19-P-1783 Appeals Court

COMMONWEALTH vs. BAIRON UBEDA.

No. 19-P-1783.

Hampden. March 19, 2021. – May 18, 2021.

Present: Vuono, Hanlon, & Shin, JJ.

Obscenity, Child pornography. Rape. Child Abuse. Trafficking. Extortion. Larceny. Assault and Battery. Practice, Criminal, Trial of indictments together, Instructions to jury, Identification of defendant in courtroom, Hearsay, Required finding. Evidence, Prior misconduct, Photograph, Hearsay, Information stored on computer.

Indictments found and returned in the Superior Court Department on March 15, 2016.

The cases were tried before John S. Ferrara, J.

Chaleunphone Nokham for the defendant.
Cynthia Cullen Payne, Assistant District Attorney, for the Commonwealth.

SHIN, J. After a jury trial, the defendant was convicted on multiple indictments charging aggravated rape and abuse of a child, posing or exhibiting a child in a state of nudity, disseminating child pornography, trafficking of a person for

sexual servitude, extortion by threat of injury, larceny over $250, assault and battery, and trafficking of a person under eighteen years of age for sexual servitude. The convictions stemmed from offenses committed against an adult victim, Rachel, and a child victim, Karen.[1] On appeal the defendant challenges the denial of his motion to sever the indictments related to Rachel from those related to Karen; the admission of prior bad act evidence, out-of-court identifications, and a police officer's testimony about the content of cell phone extraction reports; and the sufficiency of the evidence supporting the convictions of disseminating child pornography. We affirm.

Background. The jury could have found the following facts.

1. Rachel. At all relevant times, Rachel lived at a particular address in Holyoke (Holyoke address). In 2014 someone named Crystal, whom Rachel did not know, reached out to Rachel through Facebook. Crystal described a lucrative modeling opportunity and told Rachel to send photographs of herself, including nude ones. After Rachel did so, Crystal sent her a message stating that Rachel "could meet the boss." Crystal arranged for Rachel and "the boss" to meet at an apartment in Springfield.

[1] The victims' names are pseudonyms. See G. L. c. 265, § 24C.

When Rachel arrived at the apartment, a man -- later identified by Rachel as the defendant[2] -- was there alone. The defendant told Rachel that she would have to "do eight tryouts" before she received any money, and he took photographs of her in lingerie that he provided. Rachel then signed a contract and left.

Soon thereafter, the defendant sent Rachel a text message asking what she thought about the meeting. When Rachel indicated that she was having second thoughts, the defendant replied that she would have to pay him $8,000 if she did not comply with the contract. This led Rachel to meet with the defendant again. At this meeting the defendant told Rachel that she would have to clean his house, do his laundry, give him money, and have sex with him to pay off the contract. The defendant also took nude photographs of Rachel and threatened that, if she did not "follow through with [her] obligations," he would take her to court and publish the photographs, which could cause her to lose custody of her son.

From that point on until February 2016, Rachel regularly cleaned the defendant's house, did his laundry, and had sex with him while he took photographs and made video recordings (video).

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[2] Identity was not a disputed issue with respect to the charges involving Rachel.

Rachel also paid the defendant around $800 every two weeks and gave him her food assistance benefits card as extra payment. In addition, the defendant demanded a key to Rachel's apartment and occasionally ordered her to leave for a few hours at a time. One of the cell phone numbers that the defendant used to communicate with Rachel ended with 7313 (7313 number)

2. Karen. In January 2016 someone named Crystal, whom Karen did not know, contacted Karen through Facebook. Crystal described a lucrative modeling opportunity and said she was looking for someone sixteen to twenty-one years old. Karen, then fifteen years old, represented that she was seventeen. Crystal told Karen to send photographs of herself, including nude ones. After Karen did so, Crystal asked for Karen's cell phone number to give to "the boss."

A man who identified himself as "Mr. Noah" then called Karen. They spoke for approximately twenty minutes about the modeling job and arranged to meet that evening in Holyoke. Karen was late to the meeting, causing "Noah" to send a text message stating that Karen "was wasting his time, and that he was going to get another young girl." When Karen replied that she "was going to do it," "Noah" called her with directions to the apartment, stating that the door would be open.

The apartment was dark when Karen arrived. She stepped inside, and a man came in behind her and locked the door. He

pushed Karen up the stairs, took her to a dark room, and removed her clothes "[a]ggressively" when she refused to disrobe. The man said he was going to make a video and ordered Karen to state her name, the date, and that she was there of her own free will. When Karen did not comply to the man's satisfaction, he threatened to publish her nude photographs. He then recorded a second video. Karen recognized the man's voice from the two cell phone conversations she had with "Noah" earlier that evening.

