SJC-13050

COMMONWEALTH vs. ROWEN LOWERY.

Middlesex. March 3, 2021. - July 13, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Trafficking. Constitutional Law, Search and seizure. Search and Seizure, Affidavit, Probable cause. Probable Cause. Cellular Telephone. Joint Enterprise. Evidence, Joint venturer, Hearsay, Verbal conduct, Prior misconduct, Expert opinion. Witness, Expert. Practice, Criminal, Motion to suppress, Instructions to jury.

Indictments found and returned in the Superior Court Department on March 18, 2016.

A pretrial motion to suppress evidence was heard by Helene Kazanjian, J., and the cases were tried before Elizabeth M. Fahey, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

James E. Methe for the defendant.
Chia Chi Lee, Assistant District Attorney, for the Commonwealth.

GEORGES, J. The defendant, Rowen Lowery, was convicted of trafficking of persons for sexual servitude, G. L. c. 265, § 50 (a) (sex trafficking); and unlawful possession of marijuana, G. L. c. 94C, § 34. On appeal, the defendant raises six issues with respect to his sex trafficking conviction, arguing that (1) a Superior Court judge (motion judge) improperly denied his motion to suppress because the search warrants were not supported by probable cause; (2) the trial judge improperly admitted the victim's out-of-court statements under the coventurer exemption to the hearsay rule; (3) the judge abused her discretion in admitting prior text message evidence, which contained evidence of his prior bad acts; (4) the judge abused her discretion in permitting a police officer to testify as both an expert witness and a percipient witness; (5) the Commonwealth's witnesses' limited references to "FBI Child Exploitation Task Force" and "victim" were prejudicial; and (6) the Commonwealth drew an unreasonable inference from the evidence in its closing argument.

We affirm the order denying the defendant's motion to suppress. We also conclude that there were no errors necessitating a new trial, and thus we affirm the defendant's convictions.

Background. 1. Facts. We recite the facts as the jury could have found them, reserving certain details for discussion of specific issues.

In July 2015, the Southern Middlesex regional drug task force (task force), in coordination with the Federal Bureau of Investigation (FBI), launched a human trafficking investigation in Woburn to identify and assist victims of human trafficking. Detective Brian McManus of the Woburn police department was the commander of the task force; he also worked as an undercover officer in the operation. The task force began its investigation from a website titled "Backpage.com" (Backpage),[1] where McManus searched for commercial sexual services being offered in the Woburn area. McManus found one such advertisement containing photographs and a telephone number for a woman to whom we will refer as Jane.[2] Working undercover, McManus called the listed number and arranged for an hour-long session of sexual services with an individual he understood to be Jane. McManus and Jane agreed to meet at a hotel in Woburn later that evening.

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[1] According to Woburn police Detective Angelo Piazza's testimony, Backpage.com (Backpage)is a website that allows individuals to advertise a variety of products and services through user-generated posts.

[2] Because the victim's identity is impounded pursuant to G. L. c. 265, § 24C, we refer to the victim by a pseudonym.

At around 6 P.M., police surveillance units posted outside that hotel observed the defendant and Jane arrive in a gray Dodge Charger. Jane got out of the vehicle and walked into the hotel while using a cell phone. The defendant stayed in the parking lot for a short time before driving away. McManus met Jane alone in a hotel room. Several other undercover officers, however, were waiting in an adjacent room accessible by an adjoining door.

McManus and Jane immediately discussed the nature of the sexual acts to be performed, and mutually agreed on a price of $260 for oral sex. McManus gave Jane cash he had obtained from Woburn police undercover funds. Jane then appeared to start exchanging text messages with someone on her cell phone. After she appeared to have received a response, Jane put down her cell phone and was ready to perform the sexual act. When McManus told Jane that he did not have a condom, she produced a wrapped one from her back pocket and began to open the package. At that point, McManus gave a predetermined signal to the undercover officers waiting in the adjacent room, and they entered through the adjoining door. They identified themselves to Jane and began speaking with her, while McManus left the room. The officers read her the Miranda warnings and searched her. In Jane's possession was a cell phone, the $260 from McManus, and a Lifestyles brand condom in sealed packaging.

Meanwhile, one of the police surveillance units followed the Dodge Charger as the defendant drove away from the hotel. The officers maintained uninterrupted visual contact, and stopped the vehicle after a few minutes; the defendant was the only occupant. When an officer approached the driver's window, the defendant was holding an identification card belonging to an unidentified woman.[3] The defendant was arrested, and his vehicle was towed to Woburn police headquarters.

An inventory search of the vehicle produced, among other things, (1) a temporary Massachusetts identification card belonging to Jane in the "passenger area";[4] (2) five cell phones, also found in the passenger area; (3) an empty box of condoms, loose condoms, and personal lubricating gel, all of which were recovered from a purse that was on the front passenger's seat; (4) two different types of business cards for "Independent

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[3] The record is unclear as to whose identification card the defendant was holding.

[4] The record is unclear as to where exactly McManus was referring by the phrase "passenger area." Jane testified that she had left her belongings in a "purse" in the defendant's vehicle, and she was seen sitting in the front passenger's seat on her arrival at the hotel. McManus testified that he recovered "Lifestyles" condoms and lubricating gel in a "brown purse on the front passenger's seat," and that Jane's identification was found in "a black travel bag" in the same "passenger area" where the additional condoms and lubricating gel were recovered. Taken together, the jury reasonably could have concluded that the "passenger area" referred to the front passenger's seat and its immediate surroundings.

