

SUPREME JUDICIAL COURT OF MASSACHUSETTS

Commonwealth v. Montanez

439 Mass. 441 (2003) · Decided May 22, 2003

OPINION

COWIN, J.

Cowin, J. After a jury-waived trial in the Superior Court, the defendant was found guilty on ten indictments charging sexual assault.¹ The charges arose after the victim reported that she had been sexually assaulted by her mother's live-in boy friend from *443 the time the victim was nine and one-half years old until she was fifteen years old. During this period the defendant was living with the victim, her siblings, and her mother at their various residences in Lowell.* 2 The defendant appealed from his convictions to the Appeals Court, and we transferred the case to this court on our own motion.

Represented by new counsel, the defendant claims error from the admission of unobjected-to fresh complaint testimony; prosecutorial misconduct in the closing argument; and ineffective assistance of trial counsel. We conclude that much of the evidence admitted as fresh complaint testimony did not qualify as such but that there was no substantial risk of a miscarriage of justice in this jury-waived trial.

We further determine that the prosecutor's closing argument was proper and that counsel did not render ineffective assistance. Accordingly, we affirm the convictions. 1. Fresh complaint. The defendant asserts that the testimony of the victim and other witnesses exceeded the scope of fresh complaint testimony and was otherwise inadmissible hearsay; and that this inadmissible testimony served to buttress the victim's credibility.

The defendant alleges that, in a case that was essentially a contest of credibility, he was prejudiced by the admission of this testimony. Because there was no objection to this testimony,³ we review to consider whether there is a substantial risk of a miscarriage of justice. *Commonwealth v. Whelton*, 428 Mass. 24, 25-26 (1998). Examination of the trial testimony reveals the following.

The victim testified to the details of the sexual abuse by the defendant; the general substance of a conversation with a friend concerning the abuse⁴; the fact that she spoke to a female guidance counsellor about the incident and the steps the guidance counsellor took as a result of that conversation; a conversation *444 in which she told her mother a "little bit" about the situation, an interview with the police and then a representative of the district attorney's office; and, finally, a videotape interview by the district attorney's office in which she told "roughly" the same story "that [she] told [in court] today." Thereafter, her friend, the sole person denominated as a fresh

complaint witness, recounted a conversation with the victim that did not contain the details of the sexual abuse that had occurred but essentially explained the victim's prolonged delay in reporting the situation: that the family was financially dependent on the defendant and that she did not want her younger brother (the child of her mother and the defendant) to be affected.

The friend also stated, over objection, that the victim looked "worried" and "scared" during this conversation, and that she advised her to speak to a female guidance counsellor and that the victim did so and was "nervous" at that time.

Finally, the friend testified, again over objection, that she related to her cousin what had happened and received advice from that source. Both the victim's mother and a Lowell police officer, Detective Julie Mc*445Dowell, testified, but not as fresh complaint witnesses. (Their testimony will be discussed in more detail below.) There was also a stipulation regarding inconclusive DNA evidence.

The defendant denied that these assaults had taken place. He claimed he loved the victim as one of his own children, and that the story of abuse was fabricated as retribution for his allegedly harsh discipline. He stated that the mother was motivated by revenge because he had not been a good provider. He also attacked the victim's credibility by cross-examination suggesting that if the abuse had occurred she would have disclosed it earlier; her reasons for not doing so were not believable and it was unlikely that no other family member saw or heard the abuse if it had occurred mainly in the home during a period of six years.

In *Commonwealth v. Peters*, 429 Mass. 22, 27 (1999), we explained that our fresh complaint doctrine "permits an out-of-court complaint seasonably made by the complainant in a sexual assault case to be admitted as part of the prosecution's case-in-chief. Evidence of the fact of the complaint is admissible only to corroborate the complainant's testimony [and not]... to establish the truth of the complaint itself... a fresh complaint witness may testify both to the fact of the complaint and the details of the complaint as expressed by the complainant" (footnote and citations omitted).

