19-P-1767 Appeals Court

COMMONWEALTH vs. ANGELO GONZALEZ.

No. 19-P-1767.

Worcester. October 19, 2020. - February 4, 2021.

Present: Vuono, Kinder, & Shin, JJ.

Deriving Support from Prostitution. Trafficking. Jury and Jurors. Practice, Criminal, Challenge to jurors, Jury and jurors, Instructions to jury. Evidence, Relevancy and materiality, Authentication.

Indictments found and returned in the Superior Court Department on September 12, 2016.

The cases were tried before David Ricciardone, J.

Joseph Visone for the defendant.
Nathaniel R. Beaudoin, Assistant District Attorney, for the Commonwealth.

SHIN, J. The defendant was convicted on five indictments charging deriving support from prostitution and one indictment charging human trafficking. He raises numerous arguments on appeal, including that the trial judge erred by disallowing defense counsel's exercise of a peremptory challenge. Among the

reasons given by defense counsel for the challenge were that the juror in question, juror 48, had family in law enforcement and had negative opinions about a gang with which the defendant is affiliated. Noting that juror 48 is Hispanic, the judge rejected defense counsel's reasons as inadequate and denied the challenge. We agree with the defendant that this was error and, because the error was structural, reverse the convictions.

Background. We summarize the evidence in the light most favorable to the Commonwealth. The defendant and his brother, Elvin Gonzalez,[1] were both drug dealers associated with the Kilby Street Gang in Worcester. Elvin ran a prostitution operation that involved five women who provided sexual services, usually in hotel rooms. The women were addicted to drugs and would give the proceeds from their services to Elvin (either directly or through a "supervisor") in exchange for drugs. The value of the drugs provided was less than the amount of proceeds that the women turned over. One woman testified that she was incentivized to schedule more "dates"[2] because the amount of drugs that she received had started to decrease.

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[1] We spell Elvin as it appears in the record appendix. We will also refer to Elvin by his first name because he shares a surname with the defendant.

[2] Participants in the operation referred to the sexual encounters as "dates."

The defendant and his codefendant, Robert Nieves, supplied the drugs to compensate the women. Elvin paid the defendant for the drugs he supplied. Bradley Alberini, who was also associated with the Kilby Street Gang and supervised the prostitution operation, saw the defendant every day or every other day for several months when the operation was ongoing. Alberini saw the defendant deliver drugs to Elvin and receive money in exchange. Occasionally, Alberini and Elvin's girlfriend saw the defendant deliver drugs directly to the hotel rooms where the prostitution occurred.[3] On those occasions, in the defendant's presence, the women talked on the phone about their "dates" and did not try to hide their activities.

The defendant frequently drove Alberini and Elvin to or from one of the hotels. During some of these rides, Alberini spoke with the defendant about the prostitution operation, including about how Elvin handled the money and how the women were treated. On one occasion the defendant drove one of the women to an "outcall" -- a meeting to exchange sexual services for money at a location designated by the client. On another occasion the defendant rented a hotel room in furtherance of the operation. Alberini saw the defendant make a transaction at the

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[3] The defendant challenges the girlfriend's testimony as hearsay, claiming it was based on what she heard from Elvin. The testimony we reference was based on the girlfriend's own personal observations.

front desk, and the defendant then gave Alberini and Elvin a room key.

Discussion. 1. Denial of peremptory challenge. Prior to jury empanelment, defense counsel requested that the trial judge ask the prospective jurors whether "they have any opinions concerning the fact that [the defendant] is Hispanic." The judge agreed and proceeded to ask each juror some version of the following questions: (1) whether the fact that the defendant and his codefendant, Nieves, are Hispanic, and the "complaining witnesses or alleged victims" are white, would affect the juror's ability to be fair and impartial; and (2) whether the juror had any prior experience with Hispanics that would lead him or her to conclude that Hispanics are more inclined to break the law than members of other ethnic groups. Juror 48 answered, "No," to both questions.

In response to further questioning from Nieves's counsel, juror 48 revealed that she had lived in Worcester for thirty years and was familiar with, and had negative feelings about, the Kilby Street Gang. She also disclosed on her juror questionnaire that she had two cousins serving in the Worcester Police Department and that she was working at a security firm. When Nieves's counsel questioned her about her job, juror 48 confirmed that she "w[ore] a uniform" and that she "look[ed] at that job as a stepping stone to get into law enforcement,"

"something that [she] want[s] to do in the future." When the defendant's counsel asked whether she accepted that a person charged with a crime has a right not to testify, juror 48 replied, "I think you should testify . . . either you're guilty or innocent." Nonetheless, juror 48 consistently stated throughout voir dire that she could be fair and impartial.