Entertainment Services"; (5) business cards for a number of men's entertainment clubs; (6) Massachusetts identification cards in the trunk and passenger area for two different women; and (7) packages of marijuana that were recovered from a backpack in the trunk.

Subsequently, McManus applied for and obtained six search warrants to search Jane's cell phone and the five cell phones recovered from the defendant's vehicle. Among the cell phones recovered from the defendant's vehicle were a Kyocera brand cell phone and an Alcatel brand cell phone. The records for the Kyocera cell phone showed that it had received several text messages starting, "Yo Roe"; Jane testified at trial that the defendant was known as "Roe" or "Ro." The records for the Alcatel cell phone showed that the defendant had engaged in sexually explicit conversations with someone using the cell phone recovered from Jane.[5] As with the Kyocera cell phone, the user of the Alcatel cell phone responded affirmatively to messages addressed to "Ro."

2. Prior proceedings. In March 2016, a grand jury returned indictments charging the defendant with sex trafficking, G. L. c. 265, § 50 (a); and possession with intent

[5] McManus testified, based on his training and experience, that the messages contained terms commonly used in the commercial sex trade to refer to specific sexual acts.

to distribute marijuana, G. L. c. 94C, § 32C (a). In October 2017, the defendant filed a motion to suppress the text messages seized from the six cell phones. After a nonevidentiary hearing, the motion judge concluded that the search warrant affidavit supported probable cause to "search the cell phones for evidence of the crime" of sex trafficking, and denied the motion.

The Commonwealth subsequently moved in limine to introduce statements made by Jane in certain text messages as statements of a coconspirator or coventurer, and text messages from the defendant as statements of a party opponent. The trial judge, a different judge from the one who ruled on the motion to suppress, allowed both motions. The defendant's motion to preclude use of the phrase "FBI Child Exploitation Task Force" was allowed.

Trial commenced in April 2019, and the jury convicted the defendant of sex trafficking and the lesser included offense of possession of marijuana. The defendant timely appealed to the Appeals Court, and we transferred the matter to this court on our own motion.

Discussion. The defendant challenges the denial of his motion to suppress; the admission of Jane's statements under the coventurer exemption to the hearsay rule; the introduction of

prior bad act evidence;[6] and testimony by McManus as both an expert and percipient witness.[7] We address each issue in turn.

1. Motion to suppress. The defendant argues that the motion judge erred in denying his motion to suppress evidence obtained from the six cell phones because the affidavit in support of the search warrants did not establish probable cause. Specifically, the defendant contends that even if there were

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[6] The defendant also challenges the use of certain words by police witnesses: a single reference to the term "FBI Child Exploitation Task Force" by one officer, and several uses of the word "victim" by another officer. The defendant timely objected in each instance, and his objections were overruled. After careful review, we conclude that the few, scattered uses of these words do not warrant reversal of the defendant's convictions, as the terms were used only to describe the officers' professional training backgrounds. See Commonwealth v. Sullivan, 478 Mass. 369, 376 (2017) ("An error is not prejudicial if it did not influence the jury, or had but very slight effect" [citation omitted]).

[7] The defendant also argues that one of the prosecutor's statements in closing improperly referenced facts not in evidence, and the judge's failure to strike the remark and instruct the jury to disregard it constituted prejudicial error. The challenged statement was an objected-to assertion that "[the defendant] knew [Jane] was vulnerable. He preyed on her, and put her to work." In overruling the objection, the judge found that it was "inferable reasonably from the text messages that [the defendant] put [Jane] to work for him." Testimony at trial, including by Jane herself, also described her difficult circumstances, including that, while still in high school, she was living in a hotel because of issues with her family. We discern no error requiring reversal in the single challenged remark. See Commonwealth v. Rakes, 478 Mass. 22, 45 (2017), citing Commonwealth v. Bois, 476 Mass. 15, 32 (2016) ("Closing argument must be limited to discussion of the evidence presented and the reasonable inferences that can be drawn from that evidence. . . . Counsel may, however, zealously argue in favor of those inferences favorable to his or her case").

probable cause to search the cell phone that was in Jane's possession when she was detained by police, the affidavit insufficiently linked her cell phone to any of the other five cell phones recovered from the defendant's vehicle to support a search of their contents.[8] We disagree.

a. Standard of review. "The facts contained in the affidavit, and the reasonable inferences therefrom, must 'demonstrate probable cause to believe that evidence of the crime will be found in the place to be searched.'" Commonwealth v. Tapia, 463 Mass. 721, 725 (2012), quoting Commonwealth v. Jean-Charles, 398 Mass. 752, 757 (1986). As with any question of law, "we review the motion judge's probable cause determination de novo." Commonwealth v. Long, 454 Mass. 542, 555 (2009), S.C., 476 Mass. 526 (2017), citing United States v. Kelley, 482 F.3d 1047, 1051 (9th Cir. 2007), cert. denied, 552 U.S. 1104 (2008).

In determining whether probable cause exists such that a search warrant may issue, "[o]ur inquiry . . . always begins and ends with the four corners of the affidavit." Commonwealth v. Fernandes, 485 Mass. 172, 183 (2020), cert. denied, 141 S. Ct. 1111 (2021), quoting Commonwealth v. O'Day, 440 Mass. 296, 297

[8] McManus applied for six separate search warrants; each warrant application was supported by an affidavit containing the same information.

