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SJC-13207

COMMONWEALTH vs. PINGXIA FAN.

Suffolk. March 9, 2022. - August 9, 2022.

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

Trafficking. Prostitution. Deriving Support from Prostitution.
Money Laundering. Practice, Criminal, Severance, Trial of
defendants together, Instructions to jury. Grand Jury.
Evidence, Inflammatory evidence, Exculpatory, Testimony
before grand jury.

Indictments found and returned in the Superior Court Department on June 29 and September 12, 2017.

The cases were tried before Janet L. Sanders, J.

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

David M. Osborne for the defendant.

Susanne G. Reardon, Assistant Attorney General (Nancy O. Rothstein & Gretchen Pallas Brodigan, Assistant Attorneys General, also present) for the Commonwealth.

The following submitted briefs for amici curiae:

Megan A. Siddall for Timothy Hayes.

Rebecca E.S. Pritzker, Cynthia D. Vreeland, Felicia H. Ellsworth, Eliza R. Green, & Makenzi G. Herbst for Amirah, Inc., & another.

Michael W. Morrissey, District Attorney, & Tracey Cusick, Assistant District Attorney, for district attorney for the Norfolk district.

Andrea Harrington, District Attorney, & Patrick Sadlon, Assistant District Attorney, for district attorney for the Berkshire district.

Ian Stone, pro se.

GAZIANO, J. The defendant and one of her codefendants were convicted of multiple counts of human trafficking, deriving support from prostitution, keeping a house of ill fame, and money laundering for their roles in operating multiple brothels in the greater Boston area. The defendant maintains that the trial judge erred in denying her motion to sever her trial from that of her codefendant, permitting the introduction of unduly prejudicial testimony, and declining to allow the admission of exculpatory grand jury testimony. The defendant also challenges asserted errors in particular jury instructions, which she argues alone warrant a new trial.

This case requires us to consider certain elements of the offense of human trafficking under G. L. c. 265, § 50 (a), a relatively new provision intended to combat sex trafficking in the Commonwealth. In the defendant's view, the identity of a trafficking victim is an essential element of G. L. c. 265, § 50 (a), and therefore the trial judge erred by declining to instruct the jury to that effect. We conclude, as a matter of first impression, that a defendant may be convicted of human

trafficking under G. L. c. 265, § 50 (a), so long as the jury find that the defendant knowingly trafficked another person, regardless of whether that person is specifically identified. The defendant also argues that, to ensure juror unanimity, the jury must be instructed that they must all agree on the identity of a specific victim where, as here, there is evidence of multiple potential victims. Because the trafficking offenses at issue here were charged as ongoing criminal schemes, rather than as discrete instances of trafficking, we conclude that such an instruction was not warranted, and the trial judge did not err in declining to provide one.

Discerning no error in any of the other challenged decisions by the trial judge, we affirm the defendant's convictions.¹

1. Background. a. Facts. We recite the facts the jury could have found, reserving certain facts for later discussion. The defendant was involved in a romantic relationship with one of her codefendants, Timothy Hayes, and was friends with the other codefendant, Simon Lin. Witnesses described both men as being "in love" with her. Following a joint investigation by

¹ We acknowledge the amicus brief submitted by Timothy Hayes in support of the defendant, as well as the amicus briefs submitted by Amirah, Inc., and My Life My Choice; Ian Stone; the district attorney for the Norfolk district; and the district attorney for the Berkshire district, in support of the Commonwealth.

Federal, State, and local law enforcement agencies, investigators began to suspect that the defendant, Hayes, and Lin were working together to operate five brothels located in North Reading, Boston, Quincy, and Cambridge.

Over the course of several months, police conducted surveillance of each of the suspected brothels. The defendant was observed at each location, often carrying trash or groceries and occasionally driving women to or from the suspected brothels. Police also frequently observed men waiting outside each location. The men often were admitted to the apartments by young "Asian women," many of whom came to the door wearing only a bathrobe.

Police interviewed several of the men after they left the apartments; the men conceded that, while inside, they had exchanged money for sexual services. The men each reported that they went to the apartments after having seen an advertisement for a massage on the website Backpage.com (Backpage).² When they

² "Backpage.com (Backpage) [was] a website that allow[ed] individuals to advertise a variety of products and services through user-generated posts." Commonwealth v. Lowery, 487 Mass. 851, 853 n.1 (2021). Although Backpage was used to advertise many legal goods and services, it became well known for hosting "80 percent of the online advertising for illegal commercial sex in the United States." See Citron & Wittes, The Problem Isn't Just Backpage: Revising Section 230 Immunity, 2 Geo. L. Tech. Rev. 453, 453 (2018). See also Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 16 (1st Cir. 2016), cert. denied, 137 S. Ct. 622 (2017); Backpage.com, LLC v. Dart, 807

called the telephone number listed in the advertisement, an unknown woman with what the men described as an "Asian accent" would answer and would direct the men to one of the five locations. The men would arrive at the designated apartment and would pay between \$130 and \$320 in cash to the individual woman they met, who then would provide a brief massage before initiating sexual contact.

Police subsequently secured and simultaneously executed warrants to search each of the apartments under investigation. When the search warrant was executed at the location in Boston, police found the defendant, her son, and two women. In one of the Quincy locations, police found two women and one male, later identified as the husband of one of the other occupants. The other locations each were occupied by two women. The apartments were sparsely furnished; they each had at least two bedrooms containing little more than a mattress on the floor. At each location, police discovered cash hidden in various places, a substantial number of used and unused condoms, and handwritten documents that appeared to be ledgers listing various amounts of money.

