COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1530

COMMONWEALTH

vs.

GERARD L. MOQUIN.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant, Gerard Moquin, appeals from his conviction of indecent assault and battery on a child under fourteen, subsequent offense, pursuant to G. L. c. 265, § 13B. The defendant raises four issues on appeal: that the victim was not competent to testify, that the Commonwealth improperly used the defendant's prior convictions, that the admission of certain testimony violated the first complaint doctrine, and that the cumulative effect of these errors requires reversal. We affirm.

Discussion. 1. The victim's competence. The victim was six years old when he testified at the time of trial. Prior to the victim's trial testimony, the parties agreed that there were no apparent issues with the victim's competence. The victim underwent a sexual abuse intervention network (SAIN) interview prior to trial at which the interviewer discussed the difference

between truth and lies. Defense counsel represented that based on that interview, he did not have any issues with the victim giving testimony. The parties further agreed "[i]f something comes up" they would address it at sidebar or without the jury present. Neither party questioned the victim's competence or objected to his testimony at trial.

On appeal, the defendant claims that the victim was incompetent to testify and the judge should have inquired sua sponte as to his competence. While the defendant is correct that "[e]ven when a witness is determined to be competent and allowed to testify, it remains open to the trial judge to 'reconsider his decision, either sua sponte or on motion, if he entertains doubts about the correctness of the earlier ruling,'" Commonwealth v. Lamontagne, 42 Mass. App. Ct. 213, 216 (1997), quoting Commonwealth v. Brusgulis, 398 Mass. 325, 331 (1986), we discern no error. "In reviewing a trial judge's ruling on the competency of a witness, we will examine both [any] preliminary hearing and the witness's trial testimony." Commonwealth v. Thibeault, 77 Mass. App. Ct. 419, 424 (2010).

A child's testimony can establish competency. See Commonwealth v. Monzon, 51 Mass. App. Ct. 245, 249-250 (2001). The victim was able to spell his name and tell the jury when his birthday was. He testified to his teacher's name, the street on which he lives, and the town in which he lives. He then

described the behavior that was the basis for the charge. On cross-examination, defense counsel asked the victim if he saw his father in the courtroom. At first, the victim said no, but when asked to look around the room, he pointed at the defendant. The trial judge found that the victim did correctly identify his father in the courtroom.[1] "[I]t is seldom that the discretion of the trial judge [in determining a witness's competence] can be revised; its exercise must have been clearly erroneous to justify such action." Id. at 249. The judge's conclusion that the victim was competent is supported by the record and is not clearly erroneous.

2. The defendant's prior convictions. The defendant testified and contends that the Commonwealth's questions about his violations of a restraining order during cross-examination and subsequent references to his answers in its closing argument constituted improper propensity evidence. The defendant also argues that the judge should have given a limiting instruction

[1] The record reflects that the victim identified the defendant in court, stating, "That is my daddy (pointing)." When the defense attempted to clarify the victim's gesture, the victim stated that his father was not in "the audience," was not the defense counsel, and was not his uncle, but was sitting "Right there. Where [defense counsel] just pointed." After finding that the victim did identify his father, the trial judge found that any confusion resulted from where defense counsel was standing and because the victim's uncle was in the same general direction.

to the jury about use of the prior conviction evidence. We disagree.

On direct examination, the defendant testified that he was convicted of violating a restraining order for the protection of the victim's mother in March of 2016. On cross-examination, the defendant conceded that he had also been convicted of violating a restraining order for her protection in January of 2016 as well. Because the defendant discussed the restraining order and violation on direct examination, the Commonwealth was permitted to pursue this issue on cross-examination. See Commonwealth v. Daley, 439 Mass. 558, 563 (2003) ("A witness may, however, testify about his prior convictions . . . in direct examination in order to blunt the anticipated use of such evidence on cross-examination. . . . If he does so, however, opposing counsel is also free to examine him further on the subject"). There was therefore no error in permitting the Commonwealth to cross-examine the defendant on his prior convictions.

We proceed to the defendant's claims about the Commonwealth's closing argument, which we review for a substantial risk of a miscarriage of justice. A substantial risk of a miscarriage of justice exists only where there is "serious doubt whether the result of the trial might have been different had the error not been made." Commonwealth v. LeFave, 430 Mass. 169, 174 (1999). To conclude that there has been a

substantial risk of miscarriage, however, there must first be an error. See Commonwealth v. Randolph, 438 Mass. 290, 303 (2002).

In its closing argument, the Commonwealth permissibly asked the jury to consider how this evidence reflected on the defendant's credibility:

> "You can evaluate the defendant's credibility the exact same way you evaluate the other witnesses. Think about his characterization of his loving great relationship with [the victim's mother], and then you come to learn that around the same time period, he was pleading to two different violations of a restraining order where [the victim's mother] was the subject of that restraining order."