After the judge found juror 48 indifferent, the defendant's counsel sought to exercise a peremptory challenge. The following exchange ensued:

> THE COURT: "Well, hold on there. Clearly this is a member of a Hispanic ethnic group and I would ask the same question if she were a member of any other minority, but you specifically asked me to bring up ethnicity --"
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> DEFENSE COUNSEL: "Yes."
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> THE COURT: "-- she consistently said [she] will be fair to every question that was put to her."
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> DEFENSE COUNSEL: "Yes."
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> THE COURT: "I strictly and specifically followed up on the issue of whether the defendant chooses not to testify . . . if she could uphold the law and she said yes. I'm hesitant. I now have an issue with regard to member of a minority, let alone they're the same ethnic group. . . . I think there's an issue . . . that has to be addressed with regard to the use of a peremptory challenge with regard to this person and I have to be convinced that any explanation you give is genuine and adequate. So, what do you say?"

Defense counsel replied that he had three reasons for the challenge: juror 48's "family experiences with people in law enforcement," her confusing answers to whether she believed that

a defendant has a right not to testify, and her familiarity with the Kilby Street Gang. The exchange then continued:

> THE COURT: "Yeah. Do you think there's . . . anyone who has heard anything about Kilby Street Gang [who] takes away any positive image of that? . . . The issue is whether you can be fair and impartial given the fact that there will be references to gang affiliation. She answered these questions as cogently, consistently and credib[ly] as I've ever heard anyone do . . . and we go through this ethnic questioning with an eye towards making sure people can be fair and impartial and . . . as difficult as it would be for me to ask a Hispanic person if they can be fair and impartial given that they are Hispanic defendants, you asked me to do that. And now you're challenging her[]."
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> DEFENSE COUNSEL: "Yes."
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> THE COURT: "I don't find so far that you've got an adequate basis for challenging her."
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> DEFENSE COUNSEL: [Inaudible.]
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> THE COURT: "All right. On the basis of Kilby, the issue that you raised with regard to whether the defendant is testifying and even the Worcester Police Department, each of those things in my mind were answered very thoroughly and consistently by her. I don't find that your explanation is adequate given the minority status of this individual and I'm going to override your use of a peremptory and seat [her]."

Defense counsel noted his objection.

On appeal the defendant argues that the judge erred in disallowing the peremptory challenge because there was no indication that defense counsel engaged in a pattern of excluding jurors on the basis of their race, and because defense counsel offered adequate, race-neutral reasons for challenging juror 48. We "generally presume that peremptory challenges are

made and used properly during jury selection." Commonwealth v. Mason, 485 Mass. 520, 529 (2020). This presumption of propriety is rebutted, however, where "the totality of the relevant facts gives rise to an inference of discriminatory purpose." Commonwealth v. Sanchez, 485 Mass. 491, 511 (2020), quoting Johnson v. California, 545 U.S. 162, 168 (2005). In that event the burden shifts to the party exercising the challenge to articulate a nondiscriminatory explanation for it. Mason, supra at 530. It is then for the judge to determine whether the explanation is both "adequate" and "genuine." Id.

Initially, we reject the defendant's argument that a pattern of improper exclusion had to be established before the judge could require defense counsel to explain his use of a peremptory challenge on juror 48.[4] The argument fails in light of the Supreme Judicial Court's recent decision in Sanchez, which clarifies that, at the first stage of the Batson-Soares[5] inquiry, judges must "examine carefully all of the relevant facts and circumstances" -- and need not necessarily find a pattern of improper exclusion -- to determine whether an inference of discrimination exists. Sanchez, 485 Mass. at 514.

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[4] The judge did not err by acting sua sponte. See Commonwealth v. LeClair, 429 Mass. 313, 322-323 (1999).

[5] See Batson v. Kentucky, 476 U.S. 79 (1986); Commonwealth v. Soares, 377 Mass. 461, cert. denied, 444 U.S. 881 (1979).