After recording the second video, the man took nude photographs of Karen. He then grabbed her by the hair and forced her to take his penis in her mouth. Next, he put on a condom, told Karen to get on her hands and knees, and put his penis in her vagina. When he was finished, he told Karen that she could leave.

Shortly after Karen left the apartment, the man came outside, and Karen got a "clear[]" look at his face. Karen accepted his offer to drive her home because she "wanted to see . . . what he looked like." After Karen got out of the car, she sent a text message to "Noah" asking him not to post her nude photographs. He replied that he was going to post them because she "hadn't done anything he wanted [her] to do" and "hadn't had sex with him in the way that he wanted [her] to." Karen saved

the phone number as a contact in her cell phone and assigned the name "Ewwww" to it.

The next day, Karen received a text message, from a cell phone number she did not recognize, stating that she would be well paid if she "did what they wanted"; the text message also included a photograph of a hand holding money. A few days later, Karen received two photograph collages via text message.[3] Each collage contained six nude photographs of Karen -- some were the photographs that Karen sent to Crystal, and others were the ones taken at the apartment in Holyoke.

3. The investigation. On February 6, 2016, Karen and her mother met with Holyoke Police Officer Keith Williams. Karen provided a written statement, described the area where the assault occurred, and showed Williams the two collages on her cell phone. Karen pointed out the "Ewwww" contact on her phone, and Williams observed that the corresponding phone number was the 7313 number. Based on the information that Karen provided, Williams identified the defendant as a person of interest. Williams also determined that the assault likely took place at the Holyoke address.

On February 18, 2016, Holyoke Police Detective Jennifer Sattler showed Karen a photographic array. Karen selected the

[3] Karen could not remember the phone number from which these text messages were sent.

defendant's photograph but wrote on it in Spanish, "This could be him, but I am not sure." On February 24, 2016, Sattler showed Karen a second photographic array. Karen again selected the defendant's photograph, writing on it in Spanish, "In this picture he looks young, but it looks a bunch like him."

On February 25, 2016, Sattler and Williams interviewed the defendant and found Rachel's license and food assistance benefits card in his wallet. The defendant admitted he had keys to Rachel's apartment, although he claimed he had lost them three months earlier. He also confirmed that the 7313 number was his cell phone number.

After interviewing the defendant, Sattler and another officer went to the Holyoke address. With Rachel's consent, the officers photographed her bedroom and collected her bedding to see if it matched the bedding that appeared in the photographs of Karen. The photographs of the bedroom were admitted in evidence at trial.

Police extracted data from the defendant's and Karen's cell phones, using a "Cellebrite" device. The extraction report obtained from Karen's cell phone contained images of the two collages and the text messages between Karen and the 7313 number. The extraction report obtained from the defendant's phone contained images of the collages, forty-three photographs

and a video of Karen, and the photograph of the hand holding money.

Discussion. 1. Joinder. Under Mass. R. Crim. P. 9 (a) (1), 378 Mass. 859 (1979), offenses are related and properly joined "if they are based on the same criminal conduct or episode or arise out of a course of criminal conduct or series of criminal episodes connected together or constituting parts of a single scheme or plan." In determining whether offenses are related, judges may consider, among other factors, "the factual similarities between the offenses" and whether they "were near to each other in time or place." Commonwealth v. Gray, 465 Mass. 330, 335, cert. denied, 571 U.S. 1014 (2013). "The propriety of joinder is a matter for the trial judge's discretion." Commonwealth v. Sullivan, 436 Mass. 799, 803 (2002).

We discern no abuse of discretion in the trial judge's determination that the offenses in this case were connected by a "pattern of conduct." The defendant used the same distinctive method to contact the victims, i.e., through Facebook messages from someone named, or posing as, Crystal; he used the same guise of a modeling opportunity to trick the victims into sending nude photographs; and he threatened to publish the photographs if the victims did not have sex with him. The offenses were also near to each other in time, and they were

connected by place in that there was evidence from which the jury could find that the defendant assaulted Karen in Rachel's apartment. Given these factual similarities, the judge was well within his discretion in joining the offenses. See Commonwealth v. Pillai, 445 Mass. 175, 181 (2005) (despite some factual variations, judge permissibly found that "offenses were related because they showed a common pattern of operation").

