COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-85

COMMONWEALTH

vs.

AARON COSTA.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a jury trial, the defendant, Aaron Costa, was convicted of three counts of indecent assault and battery on a child under the age of fourteen, G. L. c. 265, § 13B. On appeal, he argues that the admission of certain testimony violated the first complaint doctrine, see Commonwealth v. King, 445 Mass. 217, 242-248 (2005), cert. denied, 546 U.S. 1216 (2006), and that the judge erroneously instructed the jury to ignore his Bowden defense, see Commonwealth v. Bowden, 379 Mass. 472, 485-486 (1980). He also contends that the judge abused his discretion in declining to provide an alibi instruction. We affirm.

Background. We summarize the relevant facts, reserving certain details for our discussion of the defendant's claims.

The defendant's sister was close friends with the victim's mother. As a result, the defendant and the victim often saw each other at various events for family and friends.[1] On August 29, 2015, the defendant's sister hosted an outdoor baby shower at her home that the defendant, the victim, and the victim's mother attended. The victim testified that, on that date, when she was inside in the kitchen, she sat on the defendant's lap and he touched her vaginal area over her clothes with his hand.

On September 27, 2015, the victim and her mother met the defendant and his girlfriend at a storage facility to measure a bed that the victim's mother was purchasing from the defendant's girlfriend.[2] While the victim's mother and the defendant's girlfriend were inside the storage unit, the victim was in the hallway of the facility with the defendant, and she was "doing cartwheels." The victim testified that, while she was doing cartwheels, the defendant "grabbed [her] butt" over her clothes with his hand.

Then, on October 3, 2015, the defendant and his girlfriend were visiting the victim and the victim's mother at their home. At some point, the defendant needed to retrieve something from his car and the victim accompanied him to do so. The victim

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[1] The victim was ten years old at the time of first offense and eleven years old at the time of the second and third offenses. She was fifteen years old at the time of trial.

[2] The storage unit was rented by the defendant's girlfriend.

testified that, when they reached the defendant's car, he asked if she would like to take a picture, and she responded "yes." The victim testified that she then sat on the defendant's lap in the passenger seat of the vehicle, and he rubbed his finger against her vagina over her clothes.

The victim did not immediately report any of these incidents of sexual assault. However, one evening in January 2016, after a discussion with her mother regarding "stranger danger," the victim revealed to her mother that the defendant "touched her on her privates" and she recounted each incident. The victim testified that, the day after she told her mother, she and her mother went to her school and reported the assaults to her school counselor. She also testified that the counselor told the police.

The victim's mother testified as the first complaint witness at trial. See King, 445 Mass. at 218-219. She testified about the details and circumstances surrounding the first complaint. The mother also testified that, the morning after the complaint, she and the victim went to the school and reported the offenses to the school counselor, and that the school counselor called the police.

Discussion. 1. First complaint testimony. Under the first complaint doctrine, the first complaint witness (i.e., the person to whom the victim first disclosed the assault) may

testify to the details of the first complaint and the circumstances surrounding the complaint. King, 445 Mass. at 218-219. Testimony from additional complaint witnesses is inadmissible as first complaint evidence, as is testimony indicating that the victim made additional reports beyond the first complaint. Commonwealth v. Monteiro, 75 Mass. App. Ct. 489, 493 (2009). The defendant claims, and the Commonwealth concedes, that it was error to admit testimony indicating that the victim reported the assaults to the school counselor, who in turn reported them to the police. We agree. Because the defendant did not object to the admission of this testimony, we review for a substantial risk of a miscarriage of justice. Commonwealth v. Aviles, 461 Mass. 60, 72 (2011).

Here, there was no such risk. "A substantial risk of a miscarriage of justice exists when we 'have a serious doubt whether the result of the trial might have been different had the error not been made.'" Commonwealth v. McCoy, 456 Mass. 838, 850 (2010), quoting Commonwealth v. LeFave, 430 Mass. 169, 174 (1999).

> "In analyzing a claim under the substantial risk standard, we review the evidence and case as a whole and ask four questions: '(1) Was there error? . . . (2) Was the defendant prejudiced by the error? . . . (3) Considering the error in the context of the entire trial, would it be reasonable to conclude that the error materially influenced the verdict? . . . (4) May we infer from the record that counsel's failure to object or raise a claim of error at an earlier date was not a reasonable tactical decision?"

McCoy, 456 Mass. at 850, quoting Commonwealth v. Randolph, 438 Mass. 290, 298 (2002). We seldom grant relief under this standard, and may do so only "where the answer to all four above questions is, 'Yes.'" McCoy, supra, quoting Randolph, supra.

