

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as 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 23.0 or 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

19-P-1424

COMMONWEALTH

vs.

DANIEL R. MCNULTY.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a jury trial in the District Court, the defendant, Daniel R. McNulty, was convicted of strangulation or suffocation, in violation of G. L. c. 265, § 15D (b), and assault and battery on a family or household member, in violation of G. L. c. 265, § 13M (a). The victim, whom we shall call Sally, was the defendant's girlfriend and the two were living together at the time of the events in question. On appeal, the defendant claims that the trial judge abused her discretion by permitting Sally to testify that the defendant had physically abused her on a prior occasion. He also claims that, because he asserted at trial that Sally was the aggressor and that he acted in self-defense after she struck him, he was prejudiced by the prosecutor's delayed disclosure that just

after the incident he allegedly told a roommate that he had been struck and injured by his brother. We affirm.

Background. The following evidence was presented to the jury. Just before midnight on April 5, 2018, Sally returned home from work and found the defendant sitting in the living room, intoxicated. When Sally asked the defendant why he had been drinking, he hit her in the jaw. Sally testified that she went to the bedroom to pack a bag and leave, but the defendant followed her and pinned her down on the bed. Sally defended herself and hit the defendant in the face. Sally then made her way to the basement door. The defendant told Sally that she could leave if she gave him her cell phone, and Sally handed it over. At this point, the defendant threw Sally out the basement door onto the concrete. The defendant then strangled her for about a minute. Sally hit the defendant in the face again, and the defendant released her. Sally then went next door, where the defendant's mother and sister lived. On the way there, Sally encountered the defendant's brother and told him that the defendant had hit her. Sally also told the defendant's mother and sister what had happened and admitted that she had hit the defendant.

Meanwhile, after Sally left, the defendant returned to his apartment and went upstairs, where Sally's friend, Tiara Toro, was staying. Toro testified that the defendant was intoxicated

and told her that Sally was no longer there. Toro said the defendant had a black eye and that "he pointed at his eye, and said ['T]his is your friend's fault. My brother and I got in a fight because of her.[']" The defendant remained in Toro's bedroom until the defendant's mother called for him from downstairs and he left. Toro moved out the next day.

Sally spent the night next door and went to work the following day. After work, she went to her parents' house and then to Massachusetts General Hospital to seek medical attention for her injuries. Sally had two chipped teeth, a scrape on her back, bruises on her biceps, forearm, and back, and pain in her throat that made it difficult to swallow. A few days later, she reported the assault to the police. Photographs of Sally's injuries taken by her mother and the police were admitted in evidence. Sally's family made arrangements to collect her belongings. At some point, the defendant sent a text message to Sally's father stating in part, "Sorry. My demons got the better of me." As we discuss in more detail below, Sally was permitted to testify that the defendant had assaulted her on a prior occasion. She testified as follows:

"He was intoxicated and under the influence of drugs. And I was trying to get the bottle of wine out of his hand. And I was grabbed and pushed. And then when he left the house to walk over to his mother's side to get another bottle of wine, I followed him. He tried to slam her door on my hand, and then I pushed it open and then proceeded to

be kicked in the stomach by him so he could close the door."

The defendant testified on his own behalf and described the events of April 5 differently. He acknowledged that he and Sally had a physical confrontation, but claimed that Sally was the aggressor and that she punched him in the face after apparently finding images of another woman on his cell phone. He admitted that he put his hands on Sally's biceps and held her arms down, but said that he did so to stop her from hitting him. According to the defendant, as they continued to struggle, he pushed her out the door and closed it. He denied that he had been drinking and that he put his hands around her throat or had taken Sally's cell phone. The defendant testified that Sally demanded to be let back in to collect her belongings and that once she had done so she left to go stay with her parents.

