COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-375

COMMONWEALTH

vs.

DAVID WAYNE THOMPSON.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

A jury found the defendant, David Wayne Thompson, guilty of one count of rape of a child aggravated by more than a five year age difference, G. L. c. 265, § 23A (a), two counts of indecent assault and battery on a child, G. L. c. 265, § 13B, and one count of dissemination of matter harmful to a minor, G. L. c. 272, § 28. After trial, the Commonwealth conceded that the statute proscribing rape of a child aggravated by age difference was enacted after the crimes charged were committed, and so the trial judge allowed the Commonwealth's motion to reduce that conviction to that of rape of a child, G. L. c. 265, § 23. On appeal, the defendant argues that (1) because his conviction of the greater offense of rape of a child aggravated by age difference violated the ex post facto clause, it was improper for the trial judge to reduce his conviction to the lesser

included offense of rape of a child, and (2) the motion judge erred in denying his motion for a new trial. We affirm.

Discussion. 1. Rape conviction. The defendant argues that because the greater offense of rape of a child aggravated by more than a five year age difference did not exist at the time of the abuse, the trial judge's reliance on that greater offense to reduce his conviction to the lesser included offense of rape of a child violated the ex post facto and due process clauses of the United States Constitution, common law principles, and art. 12 of the Massachusetts Declaration of Rights. We disagree.

The indictments in this case arose from the defendant's sexual abuse of the victim on multiple occasions between July 6, 2006, and July 5, 2008. The statute criminalizing rape of a child aggravated by age difference became effective on October 22, 2008, after the time period in which the abuse occurred. See G. L. c. 265, § 23A (a), inserted by St. 2008, c. 205, § 2. The statute criminalizing rape of a child, however, was in effect during the time period of the abuse. See G. L. c. 265, § 23, as amended by St. 1974, c. 474, § 3.

Rape of a child aggravated by more than a five year age difference contains only one additional element than rape of a child: That element is the five year age difference. See Commonwealth v. Claudio, 484 Mass. 203, 204 n.2 (2020) (noting

that statutory rape is lesser included offense of rape aggravated by age difference). By convicting the defendant of rape of a child aggravated by age difference, the jury found all of the elements required for the lesser included offense of rape of a child, plus an additional element. In other words, the defendant's conviction of rape of a child aggravated by age difference shows that the jury "necessarily concluded" that the Commonwealth also proved the elements for rape of a child. Commonwealth v. Trotto, 487 Mass. 708, 715 (2021).

The Supreme Judicial Court expressly approved of this procedure in Commonwealth v. Fredette, 480 Mass. 75, 87-88 (2018). In that case, the defendant's first-degree murder conviction could not stand because it was based on a predicate felony that did not exist at the time of the killing. Id. The Supreme Judicial Court stated that on remand, the judge "may order the entry of a finding of a lesser degree of guilt, i.e., murder in the second degree based on the predicate felony of kidnapping as it existed at the time of the homicide, if the record supports it, or she may grant a new trial if that is necessary and appropriate in the circumstances." Id. at 88. The judge on remand entered a finding of murder in the second degree based on the predicate felony of kidnapping as it existed at the time of the killing. We affirmed. Commonwealth v. Fredette, 97 Mass. App. Ct. 206, 221-222 (2020). Here, we

discern no error or abuse of discretion in the judge's order to reduce the conviction for rape of a child aggravated by age difference conviction to one for rape of a child, G. L. c. 265, § 23. There is no ex post facto violation because the crime of rape of a child did exist at the time the defendant abused the victim. See G. L. c. 265, § 23, as amended by St. 1974, c. 474, § 3.

2. Juror impartiality. The defendant argues that the motion judge erred and abused his discretion in denying the defendant's motion for a new trial where, during jury selection, a juror had failed to disclose the fact that he knew a prosecutor from the office that was prosecuting the defendant and had failed to disclose his prejudice and bias with respect to the nature of the allegations. We agree with the motion judge that after the trial, the juror made "boorish and inappropriate" comments, but we cannot find error in the motion judge's ultimate ruling on the motion.