Furthermore, the defendant has not demonstrated that undue prejudice resulted from the joinder. See Commonwealth v. Gaynor, 443 Mass. 245, 260 (2005) (defendant must show that "prejudice from joinder was so compelling that it prevented him from obtaining a fair trial"). The question of prejudice in this context "turns largely on whether evidence of the other offenses would have been admissible at a separate trial on each indictment." Commonwealth v. Zemtsov, 443 Mass. 36, 45 (2004). Here, given the similarities in the manner in which the victims met the defendant, and the connection in time and place, the evidence of the other offenses would have been admissible "not only to show a common pattern of conduct, but also 'to corroborate[] the victim[s'] testimony' and 'render[] it not improbable that the acts charged might have occurred.'" Pillai, 445 Mass. at 183, quoting Commonwealth v. King, 387 Mass. 464, 472 (1982). The evidence would also have been admissible on the issues of identity and motive. See Commonwealth v. Leonard, 428

Mass. 782, 787-788 (1999). The defendant has thus failed to demonstrate undue prejudice from the joinder.

2. Prior bad acts. For similar reasons the judge did not err in admitting the bad acts evidence. The witness in question, Helen (a pseudonym), testified that in August 2015 someone named Crystal contacted her through Facebook, describing a lucrative modeling opportunity and directing Helen to send nude photographs. Once Helen did so, Crystal arranged for her to meet the "boss," whom the jury could have found to be the defendant. The defendant told Helen to meet him at the Holyoke address. There, the defendant filmed the two of them having sex and then told Helen that she would have to keep having sex with him to get paid. After Helen said she was not interested in that arrangement, the defendant sent her an e-mail containing her nude photographs.

The judge concluded that Helen's testimony was admissible because it "was indicative of . . . a pattern of conduct" and not too remote in time. This was not an abuse of discretion. The evidence was probative on the issues of motive, identity, and pattern of operation, and the judge permissibly determined that its probative value was not outweighed by the risk of unfair prejudice to the defendant. See Commonwealth v. Veiovis, 477 Mass. 472, 481-482 (2017). To the extent the defendant contends that the judge applied the wrong balancing test, his

argument is misplaced. The judge correctly observed that bad acts evidence is inadmissible if its probative value is outweighed -- even if not substantially outweighed -- by the risk of unfair prejudice, which is "a more exacting standard . . . than the standard applicable to other evidence." Commonwealth v. Crayton, 470 Mass. 228, 249 n.27 (2014).

We also reject the defendant's argument that the absence of a limiting instruction requires reversal. Defense counsel stated twice that he did not want the instruction, even after the judge explained that it is "designed to aid the defense." The judge was not required to give the instruction against the wishes of defense counsel. See Commonwealth v. Sullivan, 436 Mass. at 809. Moreover, given the strength of the Commonwealth's case, the lack of an instruction did not result in a substantial risk of a miscarriage of justice. See id.

3. Out-of-court identifications. Rachel, Karen, and Helen each selected the defendant's photograph from an array with varying degrees of certainty.[4] The defendant challenges the admission of the photographic identifications, arguing generally that their probative value was substantially outweighed by the

[4] The judge found that Karen's and Helen's identifications were not unequivocal and thus precluded the Commonwealth from eliciting in-court identifications from those witnesses. See Commonwealth v. Collins, 470 Mass. 255, 265 (2014).

risk of unfair prejudice. But the defendant does not claim that the identification procedures used by the police were unnecessarily suggestive, and he articulates no other reason that would require exclusion of the identifications, which were plainly probative on the issue of identity. See Commonwealth v. Cruz, 445 Mass. 589, 592-593 (2005). Although Karen and Helen were less than unequivocal in their identifications, that went to the weight of the evidence, which was a question for the jury. See id. at 596. There was no abuse of discretion.

4. Cell phone extraction reports. Williams reviewed the extraction reports obtained from Karen's and the defendant's cell phones and testified as to their content.[5] The defendant challenges Williams's testimony solely on the ground that it was inadmissible hearsay. Specifically, the defendant contends that the judge should have excluded Williams's testimony that both extraction reports contained images of the collages and that the extraction report from the defendant's cell phone contained images of forty-three photographs and a video of Karen.[6]

[5] The reports themselves were not admitted in evidence.

[6] The defendant also argues that the judge improperly allowed Williams to testify that the extraction reports led him to the defendant as a person of interest. Williams did not so testify, however. Rather, his testimony was that he identified the defendant as a person of interest based on the information provided by Karen and an online investigation.

We agree with the Commonwealth's assertion, uncontested by the defendant, that the extraction reports are "computer-generated records," which do not implicate the rule against hearsay. Commonwealth v. Woollam, 478 Mass. 493, 498 (2017), cert. denied, 138 S. Ct. 1579 (2018). Records "generated solely by electrical or mechanical operation of computer[s]" do not, "[a]s a matter of evidence law, . . . contain a statement from a person, and . . . do not raise hearsay concerns." Id. Here, a detective testified that the human input required to create the extraction reports essentially amounted to plugging each cell phone into the Cellebrite device, which then retrieved the data on the cell phones and generated a file. Because the extraction reports were thus produced by the machine, they are not statements for purposes of the hearsay rule. Cf. id. ("no legal basis to object to the [cell phone] call logs on hearsay grounds"). See People v. Abad, 2021 COA 6, pars. 55-56 (Colo. Ct. App. 2021) (extraction reports generated using Cellebrite software not hearsay because "reports were produced automatically without human intervention"); Gayle v. State, 216 So. 3d 656, 659 (Fla. Dist. Ct. App. 2017) (extraction report not hearsay because "created by a machine that extracted the messages from the victim's phone").

