Officer Michael Ingalls, who asked whether he would answer questions about the incident at the police station. The defendant agreed. The defendant was twenty-four years old at the time, and had spent most of his life in Thailand. Although English was not his first language, he was a student at American International College, and able to converse in English. The defendant was advised of his Miranda rights at the station, and signed a card stating that he understood them.

During the thirty-six-minute recorded interview that followed, the defendant made multiple statements to the effect that "I put my fingers inside her vagina," and that he had inserted them "[o]ne inch[]" deep. The defendant explained that he was cleaning the patient with a washcloth because she smelled of urine, and that while doing so he cleaned the "inside." The defendant went on to state that he also put his fingers inside, without using the washcloth.[1]

---

[1] OFFICER INGALLS: "[D]id something else happen in there tonight?"

The Commonwealth presented the video recording of the defendant's statement during its case-in-chief. In addition, both nurses who examined the victim at the nursing center testified. One of those nurses testified that she had "never" penetrated inside a patient's vagina while conducting a perineal cleaning.

The victim also was examined by a sexual assault nurse examiner (SANE) at a local hospital on the evening of the incident. Over the defendant's objection, a forensic scientist from the Massachusetts State Police crime laboratory testified that three sperm cells were detected on the swab taken from the victim's external genitals. The forensic scientist further testified, based on a Y-STR profile of the sperm cells, that the defendant's Y-STR deoxyribonucleic acid (DNA) profile was "consistent with the profile" of the sperm cells, that 99.7% of Asian males living in the United States could be excluded as the source of the cells, but that the defendant could not be excluded.

MR. SEESANGRIT: "Yeah, I put my fingers inside her vagina."

OFFICER INGALLS: "You did? Why'd you do that? So you didn't have a cloth in your hand?"

MR. SEESANGRIT: "The cloth was taken out."

At trial, the defendant testified and presented a different interpretation of the events. He testified that he was "very confused" during the interrogation by Officer Ingalls, and that in fact he had not entered the victim's vagina with his fingers, but had merely "lift[ed] open and clean[ed]" the patient's labia. He attributed his prior statements to Officer Ingalls, to a misunderstanding over the word vagina. The defendant also testified about his challenging work and school schedule and his lack of sleep, and suggested that this impacted his ability to respond correctly to questions on the night of the incident. The defendant further testified that his reaction when the nurse opened the curtain did not stem from a fear of being caught mistreating the patient, but instead arose from the fact that he had been found violating the nursing center rule. In her closing argument, defense counsel contended that the defendant's inculpatory statements were suggested to him by Officer Ingalls, who had taken advantage of the defendant's poor command of English.

The trial judge, acting as fact finder, convicted the defendant of one count of rape. Subsequently, the defendant moved for a new trial, asserting ineffective assistance of counsel. The defendant raised a variety of grounds, including that counsel did not adequately pursue expert testimony to address the suggestiveness of the police interview, or to

counter the DNA evidence. The trial judge denied the motion in a comprehensive memorandum of decision and order. The defendant appeals from both the judgment of conviction and the order denying his motion for a new trial.[2]

Discussion. 1. The vagueness argument. We first address the defendant's argument that the rape statute is void for vagueness, as applied to a medical practitioner providing perineal care. The rape statute, G. L. c. 265, § 22 (b), prescribes punishment for a person who "has sexual intercourse or unnatural sexual intercourse with a person and compels such person to submit by force and against his will." The elements of the crime are set forth in the cases.

> "[T]he Commonwealth must prove two elements beyond a reasonable doubt: first, that there was sexual intercourse between the defendant and the victim; and second, that the defendant compelled the victim to submit to the intercourse 'by force or threat of force and against the will of the victim.' Commonwealth v. Lopez, 433 Mass. 722, 726 (2001). See G. L. c. 265, § 22 (b) ('compels such person to submit by force and against his [or her] will, or . . . by threat of bodily injury'). . . . The second [element] has been interpreted 'as truly encompassing two separate elements': force or threats, and lack of consent" (citation omitted).

Commonwealth v. Sherman, 481 Mass. 464, 471 (2019).

---

[2] The defendant also appeals from the orders denying his postconviction motions for funds and discovery, and from the single justice order denying his motion for stay of execution of his sentence. Apart from his notice of appeal, the defendant has not provided argument as to his appeal from the single justice order.

