COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-589

COMMONWEALTH

vs.

ALI MUHAMMAD.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant was tried before a jury on seven counts: three counts of armed assault with intent to murder in violation of G. L. c. 265, § 18 (b), three counts of assault and battery by means of a dangerous weapon causing serious bodily injury in violation of G. L. c. 265, § 15A (c) (i), and one count of mayhem in violation of G. L. c. 265, § 14. All seven charges arose from a fight on February 24, 2015, between the defendant and three men, Angel Gonzalez, Giovanni Gonzalez, and Patrick Poisson. During the altercation, the defendant used a folding knife to stab Giovanni Gonzalez once in the chest and once in the stomach, Angel Gonzalez two times in the skull, and Patrick Poisson once through the mouth. The defendant claimed that Angel Gonzalez started the fight by punching him, that Giovanni Gonzalez subsequently held him by the waist against a wall, that

he saw Angel Gonzalez coming toward him with a knife, and that it was only after seeing Angel Gonzalez with a knife that he took out his own knife. The defendant was acquitted of all charges but a single count of assault and battery by means of a dangerous weapon causing serious bodily injury to Giovanni Gonzalez, under G. L. c. 265, § 15A (c) (i).

As described, the defense was self-defense, and the defendant's first argument on appeal is that, in support of his claim that Giovanni Gonzalez was the first aggressor, he should have been allowed to put before the jury two prior incidents of assaultive behavior involving Gonzalez. The defendant sought specifically to put before the jury a 2010 finding of juvenile delinquency, to wit assault and battery by means of a dangerous weapon (knife), and a 2013 domestic assault and battery charge that was dismissed in 2015.

In Commonwealth v. Adjutant, 443 Mass. 649, 650 (2005), the court held that "evidence of a victim's prior violent conduct" may be admitted at trial where it is relevant to a claim that the victim was the "first aggressor" in the altercation. Judges have discretion to admit "specific incidents of violence that the victim is reasonably alleged to have initiated." Id.

In this case, on the second day of trial, the judge ruled preliminarily that the dismissed charge would not be admitted because it had been dismissed and a mere criminal charge was

insufficient to support its use as first aggressor evidence. As far as the juvenile delinquency finding from five years before the crime, the judge ruled that it was too remote in time (and was a juvenile matter). On the third day of trial, the judge made his final ruling, addressing these charges as well as other charges and convictions of the other victims. He denied the defendant's request to admit the evidence, noting that the defendant had failed to provide any information about the events that gave rise to the finding of delinquency, and that the other charge, with respect to which he had a police report, had been dismissed.

We agree with the judge that there was no evidence before the judge with respect to the facts of the assault and battery for which Giovanni Gonzalez was found delinquent in 2010, and, although there was a police report with respect to the domestic assault and battery charge that, our review reveals, does include an allegation that Gonzalez initiated a physical altercation, the charge was subsequently dismissed. Adjutant, 443 Mass. at 663, permits admission of evidence of past acts of violence "when the prior acts of violence demonstrate a propensity for initiating violence." We may assume without deciding that it would be within a judge's discretion to admit under Adjutant a finding of delinquency standing alone and evidence of an incident for which a person was charged and about

which there is a police report, but which had been dismissed for a reason not apparent on the record. Nonetheless, given the absence of any information from which the judge in this case could determine the facts surrounding the crime that formed the basis of the finding of delinquency, and given that Gonzalez was not convicted of the alleged act that formed the basis for the second charge, but that instead it was dismissed, we see no abuse of discretion in the judge's conclusion that the evidence should not be admitted under Adjutant.[1]

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[1] On the third day of trial, the defendant sought a continuance when the judge ruled that the finding of delinquency standing alone and the other dismissed charge could not come in as Adjutant evidence, in order to attempt to find witnesses who could describe the events underlying the charges, "somebody who has knowledge of specific acts that were done by the alleged victims and show that they have the propensity for violence." That motion was denied.

To the extent, if any, that the defendant challenges this ruling before us, his claim is without merit. If defense counsel intended to try to find Giovanni Gonzalez himself because he would have provided evidence that indicated he was the first aggressor with respect to the acts underlying the finding of delinquency and the dismissed charge -- something that obviously has not been shown on this record -- defense counsel had known since the first day of trial that the Commonwealth had not secured Giovanni Gonzalez's presence at trial, and it was no abuse of discretion for the judge to deny a motion for a continuance in the middle of the third day of trial so the defendant could try to find him. If (as seems more likely) defense counsel meant only that he was surprised the finding of delinquency and the dismissed charge with respect to which there was a police report had been held insufficient, and that he therefore wanted time to find other witnesses who could describe the prior acts of violence (e.g., their victims), it was no abuse of discretion to deny the defendant, whose proffered

The defendant's next argument involves a cut on his hand. The police encountered the defendant in a Honey Farms store about thirty minutes after the stabbings, less than one mile from where the stabbings occurred. Officer James Ordway, who encountered the defendant, testified that he noticed the defendant, who matched a description of the suspect in the stabbings the officer had received, through the window of the store. The defendant was talking with the clerk who was behind the counter. The officer entered the store and noticed that the defendant's jacket had blood stains and that a tissue he was holding in his right hand was stained red. He concluded the defendant might have a cut or injury to his hand and he testified that a bleeding hand had relevance to him because "from my training and experience I know that people who have been involved in a stabbings [sic], you know, sometimes blood is very slippery and they will actually, the hand will slide and they could get themselves cut." He testified that in his past experience, in attempting to identify perpetrators of stabbings, he would "look again for any blood or any injuries to themselves . . . [m]ostly a slip of a hand on the knife itself"; the officer went on to describe a case in which a suspect had

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evidence was held insufficient to support its admission, a continuance during trial to allow him to seek alternative or supplemental evidence.

stabbed someone with a folding knife, the blade of which had not locked in place, and had actually cut off the suspect's own finger. Concluding that the defendant was the suspect for whom he was looking, the officer told the defendant not to make any sudden moves, and placed him in handcuffs.

