COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-668

COMMONWEALTH

vs.

EDDIE RAY, JR.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a jury trial in the Roxbury Division of the Boston Municipal Court, the defendant was convicted of violating a restraining order, threatening to commit a crime, and violating a harassment prevention order. The victims are the defendant's former girlfriend Jane,[1] and the man whom Jane was dating at the time the offenses occurred, John.[2] On appeal, the defendant claims that the judge erred by permitting the Commonwealth to introduce certain details about the victims' relationship, Jane's medical treatment for cancer, and that the defendant remained in Jane's life "uninvited" following their breakup. He asserts that such evidence was not relevant and that it was more prejudicial than probative because it

[1] A pseudonym.
[2] A pseudonym.

improperly evoked the sympathy of the jury. The defendant also argues that he was prejudiced by Jane's improper disclosure during cross-examination that the defendant had violated the restraining order in the past. Finally, he claims that the judge abused his discretion by not instructing the jury, as requested, that the standard for obtaining the protective orders at issue is a "preponderance of the evidence, and not beyond a reasonable doubt." We affirm.

Background. The jury could have found the following facts. Jane and the defendant had dated for about eight years. After the relationship ended in 2009, Jane met John. The victims initially were friends and subsequently became romantically involved.[3] In July 2010, Jane obtained an abuse prevention order against the defendant. John obtained a harassment prevention order against the defendant at the same time.[4] There is no dispute that the defendant had knowledge of the orders, and that the orders were in effect on June 27, 2011, when Jane and John ran into the defendant as they were walking to the Dudley bus station. Upon seeing the victims, the defendant began to yell at them. He called Jane a "rat bastard, snitch bitch, and a

[3] Despite objections by the defendant, Jane testified that John took care of her and escorted her to and from her daily chemotherapy and radiation. The judge, sustaining the objections, struck this testimony and instructed the jury to disregard it.

[4] Both orders were admitted in evidence.

bloody pussy bitch" repeatedly. He made similar comments to John and also said, "When this paper is over, I'm going to fuck you up." The victims entered the station and immediately boarded a bus. They did not report the incident immediately because the parties were due in court within a couple of days. The victims appeared at the court hearing on June 30, 2011, and reported the incident to the police at that time.

Discussion. The defendant argues that the nature of the relationship between the victims and Jane's cancer treatment had no bearing on the elements of the offenses, and that, to the extent that it had any probative value, the evidence was outweighed by the risk that the jury would be swayed by sympathy for Jane. We disagree. Where trial counsel objected to such questions posed by the prosecutor, the judge sustained the majority of the objections and, where necessary, struck the answers and instructed the jury to disregard them. In addition, the judge informed the jury at the beginning and the end of trial that they must disregard any evidence that he struck from the record, eliminating the need for additional curative instructions at the time objections were sustained. See Commonwealth v. Isabelle, 444 Mass. 416, 420 (2005) (where curative instruction was not requested or given, judge's sustaining objection, striking answer, and telling jury to disregard it sufficed where judge also instructed jury in

closing not to consider and to disregard answers struck during trial).

The prosecutor asked Jane whether the defendant was "invited to remain in [her] life," and Jane responded "[u]ninvited." Trial counsel then objected, and the judge overruled the objection and stated the answer will stand. The defendant argues that Jane's answer was not relevant to any of the issues before the jury and therefore had no probative value. We disagree. Questions of relevancy are "entrust[ed] . . . to the sound discretion of the trial judge." Commonwealth v. Carey, 463 Mass. 378, 388 (2012). We discern no abuse of discretion, and even if we were to hold otherwise, there was nothing prejudicial about testimony concerning the nature of the relationship between Jane and the defendant.

As to the remaining testimony on which his claim of error is based, trial counsel did not object or move to strike the answers. Accordingly, we review any error the judge made in admitting the evidence at issue for a substantial risk of a miscarriage of justice. See Commonwealth v. Alphas, 430 Mass. 8, 17 (1999). "The weighing of the prejudicial effect and the probative value of evidence is within the sound discretion of the trial judge, the exercise of which we will not overturn unless we find palpable error." Commonwealth v. Bonds 445 Mass.

821, 831 (2006). Here, we conclude that there was no error and that therefore there is no risk that justice miscarried.

Contrary to the defendant's argument, it was entirely proper for the prosecutor to elicit details regarding the relationship between Jane and John. Moreover, the challenged testimony was essentially innocuous and did no more than provide context from which the jury could evaluate the credibility of the victims and the nature of their relationship with the defendant. In addition, we are not persuaded that John's testimony, that Jane was "in a crisis of a medical problem" when he met her, that one of his family members had gone through a similar "problem" as Jane, and that he felt a bond with Jane when they met, could have unfairly influenced the jury's consideration of the evidence. In any event, we agree with the Commonwealth that the judge's instructions given at the beginning of the trial, that if the jury "tr[ied] the issues without fear, or prejudice, or bias, or sympathy, [they would] arrive at a true and just verdict," and again at the end of trial, that they were "not to be swayed by prejudice or by sympathy," eliminated any potential for improper bias or sympathy.[5]

[5] Given our conclusion, the defendant's related claim that counsel was ineffective for not objecting to this testimony also fails.

Next, the defendant argues that Jane's testimony suggesting that the defendant had violated the protective orders in the past prejudiced him by revealing evidence of prior bad acts in violation of the judge's ruling in limine to exclude such evidence. When asked at trial why she did not report the incident immediately, Jane stated that the defendant had violated the order in the past, that she "was kind of tired of calling the police," and that she "was tired of reporting the same incidents." Trial counsel objected to Jane's answers to the effect that the defendant had previously violated the orders and that she "was tired of reporting the same incidents," and the judge sustained the objections, struck the answers, and instructed the jury to disregard them. The defendant suffered no prejudice as a result of testimony that was stricken. See Isabelle, 444 Mass. at 420. As to Jane's answer that she "was kind of tired of calling the police," trial counsel did not object. Given that the answer stopped short of referring to any misconduct by the defendant, we discern no substantial risk of a miscarriage of justice. See Alphas, 430 Mass. at 17.

Finally, the defendant argues that the judge abused his discretion by declining to instruct the jury on the standard of proof applicable to the issuance of a restraining order or a protective order. Specifically, the defendant requested that the judge instruct the jury as follows:

> "[T]he standard for getting a Restraining Order or Harassment Order is civil, preponderance of the evidence, and not beyond a reasonable doubt, so that they can -- they can weigh the issuance of the Order in such a manner that they don't assume that he's already been convicted of a crime."

In general, we review a judge's decision regarding whether to give a particular jury instruction for an abuse of discretion. See Commonwealth v. Gomes, 470 Mass. 352, 359 (2015), overruled in part on other grounds by Commonwealth v. Bastaldo, 472 Mass. 16, 18 (2015). We discern no abuse of discretion where the requested instruction would not have aided the jury in deciding the contested issues in the case, and indeed might well have confused the jury or led to undue speculation.

Judgments affirmed.

By the Court (Vuono, Sullivan & Englander, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: November 19, 2020.

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