Further, we stated that "while a complainant may testify about the fact that she made a complaint to another about a sexual assault, the person complained to, the fresh complaint witness, must be produced to testify about what the complainant said and to be available for cross-examination." *Id.* at 28.

Finally, pursuant to our rule, the admissibility of the fact of the complaint is not dependent on an attack on the credibility of the complainant. *Id.* at 27- 28. The court expressed its reservations concerning the fresh complaint doctrine, nonetheless continued to believe that fresh complaint evidence should be admissible.⁵ *Id.* at 30. Against this backdrop of the governing principles, we *446consider the defendant's specific claims.

First, the defendant contends that *Peters* requires that any fresh complaint witness mentioned by the complainant at trial must testify. He discerns this mandate from the language that the fresh complaint witness “must be produced to testify about what the complainant said.” *Id.* at 28.

The *Peters* court intended no such requirement. That case concerned a very different situation, one in which the complainant herself was permitted to testify to numerous details regarding her conversations with fresh complaint witnesses. Our decision was designed to end this practice. It was not intended to encompass the situation here in which the victim mentions that she complained to various persons without relating the specific contents of any of these fresh complaints, but those persons do not testify.

We have never held that such reference requires the production of those witnesses, and we do not adopt such a rule. Having rejected the defendant’s interpretation of the *Peters* case, that any mention of fresh complaint to a witness mandates calling that witness to testify, we consider his additional claims of inadmissible testimony. He contends that the victim should not have related the substance of her conversation with her friend, see note 4, *supra*\ the guidance counsellor’s actions in calling the Department of Social Services and her mother; the fact that she told her mother a “little bit” about the abuse and that she told the district attorney’s office “roughly the same story” she had recited in court.

The defendant argues further *447that the victim’s friend, the fresh complaint witness, should not have been permitted to repeat the victim’s reasons for delaying her report of the abuse or her own advice to the victim (to notify the guidance counsellor).

The defendant claims additional error from the victim’s mother’s testimony that she received “[absolutely shocking]” and “totally devastating” information in a conversation with the guidance counsellor; her ensuing conversation with her daughter was “devastating [.]” and her daughter spoke to two police officers and was “[e]mbarrassed” to speak with the male police officer, but could provide “additional details” to a female officer; and, finally that she gave a statement to the police that was “basically... what [she]... told... in court... with a little more detail.” The defendant alleges impropriety in the admission of the testimony of Detective McDowell of the Lowell police department, that the victim detailed to her the allegations against the defendant and that the detective took statements from numerous witnesses who never testified.⁶ We consider each of these contentions in turn, recalling that no objection was lodged to any of the above testimony.

Although the victim should not have testified to the substance of her conversation with her friend under the rubric of “fresh complaint,” *Commonwealth v. Peters*, *supra* at 30 (complainant “may testify only to the fact that a fresh complaint was made and to whom it was made [and not] about the details of the complaint”), such testimony was admissible as evidence of the victim’s state of mind.

Luz v. Stop & Shop, Inc. of Peabody, 348 Mass. 198, 208 (1964).⁷ “[Statements may be offered as evidence of state of mind without implicating the hearsay rule if the statements either do not contain assertions or are offered without regard to whether the assertions are true.” P.J. Liacos, M.S. Brodin, & M. Avery, *Massachusetts Evidence* § 8.2.6 (7th *448ed. 1999).

The prosecution’s theory was that the victim’s delay in informing anyone of the abuse was the result of the family’s need for the defendant’s financial support and the victim’s reluctance to disrupt her family. According to the Commonwealth, the victim decided to reveal the abuse at the time she did because of the defendant’s imminent return to her home (he had moved out earlier and the abuse had stopped) and her fear that the abuse would resume once he moved back.

In such circumstances, it was within the judge’s discretion to admit the testimony as evidence of the victim’s state of mind on the subject of her delay in reporting the abuse. *Id.*⁸ We view it as improper, however, for the victim to indicate the action the guidance counsellor took after learning of the assaults. There was no evidence that this was other than hearsay and it only served as self-corroboration, indicating that the victim was sufficiently credible to cause someone in authority to take certain steps.