The defendant argues first that statements of Officer Ordway concerning the origin of the cut on the defendant's hand should not have been admitted. On appeal the defendant characterizes this as testimony that "the wounds of the defendant were offensive," and argues that the testimony should not have been admitted because it was improper expert opinion evidence. See Commonwealth v. Canty, 466 Mass. 535, 541 (2013) ("An expert's opinion is admissible only where an expert possesses scientific, technical, or other specialized knowledge that will assist the jury"). He also contends this testimony undercut the defendant's expert testimony that the wound to the defendant's hand was not made by a knife but was made by blunt force trauma and shifted the burden of proof to the defendant. We discern no error.

To begin with, the officer did not testify that the cut was, in fact, caused by the defendant's own knife. He testified only that in attempting to identify a suspect in a stabbing he might look for someone with a wound because individuals who engage in stabbings sometimes cut themselves. He did not give

an opinion that this particular cut was caused by the defendant's knife, but only that had the defendant stabbed someone, he might have cut his own hand.

To the extent though that the jury might nonetheless have inferred from this testimony that the defendant's wound was accidentally inflicted by the defendant's own knife, even if this was improperly admitted expert testimony, we see no prejudice from the testimony. The defendant admitted that he used his knife to "pok[e] at the people to get them away from me." That he may have injured himself did not bear on his guilt or innocence of the crimes charged. In addition, it was not disputed that the defendant received the hand wound during the fight: the wound was bleeding when the officer saw the defendant at the store and the defendant testified that he did not notice the cut until after the fight had concluded, that at that time he was not sure how he had gotten it, but that he thought then it might have been from a knife he claimed one of the victims, Angel Gonzalez, swung at him at the outset of the fight. Since the defendant himself put on an expert witness who opined that the cut on the defendant's hand was not caused by a knife at all, that the defendant apparently suffered the cut during the altercation played little or no role in the defendant's claim of self-defense.

The judge also excluded statements made by the defendant to the officer after he was placed in handcuffs that he was "jumped." The judge appears to have done so on the ground that this was inadmissible hearsay as it was not being offered by a party opponent, stating that if the defendant wanted the statement to come in, he would have to testify so that he could be subject to cross-examination.

The defendant argues on appeal that this statement should have been admitted as an excited utterance. See Commonwealth v. Baldwin, 476 Mass. 1041, 1042 (2017). He argues that because it was not admitted, the defendant himself had to take the stand in order to get it before the jury -- which he did -- and that he should not have had to do so. The defendant asserts that "the exclusion was not objected to, or the objection was not renewed." We do think the record reflects defense counsel seeking to have the statement admitted and the judge ruling against him, but it is certainly true that counsel did not raise the excited utterance exception to the hearsay rule and that the judge did not explicitly state that he was rejecting an argument under that (or any other specific) exception. The defendant argues that the judge should have considered whether or not the statement fell within a valid hearsay exception -- either as an excited utterance or under the state of mind exception -- and

the failure to do so and to admit the statement created a substantial risk of miscarriage of justice.

We see no merit to this contention because even had the judge considered explicitly the excited utterance exception, the defendant has not demonstrated that the judge would have been required to admit the evidence. It was no abuse of discretion to determine on these facts that the defendant was no longer "under the stress of an 'exciting event and before the declarant has had time to contrive or fabricate the remark.'" Baldwin, 476 Mass. at 1042, quoting Commonwealth v. Zagranski, 408 Mass. 278, 285 (1990).

The defendant also argues that this could have come in under the state of mind exception, see Dahms v. Cognex Corp., 455 Mass. 190, 203 (2009), because the statement "concerned [the] defendant's intention to have engaged in the use of deadly force because he was 'jumped.'" The statement however is not about the defendant's state of mind. It is a statement of historical facts concerning the events earlier that evening.

Next, the defendant argues that the judge erred in failing to give two instructions. First is the so-called missing witness instruction. The Commonwealth did not call the two other living participants in the fight, Angel Gonzalez and Giovanni Gonzalez, to testify.

A missing witness instruction is appropriate where a party "'has knowledge of a person who can be located and brought forward, who is friendly to, or at least not hostilely disposed toward, the party, and who can be expected to give testimony of distinct importance to the case,' and the party, without explanation, fails to call the person as a witness." Commonwealth v. Saletino, 449 Mass. 657, 667 (2007), quoting Commonwealth v. Anderson, 411 Mass. 279, 280 n.1 (1991). In this case, the prosecutor represented to the court that he had "asked the Sudbury Police Department, the Framingham Police Department, and the Natick Police Department to look for these three individuals" and that "[s]o far as of the beginning of this trial it was to no avail." In the absence of any suggestion by the defendant that the facts represented by counsel -- that the victims could not be located -- were false, we see no abuse of discretion in the judge declining to give the missing witness instruction.

The second instruction sought was an Adjutant instruction. The defendant does not explain precisely how he would have had the judge instruct the jury, but as there was no evidence admitted of the victims' propensity to initiate violence -- and we have held that there was no error in the exclusion of that evidence -- there can have been no error in the failure to

instruct about the jury's ability to use such evidence when none was introduced.

Finally, for the reasons we have described above, the defendant's last claim, that the cumulative impact of all the claimed errors requires reversal, is also without merit.

Judgment affirmed.

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

Joseph F. Stanton

Clerk

Entered: February 1, 2023.

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