COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1706

COMMONWEALTH

vs.

MICHAEL VASQUEZ.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After trial on indictments charging sexual assault on three children, the defendant was convicted on two counts of rape of a child. Due to a deadlocked jury on certain indictments, the defendant was retried on those charges. Proceeding with new counsel and a different presiding judge, the defendant was convicted on one count of indecent assault and battery on a child. The defendant subsequently moved for a new trial as to the convictions of rape of a child. That motion was denied by the judge who had presided over the trial of those charges. The defendant now appeals from the convictions resulting from each trial as well as from the order denying his motion for a new trial. We affirm.

Discussion. 1. Motion for new trial. The defendant's motion was premised on ineffective assistance of counsel at his

first trial. He claimed that trial counsel was deficient in (1) cross-examining a witness so as to open the door to harmful testimony on redirect, (2) failing to obtain and use available impeachment evidence concerning the victims' family's motive to lie, and (3) failing to obtain and use available impeachment evidence showing the lack of documentary support for the victims' claims of physical and sexual abuse. On appeal, he argues that he met his burden in establishing ineffective assistance and is therefore entitled to a new trial.

A trial judge "upon motion in writing may grant a new trial at any time if it appears that justice may not have been done." Commonwealth v. Lane, 462 Mass. 591, 597 (2012), quoting Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). We will "only disturb the denial of a motion for a new trial where there has been a 'significant error of law or other abuse of discretion.'" Commonwealth v. Hernandez, 481 Mass. 189, 195 (2019), quoting Commonwealth v. Grace, 397 Mass. 303, 307 (1986). An abuse of discretion is "'a clear error of judgment in weighing' the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives" (citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

"Where, as here, the motion judge was also the trial judge, the decision of the motion judge is entitled to special

deference." Commonwealth v. Delong, 60 Mass. App. Ct. 122, 127 (2003), quoting Commonwealth v. Barnette, 45 Mass. App. Ct. 486, 493 (1998). Further, "[w]here a claim of ineffective assistance of counsel is the basis for the defendant's motion for new trial, appellate courts accord substantial deference to the trial judge's favorable evaluation of a trial counsel's performance." Delong, supra, quoting Barnette, supra.

To succeed on an ineffective assistance claim, a defendant must prove (1) that his attorney showed "serious incompetency, inefficiency, or inattention of counsel -- behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer -- and, if that is found, then typically, [(2) that] it has likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Phinney, 446 Mass. 155, 162 (2006), quoting Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). If "the defendant's ineffective assistance of counsel claim is based on a tactical or strategic decision, the test is whether the decision was '"manifestly unreasonable" when made.'" Commonwealth v. Kolenovic, 471 Mass. 664, 674 (2015), quoting Commonwealth v. Acevedo, 446 Mass. 435, 442 (2006).

a. Cross-examination of witness. On cross-examination of the victims' mother,[1] trial counsel posed a series of questions to elicit testimony that the mother loved her children, that she did everything she could to protect them, and that, had she seen signs of physical injuries or sexual abuse in the children, she would have taken action. The aim was to reveal her bias and establish that the victims did not exhibit any signs of physical injuries or sexual abuse. The questions as framed by trial counsel, however, were somewhat broader: for example, "And if there was someone who you thought was making [your children] unsafe, you would of course do something, wouldn't you?" At trial, the judge ruled that this line of questioning entitled the Commonwealth to inquire as to the risks the mother was aware of and what actions she took as a result. On redirect, the prosecutor did elicit this testimony. On appeal, the defendant argues that defense counsel "inexplicably opened the door to an avalanche of damning but otherwise inadmissible testimony."

As the judge ruled, trial counsel's "line of inquiry was reasonable and appropriate, but his phrasing of questions was inartfully broad." However, as the judge further concluded, this does not constitute "serious incompetency, inefficiency, or

[1] Two of the victims were twins, the son and daughter of the mother. The third victim was the granddaughter of the mother, who acted as her guardian and raised her like her own daughter. We refer to all three victims as the children of the mother.

inattention of counsel," but rather, it reflects behavior "which might be expected from an ordinary fallible lawyer."[2] Saferian, 366 Mass. at 96. Despite counsel's lapse in this one line of questioning, counsel, as the judge put it, "effectively cross examined [the victims' mother] . . . regarding her bias and hostility toward the defendant." Moreover, any potential prejudice from the mother's redirect testimony was tempered by the judge's limiting instructions, given contemporaneously and in the final charge. See Commonwealth v. Berry, 466 Mass. 763, 770 (2014) ("We assume as a rule that the jury follow the instructions provided to them by the judge").

