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19-P-193 Appeals Court

COMMONWEALTH vs. DEREK GAUGHAN.

No. 19-P-193.

Bristol. October 1, 2020. - January 14, 2021.

Present: Green, C.J., Ditkoff, & Hand, JJ.

Sex Offender. Practice, Civil, Civil commitment, Sex offender, Instructions to jury. Evidence, Qualification of expert witness, Sex offender.

Civil action commenced in the Superior Court Department on March 13, 2017.

The case was tried before Renee P. Dupuis, J.

Harry L. Miles for the defendant.
Mary E. Lee, Assistant District Attorney, for the Commonwealth.

HAND, J. Following a jury trial in the Superior Court, and pursuant to G. L. c. 123A, § 12 (statute), the defendant, Derek Gaughan, was adjudged a sexually dangerous person (SDP) and committed to the Massachusetts Treatment Center for an indeterminate period of from one day to life. At trial, Dr.

Gregg Belle and Dr. Katrin Weir testified as "qualified examiners" (QEs) for the purposes of the statute. See G. L. c. 123A, § 1. Both Dr. Belle and Dr. Weir opined that the defendant was an SDP, although their diagnoses of the defendant's "mental abnormality or personality disorder" differed in some respects. On appeal, the defendant assigns error to three aspects of the judge's conduct of the trial.[1] First, he argues that the Commonwealth failed to lay the necessary foundation for Dr. Belle's and Dr. Weir's qualifications as QEs, and that the judge abused her discretion in permitting them to testify in that capacity. Second, he contends that the judge erred in instructing the jury on one of the three essential elements of the SDP determination. Third, the defendant argues that the differences in diagnoses underpinning the two QEs' opinions required the judge to give a specific unanimity instruction, notwithstanding the experts' identical conclusions that the defendant was an SDP. Concluding that the judge did not abuse her discretion in permitting Dr. Belle and Dr. Weir to testify as QEs, and that the judge correctly instructed the jury, we affirm.

Background. The procedural history of the case is not disputed, and there is no disagreement about the state of the

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[1] None of these arguments was raised before the trial judge.

evidence or the substance of the judge's jury instructions. We summarize the salient points here, reserving certain facts for later discussion.

In 2015, the defendant was convicted in the Taunton District Court of two crimes falling within the statute's definition of a "sexual offense" -- dissemination of obscene material to a minor and possession of child pornography.[2] G. L. c. 123A, § 1. The sentencing judge imposed a split sentence of two and one-half years in the house of correction with nine months to serve and the balance suspended for a period of probation; his probation was later revoked and the balance of the sentence imposed.

The statute requires the "agency with jurisdiction of a person who has ever been convicted of . . . a sexual offense as defined in [G. L. c. 123A, § 1,] . . . [to] notify in writing the district attorney of the county where the offense occurred . . . prior to the release of such person." G. L. c. 123A, § 12 (a). Where the district attorney "determines that the prisoner . . . is likely to be a[n SDP][3] . . . the district

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[2] The defendant had also been convicted, in the Superior Court, on charges including three counts of indecent assault and battery on a child under the age of fourteen, G. L. c. 265, § 13B.

[3] The statute defines "sexually dangerous person" to include "any person who has been (i) convicted of . . . a sexual offense and who suffers from a mental abnormality or personality

attorney . . . may file a petition" in the Superior Court seeking the offender's classification as an SDP. G. L. c. 123A, § 12 (b). Here, prior to the defendant's planned release from the Bristol County house of correction on July 6, 2017, the sheriff provided the required notice to the Bristol County district attorney of the defendant's upcoming release from custody; in March, 2017, the district attorney petitioned the Superior Court for the defendant's commitment as an SDP. See G. L. c. 123A, § 12 (b).

Acting on the petition, a judge of the Superior Court found probable cause to believe the defendant was an SDP, see G. L. c. 123A, § 12 (c), and so committed him temporarily "for the purpose of examination and diagnosis under the supervision of two [QEs],"[4] charged with assessing [the defendant's] sexual

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disorder which makes the person likely to engage in sexual offenses if not confined to a secure facility; . . . or (iii) previously adjudicated as such by a court of the [C]ommonwealth and whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive sexual misconduct by either violence against any victim . . . and who, as a result, is likely to attack or otherwise inflict injury on such victims because of his uncontrolled or uncontrollable desires." G. L. c. 123A, § 1.

[4] Section 1 of the statute defines "qualified examiner" to include "a [licensed] psychologist," provided the individual meets criteria including the requirement that "the examiner has had two years of experience with diagnosis or treatment of sexually aggressive offenders." G. L. c. 123A, § 1.

dangerousness and "fil[ing] with the court a written report of the examination and diagnosis and their recommendation of the disposition of the person named in the petition." G. L. c. 123A, §§ 1, 13 (a).