Police learned that the defendant leased two of the apartments and held another lease jointly with Hayes for one of

F.3d 229, 230 (7th Cir. 2015), cert. denied, 137 S. Ct. 46 (2016).

the apartments. Hayes individually leased the remaining two apartments. Investigators obtained several Backpage advertisements appearing to reference the apartments by location, one of which included the defendant's cellular telephone number, and two of which were posted using an electronic mail address registered in the defendant's name. The defendant's telephone records showed that she had been in communication with two of the men who admitted to having paid for and received sexual services at the apartments.

b. Prior proceedings. After the execution of the search warrants, the defendant was arrested and charged with one count each of human trafficking, deriving support from prostitution, keeping a house of ill fame, and conspiracy, separately for each of the five alleged brothels, as well as three counts of money laundering. She subsequently was indicted by the grand jury on these charges. The defendant's case was joined for trial with that of both of her codefendants; the three codefendants' motion for relief from prejudicial joinder was denied after a hearing.³

At trial, the prosecutor introduced testimony from a number of law enforcement officers, as well as from several men who testified that they had received sexual services in exchange for

³ In opposition to the motion for relief from prejudicial joinder, the Commonwealth offered to omit Hayes's incriminating statement to police involving his codefendants, so long as the three codefendants' cases remained joined for trial.

cash payments at the suspect locations. The prosecutor was unable to locate the majority of the suspected trafficking victims, but introduced photographs of each of the women who had been found in the apartments, and provided names for each.

Two of the victims, BX and CWQ,⁴ testified at trial. BX testified that she came to Massachusetts to perform massage work after having connected with the defendant through an Internet messaging service. Upon arriving in Boston, the defendant told her that, in addition to massage services, she was expected to provide sexual services, and BX complied. BX testified that the defendant, whom she referred to as "the boss," would drive her between the apartments in Boston, Quincy, and North Reading, where she would engage in sexual contact with men in exchange for a fee. BX said that she would use condoms provided by the defendant, and kept a ledger of her customers, as the defendant required. BX testified that, on average, she would see three to five customers per day, and would give the defendant between thirty-eight and forty-four percent of her earnings. BX also testified that there were other women in the apartments who worked for the defendant and who provided sexual services in exchange for cash.

⁴ All of the victims are referenced by pseudonyms. See G. L. c. 265, § 24C.

CWQ testified that she came to Boston in order to perform massage work after hearing about an available job from a friend. CWQ said that a Chinese woman picked her up from the bus station and brought her to the apartment in Boston, where she engaged in sexual contact with male customers for a fee. CWQ explained that she would give some of the money she earned to the woman who met her at the bus stop, whom she described as "older sister," but did not identify by name.⁵

Before beginning deliberations, the jury were provided with verdict slips for each offense charged, separately for each of the five different locations. The jury found the defendant guilty of five counts of human trafficking, G. L. c. 265, § 50; five counts of deriving support from prostitution, G. L. c. 272, § 7; four counts of keeping a house of ill fame, G. L. c. 272, § 24; and three counts of money laundering, G. L. c. 267A, § 2.⁶

⁵ CWQ testified that, in Chinese culture, "older sister" is a "polite expression" used to refer to someone older than oneself.

⁶ Hayes was convicted of those same charges. Prior to jury deliberations, the Commonwealth dismissed the conspiracy charges against both the defendant and Hayes, and the jury acquitted them of one count of keeping a house of ill fame. At sentencing, the defendant also pleaded guilty to a sixth charge of human trafficking, arising from her role in operating a brothel in a Quincy hotel while she was on bail in August 2017. Lin, who was charged with only one count of human trafficking, was acquitted.

The defendant timely appealed, and we transferred the case to this court on our own motion.

2. Discussion. The defendant argues that the trial judge committed multiple errors that, individually and collectively, require a new trial. The asserted errors include the denial of the defendant's motion to sever on the ground of mutually antagonistic and irreconcilable defenses, evidentiary rulings on the admissibility or exclusion of specific testimony, and inaccuracies in the jury instructions. In particular, the defendant maintains that the judge should have allowed her motion to introduce grand jury testimony by two alleged trafficking victims who did not testify at trial, and should have excluded testimony by a witness who saw an "extremely frightened" woman not far from one of the apartments. The defendant also contends that the instructions did not apprise the jury of each of the elements of the offense of human trafficking, invited a nonunanimous verdict, and improperly lowered the Commonwealth's burden of proof.

a. Severance. Prior to trial, the defendant moved to sever her trial from that of her codefendants; she argued that joinder was prejudicial because the codefendants would be presenting mutually antagonistic and irreconcilable defenses. The codefendants joined the motion. At a hearing on the motion, counsel for Hayes stated that he would be arguing "that [Hayes]

didn't really understand what was going on," but, rather, "was being used by [the defendant] and she ran the whole thing." The defendant's attorney confirmed that he, too, would be "pointing fingers" at Hayes. The judge concluded that the defendant did not adequately demonstrate that she would suffer undue prejudice from the joinder.

"It is presumed that '[w]hen criminal charges against two or more individuals "arise out of the same criminal conduct," those two individuals will be tried together.' Commonwealth v. Watson, 487 Mass. 156, 167 (2021), quoting Commonwealth v. Siny Van Tran, 460 Mass. 535, 542 (2011). See Mass. R. Crim. P. 9, 378 Mass. 859 (1979). Nonetheless, a judge may sever a case, thereby granting each defendant his or her own trial, if "it appears that a joinder . . . is not in the best interests of justice." Mass. R. Crim. P. 9 (d) (1). Joinder is not in the best interests of justice if (1) the defenses are "mutually antagonistic (or mutually exclusive) and irreconcilable," Commonwealth v. Vasquez, 462 Mass. 827, 836 (2012), or (2) "the prejudice resulting from a joint trial is so compelling that it prevents a defendant from obtaining a fair trial," Siny Van Tran, supra, quoting Commonwealth v. Moran, 387 Mass. 644, 658 (1982). See Commonwealth v. Hernandez, 473 Mass. 379, 391 (2015). Defenses are considered mutually antagonistic and irreconcilable if "[t]he sole defense of each was the guilt of

the other" or "the acceptance of one party's defense will preclude the acquittal of the other," Vasquez, supra at 836-837, quoting Moran, supra at 656-657; "it is not enough that the defendants are hostile to one another or that one defendant would have a better chance of acquittal if tried alone," Commonwealth v. McAfee, 430 Mass. 483, 486 (1999). We review the denial of a motion for severance for an abuse of discretion. See id.

