COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-360

LORI LYNN DAVIS,[1] petitioner.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The petitioner was found by a jury to be a sexually dangerous person and was civilly committed in 2011, following the end of her prior incarceration for indecent assault and battery on a person over the age of fourteen. In May of 2015, she brought a petition for discharge from civil commitment pursuant to G. L. c. 123A, § 9. Following a jury trial in 2018, the petitioner was found to remain a sexually dangerous person. She now appeals from that judgment.

Background. Prior to her civil commitment in 2011, the petitioner, born Charles Riley, was convicted of numerous sex-related offenses. In 1977, at the age of eighteen, she was convicted of sexual assault in the second degree for tying up her seventeen year old girlfriend and having vaginal sex with her. In 1978, she was convicted of attempted sexual assault in

[1] Formally known as Charles Riley. All of Davis's sexual offenses were committed under the name Charles Riley.

the first degree for an attack on a twelve year old girl. In 1984, she was convicted of attempted sexual assault in the second degree, criminal impersonation, risk of injury, and unlawful restraint. She was found to have impersonated an FBI agent in order to convince three twelve and thirteen year old girls, strangers to her, to accompany her from a shopping mall into the nearby woods. The petitioner then gagged and bound one thirteen year old girl and attempted to sexually assault her. The petitioner admitted to police that she was trying to rape the victim.

Five years later, the petitioner was convicted of attempted unlawful restraint and breach of the peace for following three twelve to fourteen year old girls in her car for a month and masturbating in her car. A "BB" gun and duct tape were found in her car when she was arrested. In 1993, she also pleaded nolo contendere to sexual assault in a spousal relationship; the petitioner's then-wife reported that the petitioner had tied her up and anally and vaginally raped her.

The petitioner was then convicted of two counts of indecent assault and battery on a person over the age of fourteen in 2008 when she pleaded guilty to the assault of an eighteen year old girl outside of a mall. She was incarcerated for a year in the house of correction.

The Commonwealth moved to civilly commit the petitioner as a sexually dangerous person in November of 2009. After a two-day bench trial, the petitioner was found to be a sexually dangerous person and was committed to the Massachusetts Treatment Center (treatment center) for a term of one day to life. On May 5, 2015, the petitioner petitioned for examination and discharge on the grounds that she is no longer a sexually dangerous person. See G. L. c. 123A, § 9. The petitioner, a transgender woman, has identified as female since approximately 2014, and legally changed her name in March of 2017. She reported that in accepting her gender identity, she had become a person who was not capable of offending in the ways that she had as Charles Riley.

In accordance with G. L. c. 123A, § 9, the petitioner was evaluated by two qualified examiners,[2] Dr. Katrin Rouse-Weir and Dr. Robert Joss. Each personally interviewed her and filed written reports detailing their examinations and their opinions

[2] A qualified examiner is "a physician who is licensed pursuant to section two of chapter one hundred and twelve who is either certified in psychiatry by the American Board of Psychiatry and Neurology or eligible to be so certified, or a psychologist who is licensed pursuant to sections one hundred and eighteen to one hundred and twenty-nine, inclusive, of chapter one hundred and twelve; provided, however, that the examiner has had two years of experience with diagnosis or treatment of sexually aggressive offenders and is designated by the commissioner of correction." G. L. c. 123A, § 1.

as to whether the petitioner was a sexually dangerous person. Both testified as witnesses for the Commonwealth at trial.

Dr. Weir and Dr. Joss each opined that the petitioner met the statutory criteria for a sexually dangerous person at the time of her petition.[3] Dr. Weir diagnosed the petitioner with sexual sadism disorder and noted that her "interest in preying on more vulnerable females may have a sadistic aspect." She also concluded that the petitioner met the diagnostic criteria for pedophilic disorder; the petitioner was sexually attracted to prepubescent females as well as adult females. Dr. Weir further concluded that the petitioner also met the criteria for antisocial personality disorder, leading to her inability to control her sexual impulses. Dr. Weir concluded that, while the petitioner was able to accept responsibility for her offending in the treatment setting, her risk of sexual reoffense had not so diminished at the time of trial that she would no longer be considered a sexually dangerous person.