Sexual intercourse is defined as "the penetration of the female sex organ by the male sex organ." Commonwealth v. Gallant, 373 Mass. 577, 584 (1977). Unnatural sexual intercourse involves penetration by other means -- such as, in this case, a finger. Id. Furthermore, "penetration" does not require actual entry into the vagina; the cases establish that "[t]ouching . . . of the vulva or labia . . . is intrusion enough" (citation omitted). Commonwealth v. Donlan, 436 Mass. 329, 336 (2002).

Finally, the Commonwealth is not required to prove a specific intent to have intercourse to which the victim did not consent. Rape is a general intent crime, and "proof that a defendant intended sexual intercourse by force coupled with proof that the victim did not in fact consent is sufficient to maintain a conviction." Lopez, 433 Mass. at 728.

The defendant argues that given the above definition of the elements of rape, he could be found guilty simply for performing perineal cleaning, which is a necessary and accepted medical procedure for cleaning the private area around a woman's vagina. The defendant argues that the perineal cleaning procedure requires manipulation of a woman's vulva and labia in a manner that constitutes penetration under our cases. See Donlan, 436 Mass. at 336. He urges that the Legislature could not have intended such an appropriate medical procedure to constitute

rape, but that the present law does not expressly except or exonerate such an appropriate medical procedure. He thus posits that the line between lawful and unlawful conduct is unacceptably vague.

The defendant's void for vagueness argument was not raised before the trial judge, and accordingly our review is for a substantial risk of a miscarriage of justice. See Commonwealth v. St. Louis, 473 Mass. 350, 355 n.8 (2015). Regardless of our standard of review, however, the defendant's argument is without merit. The flaw in the defendant's argument is that he focuses only on the element of penetration, without recognizing that the Commonwealth must prove another element -- lack of consent -- that sufficiently distinguishes rape from the provision of appropriate medical care. A patient undergoing an appropriate medical procedure -- for example, a perineal cleaning, or a gynecologist's examination -- consents to that activity in advance. Such consent does not extend, however, to actions of a medical practitioner such as the Commonwealth asserts occurred here -- that is, actions which are not a necessary and appropriate medical procedure.

To satisfy constitutional vagueness concerns, "[a] criminal statute must define the offense 'in terms that are sufficiently clear to permit a person of average intelligence to comprehend what conduct is prohibited.'" St. Louis, 473 Mass. at 355,

quoting Commonwealth v. Spano, 414 Mass. 178, 180 (1993). As applied to a medical provider in the defendant's position, the statute and the case law provide sufficient notice of what does, and does not, constitute the offense of rape. Indeed, this court addressed the distinction between consensual and nonconsensual behavior of a medical practitioner in Commonwealth v. Simmons, 8 Mass. App. Ct. 713 (1979), a case which involved very similar allegations of digital rape by a nurse's aide, while caring for a patient. We approved of the judge's charge where he stated:

> "On the question of consent, I charge you that you may infer that when a person enters a hospital for medical treatment that person does consent to certain touchings which are part of the medical treatment or the general nursing care of the hospital; but you may also infer, [al]though you need not . . . that a touching, a use of force outside the scope of what is appropriate medical care . . . for the condition from which she was then suffering . . . was not consented to."

Id. at 716-717.

Accordingly, the rape laws are not unconstitutionally vague as applied to a medical provider because the elements, and their application, are sufficiently clear.[3] An action is not rape if

[3] The defendant described his vagueness challenge as "as applied," although in his brief it is presented as a broader legal argument -- that the rape statute is unconstitutional when applied to medical practices, such as a perineal cleaning, that require touching of the genitalia. If we treated the defendant's vagueness challenge as an as applied challenge it would ordinarily depend upon the evidence at trial, and where the challenge was not raised in a motion for a required finding

the patient has consented, and of course, the burden is always on the Commonwealth to prove lack of consent to a particular act. Lopez, 433 Mass. at 727. As a general rule it can be inferred that a patient consents to a necessary and appropriately performed medical procedure, and if appropriate the jury should be so instructed, as it was in Simmons. The inference of consent, however, need not and does not extend to the actions of a medical practitioner that go beyond accepted medical procedure under the circumstances. See Simmons, 8 Mass. App. Ct. at 716-717.

2. Sufficiency of the evidence of rape. The defendant also suggests that even if the rape statute is constitutional as applied to his case, here the Commonwealth failed to adduce sufficient proof of the elements of rape. We review such a contention under the familiar standard of Commonwealth v. Latimore, 378 Mass. 671, 677-678 (1979) (viewing evidence in light most favorable to prosecution, could any rational trier of fact have found essential elements of crime beyond reasonable doubt). The evidence here was sufficient.