(2003). In considering the existence of probable cause, "we deal with [practical] probabilities," Commonwealth v. Hason, 387 Mass. 169, 174 (1982), quoting Brinegar v. United States, 338 U.S. 160, 175 (1949), and we consider the search warrant affidavit "as a whole and in a commonsense and realistic fashion," Commonwealth v. Snow, 486 Mass. 582, 586 (2021), quoting Commonwealth v. Dorelas, 473 Mass. 496, 501 (2016). A reviewing court gives considerable deference to the magistrate's determination of probable cause. See Commonwealth v. Clagon, 465 Mass. 1004, 1004 (2013).

To determine whether a search warrant establishes probable cause, "[t]he basic question . . . is whether there is a substantial basis on which to conclude that the articles or activity described are probably present or occurring at the place to be searched." Commonwealth v. Spano, 414 Mass. 178, 184 (1993). In other words, "the government must demonstrate[] . . . a 'nexus' between the crime alleged and the article to be searched or seized" (quotation and citation omitted). Commonwealth v. White, 475 Mass. 583, 588 (2016). "The requisite nexus between the criminal article or activity described in the affidavit and the place to be searched need not be based on direct observation." Commonwealth v. Anthony, 451 Mass. 59, 70 (2008).

b. Jane's cell phone.[9] McManus's affidavit stated that the cell phone taken from Jane upon her detention by police was associated with the telephone number listed in the Backpage advertisement, which contained sexually suggestive photographs. The telephone number also was used to communicate with McManus to set up the appointment for sexual activity that was to take place at the hotel, and according to Jane, she generally used that cell phone to "respond to clients." Furthermore, the warrant affidavit stated that police surveilling the hotel saw the defendant drive up and drop off Jane there, and she was observed speaking with McManus on the cell phone while entering the hotel.

Jane again used this cell phone in McManus's presence in the hotel room to send a text message to someone after McManus had paid her, and immediately prior to her initiating the sexual encounter. Jane also said that she had used global positioning system (GPS) technology to find the hotel, and to provide McManus with arrival estimates; because no separate GPS units were recovered from Jane or from the vehicle, the jury reasonably could have inferred that Jane had used the GPS capabilities of the cell phone. Taken together, these facts

[9] The Commonwealth did not raise the issue of the defendant's standing to challenge the search of Jane's cell phone. Accordingly, we do not address the issue.

establish both a substantial basis and a clear nexus between the cell phone that was in Jane's possession at the time of her detention and the suspected offense of sex trafficking.

c. Cell phones found in defendant's vehicle. The search warrant affidavit also established probable cause to search the five cell phones found in the defendant's vehicle. In his affidavit in support of the search warrants, McManus averred that after Jane took possession of the money from him, she "immediately began to type on her cell phone" and "appeared to receive a message, which prompted her to begin the session." McManus explained that this conduct was consistent with sex workers, who must check in with their "pimps" to ensure that the pimp receives full payment for the services rendered. Moreover, Jane had informed McManus that she paid the defendant "to drive her to these commercial sexual activity appointments," and her personal cell phone and driver's license were in the defendant's vehicle at the time.

The search warrant affidavit also averred that as part of the inventory search of the defendant's vehicle, police recovered a business card for "Independent Entertainment Services," which stated that the company was "[h]iring new talent escort/strippers" and that "MAKING MONEY SHOULD BE FUN & EASY." The card listed the name of the business manager as "RO," and a database search of the telephone number printed on

the card showed that it was registered in the defendant's name. In addition, the warrant affidavit stated that Massachusetts identification cards belonging to three women were recovered from the vehicle, as well as condoms of the same brand that Jane had had in her possession in the hotel room, personal lubricants, and women's undergarments.

This is not a case where police relied upon the "general ubiquitous presence of cellular telephones in daily life." Commonwealth v. Morin, 478 Mass. 415, 426 (2017). The facts set forth in the warrant affidavit stand in contrast with cases where we have concluded that there was not a sufficient nexus to support probable cause to search a cell phone seized incident to a suspect's arrest. Contrast White, 475 Mass. at 590 (insufficient nexus between defendant's cell phone and joint venture offense where detectives lacked evidence that cell phone was used during commission of crime and officers did not assert that particular evidence was likely to be found on defendant's cell phone); Commonwealth v. Broom, 474 Mass. 486, 494–496 (2016) (insufficient nexus where only connections between fatal aggravated rape and defendant's cell phone were conclusory statements in search warrant affidavit that "cellular telephones contain multiple modes used to store vast amounts of electronic data" and that there was "probable cause to believe that the

[defendant's] cell phone and its associated accounts . . . will likely contain information pertinent to this investigation").

Taken together, the averments in the warrant affidavit support the inference that Jane was communicating with the defendant while she was in the hotel room with McManus, which in turn supports a finding of probable cause to search the cell phones for evidence of sex trafficking. Accordingly, the motion judge did not err in denying the defendant's motion to suppress.

2. Statements by coventurer. Prior to trial, the Commonwealth filed a motion in limine seeking to introduce, as statements by a coventurer, text messages between Jane and the defendant in June and July of 2015 regarding the alleged commercial sexual enterprise; the Backpage advertisement; and statements by Jane to McManus soliciting fees for sexual services. The judge allowed the motion over the defendant's objection.

The defendant contends that the judge erred in allowing the introduction of Jane's statements under the coventurer exemption to the hearsay rule because the judge did not make a preliminary finding that a joint venture existed, and such a finding was not possible given that there was no evidence of a joint venture between him and Jane.[10] In addition, the judge did not instruct

[10] In ruling on the Commonwealth's motion to admit Jane's statements, the judge stated, "I'm allowing this motion to admit

the jury that they could consider Jane's statements only if they first found, by a preponderance of the nonhearsay evidence, that a joint venture existed. Given these errors, the defendant argues, the jury should not have considered any of Jane's out-of-court statements.