It was also improper for the victim to state that she spoke to her mother a “little bit” about the situation. The victim may not characterize her fresh complaint, but may testify “only to the fact that [it] was made.” *Commonwealth v. Peters*, *supra* at 30. Perhaps the most serious infraction was the victim’s affirmative answer that she told “roughly the same story” during the videotaped interview prepared at the district attorney’s office.

This is simply another type of self-corroboration prohibited by *Commonwealth v. Peters*, *supra* at 28 (“We can find no decision, or other authority, which permits a complainant to engage in self-corroboration”). Moving on from the victim’s own testimony to that of her mother, it is inadmissible hearsay for a witness other than the complainant (or a fresh complaint witness) to testify that complaint was made or how it was made, nor is it permissible for a witness to characterize the conversation in which she receives such information. “[T]he [mother’s] emotional response or state of mind [that she was shocked by the] revela*449tions lack relevance; they have no ‘rational tendency to prove an issue in the case.’ ”⁹ *Commonwealth v. Quincy Q.*, *supra* at 875, quoting *Commonwealth v. Fayerweather*, 406 Mass. 78, 83 (1989).

Further, the mother should not have been asked whether what she had told the police was “basically... what [she] told... in court.” *Commonwealth v. Peters*, *supra* at 28. Detective McDowell was not called as a fresh complaint witness. She should not have been permitted to testify to the substance of her conversation with the victim. That was hearsay, with no applicable exception.

Nor is the fact that she spoke to the various other persons during her investigation relevant. As stated, no objections were lodged to the above inadmissible testimony. When the judge was considering motions in limine regarding the fresh complaint testimony prior to trial, he specifically stated that, because there would be no jury he would hear the evidence “based on the representations... made, and then mie on any objections... made either at the time of the testimony or at the completion of the testimony.” There being no objections, particularly after such a statement, we cannot say that the judge erred in admitting the testimony.

Nor can we conclude that the now-contested admission of the testimony created a substantial risk of a miscarriage of justice. Because this was a jury-waived trial, we are not here concerned with the effect of this self-corroborating testimony on a jury.

We assume that the judge is familiar with the law and did not permit himself to be influenced by such objectionable testimony. See *Commonwealth v. Ortiz*, 431 Mass. 134, 141 (2000). The remaining testimony that should not have been admitted was, for the most part, brief and fleeting. It was not sufficiently significant to have had a meaningful impact on the judge’s decision.

Cf. *Commonwealth v. Thompson*, 431 Mass. *450108, 119, cert. denied, 531 U.S. 864 (2000). 10,11 While the impact of this improper testimony on a jury might have been different, when a judge is the fact finder, we take into consideration the greater likelihood that he will not be influenced by extraneous factors.

The defendant did object to the friend’s description of the victim’s emotional state and to the testimony that the friend told her cousin what had happened and received unspecified advice from her. We therefore consider whether there was error in the admission of this testimony and, if so, whether this evidence was sufficiently prejudicial to have harmed the defendant.

Commonwealth v. Andrade, 422 Mass. 236, 239 (1996). The statement regarding the victim’s physical appearance at the time of the fresh complaint is not admissible as fresh complaint. *Commonwealth v. Quincy Q.*, supra at 874-875 (fresh complaint witness may testify to complainant’s statements of facts of assault). It is admissible, however, as evidence of the victim’s state of mind.

Luz v. Stop & Shop, Inc. of Peabody, 348 Mass. 198, 208 (1964). The testimony regarding the friend’s advice to the victim (to notify the guidance counsellor) and her request for advice from her cousin is inadmissible hearsay. It has no relation to fresh complaint and is unnecessary to give meaning to the victim’s complaint. Given the lack of significance of this evidence, however, we can say with fair assurance that in this jury-waived trial, the verdicts were not substantially swayed by this error.

Cf. *Commonwealth v. Thompson*, supra at 119. 2. Prosecutor’s closing. The defendant claims that two segments of the prosecutor’s closing were improper. As the defendant did not object to the

contested remarks, our review is limited to determining whether there was error, and, if so, *451whether there was a substantial risk of a miscarriage of justice. *Commonwealth v. Grandison*, 433 Mass. 135, 141-142 (2001).