While it was error for the Commonwealth to elicit the testimony regarding the additional reports to the counselor and the police, both the victim's and the mother's mentions of these reports were brief and non-specific. Neither the victim nor the mother testified to what was said to the counselor or the police, and the testimony did not repeat any details of the assaults. See Commonwealth v. Roby, 462 Mass. 398, 409 (2012) (where "testimony was brief and provided no details of the alleged sexual encounters," no substantial risk of miscarriage of justice); Commonwealth v. Revells, 78 Mass. App. Ct. 492, 499 (2010) (no prejudice where victim's testimony that she told police "contained no repetition of the horrific details of the abuse" and not "part of 'a parade of multiple complaint witnesses'" [citation omitted]). In closing argument, the prosecutor referenced only the fact that these reports were made, but did not argue or imply that they were believed or that the victim's credibility should be enhanced because of them. See McCoy, 456 Mass. at 851-852.

Moreover, when framed in the context of the entire trial, the references to the additional complaints were negligible. See Commonwealth v. Murungu, 450 Mass. 441, 448 (2008) (no prejudice where improper testimony "so lacking in detail as to be virtually insignificant"). The evidentiary portion of the trial lasted one day, and six witnesses testified: two prosecution witnesses (the victim and the mother) and four defense witnesses.[3] The majority of the trial testimony came from the defense witnesses, who all, in some fashion, contradicted the victim's version of the events. Each defense witness testified that they had attended the baby shower and never observed the defendant and the victim alone in the kitchen together, where the victim contended the first assault occurred. The defendant's former girlfriend testified that, at the storage facility, the defendant was not in the hallway with the victim, as the victim had testified, but rather was in the doorway of the storage unit where she could observe him. She additionally testified that she had seen the photograph that the defendant took of him and the victim in October 2015, and that it was taken in a parking lot and not inside of a vehicle as the victim had testified. It is doubtful that, in light of all the trial

[3] The defense witnesses included the defendant's sister, the defendant's brother-in-law, the defendant's former girlfriend, and the defendant's nephew.

testimony, the passing references to the reports made to the school counselor and the police, which, with the exception of closing, were made at the beginning of the trial, left an impression on the jury such that they materially influenced the verdict.

The record also shows that defense counsel may have abstained from objecting to the additional disclosures for a tactical reason -- to raise the issue that the police were informed about the allegations but did not thoroughly investigate them. See Bowden, 379 Mass. at 485-486. Although, as discussed infra, the Bowden defense was inadequately developed, defense counsel sought to raise the defense as a response to the victim's and the mother's testimony that the police were told. Indeed, during closing argument, defense counsel highlighted the fact that the allegations were reported to the school counselor and the police prior to arguing that the police failed to take certain steps during their investigation. As such, we cannot infer from the record that counsel's failure to object to this testimony was not a reasonable tactical decision, but even assuming it was not, we discern no substantial risk of a miscarriage of justice.

2. Jury instructions. a. Bowden issue. The defendant claims that the judge improperly instructed the jury to disregard what he characterized as his Bowden defense, and

consequently, lessened the Commonwealth's burden of proof. We disagree.

At a preliminary charge conference, counsel initially requested an instruction on omissions in the police investigation. See Bowden, 379 Mass. at 485-486. However, at the final charge conference, the judge asked counsel about the instruction, and counsel responded, "I don't believe I have earned that." Presumably, trial counsel did not believe that she was entitled to the Bowden instruction because, other than testimony from the defendant's former girlfriend that the police never attempted to speak with her, there was no testimony elicited about the police's investigation of the case.[4]

Nevertheless, during defense counsel's closing argument, she argued to the jury,

> "Did you hear any testimony about any police officers going to anybody's house to investigate any of these claims, you know, (knocking), 'Hello, [defendant's sister], we have an allegation that something happened at your house on August 29th of 2015 at a shower. Would you mind talking to us? Could you verify that you had a baby shower here? Could you verify the participants, your guest list, anything like that?' Did you hear any of that? No. How about this, (knocking), '[defendant's girlfriend],"' right, it's New Bedford police, Dartmouth police, were you present at Crossroads that night? Do you rent a storage unit? Were you at a storage unit on September 27 of 2015?' How about this, 'U-Haul Storage, hello, this is the New Bedford

[4] Defense counsel did not call any police witnesses to testify about the steps taken during the course of their investigation. Nor did counsel ask any witnesses, except for the former girlfriend, whether they were questioned or contacted by the police.

> police. Have any surveillance footage from September 27 of 2015?' Because, boy, I'll tell you what, that could have solved some problems, cleared some things up."

The judge, concerned about the propriety of the argument, excused the jury after closing arguments to speak with the attorneys. He questioned whether it was proper to argue that the police investigation was inadequate when, in sexual assault cases like this one, the Commonwealth is generally precluded from introducing evidence of the police investigation. See Commonwealth v. Stuckich, 450 Mass. 449, 457 (2008). He further questioned whether the argument was supported by the evidence, given that defense counsel previously acknowledged that she had not met her evidentiary burden for a Bowden instruction.

