COMMONWEALTH vs. NILTON K. ALCE.

No. 19-P-255.

Plymouth. December 9, 2019. - January 21, 2020.

Present: Sullivan, Maldonado, & Wendlandt, JJ.

Rape. Minor. Youthful Offender Act. Evidence, First complaint. Witness, Unavailability.

Indictments found and returned in the Superior Court Department on February 27, 2018.

After transfer to the Plymouth County Division of the Juvenile Court Department, the cases were tried before Dana M. Gershengorn, J.

Adriana Contartese for the defendant.
Bridget Norton Middleton, Assistant District Attorney, for the Commonwealth.

WENDLANDT, J. After a second jury trial[1] in the Brockton Juvenile Court, the defendant was convicted of three counts of

[1] The defendant was indicted as a youthful offender, pursuant to G. L. c. 119, § 54, on four counts of aggravated rape of a child in violation of G. L. c. 265, § 23A (a). During the first jury trial, the defendant's motion for a required

aggravated rape of a child, involving two different victims, in violation of G. L. c. 265, § 23A (a). On appeal, the defendant contends that the trial judge abused her discretion in allowing the first victim's mother to substitute as the first complaint witness for that victim's cousin, who the judge found was unavailable to testify. We affirm, taking the opportunity to clarify that "unavailability" for purposes of allowing substitution of a witness under the first complaint doctrine does not require the same rigorous efforts necessary to show a witness is unavailable under the hearsay exception.

Background. As set forth supra, the defendant's sexual assaults involved two different victims.

1. Sexual assault on first victim. The first victim and the defendant were cousins whose families often would visit each other's homes. During some of these visits, starting when the victim was approximately five years old through the time she was eight years old, the defendant would "tickle" and "wiggle[]" his fingers on her "private part," which she also referred to as her "pee-pee." The victim, who was ten years old at the time of the second trial, identified her "private part" or "pee-pee" as her vaginal area on a model of a naked female body; she also

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finding of not guilty was allowed on one count, and a mistrial was declared on the other counts.

identified the penile area as the defendant's "private part" or "pee-pee" on a naked male body model.

During a visit to the defendant's home in 2016, when she was eight years old, the victim was lying on the floor of the defendant's bedroom, watching a video on her cellular telephone. When others left the room, the defendant closed the bedroom door, pulled down her pants, and told her to be quiet. The defendant licked the victim's "private part," touched her "private part" with his fingers, and inserted his penis into her vagina. The defendant was fifteen years old at the time of the rape, which ended when someone came upstairs.

In July 2017, during a family vacation, the victim told a different male cousin, who was then twelve years old, about the assault.[2] During the same vacation, the cousin told an eighteen year old relative, who, in turn, immediately informed the victim's mother. The victim's mother confronted her and, although initially uncomfortable, the first victim eventually disclosed that the defendant was "on top of her," pulled her pants down and put his penis inside her vagina. She demonstrated the assault using hand gestures.

2. Sexual assault on second victim. The second victim and the defendant are also cousins. She testified that the

[2] There was no indication that the cousin is related to the defendant.

defendant put his "tu-tu" (a term she used in reference to a penis) in her mouth when she was approximately four years old. The defendant told her to "suck it." The defendant was fifteen years old at the time. The second victim's mother testified as a first complaint witness, without objection.

3. Motion in limine. Prior to the first jury trial, the Commonwealth moved in limine to substitute the first victim's mother as the first complaint witness with regard to the first victim. The cousin, to whom the victim had initially reported the assaults, was a minor who resided in Florida at an unknown address. Although the Commonwealth had a telephone number at which a detective had been able to reach him previously,[3] calls made to the telephone number prior to trial went directly into voicemail. The voicemail did not identify the cousin's name, stating only that the "caller is unavailable." The Commonwealth left messages, but did not receive a call back. The first victim's family did not have an address for the cousin. The prosecutor surmised, "It would seem that they are estranged given the circumstances."

The judge allowed the motion, finding that the Commonwealth made reasonable efforts to secure the cousin's attendance and

[3] This was prior to the filing of indictments on February 28, 2018.

concluding that he was unavailable because of his minority, out-of-State residency, and estrangement from the victim's family.

Discussion. "We review the judge's decision [allowing a substitute first complaint witness] for an abuse of discretion." Commonwealth v. Lewis, 91 Mass. App. Ct. 651, 657 (2017). See Commonwealth v. Aviles, 461 Mass. 60, 73 (2011).