b. Evidence of financial motive to lie. The defendant also argues that trial counsel "failed to obtain and use readily available impeachment evidence discovered by successor counsel in the ordinary course and used at the re-trial showing that the

[2] In his thoughtful memorandum, the judge observed,

> "Rarely, if ever, does a trial attorney achieve perfection in the direct or cross examination of a witness. Even the best trial attorney, at the end of the day, ponders whether they could have more effectively structured an examination, phrased questions, or displayed exhibits, in a more effective or impactive manner. It is not uncommon that an attorney presents certain evidence for an intended purpose and unwittingly permits its use for a different purpose. Indeed, if the measure of effective assistance of counsel was perfection rather than reasonable competence, there could be a Sixth Amendment claim advanced in every case."

victims' family had a financial motive to lie." This claim also fails. Trial counsel testified at the evidentiary hearing on the new trial motion, and the judge found, that counsel did gather documents pertinent to the financial motive theory. Those documents did not ultimately support a theory that the defendant financially cut off the victims' family, which might have prompted them to lie. Counsel therefore determined the financial-motive theory was not viable, and chose to largely forgo it.

To the extent the theory was at all helpful, counsel pursued it at trial via his cross-examination of the mother, to highlight her financial entanglements with, and animus toward, the defendant. Because counsel got the financial motive point across in his cross-examination of the mother, and the Commonwealth did not contest that point, documentary evidence would have been cumulative.

Moreover, the fact that successor counsel did introduce such documents at the second trial does not mean that trial counsel's behavior fell below that of an ordinary fallible lawyer. See Commonwealth v. Walker, 438 Mass. 246, 251 (2002) ("the mere fact that one attorney would now assemble the factual components of an attack on a . . . witness's credibility differently than trial counsel does not establish [trial counsel's] ineffectiveness"). Especially given the judge's

significant discretion, we cannot displace his conclusion that trial counsel provided effective representation despite not introducing financial records at trial. See Delong, 60 Mass. App. Ct. at 127.

c. Lack of corroborative documentary evidence. The defendant also argues that trial counsel "failed to obtain and use readily available impeachment evidence obtained by successor counsel in the ordinary course and used at the re-trial showing that [the victims'] claims of physical and sexual abuse were unsupported by medical, school and DCF [Department of Children and Families] records."

Trial counsel emphasized the absence of third-party corroboration of abuse throughout trial. Further, the Commonwealth conceded in its opening statement that "there is no DNA, there is no medical evidence, there is nothing, no videos that are going to show [the jury] exactly what happened." Counsel did not need to introduce third-party records to demonstrate lack of corroboration because he had already emphasized the absence of third-party corroboration, and because the Commonwealth never claimed the records would have provided corroboration. Again, the fact that successor counsel did introduce such records at a subsequent trial does not mean trial counsel's conduct fell below the standard of an ordinary fallible lawyer. See Walker, 438 Mass. at 251. In light of the

judge's significant discretion, we decline to override his determination that trial counsel provided effective representation despite not introducing medical, school, and DCF records at trial. See Delong, 60 Mass. App. Ct. at 127. The defendant's motion for a new trial was properly denied.

2. Other bad acts. The defendant's next claim is that both trial judges erred by allowing "other bad act" evidence to be admitted where that evidence was more prejudicial than probative. With respect to the first trial, the defendant contends that "the court erred by failing sua sponte to limit the testimony about physical abuse and by allowing, over objection, repeated testimony about pornography and sexual jokes and comments." With respect to the second trial, the defendant contends that "the court erred by allowing testimony of physical abuse and pornography over the defendant's objection."

"It is well settled that the prosecution may not introduce evidence of a defendant's prior or subsequent bad acts for the purpose of demonstrating bad character or propensity to commit the crime[s] charged." Commonwealth v. Butler, 445 Mass. 568, 574 (2005), quoting Commonwealth v. Barrett, 418 Mass. 788, 793 (1994). "Such evidence, however, 'is admissible for other relevant probative purposes.'" Butler, supra, quoting Commonwealth v. Cordle, 404 Mass. 733, 744 (1989), S.C., 412 Mass. 172 (1992). "The question of admissibility of bad act

evidence . . . is properly left to the sound discretion of the trial judge." Butler, supra at 574-575.

The defendant and the Commonwealth each filed motions in limine regarding possible bad act evidence and uncharged conduct in advance of each trial. This included "evidence that the defendant had displayed pornography to various members of the victims' family and that he told sexually explicit jokes and made sexually explicit comments . . . [and] evidence that the defendant had physically abused" several of the victims and their family members. On appeal, the defendant does not so much challenge individual evidentiary rulings below, but rather argues that at both trials the bad act testimony "in scope and duration far outweighed the evidence of the crimes for which the defendant was actually charged . . . [and that its] minimal probative value, if any, was far outweighed by the sheer volume and degree of the testimony."