The first portion of the closing to which the defendant objects is as follows: “And although [the defendant] was cooperative when he first spoke with Detective McDowell on March 31st of 1998, and said ‘I’ll be around, I’m not going anywhere’; Detective McDowell was never able to find him again. And she testified that she looked for a number of months to speak with him again before he was indicted, and that it wasn’t until a number of months later that he was finally arrested....

I would suggest, Your Honor, that that shows consciousness of guilt.” “In closing argument, counsel may argue the evidence and the fair inferences from the evidence.” *Commonwealth v. Fitzgerald*, 376 Mass. 402, 416 (1978).

The argument was a fair statement based on the evidence. Detective McDowell had testified without objection that, after she interviewed the defendant at the police station, she told him that she would probably want to speak to him again and that he said “okay” and “gave [her] every reason to believe he would” remain in the area. When she went to look for him, however, he was no longer living in his prior residence.

She looked for him “for some time,” and spoke with people in the community she thought would know of his whereabouts, but was not able to locate him. Ultimately, after the indictments were returned, a copias was issued for his arrest.

The defendant’s disappearance from his usual haunts may support a consciousness of guilt argument. See *Commonwealth v. Andrews*, 427 Mass. 434, 443-444 (1998). On this record, we cannot say that there was not a proper basis for the prosecutor to “suggest” consciousness of guilt as part of his argument.

The defendant further claims that the prosecutor misstated the evidence in closing argument when he said that the defendant first learned of the allegations against him during his interview with Detective McDowell: “When he first met with Detective McDowell was the first time he really knew what the allegations were.” The defendant contends correctly that the evidence was that the first information about the allegations came from the victim’s mother six days before the police interview, and *452that the difference in the date of the defendant’s knowledge indicates that the defendant did not disappear for approximately one week after learning of the charges.

The prosecutor did misstate the evidence. However, the law is that the fact finder is to rely on his memory of the evidence, not that of counsel. See, e.g., *Commonwealth v. Dixon*, 425 Mass. 223, 235 (1997); *Commonwealth v. Howell*, 394 Mass. 654, 662 (1985). See *Commonwealth v. Ortiz*, *supra* at 141. There was no substantial likelihood of a miscarriage of justice.

3. Ineffective assistance of counsel. The defendant contends that trial counsel was ineffective for failing to object to the multiple examples of inadmissible hearsay or moving to strike the improper testimony and for not objecting to “material misstatements” of the evidence and improper closing argument.

To show ineffective assistance, the defendant must show both that (1) “there has been serious incompetency, inefficiency, or inattention of counsel — behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer” and (2) defense counsel’s performance “deprived the defendant of an otherwise available, substantial ground of defence.” *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974).

Although objections on the basis of *Commonwealth v. Peters*, 429 Mass. 22 (1999), did not lie, as discussed, there were other valid grounds for objecting to parts of the testimony. The judge’s ruling at the outset of trial should have alerted trial counsel to object when fresh complaint testimony exceeded the permissible scope, yet he barely ever did so.

We can discern no tactical reason for this failure. However, counsel’s lapses did not deprive the defendant of an otherwise available, substantial ground of defense. Once more, as this was a jury-waived trial, exclusion of the testimony likely would have had no significant effect on the judge.

We emphasize again that our conclusion might be different had there been a jury. In regard to the contention that there was ineffective assistance of counsel for failure to object to the closing argument, because we have concluded that the consciousness of guilt argument was supported by the record, the failure of trial counsel to object cannot amount to ineffective assistance of counsel.

Commonwealth v. Oliveira, 431 Mass. 609, 613-614 n.6 (2000). *453Because the statement concerning the timing of the defendant’s knowledge of the allegations did not create a substantial risk of a miscarriage of justice, the failure of an objection to said statement did not deprive the defendant of the effective assistance of counsel. *Id.* Judgments affirmed.