We agree that the judge should have hewed more closely to the evidentiary safeguards of the coventurer exemption to the hearsay rule; specifically, she should have made a preliminary finding regarding the admissibility of the contested statements, and then, if allowing the statements' introduction, should have instructed the jury that they could consider the statements only if they first found independent, nonhearsay evidence of a joint venture and concluded that a joint venture existed.

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statements of the joint venturer." At a sidebar conference, the judge again remarked that she considered Jane to be "sort of a joint venturer, maybe not [an] overly willing [one]." The Commonwealth argues that these statements amount to an implied preliminary finding of a joint venture.

We disagree. While the Commonwealth argued at the motion hearing that "[seventeen] or [eighteen] conversations" between the defendant and Jane constituted communications "in furtherance of a conspiracy to solicit sexual conduct for a fee," the record is not clear as to which conversations the Commonwealth was referencing, and the judge did not explain the evidentiary basis for her finding that Jane was a coventurer. Accordingly, the judge's musings in allowing the introduction of Jane's statements did not sufficiently demonstrate that the judge first found, by a preponderance of the nonhearsay evidence, that a joint venture existed. See Commonwealth v. Holley, 478 Mass. 508, 534 (2017). Nonetheless, as we discuss infra, this error did not prejudice the defendant.

Nevertheless, the judge's failure to do so in these circumstances does not constitute reversible error. See Commonwealth v. Holley, 478 Mass. 508, 535 (2017).

a. Coventurer statements. "It is well established that '[o]ut-of-court statements by joint venturers are admissible against the others if the statements are made during the pendency of the criminal enterprise and in furtherance of it.'" Commonwealth v. Lopez, 485 Mass. 471, 474–475 (2020), quoting Commonwealth v. Winquist, 474 Mass. 517, 520-521 (2016). "Before admitting such evidence, a judge 'must find, by a preponderance of the evidence, the existence of a joint venture independent of the statement being offered.'" Commonwealth v. Chalue, 486 Mass. 847, 874 (2021), quoting Holley, 478 Mass. at 534. Once a judge has made such a preliminary finding, the statements may be admitted, "but the judge must instruct the jury that they may only consider the statement as evidence of guilt if the jury make 'their own independent determination, again based on a preponderance of the evidence other than the statement itself, that a joint venture existed and that the statement was made in furtherance thereof.'" Lopez, supra at 475, quoting Commonwealth v. Rakes, 478 Mass. 22, 37 (2017).

Participation in the criminal enterprise "need not 'be made through a formal or explicit written or oral advance plan or agreement; it is enough consciously to act together before or

during the crime with the intent of making the crime succeed.'" Commonwealth v. Bright, 463 Mass. 421, 435 (2012), quoting Commonwealth v. Zanetti, 454 Mass. 449, 470 (2009) (Appendix). The proponent of the evidence can satisfy the burden of demonstrating the existence of a joint criminal venture by establishing "by a preponderance of the evidence that a criminal joint venture took place between the declarant and the defendant." Commonwealth v. Cruz, 430 Mass. 838, 844 (2000). In determining whether there has been an adequate showing that a joint venture existed, "we view the evidence presented to support the existence of a joint venture in the light most favorable to the Commonwealth, recognizing also that the venture may be proved by circumstantial evidence." Lopez, 485 Mass. at 475, quoting Bright, supra. "We review the judge's decision to place a joint venturer's statement before the jury for abuse of discretion." Rakes, 478 Mass. at 37.

b. Existence of joint venture. The Commonwealth introduced independent, nonhearsay evidence establishing the existence of a joint venture between Jane and the defendant to engage in commercial sexual activity. This evidence included text messages between Jane and the defendant, verbal acts by Jane, and physical evidence. We discuss each category in turn.

i. Defendant's text messages.[11] The Commonwealth introduced numerous text messages from the defendant's cell phone that he sent to Jane in the weeks prior to his arrest, from which the jury could have found a joint venture existed between the two to operate a business selling sexual services. In these messages, for example, the defendant gave detailed instructions to Jane on how to interact with customers.[12] The jury also were presented with text message conversations between Jane and the defendant in which the two discussed various sexual acts in which Jane was to engage with customers, as well as the defendant's instructions to her on how much money to collect

[11] The defendant does not dispute the introduction of his text messages under the party opponent exemption to the hearsay rule. See Mass. G. Evid. § 801(d)(2)(A) (2021). Rather, his challenge is with respect to the admissibility of the text messages that Jane sent to him.