Dr. Belle and Dr. Weir, acting as QEs, each met with the defendant prior to trial. Having done so, each of them prepared and filed a report with the court detailing their respective examinations and diagnoses of the defendant, along with their recommendations for disposition. See G. L. c. 123A, § 13 (a). Dr. Belle and Dr. Weir both opined that the defendant met the requirements for classification as an SDP, although they differed in the details of their diagnoses. More specifically, Dr. Belle opined that "[the defendant's] constellation of behaviors is indicative of a diagnosable mental abnormality, namely, [o]ther [s]pecified [p]araphilic [d]isorder . . . . [I]n my opinion, [the defendant] also has a statutorily defined personality disorder best characterized as [o]ther [s]pecified [p]ersonality [d]isorder . . . . [The defendant] is likely to reoffend sexually and therefore is a[n SDP]." Dr. Weir opined that the defendant "meets the diagnostic criteria for [p]edophilic [d]isorder," "meets the statutory definition for [m]ental [a]bnormality . . ., [and] is likely to reoffend sexually if released," concluding, "[The defendant] meets statutory criteria as a[n SDP]."

The case was tried over six days in July, 2018. At trial, the Commonwealth elicited testimony from both Dr. Belle and Dr. Weir about their credentials, including their qualifications as QEs. Both witnesses explained the basis of their respective opinions that the defendant was an SDP, including the details of and reasons for their individual diagnoses of the defendant's "mental abnormality [or] personality disorder."[5] G. L. c. 123A, § 1. The defendant did not challenge either Dr. Belle's or Dr. Weir's qualifications as a QE.

In her final instructions, the judge explained to the jury, inter alia, the essential elements of an SDP classification, see Commonwealth v. Fay, 467 Mass. 574, 580, cert. denied, 574 U.S. 858 (2014), citing G. L. c. 123A, §§ 1, 14, including a summary of the Commonwealth's burden of proving mental abnormality or personality disorder and, as we shall discuss, lack of control. Additionally, the judge correctly instructed the jury that they could not return a verdict of sexual dangerousness unless they credited at least one QE and their verdict was unanimous.[6] The

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[5] Each QE's testimony in this regard was consistent with the opinion included in that QE's pretrial report concerning the defendant.

[6] On this point, the judge told the jury, "In sum, you may not find that the Commonwealth has proved that Mr. Gaughan is currently a sexually dangerous person unless you credit the opinion of at least one qualified examiner . . . . [Y]our verdict in this case must be unanimous. To find Mr. Gaughan is

judge was not asked to and did not give a specific unanimity instruction requiring all jurors to credit the testimony of the same QE, or both QEs, as a prerequisite to a unanimous verdict.

Ultimately, the jury returned a verdict that the defendant was an SDP; on that basis, the judge ordered the defendant to be committed for a period of from one day to life. This appeal followed.

Discussion. 1. Qualifications of "qualified examiners." We begin by considering the defendant's argument that the Commonwealth failed to satisfy its burden of demonstrating that Dr. Belle and Dr. Weir were QEs for the purposes of G. L. c. 123A, § 1, and that the judge therefore abused her discretion in permitting each of them to testify as such. Because the defendant failed to preserve any of the claims raised on appeal at trial, they are waived. See Commonwealth v. George, 477 Mass. 331, 335 n.3 (2017). Nonetheless, to the extent that the judge erred, we review for a substantial risk of a miscarriage of justice. Id.

At trial, Dr. Belle and Dr. Weir each testified to their licensure and extensive experience, which the defendant concedes, in the field of psychology and as testifying QEs, as

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a sexually dangerous person, you must have a unanimous agreement on that determination amongst the deliberating jurors."

well as their years of work with SDPs and those with mental illness. Dr. Belle testified that he had a doctorate in clinical psychology, had been a licensed psychologist in the Commonwealth for fourteen years and a QE for twelve years, and was a member of the Community Access Board (CAB) responsible for, among other tasks, conducting annual reviews of the current sexual dangerousness of committed SDPs.[7] See G. L. c. 123A, § 6A. He testified that he was a designated forensic psychologist (DFP), trained to conduct court-ordered evaluations, and that in the twelve years preceding the trial, he had completed approximately 300 QE evaluations and testified as a QE approximately 240 times.

Dr. Weir, in turn, testified that she was a licensed psychologist in the Commonwealth with twenty-three years' experience as a DFP. She testified that she had been a QE since 1999 and had completed "several thousand" examinations as a QE. Dr. Weir offered testimony regarding her years of experience treating sex offenders specifically, and her work as a member of the CAB.