At a posttrial hearing, the prosecutor brought to the trial judge's attention a Facebook message that the juror had sent to an assistant district attorney (who we shall refer to as Jay Doe), who worked with the prosecutor but was not involved in the case. The message read as follows:

> "[Jay], I got picked for a child rape case and judge Tucker's courtroom. It was the first time I was ever actually picked for jury and they pick me for a rape

> case. And I think it was supposed to be sentenced today because we actually did come up with a guilty verdict. Tuesday Wednesday Thursday was the trial Thursday around 10:30 we started deliberating and around quarter of 5 we came up with a guilty verdict. Oh my fucking god! Me and the room with 11 other people is not a good thing because most of the fucking people are morons fucked up can't think for themselves shouldn't be jury members. The assistant DA or the da that was trying was absolutely gorgeous also. She was hot. Plus very good at what she did blonde and I didn't get her name cuz I was just looking at our constantly. But I do have to say the system does work I wouldn't really want to do this again for a rape case I do I do have to say that it does work though. And that kind of thought he was guilty right away because they said that he lived in Southbridge. People that live in Southbridge all suck. So I knew he was guilty. LOL."

The trial judge suggested that the defendant was welcome to bring a postverdict motion addressing this issue.

By the time the defendant filed a motion for a new trial arguing that the juror who sent the Facebook message was biased and prejudiced against the defendant and a hearing on the matter was scheduled, the trial judge had retired and the case was assigned to a different judge (motion judge). After an evidentiary hearing at which both the juror and Doe testified, the motion judge denied the defendant's motion for a new trial. The judge explained:

> "Based on [j]uror's testimony and demeanor at the evidentiary hearing, I do not find that [j]uror purposefully or intentionally withheld his knowledge of [Doe] to secure a seat on the jury. . . . Moreover, [j]uror's full disclosure of his relationship with [Doe]

would not have provided a valid basis for a for cause challenge."[1]

As for bias, the motion judge found that the juror "at no time stated" or implied "that he could not be fair and impartial." The motion judge also found that the juror's comments about Southbridge residents "did not represent actual bias. Instead, it was a joking reference, with a childhood friend, to their long-standing rivalry with a nearby community." The motion judge also found that the juror intended the comment as a joke. The motion judge credited the juror's testimony "that trial counsel's physical appearance did not distract [from] or impact his work as a juror." The defendant appealed the denial, which was later consolidated with his direct appeal.

"We review the denial of a motion for new trial 'only to determine whether there has been a significant error of law or other abuse of discretion.'" Commonwealth v. Indrisano, 87 Mass. App. Ct. 709, 719 (2015), quoting Commonwealth v. Acevedo, 446 Mass. 435, 441 (2006). "When, as here, the motion judge did not preside at trial, we defer to that judge's assessment of the credibility of witnesses at the hearing on the new trial motion, but we regard ourselves in as good a position as the motion judge to assess the trial record." Commonwealth v. Perkins, 450

[1] The juror and Doe's adult interactions were limited to Doe's purchase of furniture from the juror's place of employment.

Mass. 834, 845 (2008), quoting Commonwealth v. Grace, 397 Mass. 303, 307 (1986).

Here, we defer to the motion judge's determinations of credibility, all of which were based upon the evidence at the motion hearing. See Commonwealth v. Lykus, 451 Mass. 310, 325 (2008) (appellate court "defer[s] to a judge's assessment of the credibility of witnesses at a hearing on the motion for a new trial"). See also Commonwealth v. Colon, 482 Mass. 162, 168 (2019) ("determination of a juror's impartiality is essentially one of credibility, and therefore largely one of demeanor," and appellate courts accord "great deference" to judge's determination of impartiality [quotations and citations omitted]). The motion judge, who had the benefit of observing first-hand the juror's demeanor and tone, credited the juror's testimony and determined that the remarks were intended as a joke. The defendant has failed to demonstrate that there was a clear abuse of discretion or error of law. See Commonwealth v. Guisti, 434 Mass. 245, 249, 253-254 (2001) (juror e-mail statement during trial, "Just say he's guilty," did not demonstrate juror bias required to warrant postverdict inquiry; e-mail "may have been only a joke"); Commonwealth v. Emerson, 430 Mass. 378, 384 (1999), cert. denied 529 U.S. 1030 (2000) (new trial not warranted where jurors did not attempt to conceal anything during voir dire and jurors unequivocally stated that

they could be impartial). See also Commonwealth v. Cash, 101 Mass. App. Ct. 473, 477-478 (2022) (no abuse of discretion in empanelment of juror when judge, after observing juror's demeanor and tone, determined juror's statement of impartiality was "unequivocal").

Judgments affirmed.

Order denying motion for new trial affirmed.

By the Court (Rubin, Henry & Grant, JJ.[2]),

Joseph F. Stanton

Clerk

Entered: September 16, 2022.

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