Dr. Joss, too, concluded that the petitioner suffered from a mental abnormality: sexual sadism disorder, focused on bondage. The petitioner also met many of the diagnostic

[3] As defined by G. L. c. 123A, § 1, a sexually dangerous person, as relevant to this case, is one who (1) has been convicted of a sexual offense, (2) "suffers from a mental abnormality or personality disorder," and (3) is likely, because of her mental abnormality or personality disorder, "to engage in sexual offenses if not confined to a secure facility."

requirements for pedophilic disorder and antisocial personality disorder. Dr. Joss found that, while the petitioner has progressed somewhat in treatment, she had suffered several setbacks. The petitioner also seemed to dismiss her prior acts of sexual violence as belonging exclusively to Charles Riley, mistakenly believing that, as a female, she no longer posed a risk of committing such acts in the future. Dr. Joss concluded that she was likely to reoffend sexually unless she remained at the treatment center.[4]

The petitioner testified on her own behalf and called two witnesses who testified that they would provide her with support were she to be released. She also presented testimony from a transgender woman, also a resident at the treatment center, who had supported the petitioner as a transgender woman in treatment. The petitioner did not present expert testimony.

The petitioner's trial took place from May 29, 2018, to June 1, 2018, during which she twice moved for mistrial. On the third day of trial, the petitioner's counsel raised the issue of

[4] In addition to the two qualified examiners, at trial the Commonwealth called a member of the community access board, Dr. James Schrage, who opined that the petitioner remained a sexually dangerous person. Members of the community access board are appointed by the commissioner of correction to consider a person's placement within a community access program and conduct an annual review of a person's sexual dangerousness. See G. L. c. 123A, § 1. Dr. Schrage testified that the community access board had unanimously recommended that the petitioner remain confined at the treatment center.

the recent media attention focused on sexually dangerous persons and the release of Wayne Chapman, a man who had been confined at the treatment center as a sexually dangerous person. The controversy over Chapman's release sparked "ubiquitous" news coverage at the time of trial, with the governor making public statements regarding the release of sexually dangerous persons like Chapman.

The judge denied the petitioner's first motion for a mistrial, deciding instead to address the issue by inquiring of the jury: "Has any member of the jury read, seen, heard, or overheard anything from any source about the issue of confinement or the release of sexually dangerous individuals that has affected or would affect your ability to consider this case in any way as a fair and impartial juror." The judge first asked this question on the morning of May 31, and none of the jurors responded in the affirmative. The next morning, the petitioner's counsel again moved for a mistrial, and the judge again denied the motion; instead, he repeated his inquiry from the day before. Again, none of the jurors responded in the affirmative. That day, the jury found that the petitioner remained a sexually dangerous person.

Discussion. On appeal, the petitioner argues first that the judge abused his discretion in denying her motions for a mistrial, as the judge's inquiries regarding the jury's exposure

to extraneous prejudicial information were insufficient to protect the petitioner's right to a fair trial. She also argues that, because both qualified examiners, Weir and Joss, had evaluated her during previous proceedings and found her to be a sexually dangerous person, their objectivity may have been compromised by "confirmation bias." Their expert testimony and reports were, she contends, erroneously admitted. The petitioner further argues that the Commonwealth's counsel's comments on her gender identity in closing argument created a substantial risk of a miscarriage of justice.

1. Exposure to extraneous information. We review the trial judge's "denial of a motion for a mistrial for abuse of discretion." Commonwealth v. Silva, 93 Mass. App. Ct. 609, 614 (2018). The petitioner first argues that the judge abused his discretion in denying her motions for a mistrial when faced with the possibility that jurors may have been exposed to highly prejudicial media coverage of Wayne Chapman's release. We disagree.

In Commonwealth v. Jackson, 376 Mass. 790, 800-801 (1978), the Supreme Judicial Court set forth the procedure by which a judge should, in order to safeguard one's constitutional right to a fair trial, determine whether jurors were exposed to extraneous prejudicial information. The trial judge must "assess the possible prejudicial effect of the jury's exposure

to extraneous information, and weigh the impact of that extraneous information on the jurors." Commonwealth v. Kamara, 422 Mass. 614, 616 (1996), citing Jackson, supra.

The judge may pose the initial question whether anyone saw or heard the prejudicial information collectively to the jury. If the judge determines that the extraneous material likely reached one or more jurors, the judge must then determine the prejudicial effect of any exposure, by conducting an individual voir dire of each exposed juror, outside the presence of any other juror. See Jackson, 376 Mass. at 800-801. See also Kamara, 422 Mass. at 616. "The purpose of the voir dire is twofold: to determine the extent of the jury's exposure and the effect of that exposure on the jurors' ability fairly to decide the matter." Commonwealth v. Blanchard, 476 Mass. 1026, 1027 (2017).