The defendant contends that severance was required because her defense and Hayes's defense were mutually antagonistic and irreconcilable. The defendant asserts that she and Hayes "largely did not challenge the allegation that someone had trafficked women for prostitution, but instead argued that, whatever was done, it was done by the other."

The defendant's characterization of these arguments, however, is belied by the record. See Commonwealth v. Vallejo, 455 Mass. 72, 88 (2009), quoting K.B. Smith, *Criminal Practice and Procedure* § 20:31, at 188 & n.5 (3d ed. 2007 & Supp. 2008) ("The true level of alleged antagonism between the defenses is measured, on appeal, by the evidence actually at trial"). See also McAfee, 430 Mass. at 486 & n.1 (examining closing arguments in determining whether severance was required); Moran, 387 Mass. at 654 (examining opening statements in determining whether severance was required). The record indicates that the

defendant's primary defense at trial was that she and the other women at the apartments were prostitutes, but that no one was trafficked. In closing, trial counsel for the defendant thrice asserted that this case is about prostitution, and not human trafficking. He emphasized that there was no evidence that the women at the apartments were being held against their will and, at one point, criticized law enforcement officers and prosecutors for aggressively pursuing crimes of prostitution rather than devoting scarce resources to more serious crimes. The defendant's counsel only briefly implicated Hayes, in a comment that "Hayes has a lot of evidence against him," as well as suggesting that some of the evidence against the defendant ultimately was attributable to Hayes.

Hayes's primary theory of defense at trial was that the Commonwealth failed to satisfy its burden of proof to establish that he knowingly participated in the trafficking scheme. In opening, counsel for Hayes said, "[T]he reason your verdict should be not guilty is that nobody, nobody is going to get on this witness stand and testify as to the essential facts that the Commonwealth is asking you to find beyond a reasonable doubt." Hayes's counsel continued to follow this strategy in closing, where he emphasized that the jury should "look at the things that the Commonwealth did not prove, the witnesses they did not put on, the evidence you did not hear from." Counsel

for Hayes argued that any evidence against Hayes "ultimately [was] attributable to [the defendant]," whom Hayes asserted had manipulated him into unwittingly becoming involved in the defendant's trafficking scheme. Nonetheless, casting blame on the defendant constituted only a small part of Hayes's argument; the majority of the argument focused on what counsel contended the Commonwealth had not proved.

Although they were no doubt hostile, the two defenses did not rise to the level of being mutually antagonistic and irreconcilable, as the jury could have accepted either codefendant's argument while at the same time acquitting the other. See Commonwealth v. Ramos, 470 Mass. 740, 749 (2015), quoting Moran, 387 Mass. at 657 ("'mutual antagonism' only exists where the acceptance of one party's defense will preclude the acquittal of the other"). Had the jury believed the defendant's assertion that the women at the apartments were prostitutes but not victims of trafficking, both she and Hayes could have been acquitted. See Ramos, supra (severance was not required where "[a]cceptance of [the codefendant's] defense . . . would not have precluded acquittal of the defendant," but rather "could have led to the conclusion that the defendant, too, should be acquitted"). Similarly, the jury could have believed that the Commonwealth did not satisfy its burden of proof with regard to Hayes, without finding the

defendant guilty, if they discredited or otherwise found insufficient the evidence Hayes attributed to the defendant's actions. See Hernandez, 473 Mass. at 391 (defenses were not mutually antagonistic where "the defendant did not need the jury to believe that [his codefendants] were guilty in order to obtain an acquittal"). Although each codefendant tried to attribute some of the incriminating evidence to the actions of the other, that, alone, did not require severance, given that the primary defenses were not mutually antagonistic. Compare Siny Van Tran, 460 Mass. at 543 (severance was not required where each defendant attributed incriminating statement to codefendant, but "[n]either defendant presented a 'sole defense' based on the guilt of the other"); Vallejo, 455 Mass. at 87 (severance was not required where defendant argued that evidence tending to incriminate him was attributable to codefendant's guilt).

b. Grand jury testimony. The defendant sought to introduce at trial testimony by two women, QB and XYZ, before the grand jury, under the prior recorded testimony exception to the rule against hearsay. See Mass. G. Evid. § 804(b)(1) (2022). Both women had testified before the grand jury that they had provided massages at the apartments, but denied having engaged in any sort of sexual contact for money. At the time of trial, neither woman could be located. After concluding that

the statements constituted hearsay that did not fall within any exception, the judge denied the defendant's motion to introduce the prior recorded grand jury testimony. The defendant argues that it was prejudicial error for the judge to exclude this exculpatory testimony.