[12] The transcripts of the text messages indicate that during one exchange in June 2015, the defendant instructed Jane, "U got 5min unless he gave u more money," followed a few hours later by a message explaining, "We will give him 40min tops if necessary and say your driver is rushing u to come out." A few minutes later, the defendant sent Jane a text message saying, "Tell him u usually charge 250 for the hr . . . [a]nd u doing him a huge favor." Regarding a different encounter several weeks afterward, the defendant sent a message to Jane saying, "Well we not giving money back," instructing her to "[g]et lube and give him a hand job [then] put condom on," and telling her that "[i]f it don't work still say u will come see him [tomorrow] for 200 or another time."

from the customers, seemingly as those appointments were unfolding.[13]

Furthermore, McManus testified that after he had arranged for commercial sexual services with Jane, the defendant drove her to the hotel. Although Jane testified that she did not tell the defendant why she was going to the hotel or with whom she was meeting, the jury could have found from the defendant's cell phone records that he had exchanged text messages with Jane while she was in the hotel room with McManus, and thus could have inferred that Jane and the defendant were communicating with each other as the appointment with McManus was unfolding.

ii. Jane's verbal acts. The jury also heard evidence of Jane's negotiations with McManus over their proposed sexual encounter. When these negotiations are viewed in the context of the defendant's text message exchanges with Jane in the weeks preceding their arrests, the jury reasonably could have concluded that a criminal joint venture existed. We have long held that "[s]tatements that comprise a solicitation of a sexual act, including any negotiations regarding the price or services,

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[13] During one such exchange, the jury could have found, the defendant sent Jane a "10min" warning and then said, "Start getting ready to come out." In another exchange, Jane sent the defendant a message that a customer "[g]ave me 149" and that "[h]e's aggressive." The defendant instructed Jane to "[t]ell him your not into aggressive stuff ull leave," and then inquired whether the customer wanted "full service." McManus testified that "full service" meant a paid hour-long session for sex.

are 'verbal acts' that have legal significance either by themselves or together with the nonverbal conduct that they accompany and explain" (citation omitted). Commonwealth v. Purdy, 459 Mass. 442, 452 (2011). Where a defendant is charged with the trafficking of a person for sexual servitude, the offer of sexual services for a fee by the person being trafficked "may establish an element of [that] offense," id., specifically that the defendant caused "a person to engage in commercial sexual activity," G. L. c. 265, § 50 (a). A sexual solicitation or related negotiation that is admitted as a verbal act is properly considered in the determination whether a joint venture existed. See Purdy, supra at 453.

Jane's verbal negotiations with McManus, when viewed in the context of the defendant's prior text messages to her, would have permitted the jury to conclude that she was acting in furtherance of a joint venture to engage in commercial sexual activity. McManus testified that he called the telephone number listed in the Backpage advertisement and agreed to pay for an "hour-long full service" with the woman on the other end of the call. McManus explained that, in his understanding, "full service" meant an hour of paid sexual activity. The jury reasonably could have inferred that the individual on the cell phone was Jane, as she testified that she had authored the Backpage advertisement and had agreed to meet someone at the

same hotel on that day for "comfort" in exchange for payment. Furthermore, McManus testified that upon Jane's arrival at the hotel room, the two immediately began discussing the specific sexual acts Jane was to perform, and they quickly agreed upon "$260 for oral sex." McManus testified that the entire exchange, from the time that Jane entered the room until he tendered payment, lasted "under five minutes."

Taken together, the jury reasonably could have found that Jane's verbal acts in arranging the appointment with McManus and agreeing to perform sexual services for payment were those of a coventurer acting in furtherance of a joint venture to engage in commercial sexual activity.

iii. Physical evidence. The jury also were presented with the items that police had seized from the defendant's vehicle after his arrest. Several of those items, which were found in the front passenger's seat, clearly were associated with sexual activity, including personal lubricating gel and a box of condoms of the same brand that Jane had had in her possession in the hotel room. Police also found a brown purse belonging to Jane in the same area of the vehicle.

These items of physical evidence, together with the defendant's text messages and Jane's negotiations with McManus, would have allowed the jury to find, by a preponderance of the

evidence, that the defendant ran a commercial sexual enterprise, and that Jane was a knowing participant in that enterprise.

iv. Victim status under coventurer exemption. The defendant also contends that there was no joint venture because Jane could not have been both a coventurer and a victim of sex trafficking. He points to the prosecutor's argument in closing that Jane was under the defendant's "control" as his "product" for sale, which, he asserts, is incongruous with knowingly participating in the defendant's commercial enterprise. This argument is inapposite.

As in many cases of sexual exploitation, sex trafficking often involves complex dynamics between the sex trafficker and the exploited individual that belie neatly defined categories of "victim" or "coconspirator." See Boggiani, When Is a Trafficking Victim a Trafficking Victim? Anti-Prostitution Statutes and Victim Protection, 64 Clev. St. L. Rev. 915, 923-924 (2016) ("trafficked individuals in general, and victims of trafficking into the sex market in particular, do not necessarily fit the mold of the 'iconic' [or passive] victim" due to physical and nonphysical pressures exerted on victim by trafficker and life circumstances). Such is often the case in situations of sex trafficking, where the coventurer in the

crimes of conviction (in the legal sense) is nevertheless a "victim" in the practical sense.[14]

In addition, and perhaps more importantly, the coventurer hearsay exemption does not turn on whether the coventurer also was a victim. Rather, the dispositive question is whether the declarant's statements were made in furtherance of an ongoing conspiracy or joint venture. This is because the coventurer exemption is premised "on the belief that the shared acts and interests of coventurers engaging in a criminal enterprise tend to some degree to assure that statements made between them will be at least minimally reliable." Mass. G. Evid. § 801(d)(2)(E) note (2021), citing Commonwealth v. Bongarzone, 390 Mass. 326, 340 (1983). See Winquist, 474 Mass. at 521 ("The admissibility of such statements is premised on a belief that common interests and activities among coventurers during a criminal enterprise tend to ensure the reliability of their statements to one another").

