

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-144

COMMONWEALTH

vs.

PHILLIP ST. HILAIRE.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury trial in Middlesex Superior Court,<sup>1</sup> the defendant, Phillip St. Hilaire, was convicted on four indictments charging rape of a child by force, pursuant to G. L. c. 265, § 22A, four indictments charging aggravated rape of a child with more than a five-year age difference, pursuant to G. L. c. 265, § 23A, and two indictments charging indecent assault and battery on a child under the age of fourteen, pursuant to G. L. c. 265, § 13B. The convictions concern the defendant's sexual assault and abuse of the victim, his stepdaughter, over the course of years, starting when she was approximately six years old until she was almost fourteen years old. On appeal, he argues the trial judge abused his discretion

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<sup>1</sup> This was the second jury trial; the first trial resulted in a hung jury, and a mistrial was declared.

in permitting the victim, her mother, and her grandmother to testify regarding uncharged acts of domestic violence against the victim and her family. We affirm.

Discussion. Evidence of a defendant's prior bad acts is "inadmissible for the purpose of demonstrating the defendant's bad character or propensity to commit the crimes charged," Commonwealth v. Crayton, 470 Mass. 228, 249 (2014); however, such evidence may be admissible if it is relevant for some other purpose, such as "common scheme, pattern of operation, identity, intent, or motive." Commonwealth v. Oberle, 476 Mass. 539, 550 (2017). Nonetheless, in determining whether to admit such evidence, the trial judge must weigh its probative value against the risk of unfair prejudice to the defendant. See id. "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. Robidoux, 450 Mass. 144, 158 (2007).

Here, the judge did not abuse his discretion or commit a clear error. The testimony regarding the defendant's domestic violence against the victim and her family<sup>2</sup> was relevant to,

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<sup>2</sup> The mother testified that the defendant had grabbed her throat "a time or two," had made threats to her physical well-being, had split her lip, and had "hit, push[ed], [sic] mostly verbal." Some of these occurred in front of family members. The mother

inter alia, two issues at trial. First, the testimony was relevant to rebut the defendant's theory that the victim recently fabricated the sexual assault allegations in response to the defendant and the victim's mother's disclosure that they would divorce and in order to live with her grandmother where she would have her own bedroom. In support of this theory, the defense specifically relied on the victim's delayed reporting. Thus, the defendant's domestic violence was probative of the victim's state of mind; it provided an alternative explanation for the victim's delayed reporting -- namely, she reasonably believed the defendant's threats to harm her family if she reported the assaults. See, e.g., Commonwealth v. Hall, 66 Mass. App. Ct. 390, 394 (2006) (prior bad act evidence admissible where it "tend[s] to rehabilitate the Commonwealth's witness by explaining why, after a long period of silence, she complained of the defendant's conduct"); Commonwealth v. McKinnon, 35 Mass. App. Ct. 398, 404-405 (1993) (prior bad acts

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also observed the defendant use physical force against the boys "when they act[ed] up." The grandmother testified that the relationship between the defendant and the mother was "volatile." Each would call her; the mother sometimes was "hysterically crying" and the defendant was verbally abusive. The defendant grabbed the mother's arm once; the grandmother once observed that the mother had a cut over her eyelids. The victim testified that the defendant verbally abused and choked the mother, verbally and physically abused the victim's siblings, and, to a lesser extent, was violent against the victim.

evidence admissible to show victim's state of mind to explain long-delayed disclosure based on fear of defendant).

Second, the testimony was relevant to the element of force for the charges of rape of a child by force. See G. L. c. 265, § 22A. Specifically, the testimony showed the defendant's use of constructive force by threats against the victim and her family, which the victim reasonably believed in light of the defendant's history of violence. See Commonwealth v. Caracciola, 409 Mass. 648, 652-653 (1991) (defendant's conduct and threats to arrest victim sufficient for constructive force as contemplated by statute).

Nor was the evidence unfairly prejudicial. To the contrary, the judge limited the testimony so as not to allow the uncharged testimony regarding the domestic violence to overwhelm the charged conduct. See Commonwealth v. Childs, 94 Mass. App. Ct. 67, 74 (2018) (no prejudice where judge limited evidence of uncharged conduct and proportion of all testimony concerning charged conduct outweighed testimony regarding uncharged conduct). Contrary to the defendant's assertion that the testimony took up almost half of the trial, a review of the record reveals that the testimony was brief in relation to the charged conduct of rape. Out of the three days of witness testimony, the direct testimony regarding the defendant's domestic violence constituted four pages of the mother's

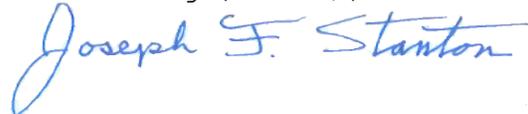
testimony, three pages of the grandmother's, and two pages of the victim's. In contrast, the combined testimony of the victim and the first complaint witness on the charged conduct of sexual assault spanned sixty-nine pages.

In addition, any prejudicial impact was attenuated further because: the uncharged conduct (which involved domestic violence) was different from that of the charged rapes, see Commonwealth v. Veiovis, 477 Mass. 472, 483 (2017) (prior bad act evidence poses less risk of unfair prejudice when not involving commission of similar crimes); the prosecutor's brief reference to the uncharged conduct was responsive to the defendant's closing argument that the victim was not credible by virtue of her delayed disclosure, see Commonwealth v. Philbrook, 475 Mass. 20, 28-29 (2016) (permissible use of prior bad act evidence in closing argument where prosecutor limited use to emphasize defendant's deliberate actions in rebuttal to defense theory of mental disease); and the judge gave a proper limiting instruction, see, e.g., Commonwealth v. Almeida, 479 Mass. 562, 569 (2018) (proper jury instructions minimize potential for

prejudicial effect).

Judgments affirmed.

By the Court (Desmond,  
Wendlandt &  
McDonough, JJ.<sup>3</sup>),



Clerk

Entered: March 13, 2020.

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<sup>3</sup> The panelists are listed in order of seniority.