Hearsay "is generally inadmissible unless it falls within an exception to the hearsay rule." Commonwealth v. Rice, 441 Mass. 291, 305 (2004). One such exception, concerning prior recorded testimony, permits the introduction of hearsay where the statement was "[(1)] given by a person, now unavailable, [(2)] in a proceeding addressed to substantially the same issues as in the current proceeding, [(3)] with reasonable opportunity and similar motivation on the prior occasion for cross-examination of the declarant by the party against whom the testimony is now being offered." Commonwealth v. Fisher, 433 Mass. 340, 355 (2001), quoting Commonwealth v. Trigones, 397 Mass. 633, 638 (1986). See Mass. G. Evid. § 804(b)(1). Grand jury testimony may be admissible under this exception, although "[i]t is likely to be very difficult for defendants offering grand jury testimony to satisfy the 'opportunity and similar motive' test," given that "by its very nature, the testimony provided to a grand jury is limited." Commonwealth v. Clemente, 452 Mass. 295, 315 (2008), cert. denied, 555 U.S. 1181 (2009), quoting United States v. Omar, 104 F.3d 519, 523 (1st Cir.

1997). "A determination whether there was opportunity and similar motive is fact specific and dependent on the particular circumstances." Commonwealth v. Gray, 463 Mass. 731, 746 n.18 (2012).

Here, the questioning of QB and XYZ demonstrates that the prosecutor's motive at the grand jury was "to present enough evidence to obtain an indictment, and not to develop [the Commonwealth's] case as fully as possible." Clemente, 452 Mass. at 314. For instance, for reasons that are not clear on the record, when QB and XYZ denied having engaged in prostitution, the prosecutor did not make any effort to challenge or otherwise discredit that testimony. See United States v. DiNapoli, 8 F.3d 909, 914 (2d Cir. 1993). Because several other witnesses apparently testified for the Commonwealth,⁷ the prosecutor might have discerned little if any reason to attempt to extract additional inculpatory testimony from QB and XYZ. See Commonwealth v. Martinez, 384 Mass. 377, 385 (1981). In addition, at the time of the grand jury proceedings, the Commonwealth might not have had a meaningful opportunity to challenge the testimony because the investigation was still ongoing at that stage. See Clemente, supra at 315 (no meaningful opportunity to develop testimony if Commonwealth does

⁷ The record includes grand jury testimony only by specific witnesses and not the entire transcript of the proceedings.

"not yet possess evidence with which to confront and contradict an adverse witness"). Indeed, the proceedings before the grand jury were conducted only one day after the execution of the search warrants, whereas the Commonwealth continued to compile evidence for two years after the grand jury returned the indictments. This later-obtained evidence included evidence of commercial sexual activity that, if it had been available,⁸ could have been used to call into question QB's and XYC's denials of having engaged in sex for money. See Omar, 104 F.3d at 523 (government had no meaningful opportunity to discredit witness at grand jury where record did not show that government had any evidence available with which to confront or contradict witness). Accordingly, the judge did not err in declining to allow the introduction of the grand jury testimony.

c. Unduly prejudicial testimony concerning unknown woman.

The defendant argues that the judge erred in allowing the introduction of testimony about a witness's interactions with an unknown woman near one of the alleged brothels. The witness testified that, in early April 2017, she had been driving past the apartment complex in North Reading, where the alleged

⁸ Although the parties contest whether the witnesses were truly unavailable, in light of our conclusion that the defendant did not demonstrate that the Commonwealth had the same opportunity and motive to develop the witnesses' testimony at the grand jury proceedings, we need not consider this issue. See Commonwealth v. Fisher, 433 Mass. 340, 355 (2001).

brothel was located, when she saw an "extremely frightened" young woman waving her arms in the nearby woods. The witness described the woman as Asian, approximately fifteen to twenty years old, wearing a short bathrobe but with bare legs and bare feet. When the driver (the witness's husband) stopped the vehicle, the woman ran to and attempted to enter it, while hurriedly asking to be driven to "Chinatown." The witness did not allow the woman to enter, but indicated that she would summon help and called the police. At some point during the call, the woman left the area. The woman was not located or identified.

The judge permitted the witness, over the defendant's objection, to testify about having seen the woman. The judge limited the testimony to what the witness had observed and excluded any statements by the witness about her own feelings regarding the incident, or any speculation about the unknown woman's mindset.

Evidence is not admissible if "its probative value is substantially outweighed by its prejudicial effect." Gray, 463 Mass. at 751, quoting Commonwealth v. Sylvia, 456 Mass. 182, 192 (2010). See Mass. G. Evid. § 403. "In weighing the probative value of evidence against any prejudicial effect it might have on a jury, we afford trial judges great latitude and discretion" and will uphold a judge's decision unless it constitutes an

abuse of discretion. See Commonwealth v. Sicari, 434 Mass. 732, 752 (2001), cert. denied, 534 U.S. 1142 (2002).

Although the evidence bore only a tenuous connection to the charged crimes, we cannot say that the judge abused her discretion in concluding that it was probative; it tended to support the Commonwealth's contention that human trafficking activity was taking place at or near the North Reading apartment complex. See Commonwealth v. Howard, 386 Mass. 607, 613 (1982) (O'Connor, J., concurring), quoting P.J. Liacos, *Massachusetts Evidence* 408 (5th ed. 1981) ("To have probative worth the evidence offered must tend to show, with a fair degree of probability, the fact for which it is offered as proof"). In conjunction with other evidence before them, the jury could have inferred that the woman was one of the individuals engaged, perhaps unwillingly, in commercial sexual activity at the apartment. Therefore, there was no abuse of discretion in the judge's conclusion that the evidence had some probative value, even though the woman was not definitively linked to the defendant's trafficking activity. Compare Commonwealth v. Yesilciman, 406 Mass. 736, 744-745 (1990) (evidence of blood in car of defendant charged with murder was admissible, even though expert "was unable to determine whether the blood was human or animal in origin," and therefore bore only inconclusive connection to crime).