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[7] The CAB is a five-person body appointed by the commissioner of correction. See G. L. c. 123A, § 6A. Its responsibilities include conducting annual reviews of the current sexual dangerousness of persons committed as SDPs. See G. L. c. 123A, § 6A.

On appeal, the defendant argues that because neither Dr. Belle nor Dr. Weir testified explicitly to having "diagnos[ed] or treat[ed] . . . sexually aggressive offenders," G. L. c. 123A, § 1, the judge abused her discretion in permitting them to testify as QEs. See LeSage, petitioner, 76 Mass. App. Ct. 566, 571-572 (2010) (under c. 123A, qualification of expert to testify within discretion of trial judge, guided by statute's requirements). We are not persuaded.

The statute does not define the term "sexually aggressive offender." Considering the term as it is used in the statute, however, and consistent with the statute's purpose -- "to protect forthwith the vulnerable members of our communities from sexual offenders," Commonwealth v. McLeod, 437 Mass. 286, 291 (2002), quoting St. 1999, c. 74, emergency preamble -- we agree with the Commonwealth that the term "sexually aggressive offender" includes SDPs. See Modica v. Sheriff of Suffolk County, 477 Mass. 102, 104 (2017), quoting Commonwealth v. Bell, 442 Mass. 118, 124 (2004) ("When a statute does not define its words we give them their usual and accepted meanings, as long as these meanings are consistent with the statutory purpose"). Dr. Belle's and Dr. Weir's testimony about their extensive experience in conducting SDP examinations permitted the judge to infer that both witnesses had, at a minimum, the required experience in "diagnos[ing]" sexually aggressive offenders. See

G. L. c. 123A, § 13 (a) (requiring pretrial "examination and diagnosis" of subject of SDP petition). Cf. LeSage, 76 Mass. App. Ct. at 572 (Commonwealth failed to establish QE met statutory requirements because QE had only approximately three months' experience with "sexual dangerousness" diagnosis or treatment).

2. Jury instructions. The defendant's remaining challenges are to the jury instructions. As the claimed errors were not preserved, we again review any errors for a substantial risk of a miscarriage of justice. See George, 477 Mass. at 335 n.3.

a. "Serious difficulty" controlling behavior. We consider first the defendant's argument that the judge erred in instructing the jury on the elements of an SDP determination. To establish that a person is "sexually dangerous" for the purposes of G. L. c. 123A, the Commonwealth must prove beyond a reasonable doubt that the defendant (1) "has been convicted of a sexual offense"; (2) "suffers from a [statutorily-defined] mental abnormality or personality disorder that renders him a menace to the health and safety of others"; and (3) "is likely to engage in sexual offenses if not confined." Fay, 467 Mass. at 580, citing G. L. c. 123A, §§ 1, 14. The defendant argues that the judge improperly instructed the jury on the second of these elements.

In her final instructions to the jury, the judge summarized the Commonwealth's burden of proving lack of control, explaining that "the Commonwealth must prove beyond a reasonable doubt that [the defendant] has a mental condition that causes him, at a minimum, serious difficulty in controlling his sexual behavior at the present time" (emphasis added).[8] Although the defendant approved the instructions at the time of trial, on appeal he argues that the judge's inclusion of "serious difficulty" in the instructions amounted to reversible error because those words do not appear in the statute's definition of "personality disorder." See G. L. c. 123A, § 1. We do not agree.

As the Commonwealth argues, the Supreme Judicial Court foreclosed the defendant's argument when, in affirming the constitutionality of SDP commitments, it ruled that "[t]he requirement in G. L. c. 123A of a 'general lack of power to control' is analogous to [the Federal minimum standard of proof in SDP proceedings], that the State demonstrate 'a serious difficulty' in controlling behavior." Dutil, petitioner, 437 Mass. 9, 17-18 (2002), quoting Kansas v. Crane, 534 U.S. 407, 413 (2002). See Chapman, petitioner, 482 Mass. 293, 298 (2019), quoting Kenniston v. Department of Youth Servs., 453 Mass. 179,

[8] The judge included similar language in her preliminary instructions to the jury.

184 (2009) (acknowledging Crane requirement that civil commitment available only "where the individual's dangerousness is linked to a mental illness or abnormality that causes the individual to have 'serious difficulty' in controlling his or her behavior" [emphasis added]). The instruction to which the defendant now objects was a correct statement of the law.[9]

b. Specific unanimity. Here, both Dr. Belle and Dr. Weir determined that the defendant was an SDP, but diverged in opinion as to the defendant's precise diagnosis. The judge instructed the jury on their obligation to reach a unanimous verdict. See Commonwealth v. G.F., 479 Mass. 180, 181 (2018), citing G. L. c. 123A, § 14 (d) ("Prior to civilly committing an individual under this statute, the Commonwealth must obtain a unanimous jury verdict finding that the individual is sexually