---

of not guilty, review on appeal would be for a substantial risk of a miscarriage of justice. See Commonwealth v. Chou, 433 Mass. 229, 238 (2001). We discuss the facts of this case in the next section, addressing sufficiency of the evidence of rape. That discussion shows that there is no substantial risk of a miscarriage of justice on the facts here.

As noted, the focus of the defendant's argument is that he merely performed an ordinary and appropriate medical procedure, in an acceptable fashion. A factfinder reasonably could have found, however, that the defendant did not perform an ordinary and appropriate medical procedure. To begin, a factfinder could have drawn adverse inferences from the circumstances -- the defendant was found behind a curtain, caring for a female patient in violation of a nursing center rule. The patient was naked from the waist down, fully exposed, and her dry pull-up brief was on the floor. Small amounts of blood were later observed on the victim's pull-up (which had been placed back on her after she was found). The defendant's immediate reaction, on being questioned, was to say, "I know I'm in trouble." Subsequently, at the police station, he admitted to putting his fingers inside the victim's vagina, without a washcloth. Although the defendant also claimed that he was cleaning the victim, a reasonable factfinder, on reviewing the videotaped interrogation, could have concluded that the defendant admitted to more than just "cleaning." The factfinder, of course, was not obliged to accept the defendant's different explanation at trial.[4] And finally, one of the nurses testified that she had

[4] We note that during the police interrogation, the defendant claimed that he was taught to clean inside the vagina, and that he did so. He did not repeat that claim when he

never put her fingers inside a patient during a perineal cleaning. There was accordingly sufficient evidence that the defendant did not merely perform an appropriate medical procedure, but rather, penetrated the victim with force and without her consent.

Citing Commonwealth v. Forde, 392 Mass. 453 (1984), the defendant makes a related argument -- that the Commonwealth's proof was insufficient because the only proof that the defendant committed the crime came from his own confession, and "an uncorroborated confession is insufficient to prove guilt." Id. at 457. The Forde rule, however, "requires only that there be some evidence, besides the confession, that the criminal act was committed by someone, that is, that the crime was real and not imaginary." Id. at 458. Here there was such evidence, where the defendant and the victim were observed together close in time to the event, under circumstances highly consistent with the defendant's confession, and where the defendant's preconfession actions evidenced consciousness of guilt. The small amount of blood observed on the brief also corroborated the defendant's statements.

---

testified at trial, but rather claimed that he did not clean inside.

3. The DNA evidence. The defendant objected to the Commonwealth's DNA evidence from the sperm cells, but the judge admitted it "for exclusion purposes" -- meaning, apparently, that it showed the defendant could not be excluded as a contributor. Subsequently, the Commonwealth argued that the evidence was "suggestive [that] there was some sort of sex act accompanying that digital penetration." The defendant argues that the DNA evidence lacked the proper statistical analysis for admission, and that in any event, it simply was not relevant to the charges of digital rape.

To begin, we disagree that the DNA evidence was not properly supported by the expert testimony. The Commonwealth's expert testified that the sample was sufficient to exclude 99.7% of the DNA profiles of Asian males in the United States, but that the defendant's DNA profile could not be excluded. This testimony was not undermined on cross-examination, and it was sufficient under the case law. See Commonwealth v. Mattei, 455 Mass. 840, 855 (2010) (expert testimony on DNA evidence must be accompanied by "statistical explanation of the meaning of nonexclusion" regarding probability of match at tested allele sites). See also Commonwealth v. Barry, 481 Mass. 388, 408-409, cert. denied, 140 S. Ct. 51 (2019) (expert's conclusion regarding probabilities of partial profile match at eight DNA loci not undermined simply because testing additional loci may

establish match to even greater degree of certainty). We also think the evidence could be relevant, in that it tended to confirm that the defendant touched the victim's genitalia.

That said, the relevance of the DNA evidence was marginal, and overall the evidence did not support the prosecutor's suggestion that the digital rape was accompanied by "some sort of sex act." As to relevance, the defendant had readily admitted to touching the victim, so the DNA evidence was cumulative as to that point. And as to the prosecutor's "sex act" argument, there was no evidence that finding only three sperm cells (with no evidence of seminal fluid) was indicative of recent sexual activity relative to the victim. Accordingly, while judges have significant discretion in admitting or excluding evidence, Commonwealth v. Gray, 463 Mass. 731, 751-752 (2012), had this been a jury trial there may well have been merit to the argument that the sperm cell DNA evidence should have been excluded, as more prejudicial than probative.