To correct the issue, the judge proposed instructing the jury that closing arguments are not evidence, and that "the police cannot come in and testify about conversations with others, that's not admissible." He further stated that he would instruct the jury to focus on the evidence in the case and not to speculate about what was not in evidence. Neither attorney objected, and the judge provided these instructions during the final charge to the jury.

The defendant now takes issue with the instruction, "the police cannot come in and testify about conversations with others." He contends the instruction both misstated the law and stripped from the jury the ability to consider the testimony by

the defendant's former girlfriend that the police never questioned her or asked about her storage unit. Again, as the instruction was not objected to, we review to determine whether the error, if any, created a substantial risk of a miscarriage of justice. Commonwealth v. Delaney, 425 Mass. 587, 596 (1997).

"Testimony detailing an investigation 'generally is not allowed unless it is from the first complaint witness or in response to a defense theory.'" Commonwealth v. Espinal, 482 Mass. 190, 202 (2019), quoting McCoy, 456 Mass. at 847. "The fact that the Commonwealth brought its resources to bear on this incident creates the imprimatur of official belief in the complainant. It is unnecessary and irrelevant to the issue of the defendant's guilt, and is extremely prejudicial." Stuckich, 450 Mass. at 457. Accordingly, while not the clearest formulation of the rule, it was not an inaccurate statement of law to say that the police were not permitted to testify about conversations they had with other witnesses.[5]

[5] While such evidence may be introduced in response to a defense theory, the defense theory in this case was not inadequate police investigation. Other than the few questions posed to the defendant's former girlfriend, none of the witnesses, prosecution or defense, testified regarding the police's investigation of the allegations. Indeed, as noted, counsel conceded at trial that she had not met her evidentiary burden for a Bowden instruction. Contrast Commonwealth v. Arana, 453 Mass. 214, 226 (2009) (where at outset of trial defendant vigorously argued that police investigation was incompetent, evidence of police involvement was relevant and admissible).

Perhaps more importantly, the statement in no way instructed the jurors to disregard the testimony of the defendant's former girlfriend or, for that matter, any evidence of the police's failure to interview witnesses or take certain investigatory steps. Of course, that would be impermissible. See Commonwealth v. Seng, 456 Mass. 490, 502 (2010) ("judge may not 'remove [Bowden] evidence from the jury's consideration'" [citation omitted]). Instead, in context, the instruction directed the jurors away from improper speculation invited by defense counsel's closing argument about conversations that the police purportedly failed to have with certain witnesses. With the exception of the defendant's former girlfriend, whether the police interviewed, or did not interview, those witnesses was not in evidence. See Commonwealth v. Tolan, 453 Mass. 634, 652 (2009) (jury's consideration of police failure to take investigatory steps must be based on evidence of failure actually presented, not speculation). Appropriately, the judge instructed the jurors to focus on the evidence, including the testimony of all the witnesses. See id. The defendant's former girlfriend testified that the police did not contact or question her, and contrary to the defendant's argument, the judge did not instruct the jury to disregard that testimony. There was no error, and certainly no substantial risk of a miscarriage of justice.

b. Alibi instruction. The defendant lastly claims that the judge abused his discretion in refusing to provide an alibi instruction to the jury regarding the assault that occurred at the baby shower. He asserts that he was entitled to this instruction because the defense witnesses testified that they had not seen him in the kitchen with the victim at the time she claimed that the assault took place. The claim requires little discussion. "While a judge may choose to give an alibi instruction, it is well settled that an 'alibi instruction is not required where the charge as a whole makes clear that the Commonwealth must prove beyond a reasonable doubt that the defendant committed the crime[s] for which he was [charged].'" Commonwealth v. Walker, 460 Mass. 590, 614 (2011), quoting Commonwealth v. Thomas, 439 Mass. 362, 371 (2003). Throughout the trial and in the final charge, the judge repeatedly instructed the jury that it was the Commonwealth's burden alone to prove that the defendant committed the crimes charged beyond a reasonable doubt. Further, during the final charge, the judge specifically instructed the jury that the defendant was charged with three separate crimes from different times and events and that they must consider each charge separately and render a verdict for each charge. See Commonwealth v. Medina, 380 Mass. 565, 579 (1980) (not error to omit alibi instruction where instructions "otherwise made clear that the burden of showing

that the defendant was present at the time and place, and thus capable of committing the crime, remains on the Commonwealth"). We discern no error.[6]

Judgments affirmed.

By the Court (Desmond, Sacks & Lemire, JJ.[7]),

Joseph F. Stanton

Clerk

Entered: October 15, 2021.

[6] The defendant also contends that his convictions should be reversed because of the cumulative effect of the above-claimed errors. Given our conclusions regarding the defendant's claims, "there was no risk that any error requires reversal." Commonwealth v. Roy, 464 Mass. 818, 836 (2013).

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