Nonetheless, we recognize that the evidence was, as the defendant contends, highly prejudicial. The testimony about the woman's frightened demeanor, in particular, risked "appeal[ing] to the jury's sympathies, arous[ing] [their] sense of horror, [and] provok[ing] [their] instinct to punish." See Carter v. Hewitt, 617 F.2d 961, 972 (3d Cir. 1980), quoting 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 403(03), at 403-15 to 403-17 (1978). See also Commonwealth v. Rutherford, 476 Mass. 639, 646 (2017). Although the judge attempted to minimize the risk of prejudice by limiting the scope of the witness's testimony, the permitted testimony nonetheless was inflammatory. See Commonwealth v. Martinez, 476 Mass. 186, 190 (2017).

A determination whether the risk of prejudice substantially outweighs the probative value of the evidence is for the trial judge, who is in the best position to evaluate the effect of the evidence and therefore enjoys broad discretion in the matter. See Commonwealth v. Lewin (No. 2), 407 Mass. 629, 631 (1990). "While it is a close call, and we might have reached a different result had the question been de novo before us, we are unable to conclude that the judge abused [her] discretion" Commonwealth v. Bell, 473 Mass. 131, 145 (2015), cert. denied, 579 U.S. 906 (2016).

d. Jury instructions. The defendant asked the judge to instruct the jury in her final charge that, for each count of

human trafficking, they must "be unanimous as to at least one human person" that the defendant had trafficked at the specific location set forth on the verdict slip. The request was denied, and the judge instead instructed the jury, sua sponte, that "[t]he Commonwealth need not prove the identity of the person or persons engaged in prostitution, so long as it proves that one or more persons were engaged in commercial sexual activity at the location identified by the verdict slip." The defendant objected when the judge issued the denial, but did not object to the instruction subsequently provided.

The defendant argues that, by declining to instruct the jury as she requested, the judge did not inform them of an essential element of the offense of human trafficking, and that this, in turn, created a risk that the jury would convict the defendant without unanimously agreeing on the underlying criminal act, thereby depriving her of her right to a unanimous jury. The defendant also argues that the instruction the judge gave sua sponte "wrongly suggested that the jury could convict even if the defendants were not connected to acts of prostitution that occurred at the apartments."

i. Specific victim. It is axiomatic that a "jury verdict in a criminal trial must be unanimous." Commonwealth v. Cyr, 433 Mass. 617, 621 (2001). Thus, in order to convict, a jury must find unanimously that the Commonwealth proved each of the

required elements of the charged offense beyond a reasonable doubt. See Commonwealth v. Cruz, 456 Mass. 741, 752 (2010), quoting In re Winship, 397 U.S. 358, 364 (1970) ("Due process requires that the government prove 'beyond a reasonable doubt . . . every fact necessary to constitute the crime with which [the defendant] is charged'"). In addition, the jury must be "unanimous as to which specific act constitutes the offense charged." Commonwealth v. Conefrey, 420 Mass. 508, 512 (1995), quoting Commonwealth v. Keevan, 400 Mass. 557, 566-567 (1987). Accordingly, an instruction that jurors unanimously must agree on a particular victim is warranted if the identity of the victim is an element of the offense, see Commonwealth v. Reyes, 464 Mass. 245, 259 (2013), or if it is necessary to prevent the possibility of the jury convicting the defendant without agreeing on the particular criminal act, see Conefrey, supra at 513. The defendant's argument invokes both possibilities.

General Laws c. 265, § 50 (a), the human trafficking statute, provides, in relevant part:

"Whoever knowingly . . . subjects . . . recruits, entices, harbors, transports, provides or obtains by any means . . . another person to engage in commercial sexual activity . . . or causes a person to engage in commercial sexual activity . . . shall be guilty of the crime of trafficking of persons for sexual servitude" ⁹

⁹ "Commercial sexual activity" is defined as "any sexual act on account of which anything of value is given, promised to or received by any person." G. L. c. 265, § 49.

The defendant argues that the identity of the particular trafficking victim is an essential element of G. L. c. 265, § 50 (a), and therefore the jury unanimously must agree "on a person who was trafficked for each count." In her view, such an element can be inferred from the Legislature's use of the words "another person" and "a person" in this provision. The defendant also maintains that, because the clear legislative intent in adopting G. L. c. 265, § 50 (a), was to protect victims of human trafficking, the Legislature must have intended to require the Commonwealth to prove the existence of a specific victim.

"To ascertain the elements of a crime we ordinarily look to the statutory language." Commonwealth v. Burke, 390 Mass. 480, 483 (1983). We interpret the statutory language "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Commonwealth v. Figueroa, 464 Mass. 365, 368 (2013), quoting Harvard Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 749 (2006). "Ordinarily, we do not look to extrinsic sources to vary the plain meaning of a clear, unambiguous statute unless a literal construction would

yield an absurd or unworkable result." Commonwealth v. Millican, 449 Mass. 298, 300-301 (2007). "We will not 'read into [a] statute a provision which the Legislature did not see fit to put there.'" Chin v. Merriot, 470 Mass. 527, 537 (2015), quoting Commissioner of Correction v. Superior Court Dep't of the Trial Court for the County of Worcester, 446 Mass. 123, 126 (2006). "Any reformulation of the statutory crime . . . is a matter for the Legislature." Commonwealth v. Bell, 455 Mass. 408, 414 (2009), abrogated on other grounds by Commonwealth v. LaBrie, 473 Mass. 754 (2016).