Discussion. 1. Prior bad act evidence. Prior to trial, the Commonwealth filed a motion in limine seeking to introduce evidence that on December 16, 2015, the defendant had been drinking and kicked Sally in the stomach and almost knocked her down the stairs. The defendant filed a motion to preclude testimony regarding his prior bad acts, including any prior instances of physical abuse or substance abuse. The judge determined that the evidence was probative of the defendant's intent and to show a pattern of conduct and the context of the

relationship, and ruled that its relevance outweighed any undue prejudice. The judge then inquired whether defense counsel had a suggestion or proposal for a limiting instruction, but none was offered.

After Sally testified as described above, defense counsel objected on the ground that Sally's description of the prior incident was not consistent with what had been reported by the Commonwealth in its motion in limine. First, the Commonwealth had not indicated that Sally's testimony would include the fact that the defendant had been using drugs as well as drinking. Second, the Commonwealth's motion in limine had not indicated that Sally would testify that the defendant had kicked her in the stomach. Defense counsel then requested a mistrial. The objection to the testimony was overruled in light of the judge's earlier ruling, and the motion for a mistrial was denied. A good portion of the sidebar conference was inaudible, but it appears that defense counsel requested that the judge give a curative instruction during her final charge to the jury or at some other time.

"It is long established that evidence of uncharged criminal acts or other misbehavior is not admissible to show a defendant's bad character or propensity to commit the charged crime, but may be admissible if relevant for other purposes such as 'common scheme, pattern of operation, absence of accident or

mistake, identity, intent or motive'" (citation omitted). Commonwealth v. Barbosa, 457 Mass. 773, 794 (2010), cert. denied, 563 U.S. 990 (2011). "[A] defendant's prior acts of domestic violence may be admitted for the purpose of showing a 'defendant's motive and intent and to depict the existence of a hostile relationship between the defendant and the victim,'" (citation omitted), Commonwealth v. Oberle, 476 Mass. 539, 550 (2017), as well as "to describe the entire relationship between the defendant and the victim," Commonwealth v. Thomas, 448 Mass. 180, 188 (2007). See Commonwealth v. Oliveira, 74 Mass. App. Ct. 49, 54 (2009) (defendant's prior conviction of crimes involving ex-wife "were relevant to show the hostile nature of the defendant's relationship with her and his motive to commit the crime").

The defendant contends that the probative value of the prior bad act evidence was outweighed by the risk of prejudice because the prior assault had no "temporal and schematic nexus" to the charged conduct and because the judge failed to properly weigh the prejudicial effect of the evidence. The defendant further contends that the judge should have conducted a pretrial evidentiary hearing on the admissibility of the evidence and given a contemporaneous limiting instruction to mitigate the risk of prejudice.

Although it is clear that Sally's testimony was not consistent with what the Commonwealth had projected, the judge did not abuse her discretion. First, we conclude that the judge appropriately balanced the probative weight of the evidence with the risk of unfair prejudice. An evidentiary hearing was not requested, nor was one necessary in the circumstances. The evidence was admissible to show the hostile nature of the relationship and the defendant's pattern of behavior and intent, and to give the jury a full picture of the events. It was particularly relevant to explain why Sally did not immediately report the incident to the police, as defense counsel emphasized in his cross-examination of Sally, and to rebut the defendant's claim of self-defense. Second, the prior bad acts were not too remote in time to demonstrate a pattern of conduct on the defendant's part. "[T]here is no bright-line test for determining temporal remoteness of evidence of prior misconduct." Commonwealth v. Scullin, 44 Mass. App. Ct. 9, 16 (1997) (where prior bad acts were two and one-half years before charged assault, "this gap [was] not so great as to render the evidence inadmissible" where instances of misconduct were similar).¹ Third, this is not an instance where the victim's

