COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1656

COMMONWEALTH

vs.

GEORGE B. PETERSON.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant appeals from his convictions of an indecent assault and battery on a child under the age of fourteen, G. L. c. 265, § 13B (subsequent offense), and attempt to commit an indecent assault and battery on a child under the age of fourteen, G. L. c. 265, § 13B. The defendant assigns error to the trial judge's denial of a motion in limine to cross-examine the victim (victim 1) about a recanted allegation of physical abuse by the victim's father, and to the Commonwealth's closing argument. We discern no cause to disturb the convictions and therefore affirm the judgments.[1]

[1] The defendant was convicted of several other charges, none of which he challenges in this appeal. As to victim 1, the defendant was also found guilty of (a) dissemination of matter harmful to minors, in violation of G. L. c. 272, § 28, and (b) contributing to the delinquency of a child, in violation of G. L. c. 119, § 63. As to a second minor (victim 2), the

Discussion. a. Motion in limine. "Individual bad acts of untruthfulness are for the most part inadmissible to impeach a witness." Commonwealth v. Almonte, 465 Mass. 224, 241 (2013). See Mass. G. Evid. § 608(b) (2020). An exception to this general rule, available only in "very limited circumstances," was established by Commonwealth v. Bohannon, 376 Mass. 90 (1978). Almonte, supra. See Bohannon, supra at 94 ("When evidence concerning a critical issue is excluded and when that evidence might have had a significant impact on the result of that trial, the right to present a full defense has been denied"). In Bohannon, evidence of the witness's previous false allegations of rape was admissible in a trial for rape because of the "special circumstances" of that case, specifically that "the witness was the victim in the case on trial, her consent was the central issue, she was the only Commonwealth witness on that issue, her testimony was inconsistent and confused, and there was a basis in independent third-party records for

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defendant was found guilty of (a) dissemination of matter harmful to minors, in violation of G. L. c. 272, § 28, and (b) contributing to the delinquency of a child, in violation of G. L. c. 119, § 63. The defendant also was found guilty of eight counts of unlawful possession of shotguns and rifles each in violation of G. L. c. 269, § 10 (h). The jury found the defendant not guilty of two counts of rape of a child under age twelve, aggravated by age difference, G. L. c. 265, § 23A (a), and not guilty of two counts of rape of a child by force, G. L. c. 265, § 22A. The jury also found the defendant not guilty of disseminating matter harmful to minors or of contributing to the delinquency of a third boy.

concluding that the prior accusations of the same type of crime had been made and were false." Commonwealth v. Sperrazza, 379 Mass. 166, 169 (1979), citing Bohannon, supra at 94-95.

Here, there was no abuse of discretion[2] in denying the defendant's motion because this case falls outside the narrow Bohannon exception. The victim's statements and testimonies about the defendant were consistent and coherent, nothing like the inconsistent and confused statements of the witness in Bohannon. See Bohannon, 376 Mass. at 91. In addition, consent was not an issue in this case because of the victim's age.[3] As to the indecent assault and battery charge, victim 1 was not the sole witness. Victim 2 was present when the defendant assaulted victim 1 and corroborated victim 1's account of the events, including testimony that he observed the defendant's hand on victim 1's penis. As to the attempt charge, it is beside the

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[2] "[T]he admissibility of . . . evidence of prior bad acts lies in large measure in the discretion of the trial judge. Commonwealth v. LaVelle, 414 Mass. 146, 152 (1993), quoting Commonwealth v. McGeoghean, 412 Mass. 839, 841 (1992). An abuse of discretion will be found only if the judge made "'a clear error of judgment in weighing' the factors relevant to the decision such that the decision falls outside the range of reasonable alternatives." L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014), quoting Picciotto v. Continental Cas. Co., 512 F.3d 9, 15 (1st Cir. 2008).

[3] The victim was eleven years old at the time of the abuse, and therefore was too young to give consent, see G. L. c. 265, § 13B, but this by itself does not necessarily bar application of the Bohannon exception. See Commonwealth v. Nichols, 37 Mass. App. Ct. 332, 337 (1994) (holding that not every aspect of Bohannon must be present to apply Bohannon exception).

point whether victim 1 was the sole witness because the defendant did not dispute that he grabbed the crotch of victim 1's low hanging jeans, the basis for that charge. His argument was that he lacked intent. Finally, the allegations that victim 1 made against his father, and then recanted, were of nonsexual abuse, such as being kicked, slapped, pushed, and whipped. The alleged abuse by victim 1's father is plainly not "the same type of crime" as the sexual abuse alleged to have been perpetrated by the defendant on victim 1. See Commonwealth v. Hicks, 23 Mass. App. Ct. 487, 490 (1987) (victim's false allegation of being "jumped" and "beat" by her boyfriend was different than her allegations of sexual assault by defendant; no error to not permit cross-examination; no error in excluding such cross-examination).