We begin with the plain meaning of what the defendant identifies as the operative statutory language: "another person" and "a person." See G. L. c. 265, § 50 (a) (prohibiting certain activities enabling "another person to engage in commercial sexual activity" or "caus[ing] a person to engage in commercial sexual activity"). In common usage, "another" is defined as "other than oneself or the one specified." See Webster's New Universal Unabridged Dictionary 85 (1996). See also Commonwealth v. Samuel S., 476 Mass. 497, 501 (2017) (relying on dictionary definitions to interpret statute). "Person," in ordinary use, means "a human being." See Webster's New Universal Unabridged Dictionary, supra at 1445. Therefore, as ordinarily understood, the phrases "another person" and "a person" appear to indicate that (1) the trafficking must be of a

human being, compare G. L. c. 272, § 77C (prohibiting "obtain[ing] an animal with the intent that the animal be used for sexual contact"); and (2) one cannot be convicted of trafficking him- or herself,¹⁰ compare G. L. c. 272, § 53A (prohibiting "engag[ing] in sexual conduct with another person in return for a fee"). This plain reading of the language comports with the Legislature's intent to "change the focus of police and prosecutors from targeting prostitutes to going after . . . the pimps who profit from the transactions" by ensuring that traffickers, and not only the individuals solely engaged in commercial sexual activity, are prosecuted.

Commonwealth v. Dabney, 478 Mass. 839, 853, cert. denied, 139 S. Ct. 127 (2018), quoting Gov. Patrick Signs Bill Against Human Trafficking, Associated Press, Nov. 21, 2011. Thus, these

¹⁰ Our decision in Lowery, 487 Mass. at 864, where we concluded that a trafficking victim participated in a joint venture with the defendant, her trafficker, "to engage in commercial sexual activity," id. at 861, is not to the contrary. There, we considered whether a victim of human trafficking could be deemed to have engaged in a joint venture with her trafficker within the meaning of Mass. G. Evid. § 801(d)(2)(E), which permits the introduction of out-of-court statements made by coventurers in furtherance of a joint venture. See Lowery, supra at 860. It does not follow, however, that the victim was involved in a joint venture to traffic herself -- as opposed to, for example, the separate crime of aiding and abetting prostitution -- nor does it follow that she could be charged with as much under G. L. c. 265, § 50 (a). See Commonwealth v. Dabney, 478 Mass. 839, 855, cert. denied, 139 S. Ct. 127 (2018) (noting that crime of aiding and abetting prostitution is distinct from human trafficking).

phrases do not, as the defendant contends, require proof of a victim's identity. Compare United States vs. Jones, U.S. Dist. Ct., No. 1:05-cr-617-WSD (N.D. Ga. July 18, 2007) ("[t]he identity of a particular victim is not an element" of Federal antihuman trafficking statute, notwithstanding statute's use of phrases "another person" and "a person").

Accordingly, to establish a violation of G. L. c. 265, § 50 (a), the Commonwealth need only prove that a defendant (1) knowingly (2) "enabled or caused," by one of the statutorily enumerated means, (3) another person (4) to engage in commercial sexual activity. See Commonwealth v. McGhee, 472 Mass. 405, 418 (2015) (G. L. c. 265, § 50 [a], prohibits "individuals or entities from knowingly undertaking specified activities that will enable or cause another person to engage in commercial sexual activity"). See also Dabney, 478 Mass. at 857 (references to "enabling" or "causing" prostitution are "a short-hand means of describing the various ways in which a person may violate the human trafficking statute," as enumerated in G. L. c. 265, § 50 [a]). Although the Commonwealth must prove beyond a reasonable doubt that there was a victim, i.e., someone whom the defendant enabled or caused to engage in commercial sexual activity, it need not prove the identity of that person as an element of the offense.

To be sure, the Commonwealth may, and often will, elect to prove a victim's identity in order to demonstrate that the defendant enabled or caused that individual's commercial sexual activity. See, e.g., Dabney, 478 Mass. at 840. But the Commonwealth need not do so as part of its burden of proof. See Richardson v. United States, 526 U.S. 813, 817 (1999) (distinguishing element of crime and facts that may be used to establish that element).

The defendant argues that interpreting the statute not to require a specifically identified victim does not give effect to the Legislature's intent to protect victims of trafficking. We agree that the Legislature enacted G. L. c. 265, § 50 (a), because it wanted to protect victims from the harms of human trafficking. See McGhee, 472 Mass. at 420 (recognizing "the Legislature's intent to protect victims of sex trafficking"). It sought to do so by filling a gap in Massachusetts law and permitting prosecution of traffickers in the Commonwealth rather than being forced to rely upon prosecution by Federal authorities under the Federal statute. See Dabney, 478 Mass. at 853; Office of the Governor, Press Release, Governor Patrick Signs Anti-Human Trafficking Legislation, (Nov. 21, 2011) (Legislature intended to protect victims by providing law enforcement with "modern and effective tools to confront the

people who profit from enslaving others").¹¹ See also Weekly Roundup -- From the State House to the Courthouse, State House News Service, May 27, 2011 (human trafficking legislation will "secure the safety of folks across the Commonwealth . . . by helping our law enforcement officials combat the horrific practice of human trafficking"). Our conclusion does nothing to undermine these related purposes; to the contrary, requiring proof of a victim's identity potentially could result in less protection for victims, by making it more difficult to prosecute offenders.¹²

¹¹ Available at <https://archives.lib.state.ma.us/bitstream/handle/2452/125841/ocn795183245-2011-11-21b.PDF?sequence=1> [<https://perma.cc/SB6F-MDEG>].