¹ We are not persuaded by the defendant's claim that the only similarity between the two assaults was that he had been drinking, or by his argument, based on Commonwealth v. McClendon, 39 Mass. App. Ct. 122, 129-130 (1995), that his

testimony about prior bad acts "overwhelmed" the case. See Commonwealth v. Morris, 82 Mass. App. Ct. 427, 442 (2012). Contrast Commonwealth v. Dwyer, 448 Mass. 122, 128-129 (2006) (detailed testimony of seven uncharged incidents of sexual assault was overwhelmingly prejudicial). Furthermore, contrary to the defendant's assertion, the judge's limiting instruction (to which there was no objection) given during her final charge to the jury was sufficient to cure any prejudice. See Commonwealth v. Gonzalez, 469 Mass. 410, 421 (2014). Lastly, while it would have been better if the judge had given a limiting instruction at the time the evidence was admitted, the defendant did not ask her to do so. Where, as here, the evidence against the defendant was strong, we discern no error.

drunkenness does not render the two instances sufficiently similar to allow testimony about the prior assault to be admitted. In McClelland, evidence of the defendant's prior strangulation of a family member while drunk was inadmissible in a later prosecution of the defendant for strangling an unrelated acquaintance while drunk. Id. We concluded in part that there was no evidence to show that the circumstances surrounding the two incidents "were in any way similar, apart from the fact that the defendant had been drinking immediately prior to both occurrences." Id. at 131. Here, on both occasions, the defendant, while drunk, became extremely violent with the same individual, Sally, when she expressed disapproval of his drinking. See Commonwealth v. Morris, 82 Mass. App. Ct. 427, 441-442 (2012) (instances of calling victim vulgar names and threatening her were admissible prior bad acts in rape prosecution relevant to show "pattern of disrespect and hostility toward the victim"). Thus, the circumstances of the defendant's conduct were sufficiently similar to allow for Sally's testimony regarding the prior assault to be admitted.

which would have influenced the jury or "substantially swayed" the judgment. Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994). We conclude that the judge did not err in admitting the prior bad act evidence as probative of the defendant's pattern of conduct or the context of the relationship.

2. Motion for mistrial. As noted, Toro testified that the defendant said he had had a fight with his brother and "pointed at his black eye." There is no dispute that this evidence was revealed for the first time during Toro's direct examination. Defense counsel objected and moved for a mistrial. He argued that the evidence was "highly prejudicial" because the "heart" of the defense was that Sally had inflicted the injury to the defendant's face. The prosecutor acknowledged that the statement attributed to the defendant should have been provided, but explained that she had first learned of it herself that morning when she spoke with the witness before trial commenced. Noting that Toro was available to be interviewed by defense counsel as well as the prosecution, the judge denied the motion.

"The decision to declare a mistrial is within the trial judge's discretion." Commonwealth v. Bockman, 440 Mass. 757, 766 (2004). Although the judge did not find that the Commonwealth was obligated to disclose the statement, the Commonwealth has acknowledged that the evidence should have been disclosed. Thus, the question we ask is "whether 'the defense

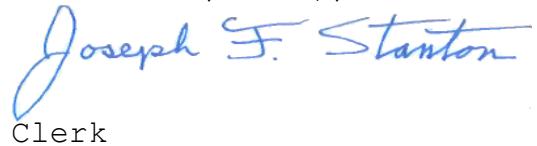
[was] materially hurt in its preparation by having to meet [the] unexpected [evidence.]'" Commonwealth v. Eneh, 76 Mass. App. Ct. 672, 678 (2010), quoting Commonwealth v. Gilbert, 377 Mass. 887, 895 (1979).

We discern no material harm. The defendant proceeded on the theory that he acted in self-defense when Sally, upset over seeing images of another woman on his cell phone, hit him. While it is true that evidence that Sally had caused the injury to the defendant's face supported this theory, there was no dispute at trial that Sally struck him. Sally admitted that she did so on direct and cross-examination. Thus, while the defendant may have been harmed to some degree by Toro's testimony, he was not "materially" harmed. Furthermore, we note that the defendant denied that his brother was there on the night of the events in question, and that his mother testified

that the brother was not home. Accordingly, we conclude that the judge did not abuse her discretion in not declaring a mistrial.

Judgments affirmed.

By the Court (Vuono, Rubin & Sullivan, JJ.²),


Joseph F. Stanton
Clerk

Entered: February 22, 2021.

² The panelists are listed in order of seniority.