The defendant relies on Commonwealth v. Nichols, 37 Mass. App. Ct. 332 (1994), to argue that the existence of an independent third-party record showing the victim's false allegation against his father is determinative in the Bohannon analysis. We disagree. In Nichols, the witness made allegations of sexual molestation against the defendant, and then a false allegation against her uncle, after she felt unfairly disciplined or restrained by each of them. See id. at 333-334. This parallel fact pattern was part of the "unusual situation" that justified the application of the Bohannon

exception in Nichols. See id. at 337. This case does not present such an unusual situation.

b. Closing argument. The defendant contends that the Commonwealth argued an inference that the defendant "groomed" the victim for sexual assault, that the phenomenon of "grooming" is a subject beyond the knowledge of the common lay person, and that therefore it was error to allow that argument without expert testimony. Compare Commonwealth v. Sherman, 481 Mass. 464, 477 (2019) ("Where there is a lack of reliable general knowledge regarding the relevant effects of a drug, expert testimony is required to show that connection").

As an initial matter, the parties disagree as to whether the issue was preserved by the defendant's motion in limine prior to closing arguments.[4] We need not resolve that issue because there was no error in the Commonwealth's closing argument. "In closing argument, '[p]rosecutors are entitled to marshal the evidence and suggest inferences that the jury may draw from it.'" Commonwealth v. Holbrook, 482 Mass. 596, 604 (2019), quoting Commonwealth v. Roy, 464 Mass. 818, 829 (2013).

[4] The Commonwealth maintains that the issue was not preserved because the defendant did not alert the trial judge of the alleged problems in the closing after the motion in limine was denied. See Commonwealth v. McDonagh, 480 Mass. 131, 137 (2018) (requiring objections to be "timely and precise" to "preserve a claimed error for appellate review").

"Such inferences need only be reasonable and possible based on the evidence before the jury." Holbrook, supra.

Here, the Commonwealth did not use the term "groom" or "grooming" in its closing. The Commonwealth argued the evidence to show that the defendant allowed the victim to do things at his home that would not be allowed elsewhere. The defendant actively provided the preteen victim with cigarettes, beer, liquor, marijuana, and videos depicting naked women. The defendant also told the victim not to tell other adults about these forbidden activities. The defendant grabbed the crotch of the victim's pants, and the night before the last abuse, the defendant crawled up to the sleeping victim in the middle of the night. The Commonwealth merely effectively marshalled the evidence to argue that the defendant repeatedly "redefined" and "challenged boundaries" with the victim by enabling him to participate in forbidden activities, and that the defendant "tested" the victim by incrementally increasing inappropriate behavior toward him. Accordingly, the inference argued by the Commonwealth that the defendant did these things to "condition" or "prime" the victim was a "reasonable and possible [inference] based on the evidence before the jury." Holbrook, 482 Mass. at 604.

Furthermore, to the extent that the Commonwealth's argument implied that the defendant "groomed" the victim, there is no

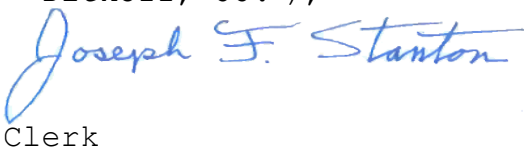
Massachusetts case law that supports the defendant's contention that an inference of grooming must be supported by expert testimony. On the contrary, the Supreme Judicial Court has noted that "evidence of grooming may be introduced for the nonpropensity purposes of demonstrating the defendant's intent, preparation, plan, or design," without noting a requirement that such evidence be introduced through expert testimony. Commonwealth v. McDonagh, 480 Mass. 131, 135 n.6 (2018). The Commonwealth marshalled the evidence to show the defendant's sexual intent and a lack of mistake or accident. The defendant points only to out-of-State authority[5] to support his contention, and we decline to adopt such a rule when the circumstances of

[5] See, e.g., State v. Atkins, 315 P.3d 868, 871-872 (Kan. 2014); State v. Morris, 361 S.W.3d 649, 669 (Tex. Crim. App. 2011).

this case do not require us to go so far.[6]

Judgments affirmed.

By the Court (Kinder, Henry & Ditkoff, JJ.[7]),



Clerk

Entered: July 31, 2020.

[6] We also disagree with the defendant that the Commonwealth's "grooming" argument was made for an inappropriate propensity purpose. Focusing on the evidence and the inferences relevant to the interactions directly between the defendant and the victim was relevant to "the defendant's intent, preparation, plan, and design" in regard to the specific sexual assault against the victim. McDonagh, 480 Mass. at 135 n.6.

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