Here, the judge considered the petitioner's argument that it would be impossible to insulate the jury from the prejudicial publicity but decided, in his discretion, that it was not necessary to declare a mistrial. We conclude that he did not abuse his discretion in so deciding. In the absence of any information in the record that any of the jurors were actually exposed to extraneous information at all, despite being queried twice by the judge, we cannot conclude that the judge had no choice but to declare a mistrial.

The petitioner also raises the argument, though, that the judge's "general question to the collective jury, asked as part of a string of questions, was not sufficient to detect whether a juror actually was exposed . . . , nor was it sufficient to detect actual bias." The petitioner failed to object, both on May 31 and June 1, to the form of the judge's question; on neither day did she challenge the judge's collective inquiry of the jury. We therefore review only to determine whether, if error, it created a substantial risk of a miscarriage of justice. See R.B., petitioner, 479 Mass. 712, 713 (2018).

We agree that the judge failed to follow the procedure set out by Jackson and later cases. Instead of first determining whether any jurors had been exposed to extraneous information collectively, and then conducting a separate individual voir dire of any exposed jurors regarding how they were affected by the extraneous information, see Blanchard, 476 Mass. at 1027, Kamara, 422 Mass. at 616; Jackson, 376 Mass. 800-801, the judge combined the exposure and effect inquiries into a single question posed to the collective jury: whether they had been exposed to any information that has or would affect their ability to be fair and impartial. We conclude, however, that the petitioner has not shown that the form of the judge's inquiry created a substantial risk of a miscarriage of justice.

The judge twice asked the jurors if they had been exposed to extraneous information about sexually dangerous persons that would affect their ability to be fair and impartial. The judge also asked the jurors whether they had "read, seen, heard, or overheard anything from any source about any aspect of this case outside of the courtroom since yesterday that has affected or would affect [their] ability to consider this case as a fair and impartial juror" each day before trial commenced. The judge twice instructed the jury that they were to "decide what the facts are solely from the evidence admitted in this case," and we presume that the jury followed those instructions. See Commonwealth v. Watkins, 425 Mass. 830, 840 (1997). Given these inquiries and instructions, and in the absence of evidence that any jurors were actually exposed to information about the Chapman case, the petitioner has not demonstrated a substantial risk of a miscarriage of justice.

2. Admission of the qualified examiners' evidence. The petitioner next contends that her due process rights were violated when the judge admitted the expert testimony and reports of qualified examiners Weir and Joss, because their conclusions may have been affected by confirmation bias. Both Weir and Joss had previously evaluated the petitioner, either as a qualified examiner or a member of the community access board. This argument is preserved as to Weir, as the petitioner moved

in limine to exclude her testimony and report, but raised for the first time on appeal as to Joss. We therefore review the admission of Joss's testimony and report to determine whether there was error, and if so, whether it created a substantial risk of a miscarriage of justice.

While pursuant to G. L. c. 123A, § 14 (c), qualified examiners' reports and testimony are presumed to be admissible without a judicial determination that their analyses meet the standards set by Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 597 (1993), and Commonwealth v. Lanigan, 419 Mass. 15, 26 (1994), their testimony and reports "are not wholly immune to judicial scrutiny . . . [and] may be objectionable on constitutional grounds." Commonwealth v. Baxter, 94 Mass. App. Ct. 587, 590 (2018).

As to the admission of Weir's testimony and report, even assuming that the effect of confirmation bias on the reliability of a qualified examiner's analysis is a question of admissibility of the evidence under due process, rather than one of its weight, we conclude that the petitioner has failed to point to sufficient evidence in the record to support her contention that confirmation bias renders Weir's opinions so unreliable that they are inadmissible as a matter of law because they violate due process. To demonstrate confirmation bias, the petitioner points only to the fact that Weir had previously

found the petitioner to be a sexually dangerous person, Weir's discussion of prior evaluations of the petitioner in her latest report, and to several generic articles about the confirmation-bias phenomenon. In the absence of stronger evidence than that before us, we are unable to conclude on this record that the fact that a qualified examiner has previously found an individual to be a sexually dangerous person renders her every future conclusion about that individual so unreliable that it is inadmissible as a matter of due process because of the possibility of confirmation bias. Without more evidence to suggest that unconscious bias drove Weir to confirm her prior conclusions without due consideration of the petitioner's current sexual dangerousness, the petitioner's claim amounts to mere speculation. The judge did not, therefore, abuse his discretion in deciding that cross-examination, rather than exclusion, was the proper means by which the petitioner could explore the issue of confirmation bias.