¹² Victims of human trafficking often suffer significant emotional and physical trauma, which may manifest in persistent mistrust of individuals and their motives, including those attempting to offer assistance. See United States Department of Health and Human Services, Human Trafficking into and within the United States: A Review of the Literature 14 (Aug. 29, 2009), https://aspe.hhs.gov/sites/default/files/migrated_legacy_files//43241/index.pdf [<https://perma.cc/T2PR-WR7P>]. Moreover, victims of human trafficking often may be homeless or otherwise transient, and frequently may be foreign nationals. See *id.* at 7-8. The confluence of these circumstances may result in difficulty in maintaining contact with and ensuring the cooperation of victims throughout the course of a prosecution, as could be necessary to prove a victim's identity beyond a reasonable doubt at trial. See Farrell, Owens, & McDevitt, *New Laws but Few Cases: Understanding the Challenges to the Investigation and Prosecution of Human Trafficking Cases*, 61 *Crime, L. & Soc. Change* 139, 158 (2014) (in multijurisdictional study, "more than half of the [trafficking] victims who initially cooperated with prosecutors refused to cooperate or went missing as the case progressed").

The defendant also argues that proof of a victim's identity is necessary to preclude a violation of the protections against double jeopardy. "The double jeopardy clause of the Fifth Amendment to the United States Constitution, and protections recognized in Massachusetts statutory and common law, prevent a defendant from being tried more than once for the same offense." Commonwealth v. Love, 452 Mass. 498, 502 (2008). The defendant argues that, if a jury do not identify and agree unanimously on a particular victim, there would be no way to discern which particular act a defendant was found to have committed, and thus no way to prevent duplicative convictions. See Commonwealth v. Constantino, 443 Mass. 521, 523 (2005). We attempt to preclude duplicative convictions, however, by discerning "what 'unit of prosecution' was intended by the Legislature as the punishable act," and by barring subsequent prosecution for the same act, rather than by grafting additional elements onto an offense. See Commonwealth v. Traylor, 472 Mass. 260, 268 (2015), quoting Commonwealth v. Botev, 79 Mass. App. Ct. 281, 286 (2011).

In addition, the defendant contends that, even if in some circumstances the jury need not agree on a particular trafficking victim for each conviction of trafficking, they nonetheless should be required to do so where, as here, there are multiple possible victims for each charge. Absent such a requirement, the defendant maintains, there would be no way to

ensure that the jurors agreed on what prohibited act she committed, because the jury could convict her while disagreeing as to which individual she trafficked.

"A specific unanimity instruction 'indicates to the jury that they must be unanimous as to which specific act constitutes the offense charged.'" Commonwealth v. Palermo, 482 Mass. 620, 629 (2019), quoting Keevan, 400 Mass. at 566-567. Such an instruction is necessary where "the evidence raises the possibility" that "the jury might mistakenly believe that they could convict the defendant even if they disagreed as to which of the alleged criminal acts he [or she] had committed." See Commonwealth v. Santos, 440 Mass. 281, 285 (2003), overruled on other grounds by Commonwealth v. Anderson, 461 Mass. 616, cert. denied, 568 U.S. 946 (2012). This possibility arises most frequently "when, 'on a single charged offense, the prosecutor presents evidence of separate, discrete incidents, any one of which would suffice by itself to make out the crime charged.'" Palermo, supra, quoting Santos, supra at 284-285. Accordingly, where the Commonwealth presents evidence of two or more acts against different victims on a single charge, we have required the jury unanimously to agree on a particular victim. See, e.g., Palermo, supra at 629-631 (specific unanimity instruction was required where Commonwealth presented evidence that defendant threatened two individuals within short period of

time, but was charged with only one count of threatening to commit crime).

Where the Commonwealth proceeds on a theory that the criminal act was "a continuing course of conduct," however, or "a single criminal scheme or plan carried out consistently overtime," a specific unanimity instruction is not required. See Santos, 440 Mass. at 285-286, quoting Commonwealth v. Thatch, 39 Mass. App. Ct. 904, 905 (1995) (no specific unanimity instruction required to sustain conviction of armed robbery based on "a single criminal episode, with multiple applications of force and threats of force inflicted on the occupants of the apartment during that episode"). In such circumstances, the Commonwealth alleges only one criminal act, consisting of a continuing course of conduct or a single criminal scheme. See Santos, supra. Thus, the "jury will either believe that [the course of conduct or criminal scheme] has occurred, of necessity encompassing a number of discrete acts, or they will disbelieve it" (citation omitted). Commonwealth v. Sanchez, 423 Mass. 591, 600 (1996). Because, in those circumstances, "a jury are not offered a choice between discrete incidents . . . to support a single charge, the risk of a lack of unanimity . . . does not exist." Id.

To determine whether an act was charged as a continuing course of conduct or as a single criminal scheme, we look to the

evidence and arguments as they were presented to the jury. Compare Conefrey, 420 Mass. at 514 (specific unanimity instruction was required in prosecution for indecent assault and battery where Commonwealth presented evidence of several discrete instances of abuse), with Commonwealth v. Kirkpatrick, 423 Mass. 436, 443, cert. denied, 519 U.S. 1015 (1996), overruled on other grounds by Commonwealth v. King, 445 Mass. 217 (2005) (no risk of nonunanimous verdict in prosecution for indecent assault and battery where Commonwealth introduced evidence of continuing course of abuse, consisting of multiple undifferentiated acts).

The defendant's argument presupposes that each victim represents a separate and distinct criminal act. Although trafficking offenses frequently may be prosecuted under such a theory, see, e.g., McGhee, 472 Mass. at 408-409, in this case they were not. Rather, the charges were based on the theory that the actions at each alleged brothel constituted a distinct criminal scheme to traffic multiple women. The Commonwealth's case relied upon evidence of a criminal scheme to sell the sexual services of various women at each of the alleged brothels, carried out consistently over time. See Conefrey, 420 Mass. at 513-514 (analyzing evidence at trial to determine whether specific unanimity instruction was required); Commonwealth v. Steed, 95 Mass. App. Ct. 463, 469-470 (2019) (no

specific unanimity instruction was required where "the Commonwealth based its prosecution for human trafficking on but one theory of guilt -- an ongoing course of conduct by the defendant offering sexual services of various women").