This was a bench trial rather than a jury trial, however. In a bench trial judges have broader discretion to admit evidence that they might not admit before a jury, because we recognize that judges are less likely to be unduly swayed by potentially inflammatory evidence. See Commonwealth v. Bonner, 33 Mass. App. Ct. 471, 477 (1992) ("where the fact finder is a judge, not a jury, . . . [a] departure from usual procedure is

not likely to be prejudicial" [citation omitted]); Commonwealth v. Beaulieu, 3 Mass. App. Ct. 786, 787 (1975) (judge, acting as fact finder, presumed to have correctly instructed self "as to the manner in which" potentially inflammatory "evidence was to be considered"). Here the judge's statements and rulings did not ascribe much weight to the DNA evidence. Indeed, the judge indicated why the evidence carried little weight with her when she responded to the defendant's argument, in his motion for a new trial, that his counsel had failed by not retaining a DNA expert. The judge observed:

> "No DNA expert testimony would have aided the defendant because the rape was digital. . . . [E]ven if . . . the sperm cells did not match the defendant's DNA, it would not exculpate the defendant because it would not demonstrate that the defendant had not inserted his fingers into the victim's vagina. The DNA evidence, challenged or not, was not a significant basis for the defendant's conviction."

We are satisfied that the DNA evidence did not substantially prejudice the defendant in the overall context of the trial. See Commonwealth v. Daggett, 416 Mass. 347, 352 (1993) (no prejudice from improperly admitted DNA evidence where it was "merely cumulative of other overwhelming evidence" and lacked significant probative value).

4. The motion for a new trial. Finally, the defendant challenges the judge's denial of his motion for a new trial. A new trial may be granted if the judge concludes "that justice may not have been done." Mass. R. Crim. P. 30 (b), as appearing

in 435 Mass. 1501 (2001). To prevail on a claim of ineffective assistance of counsel, the defendant needs to show that counsel's performance fell "measurably below that which might be expected from an ordinary fallible lawyer -- and, if that is found . . . whether it has likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). We review the judge's denial for an abuse of discretion. See Commonwealth v. Marinho, 464 Mass. 115, 122-123 (2013).

We discern no abuse of discretion here. The defendant urges first that counsel failed to pursue an expert to show that the interrogation was improperly suggestive. The argument is not compelling, however, because as the judge discussed in her memorandum and order, the defendant is educated and intelligent, and the video recording and audiotape show a person with a sound command of the English language, whose statements do not appear to be the product of suggestion. Counsel cannot be faulted for not pursuing an interrogation expert under those circumstances. See Commonwealth v. Tran, 460 Mass. 535, 559 (2011). Similarly, the defendant's argument that counsel should have retained an expert to address the DNA evidence also is not persuasive; the defendant's submissions do not show that an expert could have undermined the DNA evidence, and in any event, as discussed above, the DNA evidence was not critical to the determination of

guilt. See Commonwealth v. Barnett, 482 Mass. 632, 638-640 (2019).[5]

Finally, the argument that defense counsel should have presented evidence that the defendant's conduct constituted an acceptable medical procedure also fails, because the defendant's motion for a new trial did not proffer any evidence indicating that it is appropriate to clean inside the vagina during a perineal cleaning. The defendant criticizes his trial counsel for failing to introduce a treatise, and he cites to the chapter on perineal care in the American Red Cross Nurse Assistant Training Textbook (3d ed. 2013). The textbook, however, conspicuously does not say that one should clean inside the vagina, and also shows that the cleaning is done with a washcloth. Again, counsel cannot be faulted for failing to present such evidence, where the evidence reasonably could be viewed as supporting the Commonwealth's case.

The remaining alleged failures were also addressed by the judge, and appropriately rejected. Our review of the record does not reveal actions of counsel that fell below that of an ordinary fallible lawyer.

---

[5] For essentially the same reasons, the judge did not abuse her discretion when she denied the defendant's motions, postconviction, which sought funds to retain experts to analyze the DNA evidence, and the suggestiveness of the interrogation.

The judgment is affirmed. The orders denying the motion for a new trial and the motions for postconviction funds and discovery are affirmed. The order of the single justice denying the defendant's motion for stay of execution of his sentence is affirmed.

So ordered.