For the same reason, we find no error in the judge's admission of Joss's testimony and report. While Joss, too, had previously evaluated the petitioner and found her to be a sexually dangerous person, there is no more evidence in the record that demonstrates that his testimony was rendered

unreliable by confirmation bias than there is with respect to Weir's testimony and report.[5]

3. Closing argument. The petitioner argues that the Commonwealth's counsel's remarks in closing arguments, namely, that the petitioner's arguments about her treatment as a transgender person were a distraction, like one in a magician's "trick," disparaged the petitioner and mischaracterized the evidence.[6] As no objection was made at trial, we review to

[5] Because we find no error in the admission of both qualified examiners' reports and testimony, we need not address the petitioner's argument that, in the absence of at least one qualified examiner's reliable, admissible conclusion that the petitioner remains a sexually dangerous person, the evidence would have been insufficient to find her to be a sexually dangerous person. See Chapman, petitioner, 482 Mass. 293, 307 (2019).

[6] The prosecutor made the following statements in closing argument: "This case is not about transgenderism, gender identification disorder, or gender dysphoria. And I suggest, I'm not going to say that it's a ruse, as he predicted, but it's like what a magician does when he's trying to do a trick. A magician wants you looking over here when the trick is happening here, before he reveals the trick. And this entire trial has been about trying to distract you and divert your attention to what this trial is actually about, and to grab at your heartstrings and look for your sympathy and say, Ms. Davis has not been treated fairly as a transgender individual. . . . But even if Ms. Davis has been treated unfairly, or feels like she didn't get the services, or hasn't got the gender dysphoria diagnosis she wants, which an individual, as you heard from the Commonwealth's witnesses, they have to meet the criteria, even if you believe all she says about how difficult it's been, that's got nothing to do with the ultimate issue. Again, look over here, don't look over here about the sexual dangerousness. Just let's grab the jury's sympathy and distract them completely."

determine whether any error created a substantial risk of a miscarriage of justice.

While a prosecutor may argue "forcefully" during closing argument, his arguments must be "based on the evidence and on inferences that may reasonably be drawn from the evidence." Commonwealth v. Kozec, 399 Mass. 514, 516 (1987). "Errors that arguably occur during the closing arguments of counsel must be 'considered in the context of the entire argument, and in light of the judge's instructions to the jury and the evidence at trial.'" Commonwealth v. Cassidy, 470 Mass. 201, 222 (2014), quoting Commonwealth v. Degro, 432 Mass. 319, 333-334 (2000).

Here, considering the Commonwealth's entire argument in context, we conclude that the Commonwealth's counsel's statements were responses, supported by reasonable inferences drawn from the evidence, to the petitioner's counsel's arguments in closing that the Commonwealth would attempt to paint the petitioner's identity as a transgender woman as "all a ruse . . . [,] all deception." See Commonwealth v. Grandison, 433 Mass. 135, 143 (2001). The jury were charged with deciding whether the petitioner remained a sexually dangerous person. While the petitioner presented evidence at trial that her gender identity had changed her and caused her to suffer discrimination at the treatment center, the Commonwealth was permitted to argue that the evidence of the petitioner's difficulties surrounding

her transgenderism and gender dysphoria should not "distract you and divert your attention to what this trial is actually about, and to grab at your heartstrings and look for your sympathy." Nor, even if there was error in the closing, would it have created a substantial risk of a miscarriage of justice. "The substantial risk standard requires us to determine 'if we have a serious doubt whether the result of the trial might have been different had the error not been made.'" Commonwealth v. Dirgo, 474 Mass. 1012, 1016 (2016), quoting Commonwealth v. Azar, 435 Mass. 675, 687 (2002), S.C., 444 Mass. 72 (2005). Here, given the strength of the Commonwealth's case, supported by the expert opinions of both qualified examiners, we are not left with serious doubts that the jury may have found the petitioner not to be a sexually dangerous person had they not been exposed to

these statements in closing.[7]

Judgment affirmed.

By the Court (Rubin, Blake & Wendlandt, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: July 1, 2020.

[7] The petitioner also argues that the errors she raises on appeal, considered together, made her trial fundamentally unfair and created a substantial risk of a miscarriage of justice. As we conclude that the judge's decision to deny the petitioner's motions for mistrial was not an abuse of discretion, the qualified examiners' testimony and reports were properly admitted, and the Commonwealth's closing was not improper, we find no merit in this argument.

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