Here, the evidence was presented largely in generalities concerning all of the victims; there was scant evidence of particular actions against specific victims. Compare Kirkpatrick, 423 Mass. at 442-443 (no risk of nonunanimous jury where evidence was presented in generalities such that jury would have had no basis to differentiate between different incidents). Indeed, many of the actions alleged to have established trafficking here involved a pattern of behavior directed at multiple victims, rather than at individual victims, and thus provided no basis upon which the jury could have differentiated between the victims.¹³ Cf. Commonwealth v. Pimental, 54 Mass. App. Ct. 325, 328-329 (2002) (no specific unanimity instruction was required where Commonwealth based

¹³ For example, the Commonwealth alleged that the defendant posted Backpage advertisements offering sexual services. The advertisements did not offer the services of any particular victim, but, rather, apparently relied upon generic pictures of women, such that any given photograph could not be used to link a particular woman to a specific advertisement. Similarly, the Commonwealth alleged that the defendant provided the women with supplies such as condoms and personal lubricant. Because, under the Commonwealth's theory, all of the women working at the apartments would use these supplies, there would have been no basis for the jury to conclude that this action was taken against one victim, but not another.

larceny prosecution on "a single theory of culpability, directed to a single larcenous plan, involving multiple stolen items").

In her opening statement and closing argument, the prosecutor did not rely upon any particular instances of trafficking, but, rather, discussed evidence of the codefendants' general pattern of behavior. See Commonwealth v. Zane Z., 51 Mass. App. Ct. 135, 139-140 (2001) (analyzing Commonwealth's opening and closing statements to determine whether specific unanimity instruction was warranted). Indeed, the prosecutor noted on multiple occasions that this case was about an unlawful "business" that was "selling sex," thus underscoring that its theory turned on a general scheme to traffic women, rather than on distinct acts of trafficking.

In sum, the trafficking and associated offenses were charged and tried as distinct criminal schemes, rather than as "a succession of clearly detached incidents." See Santos, 440 Mass. at 285. For each charge, there was only one theory of culpability, based on an ongoing trafficking scheme involving multiple victims. Accordingly, there was no realistic possibility that the jurors would convict the defendant while disagreeing as to what she had done, and a specific unanimity instruction thus was not required.

ii. Jury instructions. In lieu of the defendant's requested instruction, the judge instructed the jury that "[t]he

Commonwealth need not prove the identity of the person or persons engaged in prostitution, so long as it proves that one or more persons were engaged in commercial sexual activity at the location identified by the verdict slip sometime between January 1, 2017 and May 4, 2017." In the defendant's view, this instruction erroneously suggested that the defendant could be convicted of trafficking so long as the jury found that someone engaged in prostitution at the apartments, regardless of the defendant's connection, or lack thereof, to such conduct.

"When reviewing jury instructions, we 'evaluate the instruction as a whole, looking for the interpretation a reasonable juror would place on the judge's words.'"

Commonwealth v. Odgren, 483 Mass. 41, 46 (2019), quoting Commonwealth v. Vargas, 475 Mass. 338, 349 (2016). "We do not consider bits and pieces of the instruction in isolation." Commonwealth v. Young, 461 Mass. 198, 207 (2012). Rather, we evaluate "the adequacy of instructions . . . in light of their over-all impact on the jury." Commonwealth v. Galford, 413 Mass. 364, 372 (1992), cert. denied, 506 U.S. 1065 (1993), quoting Commonwealth v. Sellon, 380 Mass. 220, 231-232 (1980).

The defendant is certainly correct that the Commonwealth must establish an appropriate connection between the defendant's trafficking behavior and the victim's commercial sexual activity. As we have previously stated, to be found guilty of

human trafficking under G. L. c. 265, § 50 (a), a defendant must "enable or cause another person to engage in commercial sexual activity" via one of the statutorily enumerated means. See McGhee, 472 Mass. at 418.

Nonetheless, the judge's instructions, when viewed as a whole, adequately conveyed this standard. Before providing the challenged instruction, the judge clearly explained the elements of G. L. c. 265, § 50 (a),¹⁴ employing language substantially similar to both the statute and the instruction approved in Dabney, 478 Mass. at 856. The challenged instruction did nothing to rescind or to alter these elements but, rather, clarified that the Commonwealth need not identify any particular victim, so long as it proved that there were one or more victims for each charge, that is, someone the defendant caused or enabled to engage in commercial sexual activity. In light of

¹⁴ The judge's instructions on the elements were as follows:

"In order to prove any one of these defendants guilty of [human trafficking], the Commonwealth must prove essentially two elements beyond a reasonable doubt. The first element can be divided into two subparts. That is, the Commonwealth satisfies this first element if it proves beyond a reasonable doubt that the defendant: A) subjected, recruited, enticed, harbored, transported, provided, or obtained by any means a person or persons to engage in commercial sexual activity at the particular location identified by the verdict slip; or B) caused a person or persons to engage in commercial sexual activity at the location identified in the verdict slip. The second element that the Commonwealth must prove is that the defendant engaged in this conduct knowingly."

this, no reasonable juror would have concluded that the defendant could have been convicted solely on a finding that someone had engaged in prostitution at the indicated location. See Commonwealth v. Lynch, 439 Mass. 532, 543, cert. denied, 540 U.S. 1059 (2003) (no substantial likelihood of miscarriage of justice where "the judge's charge, read as a whole, could not have been understood to relieve the Commonwealth of its burden to prove beyond a reasonable doubt every element of the crime").

Judgments affirmed.