[9] We briefly address two other points raised as part of the defendant's challenge to this aspect of the instructions. His contention that the statutory definition of "sexual offense," see G. L. c. 123A, § 1, is impermissibly vague is unsupported by any legal authority, and does not rise to the level of appellate argument. See Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019); Halstrom v. Dube, 481 Mass. 480, 483 n.8 (2019) (contention not raised "in any meaningful way" need not be considered); Care & Protection of Martha, 407 Mass. 319, 330 n.11 (1990) (argument made in "cursory and conclusory fashion" considered "an insufficient appellate argument" under Rules of Appellate Procedure [citation omitted]). His additional argument that the judge erred in her use of the term "menace" in her instructions on the element of "mental abnormality or personality disorder" likewise lacks proper support; in any event, the defendant at oral argument declined to press the challenge.

dangerous"). Although the defendant did not request a specific unanimity instruction and, at trial, confirmed his satisfaction with the judge's final instructions as they were given to the jury, he now contends that the judge erred in failing to instruct the jury that a unanimous verdict required all jurors to credit the testimony of at least one of the QEs. In other words, the defendant argues that the judge was required to give, sua sponte, a specific unanimity instruction as to the QEs' testimony.

"Where there was no objection to the absence of an instruction on specific unanimity, we need not decide whether the judge could have or should have provided such an instruction in this case. It is sufficient that we conclude that the absence of such an instruction did not create a substantial risk of a miscarriage of justice." Commonwealth v. Shea, 467 Mass. 788, 798 (2014).

In the criminal context, to which we look for an analogy, "a defendant is entitled to a specific unanimity instruction 'when the Commonwealth has proceeded on "alternate theories"' of guilt." Commonwealth v. Arias, 78 Mass. App. Ct. 429, 432 (2010), quoting Commonwealth v. Santos, 440 Mass. 281, 287-288 (2003), overruled on other grounds by Commonwealth v. Anderson, 461 Mass. 616, 633-634, cert. denied, 568 U.S. 946 (2012). The purpose of a specific unanimity instruction is to ensure that

where the jury are presented with evidence of "separate, distinct, and essentially unrelated ways in which the same crime can be committed," Arias, supra, quoting Santos, supra, the jurors do not conclude that they may convict the defendant without unanimous agreement on which distinct theory of the crime applies. See, e.g., Commonwealth v. Palermo, 482 Mass. 620, 629 (2019) (specific unanimity instruction required to avoid jury confusion where prosecution presents evidence of separate acts, independently sufficient to prove crime charged). Here, where both QEs determined that the defendant was likely to reoffend and was an SDP, we discern no significant distinction between the QEs' conclusions that could lead to the jury confusion that specific unanimity instructions are intended to prevent. See Santos, supra at 285, 290 (jury "need not agree as to every detail" and "unanimity as to minute factual details" not required).

Under these circumstances, we discern no error in the instructions as the judge gave them; even were we to conclude otherwise, the failure to give the instruction the defendant now contends was required did not create a substantial risk of a miscarriage of justice.[10] See Commonwealth v. Comtois, 399 Mass. 668, 677 (1987).

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[10] As we have observed, "The technical distinctions among various clinical diagnoses are immaterial so long as the

We discern no merit in the defendant's related assertion that G. L. c. 123A, § 13 (a), requires the two qualified experts to submit a single report. Section 13 (a) requires the subject of an SDP petition to undergo "examination and diagnosis under the supervision of two [QEs] who shall . . . file with the court a written report of the examination and diagnosis and their recommendation." G. L. c. 123A, § 13 (a). It does not strain the statutory language to read § 13 (a) to permit each examiner to prepare an individual report; indeed, the Supreme Judicial Court has done so explicitly. See Chapman, 482 Mass. at 300 ("each [QE] must provide the court with a written report summarizing his or her examination and diagnosis"). Cf. G. L. c. 4, § 6, Fourth (ordinarily, in construing statutes, "[w]ords importing the singular number may extend and be applied to several persons or things").

Conclusion. We discern no error in the judge permitting Dr. Belle and Dr. Weir to testify at trial as "qualified experts," and no abuse of discretion in the judge's instruction on the elements of the sexually dangerous person determination. Without reaching the question whether the judge was required,

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Commonwealth proves beyond a reasonable doubt that the defendant suffers from a '[mental abnormality or] personality disorder which makes [him] likely to engage in sexual offenses if not confined to a secure facility.'" Commonwealth v. Husband, 82 Mass. App. Ct. 1, 5 (2012), quoting G. L. c. 123A, § 1.

sua sponte, to provide a specific unanimity instruction in this case, we conclude that any failure to do so here did not create a substantial risk of a miscarriage of justice.

Judgment affirmed.