Both judges made careful, individual rulings on every piece of bad act evidence the Commonwealth sought to admit. Both judges considered the appropriate factors in determining the admissibility of bad act evidence. We have no basis on which to conclude that any of the judges' bad act evidentiary rulings fell outside the range of reasonable alternatives. See L.L., 470 Mass. at 185 n.27; Butler, 445 Mass. at 574-575. Moreover, the defendant has not demonstrated the requisite level of

prejudice for appellate remedy. See Commonwealth v. Miller, 475 Mass. 212, 228 (2016) (where defendant preserved issue by timely objection or motion we review for prejudicial error); Commonwealth v. Azar, 435 Mass. 675, 685 (2002) (where defendant waived issue by failing to object we review for substantial risk of miscarriage of justice).

Each judge issued numerous limiting instructions regarding the proper use of bad act evidence, both contemporaneously with the introduction of the evidence and during final jury instructions. These instructions alleviated any potential prejudice. See Berry, 466 Mass. at 770.

3. First complaint witness. Finally, the defendant claims that, in the second trial, the judge "erred by allowing [one victim's former boyfriend], the wrong first complaint witness for [the victim], to testify as such over the defendant's objection." Our review is for an abuse of discretion. See Commonwealth v. Aviles, 461 Mass. 60, 73 (2011) (appellate courts review trial judge's determination that proposed first complaint evidence is admissible "under an abuse of discretion standard").

"[T]he recipient of a complainant's first complaint of an alleged sexual assault may testify about the fact of the first complaint and the circumstances surrounding the making of that first complaint." Commonwealth v. King, 445 Mass. 217, 218-219

(2005). "If testimony, other than that specifically and properly designated as first complaint testimony, serves no purpose other than to repeat the fact of a complaint and thereby corroborate the complainant's accusations, it is inadmissible." Commonwealth v. Arana, 453 Mass. 214, 229 (2009).

The defendant argues the victim's twin brother, not her former boyfriend, received her first complaint. However, the "first complaint" for purposes of the first complaint doctrine is the first account of sexual assault, which the complainant tells another person, and which that other person understands as such. See Commonwealth v. Murungu, 450 Mass. 441, 446 (2008). See also King, 445 Mass. at 243-244. At the first trial, the judge held a voir dire of the victim and her twin brother on this point. The judge ruled the former boyfriend could testify as the first complaint witness:

> "[S]eparate and apart from [the victim's twin brother's] lack of memory, and denial of remembering any such conversation, it seems to me that the statements made by [the victim] to [her twin brother] do not provide any level of detail. Indeed, they do not even reference inappropriate touching. It's 'something happened,' without going into the nature of what, and I don't see from the circumstances as I heard them in the testimony that we can fairly infer that there was a discussion around any forms of touching, abuse, or sexual assault, such that statements made would qualify as a disclosure or report under the first complaint doctrine. So I'm prepared to rule, based on the proffer as I've heard it, and as I would contemplate [the former boyfriend's] testimony to be that the first complaint

> as it relates to [the victim] was her disclosure to [her former boyfriend]."

In short, the judge ruled the victim's former boyfriend was the proper first complaint witness because he received the first cognizable complaint.

The judge at the second trial, for his part, ruled at a pretrial hearing that the victim's former boyfriend could again testify as the first complaint witness. There, the judge acknowledged that the judge at the first trial allowed the former boyfriend to testify as the first complaint witness. The judge at the second trial did not further expound upon the reasoning behind his own ruling. Nonetheless, with the benefit of the first trial judge's sound explanation, of which the second trial judge appeared to take note, we have no basis to conclude that the second trial judge's first complaint ruling fell outside the range of reasonable alternatives. See L.L., 470 Mass. at 185 n.27; Aviles, 461 Mass. at 73.

In any event, the defendant has failed to establish prejudice. See Miller, 475 Mass. at 228. The second trial judge issued three limiting instructions regarding the former boyfriend's first complaint testimony, both before and after he testified, and in the final jury charge. These instructions

resolved any possible prejudice. See Berry, 466 Mass. at 770.

Judgments affirmed.

Order denying motion for new trial affirmed.

By the Court (Milkey, Singh & Hand, JJ.[3]),

Clerk

Entered: March 17, 2020.

[3] The panelists are listed in order of seniority.