Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-021

SEPTEMBER TERM, 2017

State of Vermont	}	APPEALED FROM:
	}	
	}	Superior Court, Orleans Unit,
v.	}	Criminal Division
	}	
	}	
Ashley Geoffroy	}	DOCKET NO. 106-3-16 Oscr
		Trial Judge: Howard E. VanBenthuysen

In the above-entitled cause, the Clerk will enter:

Defendant appeals from her conviction for sexual assault of a minor, arguing that the trial court improperly excluded exculpatory evidence at trial. We affirm.

Defendant was charged in March 2016 with one count of sexual assault of a minor under 13 V.S.A. § 3252(c), which makes it a crime for a person to engage in a sexual act with a child who is under the age of sixteen. A jury trial was held in December 2016 at which the following evidence was presented. In the fall of 2015, defendant, who was then twenty-seven years old, began a physical relationship with complainant. Complainant was born on December 5, 1999, and was fifteen years old when the relationship began. Defendant was friends with complainant's parents and would often spend time at their house with complainant and his siblings.

Complainant testified that on September 27, 2015, his parents went to a race track in New Hampshire and left him and his younger sister at home in the care of defendant for the day. The three of them watched television. At some point, while complainant's sister was in the bathroom, defendant covered complainant with a blanket and rubbed his penis under his clothes. After his sister went to bed, defendant and complainant went to his bedroom, where they had sexual intercourse for the first time. They had sex again two or three days later, and then every day for a period of time. Complainant used a condom the first time they had sex, but did not do so on subsequent occasions because defendant told him she "was on an implant." Complainant testified that they continued to have sex up until his birthday, and that their relationship ended right before Christmas of 2015.

Complainant's mother testified that she became concerned about the nature of his relationship with defendant shortly after attending the races in September 2015. She eventually learned that they had been having sex and contacted a police detective. The detective testified that she interviewed both complainant and defendant. When asked by the detective, defendant denied having sex with complainant. The detective later learned that defendant was pregnant and obtained a non-testimonial identification order to obtain DNA from defendant and the baby. The DNA results showed with a very high degree of probability that complainant was the father. A pretrial

stipulation filed by the parties, which stated that R. was born on June 29, 2016, and that complainant was R.'s father, was read to the jury.

Prior to trial, the State had filed a motion to compel defendant to provide copies of any medical records concerning the birth of the baby that defendant intended to rely upon at trial. The State believed that defendant intended to testify that R. was born prematurely, as indicated by R.'s birthweight of five pounds, nine ounces, and was therefore conceived after complainant turned sixteen. The trial court granted the motion to compel, but defendant did not provide any records.

On the morning of trial, defense counsel stated that he did not intend to use any medical records. He stated that "defendant can probably state her own personal observations about whether she believed, you know, the baby was early or not, because she's the mother, and she's given birth before. That would be personal knowledge, not directly related to when the baby was necessarily conceived." The court responded that calculating whether R. was premature would require expert testimony and that it would not permit defendant "to even opine about prematurity." Defense counsel then moved to exclude evidence of R.'s birthdate from the stipulation, arguing that the jury would likely infer that the child was born full-term and was conceived well before complainant turned sixteen. The trial court denied the motion, noting that defendant had already stipulated to the birthdate and that it likely would have come into evidence anyway. Defendant then reiterated his objection to excluding R.'s birthweight, arguing that no expert testimony was needed to establish that fact. Defense counsel did not disagree with the court's observation that someone else likely weighed R. and informed defendant of the weight.

Defendant did not present any evidence at trial. After the State presented its case, defendant moved for judgment of acquittal, arguing that there was insufficient evidence to prove that defendant had sex with complainant prior to his sixteenth birthday. The court denied the motion, and the jury found defendant guilty.

On appeal, defendant contends that the trial court committed reversible error by precluding her from introducing evidence of R.'s birthweight and then denying her motion to exclude the stipulated fact of R.'s birthdate. She argues that if gestational calculations require expert testimony, then neither the baby's birthdate nor the birthweight should have been admitted because the jury would make inferences from that evidence.

Our review of a trial court's evidentiary rulings is deferential, and we will reverse "only when there is an abuse of discretion resulting in prejudice." State v. Spooner, 2010 VT 75, ¶ 15, 188 Vt. 356. We discern no abuse of discretion in the rulings challenged on appeal.

The trial court acted within its discretion in admitting the date of R.'s birth. Defendant had already stipulated to the fact of the baby's birthdate. The information was relevant because it tended to show that defendant and complainant had sexual intercourse before complainant turned sixteen years old. See V.R.E. 402 (stating that relevant evidence is admissible). The jury could rationally infer, based on common knowledge that the normal period for human gestation is approximately nine months, that R. was conceived in September or October 2015. Expert testimony was not required for such an inference. See V.R.E. 201 (permitting judicial notice of facts that are generally known); Monday v. United States, 76 A.2d 68, 69 (D.C. 1950) ("[C]ourts may take judicial notice that the period of human gestation is about 280 days or 9 calendar months.").

The trial court also acted within its discretion in ruling that defendant could not testify regarding R.'s birthweight or opine regarding R.'s alleged prematurity. The court pointed out that defendant likely did not have personal knowledge of R.'s birthweight, and defense counsel did not

contest this assertion. Defendant's proffered testimony therefore was inadmissible hearsay, and the trial court properly excluded it. V.R.E. 801, 802; State v. Gilman, 158 Vt. 210, 214 (1992) ("A defendant is entitled to call witnesses and present evidence on his behalf, but the evidence must be otherwise admissible."). Further, absent expert testimony, the mere fact that R. was born weighing five pounds, nine ounces was not probative of prematurity. A birthweight of five pounds, nine ounces falls within the normal range for a full-term baby. See National Institutes of Health, National Vital Statistics Report, at 11 (Jan. 5, 2017), https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66_01.pdf (defining low birthweight as "less than 2,500 grams or 5 pounds, 8 ounces"). Even a low birthweight would not necessarily indicate prematurity, as it could be due to other factors. See March of Dimes, Low Birthweight (October 2014), http://www.marchofdimes.org/baby/low-birthweight.aspx (explaining that potential reasons for low birthweight include fetal growth restriction caused by birth defects or infection). As the trial court properly determined, although the normal human gestational period is a matter of general knowledge, estimating the date of conception based on a child's allegedly low birth weight is a matter of specialized knowledge for which expert testimony is required. See V.R.E. 701; Burton v. Holden & Martin Lumber Co., 112 Vt. 17, 19 (1941).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Beth Robinson, Associate Justice