Nor did Williams testify as to any hearsay contained within the extraction reports. Cf. Commonwealth v. Hobbs, 482 Mass.

538, 558 (2019) (each level of multilayered hearsay analyzed separately to determine admissibility). As the Commonwealth argues, and we agree, the photographs and the still image of the video are not statements, and therefore not hearsay. See Commonwealth v. Thornley, 400 Mass. 355, 361 (1987), S.C., 406 Mass. 96 (1989). See also Mass. G. Evid. § 801(a) (2021) ("[s]tatement" is "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion"); United States v. Clotaire, 963 F.3d 1288, 1295 (11th Cir. 2020), cert. denied, S. Ct. (2021) ("Still frame pictures are not statements"); United States v. Lizarraga-Tirado, 789 F.3d 1107, 1109 (9th Cir. 2015) ("a photograph isn't hearsay because it makes no 'assertion'"). Again, the defendant makes no claim otherwise. He has thus failed to show that the judge abused his discretion in admitting Williams's testimony.

5. Sufficiency of the evidence. The defendant argues that the Commonwealth failed to prove two elements of the crime of disseminating child pornography: dissemination and lascivious intent. See G. L. c. 272, § 29B (a). In considering the defendant's arguments, we "view[] the evidence in the light most favorable to the Commonwealth" to determine whether "any rational trier of fact could have found the . . . elements of

the crime[] beyond a reasonable doubt." Commonwealth v. Ayala, 481 Mass. 46, 51 (2018).

There was sufficient evidence to prove the element of dissemination. "Disseminate" is defined by statute as "to import, publish, produce, print, manufacture, distribute, sell, lease, exhibit or display." G. L. c. 272, § 31. Here, the jury could have found that the defendant created the collages of the nude photographs of Karen and then sent them to her by text message. This was sufficient to establish that the defendant disseminated the materials. Although the defendant argues that dissemination requires publication to a broad audience, the statute contains no such limitation, and we will not "add language to a statute where the Legislature itself has not done so." Commonwealth v. Mansur, 484 Mass. 172, 176 (2020), quoting Tze-Kit Mui v. Massachusetts Port Auth., 478 Mass. 710, 712 (2018). See Commonwealth v. Dodgson, 80 Mass. App. Ct. 307, 311 (2011) (defendant disseminated photograph within meaning of G. L. c. 272, § 31, by transmitting it during private instant message conversation). We also reject the defendant's argument that dissemination requires receipt by a third party, i.e., someone other than the subject of the materials. The defendant claims in essence that no dissemination occurred because Karen was a willing model who participated in the manufacture and distribution of the materials. Contrary to the defendant's

assertion, this is not a reasonable inference from the evidence. Furthermore, G. L. c. 272, § 29B (d), provides that, "[i]n a prosecution under this section, a minor shall be deemed incapable of consenting to any conduct of the defendant for which said defendant is being prosecuted."

There was likewise sufficient evidence to prove the element of lascivious intent. "Lascivious intent" is defined by statute as "a state of mind in which the sexual gratification or arousal of any person is an objective." G. L. c. 272, § 31. This can be shown in several ways, including through proof that "the circumstances include sexual behavior, sexual relations, . . . or sexually oriented displays," that "the focal point of a visual depiction is the child's genitalia, pubic area, or breast area of a female child," or that "the depiction is of a child engaging in or being engaged in sexual conduct, including . . . masturbation . . . or lewd exhibition of the genitals." Id. Given the graphic sexual nature of the photographs in this case, which included photographs of Karen engaging in masturbation and lewd exhibition of the genitals, the jury could have found that "the defendant had his own sexual gratification as an objective" in creating and sending the collages to Karen. Commonwealth v. Molina, 476 Mass. 388, 405-406 (2017) (sufficient proof of lascivious intent where defendant shared files showing children in state of nudity and engaging in sexual conduct). That the

defendant might also have intended to blackmail or embarrass Karen does not render the evidence insufficient, as the defendant argues. So long as there is proof that sexual gratification or arousal is "an objective," the element of lascivious intent is satisfied. Id. at 405, quoting G. L. c. 272, § 31.

Judgments affirmed.