For this reason, courts in other States have concluded that a declarant's status as a victim -- even of human trafficking or a similar crime -- does not preclude the admission of his or her statements under the coventurer or coconspirator exemption to

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[14] Individuals who are exploited by perpetrators of sex trafficking are undoubtedly "harmed by a crime, tort, or other wrong." Black's Law Dictionary 1878 (11th ed. 2019) (defining meaning of "victim").

the hearsay rule, where the statements were made in furtherance of a criminal conspiracy. See People v. Brown, 14 Cal. App. 5th 320, 335 (2017) (human trafficking victim "was properly treated as an uncharged coconspirator for purposes of the coconspirator exemption to the hearsay rule, and evidence of her statements was admissible to show defendant's liability as to both human trafficking counts"); State vs. Hopwood, Wash. Ct. App., No. 50427-8-II (June 11, 2019) (statements by minor victim admissible against defendant because victim was "a coconspirator to prostitution and her statements were made to the undercover detective in furtherance of that conspiracy").

Here, the jury could have found that Jane, in close coordination with the defendant, knowingly participated in the defendant's commercial sexual enterprise and shared a common interest with the defendant in profiting from the enterprise. Indeed, this money-making aspect was a selling point on the business cards that the jury could have found the defendant used in his efforts to recruit women to participate in his scheme. Moreover, as discussed supra, there was clear evidence for the jury to conclude that Jane's text messages to the defendant, as well as her sexual solicitations to McManus, were made for the purpose of profiting from the commercial sexual activity that the defendant directly oversaw. Given Jane's shared interest with the defendant in furthering the commercial sexual

enterprise, and notwithstanding her status as a victim of sex trafficking, the jury could have found that Jane's statements were reliable as those of a coventurer and "equivalent to a statement by the defendant." Commonwealth v. Stewart, 454 Mass. 527, 535 (2009).

In sum, although the judge erred in not making an explicit preliminary finding that a joint venture existed between the defendant and Jane, her decision to permit the introduction of Jane's statements under the coventurer exemption to the hearsay rule did not constitute reversible error.[15]

c. Jury instruction. The defendant maintains that the judge committed reversible error in not instructing the jury that they could consider Jane's statements only if they first made their own independent determination that there had been a

[15] The defendant also contends there was not enough evidence to find the existence of a joint venture because Jane was not charged with any crime. This argument is unavailing. "The general rule that declarations by joint venturers are admissible against fellow venturers applies where a conspiracy or common enterprise is shown to exist even though it is not charged." Commonwealth v. Colon-Cruz, 408 Mass. 533, 544 n.4 (1990), citing Commonwealth v. Flynn, 362 Mass. 455, 477 (1972). Accordingly, the fact that Jane was granted immunity in exchange for her testimony has no bearing on whether a joint venture existed. See Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073, 1081 n.5 (10th Cir. 2006) ("The co-conspirator hearsay [exemption] contains no requirement that the declarant be a defendant, only that she be a member of the conspiracy").

joint venture.[16] We agree that, after allowing the introduction of Jane's statements in evidence, the judge should have "instructed the jury that they could consider those statements only if they first found independent, nonhearsay evidence of a joint venture." See Holley, 478 Mass. at 534-535. The defendant concedes that he neither requested such an instruction nor objected to its absence from the judge's final charge. Because the defendant did not object to the absence of the joint venture jury instruction, "we review for a substantial risk of a miscarriage of justice." Commonwealth v. Washington, 449 Mass. 476, 488 (2007).

For the reasons previously discussed, we conclude that there was no such risk here because "[t]he Commonwealth introduced overwhelming independent, nonhearsay evidence establishing the existence of a joint venture [to engage in commercial sexual activity] by, at the very least, a preponderance of the evidence." Holley, 478 Mass. at 535.

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[16] The judge instructed: "During your deliberations, you will have an opportunity to examine all of the exhibits which were introduced during the trial." The judge also instructed that the jury could "draw reasonable and fair conclusions from the evidence so long as the conclusions [they] draw are solidly based on the evidence and based on the jury's fair reasoning." The judge, however, did not instruct the jury that they could consider Jane's statements only after they made an independent determination that a joint venture existed. The judge should have given this instruction. See Holley, 478 Mass. at 534-535.

Accordingly, the judge's failure to provide the limiting instruction, while in error, did not prejudice the defendant.

3. Prior bad acts. As previously detailed, the Commonwealth sought to enter in evidence text messages between the defendant and Jane spanning the six weeks prior to the defendant's arrest. These text messages contained vulgar sexual references by the defendant, which the Commonwealth sought to introduce as evidence of the defendant's knowledge of Jane's commercial sexual activities and the ways in which he "entice[d], harbor[ed], [or] transport[ed]" her "to engage in commercial sexual activity." G. L. c. 265, § 50 (a). The defendant objected unsuccessfully to the introduction in evidence of these messages, arguing that they were evidence of prior bad acts that would prejudice him in the eyes of the jury because the sex trafficking charge pertained only to conduct on the day of his arrest.

On appeal, the defendant argues that the judge erred in allowing the introduction of the prior text messages because their probative value was "overwhelmed" by their prejudicial nature. Specifically, the defendant contends that the prejudice stemmed from the volume of text messages that were admitted, and that the excessive number of text messages primarily served to emphasize to the jury the defendant's bad character.

"Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Mass. G. Evid. § 404(b)(1). See Commonwealth v. Crayton, 470 Mass. 228, 249 (2014). Such evidence, however, "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Mass. G. Evid. § 404(b)(2). See Commonwealth v. Facella, 478 Mass. 393, 403-404 (2017). The probative value of the evidence may not be outweighed by the risk of unfair prejudice. Commonwealth v. Peno, 485 Mass. 378, 385 (2020). "To be sufficiently probative the evidence must be connected with the facts of the case [and] not be too remote in time" (citation omitted). Id. at 386. In evaluating this temporal connection, we look to "the 'logical relationship' between the [prior bad act] evidence and the crime charged." Id., quoting Facella, supra at 405.

"Where the error is properly preserved, as here, we review a judge's decision to allow the introduction of prior bad act evidence for abuse of discretion." Commonwealth v. Teixeira, 486 Mass. 617, 627 (2021). "Determinations of the relevance, probative value, and prejudice of such evidence are left to the sound discretion of the judge, whose decision to admit such evidence will be upheld absent clear error." Commonwealth v.

Bryant, 482 Mass. 731, 735 (2019), quoting Commonwealth v. Dung Van Tran, 463 Mass. 8, 14-15 (2012). In addition, "[t]he effectiveness of limiting instructions in minimizing the risk of unfair prejudice should be considered in balancing prejudice and probative value." Bryant, supra.

At the outset of the trial, the judge expressly limited introduction of the prior text messages between the defendant and Jane to the six-week period before their arrest in July of 2015. This time period had a "logical relationship" to the charge of sex trafficking because Jane testified that she first met the defendant in the "summer of 2015." The text messages were introduced to show the defendant's relationship with Jane and his knowledge and facilitation of her commercial sexual activities. They also showed the way in which the defendant's conduct on the day of his arrest fit within an ongoing commercial sexual enterprise that he oversaw, in which he and Jane actively worked together to increase revenues, and from which the two of them profited.[17]

[17] In one exchange, for example, Jane sent a text message to the defendant asking, "You still thinking about taking [(female name)] back till you get more girls[?] I think it's a good idea . . . just to make the money come in faster." The defendant appeared open to the idea and seemed to suggest that he would hire the person in question "[i]f I don't find someone by July 1st."

We previously have explained that G. L. c. 265, § 50 (a), the sex trafficking statute, "forbids . . . individuals or entities from knowingly undertaking specified activities that will enable or cause another person to engage in commercial sexual activity." Commonwealth v. McGhee, 472 Mass. 405, 418 (2015). Taking into account the business cards, condoms, and other items seized from the defendant's vehicle, the jury could have found that the text messages demonstrated that the defendant knowingly transported Jane to the hotel to meet with McManus to perform sexual services for payment, and that her interactions with McManus were in furtherance of the illicit sex-as-service scheme that the defendant directly oversaw and from which he benefited financially. Thus, the jury could have relied upon the text messages as part of a chain of evidence supporting the conclusion that the defendant was actively engaged in sex trafficking. Contrast Commonwealth v. Dwyer, 448 Mass. 122, 129 (2006) (prior bad act evidence overwhelmed evidence of two rape charges where complainant testified "in detail about each of seven uncharged incidents" spanning "years of abuse").

Furthermore, any risk of prejudice from the introduction of the earlier text messages was mitigated by the multiple limiting instructions, which the judge gave at the defendant's request, at multiple points during the trial where the text messages were

introduced.[18] See Commonwealth v. Forte, 469 Mass. 469, 480-481 (2014) (no error in admission of prior bad acts evidence where, among other things, numerous contemporaneous jury instructions minimized potential for prejudicial effect). Thereafter, the judge repeated her instruction on the prior bad act evidence during her final charge . "We presume that the jury followed the judge's instructions." Bryant, 482 Mass. at 737. See Commonwealth v. Donahue, 430 Mass. 710, 718 (2000) (proper jury instructions can render potentially prejudicial evidence harmless). Accordingly, the judge did not abuse her discretion in permitting the introduction of the six weeks of earlier text messages.

4. Expert witness testimony. The defendant objected to McManus's testifying as an expert witness in part because the Commonwealth had not provided prior notice that it intended to call any expert witnesses. The judge agreed that the

[18] Specifically, the judge instructed the jury that they could only consider the text messages on the limited issue of "the defendant's motive, intent, or proof of a pattern of conduct or a common scheme, or whether the defendant acted intentionally and not because of some mistake or accident or other innocent reason." The judge emphasized that the jury could not "consider this evidence for any other purpose, specifically, you may not use it to conclude that if the defendant received these [text message] responses, that he committed the act contained in the indictment . . . [or] that if the defendant committed the acts alleged in [the prior text messages], that he must also have committed the indictment charged."

Commonwealth did not provide notice that an expert witness would be called, and that it was improper for the Commonwealth not to have disclosed its intent to have McManus tender expert testimony. Nonetheless, after reviewing the police reports that had been introduced as exhibits, the judge permitted McManus to provide some explanatory expert testimony based on his training and experience. Thereafter, the defendant objected numerous times to McManus's expert testimony, and most of the defendant's objections were overruled.