Under G. L. c. 233, § 21, a defendant's prior convictions may be used to impeach his credibility but not "for the purpose of establishing the defendant's bad character or propensity to commit the crime charged." Daley, 439 Mass. at 563. Because the evidence here was used, as permitted, to impugn the defendant's credibility, there was no error, let alone a substantial risk of miscarriage of justice. Commonwealth v. Veiovis, 477 Mass. 472, 481-483 (2017).

The defendant also contends that he was entitled to a limiting instruction, though he did not request one. See Commonwealth v. Bradshaw, 385 Mass. 244, 270 (1982) (law does not require judge to give limiting instructions regarding purpose for which evidence is offered unless requested by defendant). "When the failure to give a limiting instruction is

raised for the first time on appeal, we review for a substantial risk of a miscarriage of justice." Commonwealth v. Washington, 449 Mass. 476, 488 (2007). Given our conclusion that the Commonwealth's closing argument was permissible, we conclude that there was no error in not giving a limiting instruction.

3. First complaint witness. The defendant argues on appeal that the trial judge erroneously designated the maternal grandfather as the first complaint witness, impermissibly allowed the victim to testify about telling both his grandparents and his mother, and incorrectly described first complaint testimony as an exception to the hearsay rule to the jury.

a. The maternal grandfather as first complaint witness. The victim testified on direct examination that he had first complained of the sexual assault to his grandparents but on cross-examination that he had told his mother first. The victim then stated again that he told his grandparents "the specific stuff." After the victim's testimony, the trial judge stated that the grandfather could not testify as "a first complaint [witness] if that is the state of the record," and conducted voir dire of the victim's mother to determine the proper first complaint witness. The victim's mother testified that she had first heard of the assault from her mother, the victim's maternal grandmother. After the victim's testimony and the voir

dire of the victim's mother, the trial judge "[found] as a predicate matter that . . . the first complaint in this case was made to the [victim's] grandparents" and that therefore the victim's grandfather was the proper first complaint witness. As the defendant did not object to the designation of the first complaint witness, we review for abuse of discretion or clear error. See Commonwealth v. Murungu, 450 Mass. 441, 446-447 (2008).

Pursuant to the first complaint doctrine, "the recipient of a [victim's] first complaint of an alleged sexual assault may testify about the fact of the first complaint and the circumstances surrounding the making of that first complaint." Commonwealth v. King, 445 Mass. 217, 218-219 (2005). The record here shows that trial judge heard the victim's testimony, held a voir dire of the victim's mother, and only then designated the grandfather as the first complaint witness. The mother's testimony was unequivocal that she first learned of the abuse from her mother. We therefore conclude that the trial judge did not abuse his discretion and that there was no error. The defendant's contention that the maternal grandfather was more hostile towards the defendant than the victim's mother would have been does not change the decision. "[T]he designation of the first complaint witness is solely a temporal consideration." Commonwealth v. Asenjo, 477 Mass. 599, 603-604 (2017).

b. Evidence of multiple complaints. The defendant also argues that because the first complaint doctrine also bars a victim from testifying about reporting the incident to multiple people, Commonwealth v. Stuckich, 450 Mass. 449, 456-457 (2008), the allowance of the victim's testimony that he told both his mother and his grandparents about this incident was prejudicial. However, defense counsel elicited the testimony on cross-examination of the victim, therefore there was no such prejudice. See Commonwealth v. Dumas, 83 Mass. App. Ct. 536, 540 (2013) (defendant not unfairly prejudiced by violation of first complaint doctrine when complained-about testimony was elicited by defendant himself). The jury could reasonably infer that a child victim likely would have discussed the allegations sometime prior to trial two years later. There was no substantial risk of a miscarriage of justice.

c. Instruction on the first complaint doctrine. The defendant also points out that the trial judge incorrectly stated that testimony offered under the first complaint doctrine is an exception to the hearsay rule. Although the trial judge did misstate the rule once, in that same instruction he proceeded to correctly explain to the jury that they could not use the first complaint testimony as proof that the assault occurred and could use it only for the "specific and limited purpose" of assessing the complainant's credibility and

reliability. The judge again correctly stated the rule in his closing charge to the jury. Given the judge's multiple correct instructions, this error did not create a substantial risk of a miscarriage of justice. See Commonwealth v. Thomas, 439 Mass. 362, 366 (2003) (jury instructions reviewed in their entirety, not as fragments "out of context").

4. Cumulative error. Finally, the defendant claims that the alleged errors cumulatively created a substantial risk of a miscarriage of justice. Given our conclusions herein on the underlying alleged errors, there was no cumulative error.

Judgment affirmed.

By the Court (Neyman, Henry & Desmond, JJ.[2]),

Joseph F. Stanton

Clerk

Entered: March 15, 2021.

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