The ten indictments consist of two charging statutory rape, G. L. c. 265, § 23; one charging assault on a child under sixteen with intent to rape, G. L. c. 265, § 24B; and seven charging indecent assault and battery (four on a *443child under the age of fourteen years, G. L. c. 265, § 13B, and three on a person who has attained fourteen years, G. L. c. 265, § 13H).

The victim referred to the defendant as her “stepfather.” No evidence of such a legal relationship was presented, but the victim testified that the defendant contributed significantly to the family’s financial support and that he treated the children “just like we were his kids.” Objections were lodged at two points, see *infra*.

The victim’s testimony in this regard was as follows: *444Q.: “And at that point did you have a conversation with [your friend]?” A.: “Yes.” Q.: “And did you tell her initially that it was you that

you were talking about or did you say something different?” A.: “No, I told her that, what would she do if a friend had this particular problem and I described it to her.” Q.: “And then at some point did you change and tell her that it was in fact you that you were talking about?” A.: “Yes.” Q.: “As a result of that conversation that you had with [your friend], did you make some kind of a plan or an agreement with her?” A.: “Yes.” Q.: “And what was that plan?” A.: “That we wouldn’t say anything until Monday, that we would tell, don’t tell anybody until Monday morning.” It may well be time to address further the validity of these beliefs, see post at 453, and the fact that we remain one of the only jurisdictions where a fresh complaint witness may testify both to the fact of the complaint and its details *446 before the complainant’s credibility is attacked.

Apparently, only Massachusetts and Minnesota still adhere to this rule. See *State v. Blohm*, 281 N.W.2d 651, 652 (Minn. 1979). See also *State v. Kendricks*, 891 S.W.2d 597, 602-603 (Tenn. 1994). Within the past ten years, in fact, at least two States, Connecticut and Tennessee, have overturned precedent to conclude that detailed testimony of a fresh complaint witness is inadmissible as fresh complaint before the complainant’s credibility has been attacked.

See *State v. Troupe*, 237 Conn. 284, 303 (1996); *State v. Kendricks*, supra at 602-603. The rule in most jurisdictions is that, if the complainant has not been impeached, and the complaint is not a spontaneous utterance, only the fact of the complaint is admissible in the prosecution’s case-in-chief. But many other jurisdictions allow evidence of the details of the complaint in certain other circumstances.

See *Commonwealth v. Peters*, 429 Mass. 22, 27 n.7 (1999); *Commonwealth v. Licata*, 412 Mass. 654, 659 n.8 (1992). We have not been requested in this case to revisit the entire doctrine and that issue has not been briefed. McDowell testified only that she had taken statements from certain people. She did not testify as to the contents of any of those statements.

The prosecutor did not articulate to the judge any basis for the admissibility of this testimony other than fresh complaint. However, “[i]f there is any basis for upholding the admissibility of the evidence, the reason on which the decision rests is immaterial and the lower court’s ruling is sustained.” *G.E.B v. S.R.W.*, 422 Mass. 158, 168 (1996). Similarly, the testimony of the victim’s friend recounting the victim’s explanation for the delay in reporting while not admissible as fresh complaint, was admissible as evidence of the victim’s state of mind.

Defense counsel’s failure to object to this particular testimony may have been a strategic measure to emphasize his point that it was unlikely that no one in the household had observed the abuse despite the fact that the assaults had occurred frequently for a period of years in the home with other family members present. During cross-examination of the mother, defense counsel himself elicited testimony of the mother’s reaction to illustrate this precise point.

The defendant also contends that the mother's testimony that the defendant drooled when he kissed her was not proper. The victim had testified similarly. The mother's testimony corroborated the victim's testimony and was relevant. See *Commonwealth v. Good*, 409 Mass. 612, 621 (1991).

The defendant further objects to references by various witnesses to tissue paper found in the basement of the home as "prejudicial suggestion and innuendo." However, this evidence was relevant to the victim's statement that she used tissue paper to clean herself and to her description of the final incident of rape.

The evidence seems to have been of little or no evidentiary value as no sperm were detected on the tissue.