On appeal, the defendant argues that the judge committed prejudicial error in allowing McManus to offer expert testimony because the Commonwealth did not provide proper notice, and that McManus impermissibly blurred the line between his testimony as an expert witness and that as a percipient witness.

a. Discovery violation. The Commonwealth is required to disclose to a defendant its intended expert opinion evidence, including the witness's identity and any reports prepared by the witness. Mass. R. Crim. P. 14 (a) (1) (A) (vi), as amended, 444 Mass. 1501 (2005). When a violation of the discovery rules occurs, judges have "wide discretion to determine the severity of a sanction" in accordance with the severity of the discovery violation. Commonwealth v. Carney, 458 Mass. 418, 429 (2010), citing Commonwealth v. Giontzis, 47 Mass. App. Ct. 450, 459 (1999). See Mass. R. Crim. P. 14 (c) (2), as appearing in 442

Mass. 1518 (2004). In determining whether to exclude evidence from a witness whose name was not disclosed during discovery, a judge considers "(1) the prevention of surprise; (2) the effectiveness of sanctions less severe than exclusion; (3) evidence of bad faith; (4) prejudice to the other party caused by the testimony; and (5) the materiality of the testimony to the outcome of the case." Giontzis, supra at 459-460, citing Commonwealth v. Chappee, 397 Mass. 508, 518 (1986). "Although the court may exercise its general sanction power under [Mass R. Crim. P. 14 (c) (2)] to exclude evidence, it is generally better to grant each party the freedom to present all relevant evidence at trial." Reporters' Notes (Revised, 2004) to Rule 14 (c), Mass. Ann. Laws Court Rules, Rules of Criminal Procedure (LexisNexis 2021).

The judge did not abuse her discretion in allowing McManus to provide limited expert testimony. First, the defendant was not surprised by the substance of McManus's testimony, which largely repeated the same information contained in his affidavit in support of the cell phone search warrants. In his affidavit, McManus explained, generally, the coercive relationships between pimps and sex workers, as well as various methods pimps use to control sex workers, such as by maintaining physical possession of the sex workers' identification cards and money. Indeed, defense counsel noted at a sidebar conference that he was not

"surprised" by the substance of McManus's testimony, because, as the judge noted, the defendant had had access to McManus's affidavit for "years" prior to trial.

Second, the judge expressly limited the scope of McManus's expert testimony. From the outset, the judge advised the prosecutor that the Commonwealth could elicit some explanatory expert testimony from McManus, such as how pimps generally operate, but that it could not ask McManus about specific nondisclosed topics, such as the significance of the hotel keys that were seized from the defendant's vehicle. The judge also cautioned the prosecutor that while McManus could testify to what he knew was "routine or common" in the sex trade, based on his training and experience, he could not use that expertise to opine on whether he thought the defendant indeed was a pimp.

Third, in light of defense counsel's lack of surprise concerning the substance of McManus's expert testimony, we discern no evidence of bad faith on the part of the Commonwealth.[19] The judge's decision to permit the defendant a day to prepare to cross-examine McManus further minimized any

[19] At a sidebar conference, the prosecutor argued that McManus was not asked "to render any kind of opinion" based on "scientific testing or analysis" and thus that McManus was not tendering expert testimony. It may be that the Commonwealth misconstrued what may constitute expert testimony, see Mass G. Evid. § 702, but nothing in the record suggests that the Commonwealth intended to mislead either the defendant or the judge as to the nature of the testimony McManus was to present.

prejudice to the defendant. Finally, McManus's expert testimony was not substantively material to the case. The lion's share of his expert testimony was given in an effort to aid the jury's understanding of terms used in the sex trade. The focus of the Commonwealth's case, however, was the physical evidence and transcripts of the text messages, and not on McManus's explanations of terms generally used in the sex trade.

b. Testimony as both expert and percipient witness. "A percipient police witness may also testify as an expert witness, though care should be taken in presenting such expert testimony . . . ." Commonwealth v. Ortiz, 50 Mass. App. Ct. 304, 306-307 (2000). The "risk of prejudice is great where a percipient witness comments on a defendant's guilt because the line between 'specific observations and expert generalizations [becomes] blurred,'" and "[i]t may result in improper vouching by the Commonwealth." Commonwealth v. MacDonald, 459 Mass. 148, 163 (2011), quoting Commonwealth v. Tanner, 45 Mass. App. Ct. 576, 579 (1998). In determining whether an expert witness's testimony was permissible, "the better practice is to focus the analysis on whether the evidence is explanatory," as opposed to "conclusory" or "couched simply in terms of whether a defendant did or did not commit a particular offense" (emphasis in original). Tanner, supra at 581.

As discussed, McManus's expert testimony here essentially was confined to explaining technical terms. When the prosecutor asked McManus the "significance" of the women's identification cards that were seized from the defendant's vehicle, McManus answered in general terms that "a person in control will maintain possession of these items so that it's a control tactic." Although this particular answer is a close call, McManus did not opine as to whether the defendant was a pimp, whether his conduct amounted to the control tactics that were commonly used by pimps, or whether the defendant had engaged in sex trafficking on the day of his arrest. Contrast Ortiz, 50 Mass. App. Ct. at 307 ("While it was certainly permissible for Williams to explain what function a runner performed in the street level sale of drugs, his testimony that he believe[d] the defendant was a runner amount[ed] to a personal assurance by the witness that the crime charged had occurred, and thereby constitute[d] an improper intrusion into the fact-finding function of the jury" [quotations and citation omitted]); Tanner, 45 Mass. App. Ct. at 580 (officer impermissibly blurred line between expert and percipient testimony by opining, "[F]rom my experience, I believed a drug transaction had taken place").

Moreover, the judge properly instructed the jury on the differences between expert and lay witness testimony. See Commonwealth v. Mason, 485 Mass. 520, 538 (2020) (sua sponte

instruction explaining differences between expert and lay opinion testimony "likely would have helped the jury differentiate between the two types of testimony provided by the same witness"). Accordingly, there was no impermissible blurring of lines here.

Order denying motion to suppress affirmed.

Judgments affirmed.