Whether the judge here was warranted under Sanchez in finding such an inference, and consequently in requiring defense counsel to articulate a race-neutral reason, is a question that has not been briefed, and we do not decide it.[6] Instead, for our purposes, we will assume that "because the judge asked for a reason . . . , the first phase of the analysis, i.e., rebutting the presumption that the peremptory challenge was proper, implicitly was satisfied." Mason, 485 Mass. at 530. See Commonwealth v. Robertson, 480 Mass. 383, 396 n.10 (2018); Commonwealth v. Curtiss, 424 Mass. 78, 81-82 (1997).

The defendant's second argument fares better. A judge is "obligated to make a specific determination or specific findings, in some form" regarding the adequacy and genuineness of an attorney's proffered reasons for a peremptory challenge. Commonwealth v. Benoit, 452 Mass. 212, 221 (2008). Where the

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[6] In Sanchez, 485 Mass. at 512, which was decided after the trial in this case, the court set out the following nonexhaustive list of factors relevant to the first stage of the analysis: "the number and percentage of group members who have been excluded from jury service due to the exercise of a peremptory challenge"; "any evidence of disparate questioning or investigation of prospective jurors"; "any similarities and differences between excluded jurors and those, not members of the protected group, who have not been challenged"; "whether the defendant or the victim are members of the same protected group"; and "the composition of the seated jury." Here, while it is undisputed that the defendant and juror 48 are both Hispanic, the record reveals little to nothing about the remaining factors.

judge fails to do so, "as an appellate court we must consider [the issues] more directly . . . , rather than confine ourselves to a review of the judge's findings." Id. at 223.

On the record before us here, we agree with the defendant that defense counsel's proffered reasons -- juror 48's familial connections to the Worcester Police Department, her statement that a defendant should testify as to his innocence, and her familiarity with and negative feelings toward the Kilby Street Gang -- were adequate to justify the peremptory challenge. These reasons were "clear and reasonably specific, personal to the juror and not based on the juror's group affiliation . . . , and related to the particular case being tried." Commonwealth v. Rosa-Roman, 485 Mass. 617, 636 (2020), quoting Commonwealth v. Maldonado, 439 Mass. 460, 464-465 (2003). See Commonwealth v. Torres, 453 Mass. 722, 731 (2009) ("a defendant may use a peremptory challenge to remove a juror with familial connections to law enforcement"). It is evident from the judge's comments that he nonetheless rejected defense counsel's explanation because juror 48 had stated that she could be fair and impartial. "Defense counsel, however, was not required to establish that the juror[] lacked impartiality" to properly exercise a peremptory challenge. Commonwealth v. Green, 420 Mass. 771, 777-778 (1995). "That is the kind of showing required for a challenge for cause." Id. at 778. Thus, we

conclude that the judge applied the wrong legal standard in assessing the adequacy of defense counsel's explanation.

The issue is controlled in all material respects by Green.[7] There, defense counsel sought to use peremptory challenges to remove two black jurors. When the prosecutor objected, defense counsel explained that one juror's sister-in-law had been the victim of a shooting and the other juror's father and brother were police officers. See Green, 420 Mass. at 774-775. Noting "somewhat of a pattern of knocking off black people from [the] jury," the judge found these reasons "not sufficient because the jurors unequivocally had stated that they could be impartial." Id. at 775, 777. The Supreme Judicial Court concluded that this was error because, while the "reasons might not have sufficed for a challenge for cause," they "were adequate to demonstrate that [defense counsel] did not peremptorily challenge the jurors on the basis of race." Id. at 778.

Similarly, in Commonwealth v. Roche, 44 Mass. App. Ct. 372, 374-375 (1998), the judge, acting sua sponte, denied defense counsel's attempt to use a peremptory challenge to remove the only black juror in the venire. Defense counsel had explained that he was challenging the juror because she was a nurse and,

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[7] One aspect of Green -- concerning the showing that must be made at the first stage of the Batson-Soares inquiry, see Green, 420 Mass. at 777 -- has been abrogated by Sanchez, 485 Mass. at 511. This does not affect our analysis.

given the nature of the evidence that the Commonwealth would offer, he did not want anyone with a medical background on the jury. See id. at 378-379. We determined that this was an adequate, race-neutral reason, noting that the judge never stated that he believed it to be a sham. See id. at 379 & n.5. Instead, the judge's comments suggested that his goal was "to construct a demographically representative jury," which was not a proper basis to reject the challenge. Id. at 379.