The principles of the first complaint doctrine are well known. See Commonwealth v. King, 445 Mass. 217, 243 (2005), cert. denied, 546 U.S. 1216 (2006). Briefly, it allows a witness to "testify to the details of [a] victim's first complaint of sexual assault and the circumstances surrounding that . . . complaint as part of the prosecution's case-in-chief." Id. The doctrine was designed to "cure" stereotyping in sexual assault cases and reflects an understanding that "victims often do not promptly report a sexual assault for a variety of reasons that have nothing to do with the validity of the claim of assault." Id. at 242. At the same time, the doctrine prevents "piling on" by generally limiting the prosecution to one first complaint witness.[4] Id. at 243, 245.

There are limited exceptions to the first complaint doctrine. "[I]n certain circumstances a judge, in [her]

[4] The doctrine revised the so-called "fresh" complaint doctrine, as described in King, 445 Mass. at 228-232.

discretion, [may] permit someone other than and 'in lieu of, the very "first" complaint witness' to testify . . . ." Commonwealth v. Murungu, 450 Mass. 441, 445 (2008), quoting King, 445 Mass. at 243. Among such circumstances are those in which the first person told of the assault is "unavailable." King, 445 Mass. at 243.

In the present case, the defendant maintains that the Commonwealth's efforts to secure the cousin were insufficiently rigorous to meet the type of good faith, diligent, and reasonable efforts required to show that he was "unavailable" for the purpose of a hearsay exception. See Mass. G. Evid. § 804(a) (2019) (setting forth criteria for being unavailable for purposes of hearsay exceptions).[5] However, the first complaint doctrine is not an exception to the rule against hearsay.[6] To the contrary, "the rule against hearsay [is] not

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[5] Compare Commonwealth v. Sena, 441 Mass. 822, 832-833 (2004) (efforts adequate where Commonwealth attempted to locate witness at last known address, interviewed roommate, who indicated witness had moved to Puerto Rico, and enlisted assistance of Puerto Rican authorities) and Commonwealth v. Roberio, 440 Mass. 245, 248 (2003) (efforts included attempts to locate witness in Florida, outreach by Massachusetts State troopers to probation officer and Florida deputy sheriff, contact with girlfriend, mother, and brother, and surveillance) with Commmonwealth v. Lopera, 42 Mass. App. Ct. 133, 136-137 (1997) (summons to witness for earlier trial date insufficient to show good faith efforts to obtain witness's appearance on actual trial date).

[6] Significantly, because, under the first complaint doctrine, the alleged victim's out-of-court statement is not

implicated because first complaint evidence may be considered only for specific limited purposes and not for the truth of the matter asserted, namely, that the assault in fact occurred." Commonwealth v. Pena, 96 Mass. App. Ct. 655, 659 (2019). Indeed, the Supreme Judicial Court has cautioned that "[r]ather than considering the first complaint doctrine as an evidentiary 'rule,' it makes greater sense to view the doctrine as a body of governing principles to guide a trial judge on the admissibility of first complaint evidence." Aviles, 461 Mass. at 73. The trial judge is best positioned "to determine the scope of admissible evidence, keeping in mind the underlying goals of the first complaint doctrine, our established first complaint jurisprudence, and our guidelines for admitting or excluding relevant evidence." Id.

In light of these principles and the aforementioned goals of the first complaint doctrine, we reject the defendant's contention that the Commonwealth must show the same unavailability required to establish a hearsay exception. Here, the Commonwealth was unable to reach the cousin via the telephone number at which he was previously contacted by police investigators. Multiple voicemail messages to this telephone

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offered for its truth, "it is not hearsay and the confrontation clause is not implicated." Commonwealth v. Caruso, 476 Mass. 275, 295 n.15 (2017).

number went unreturned; the calls went to a prerecorded message that indicated only that the "caller is unavailable" with no further information. The whereabouts of the cousin were unknown at the time of the trial, although he was last reported living in Florida. The victim's family did not have the cousin's address. See, e.g., Commonwealth v. Thibeault, 77 Mass. App. Ct. 419, 421-423 (2010) (substitution of mother for father as first complaint witness allowed where father had fled Commonwealth and could not be located at time of trial).

Additionally, the mother, who was the substitute first complaint witness, was the next person to whom the first victim reported the rapes. See Murungu, 450 Mass. at 446 ("The substituted witness should in most cases be the next complaint witness . . . "). She learned of the complaint essentially contemporaneously with the cousin, immediately following the first disclosure and during the same vacation in Florida. Finally, the judge found no indication that the Commonwealth sought to substitute the later complaint witness to gain a strategic advantage.

In short, we discern no abuse of discretion in the judge's decision to allow the mother to testify in lieu of the cousin, whose presence the Commonwealth could not secure despite reasonable efforts.

Judgments affirmed.