There is likewise nothing in the record before us to suggest that the judge found defense counsel's explanation to be a sham, i.e., not genuine. See Maldonado, 439 Mass. at 465 ("An explanation is genuine if it is in fact the reason for the exercise of the challenge" [emphasis omitted]). This case is not like those where the judge either expressly or implicitly found that the real reason for a defendant's peremptory challenge was race or some other impermissible consideration.[8] The judge here never stated that he disbelieved defense

[8] See, e.g., Commonwealth v. Oberle, 476 Mass. 539, 547 (2017) (judge "specifically found that the defendant's proffered explanation for the challenge was a pretext for keeping women off the jury"); Commonwealth v. Prunty, 462 Mass. 295, 309-310 (2012) (judge stated that explanation was "not bona fide, but rather [was] a mere sham"); Commonwealth v. LeClair, 429 Mass. 313, 322-323 (1999) (judge expressly found challenges to be race-based); Curtiss, 424 Mass. at 82 & n.4 (where judge "recognized his responsibility 'to make a judgment as to whether [the] challenge ha[d] a nonracial basis,'" his statements that he was "not convinced" and that explanation was "inappropriate" showed that he rejected explanation as not genuine).

counsel's explanation, and we cannot infer any such finding from the record. Rather, the judge's comments reflect that he rejected the explanation solely on the basis of inadequacy. See Commonwealth v. Oberle, 476 Mass. 539, 547 n.4 (2017) ("it is important that a judge make the required separate and specific findings as to the adequacy and genuineness of an explanation").

"An erroneous denial of a peremptory challenge is a structural error, requiring reversal without a showing of prejudice." Oberle, 476 Mass. at 545. See Commonwealth v. Bockman, 442 Mass. 757, 762 (2004); Green, 420 Mass. at 776, 778. Thus, because the finding on inadequacy was erroneous, and absent a finding on lack of genuineness, we conclude that the disallowance of the peremptory challenge was reversible error, entitling the defendant to a new trial.

2. Sufficiency of the evidence. We address the defendant's sufficiency arguments for purposes of determining whether he may be retried. Viewing the evidence in the light most favorable to the Commonwealth, see Commonwealth v. Ayala, 481 Mass. 46, 51 (2018), we conclude that the evidence was sufficient to support all of the convictions.

a. Deriving support from prostitution. General Laws c. 272, § 7, provides that "[w]hoever, knowing a person to be a prostitute, shall live or derive support or maintenance, in whole or in part, from the earnings or proceeds of his

prostitution . . . or shall share in such earnings, proceeds or moneys, shall be punished." To sustain the convictions under this statute, the Commonwealth had to prove that the defendant "knowingly and intentionally" profited from the prostitution of another. Commonwealth v. Brown, 481 Mass. 77, 83-84 (2018).

The evidence was sufficient to establish that the defendant knew that the women involved in the operation were engaged in prostitution. The defendant discussed the operation with Alberini and on multiple occasions was in the hotel rooms where the women talked openly about their "dates" in the defendant's presence. Furthermore, the jury could have found that the defendant profited and intended to profit from the operation. The defendant supplied the drugs that were given to the women and received money in return. He also gave Elvin and Alberini rides to the hotel, drove one woman to an "outcall," and rented a hotel room for the operation. This was sufficient to permit a jury to conclude that the defendant had the requisite intent to profit. See Brown, 481 Mass. at 79; Commonwealth v. Matos, 78 Mass. App. Ct. 578, 589-590 (2011).

b. Trafficking of a person for sexual servitude. General Laws c. 265, § 50 (a), provides in relevant part that:

> "Whoever knowingly: (i) subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person to engage in commercial sexual activity . . . or

> causes a person to engage in commercial sexual activity . . . or (ii) benefits, financially or by receiving anything of value, as a result of a violation of clause (i), shall be guilty of the crime of trafficking of persons for sexual servitude."

"Commercial sexual activity" is defined as "any sexual act on account of which anything of value is given, promised to or received by any person." G. L. c. 265, § 49. The statute requires neither force nor coercion; "[t]he clear and deliberate focus of the statute is the intent of the perpetrator, not the means used by the perpetrator to accomplish his or her intent." Commonwealth v. McGhee, 472 Mass. 405, 415 (2015). See Commonwealth v. Dabney, 478 Mass. 839, 853-854 (2018).

The jury here could have found that the defendant knowingly "enticed" and "recruited" B.H.[9] to engage in prostitution, given that he supplied the drugs that were the payment and incentive for B.H. to participate in the operation. The jury could also have found that the defendant assisted the operation in various ways that facilitated its continuation, knowing that this would result in B.H's "anticipated engagement in commercial sexual activity." McGhee, 472 Mass. at 417. See Dabney, 478 Mass. at 854 ("The jury could have found that the defendant 'enticed' and 'recruited' the victim to engage in prostitution because he told

[9] Of five charges of human trafficking, the defendant was convicted only on the charge relating to a woman with the initials B.H.

her that she was beautiful and would make 'good money' from prostitution, controlled the terms of her client visits, encouraged her to advertise on Backpage, and helped her pay for and set up the Backpage account"). Moreover, though a defendant need not benefit financially to be guilty of human trafficking, see McGhee, supra, there was evidence here to support a conclusion that the defendant did in fact so benefit. The evidence as a whole was thus sufficient to support the conviction.[10]

3. Other issues. Because certain issues are likely to recur on retrial, we address them briefly.[11] Notwithstanding our discussion, in any retrial, the judge may consider these issues anew in light of the evidence presented.

First, the judge acted within his discretion by admitting evidence that the defendant was associated with the Kilby Street Gang. The Supreme Judicial Court "repeatedly ha[s] held that evidence of gang affiliation is admissible to show motive or joint venture, and ha[s] given deference to judges' determinations in that regard." Commonwealth v. Swafford, 441

[10] To the extent the defendant argues that we must assess separately the evidence as to principal and joint venture liability, that argument is foreclosed by Commonwealth v. Zanetti, 454 Mass. 449, 468 (2009).

[11] We do not address the remaining issues because they are not likely to recur or to recur in the same context on retrial.

Mass. 329, 332 (2004). See Commonwealth v. Smith, 450 Mass. 395, 399 (2008), cert. denied, 555 U.S. 893 (2008). As the case was presented, the evidence of gang affiliation was relevant to whether the defendant was engaged in a joint venture with the other participants in the operation, and it was within the judge's discretion to admit the evidence after weighing the probative value against its prejudicial effect. See Commonwealth v. John, 442 Mass. 329, 337-338 (2004); Commonwealth v. Correa, 437 Mass. 197, 201 (2002). The judge also appropriately "limited any prejudicial effect of the evidence concerning the defendant's gang affiliation . . . by providing strong limiting instructions to the jury." Commonwealth v. Phim, 462 Mass. 470, 477-478 (2012). See Commonwealth v. Smiley, 431 Mass. 477, 484 (2000).

Second, the judge acted within his discretion by admitting a hotel surveillance video in evidence after finding it to be properly authenticated. The authentication requirement is met when there is sufficient evidence, "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). Here, an officer testified that he met with the hotel manager, went to where the surveillance system was located, and, together

with the manager, searched the system for particular files and copied them to a flash drive; he then copied the files from the flash drive to a compact disc, which was provided to the prosecution. This foundational testimony supported the judge's finding that, because the officer was "directed to the source of the surveillance video which was kept under the control of that hotel" and "the management was in a position of pointing out the specific files that dealt with the [relevant] timeframe," "a reasonable fact finder could conclude this evidence is what the proponent claims it to be; that is, surveillance video of the particular hotel." See Commonwealth v. Siny Van Tran, 460 Mass. 535, 546 (2011); Commonwealth v. Leneski, 66 Mass. App. Ct. 291, 295 (2006).

Finally, the judge did not err by failing to give a specific unanimity instruction. There is no merit to the defendant's argument that principal liability and joint venture liability are alternate theories of guilt, necessitating a specific unanimity instruction. See Commonwealth v. Zanetti, 454 Mass. 449, 464 (2009). Nor was the judge required to instruct the jury that they had to be unanimous as to which specific act constituted each charged offense. Such an "instruction is required only if there are separate events or episodes and the jurors could otherwise disagree concerning which act a defendant committed and yet convict him of the crime

charged." Commonwealth v. Thatch, 39 Mass. App. Ct. 904, 904-905 (1995). It is not required where, as here, "the facts show a continuing course of conduct, rather than a succession of clearly detached incidents." Id. at 905. See Commonwealth v. Wadlington, 467 Mass. 192, 207 (2014); Commonwealth v. Steed, 95 Mass. App. Ct. 463, 469-470 (2019).

Conclusion. The convictions of deriving support from prostitution and human trafficking are reversed, the verdicts are set aside, and the matter is remanded for a new trial on those charges.

So ordered.