

Commonwealth v. Gonzalez

Appeals Court of Massachusetts

October 23, 2020, Entered

19-P-729

Reporter

2020 Mass. App. Unpub. LEXIS 887 *; 98 Mass. App. Ct. 1115; 157 N.E.3d 102; 2020 WL 6227994

COMMONWEALTH vs. ANIBAL GONZALEZ.

Notice: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See *Chace v. Curran*, 71 Mass. App. Ct. 258, 260 n.4, 881 N.E.2d 792 (2008).

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Subsequent History: Appeal denied by *Commonwealth v. Gonzalez*, 486 Mass. 1109, 2020 Mass. LEXIS 835, 160 N.E.3d 612 (Mass., Dec. 10, 2020)

Disposition: Judgments affirmed.

Judges: Rubin, Desmond & Englander, JJ. [*1]

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant was charged with three counts of indecent assault and battery on a child under the age of fourteen, G. L. c. 265, § 13B, and three counts of rape of a child, G. L. c. 265, § 23, each naming L.R. as the alleged victim. He was convicted of four of the six crimes but acquitted of two counts of rape of a child. He now appeals.

The defendant presents a single issue on appeal. There was testimony during the direct examination of L.R. that the defendant watched her and her two younger brothers all the time as L.R.'s mother worked. There was testimony that there was rarely any other adult at home when the defendant was watching the children, that the mother worked every weekday while the defendant watched the children, and that L.R.'s older sisters were not around because they were out a lot. After the defendant moved to a neighboring apartment with L.R.'s older sister and the sister's children, he would still watch L.R. and the other children, usually with no other adults present. As L.R. was the first child home from school and there was nobody in her apartment, she went directly to the apartment shared by her older sister and the defendant. Only the [*2] defendant and L.R.'s older sister's baby would be home when L.R. arrived. After L.R.'s family, including her older sister and the defendant, relocated, and while L.R.'s older sister and mother were working, the defendant was still always home to watch L.R. after school.

On direct, the Commonwealth asked L.R. what the defendant said during one particular sexual encounter. L.R. responded that the defendant "was a drug dealer at the time, so he would — ." Defense counsel objected and moved for a mistrial.

The trial judge denied defense counsel's motion for a mistrial, concluding over the defendant's objection that a curative instruction could address any prejudice arising from the witness's statement. The judge found that that inadmissible statement was not purposefully solicited by the Commonwealth and that the witness made no "calculated or volitional decision to introduce a prejudicial and inadmissible accusation before the jury." The judge gave a curative instruction stating that the witness "made some reference to the [d]efendant having been a drug dealer I'm striking that statement. I am directing you to disregard it." The judge proceeded to explain as follows:

"The reason for my doing [*3] so goes beyond the fact that the answer was nonresponsive. More fundamentally, whether the [d]efendant was or was not engaged in any such activity is totally irrelevant to the issues that you must decide in this case. So you must not consider the stricken statement in any way in determining whether the Commonwealth has met its burden of proof beyond a reasonable doubt as to any of the six charges that are before you in this case.

"I remind you in that regard that the [d]efendant, Mr. Gonzalez, is not charged in this case with any violation of our drug laws. In fact, the [d]efendant has never been charged with any drug offense.

"It would be grossly unfair to him and a violation of your oath as jurors if you allow yourselves to give any credit whatsoever to the stricken statement.

"Again, you are to disregard it completely."

The defendant argues that denial of a mistrial was, as a matter of law, an abuse of discretion. See *Commonwealth v. Bryant*, 447 Mass. 494, 503-504, 852 N.E.2d 1072 (2006). The defendant argues further that the erroneous denial of the motion for a mistrial violated the defendant's right to due process and a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and under articles 12 and 29 of the Massachusetts Declaration of Rights.

The defendant points out that the question of why the defendant was available for babysitting [*4] may have been on the minds of the jurors, as the judge said it was on his, as they listened to the testimony. Although that question was not critical to the case, it may be that because that question was on the minds of the jurors, they took particular note of the inadmissible statement by the witness. Indeed, even without such a question, the statement of a witness that a defendant was a drug dealer is not one that is likely to be forgotten by jurors.

Nonetheless, we think that the strong curative instruction was sufficient to address the risk of prejudice from the unsolicited inadmissible remark of the witness such that the judge was not required to grant the motion for a mistrial instead of giving the curative instruction. The judge not only struck the statement and instructed the jurors to disregard it, but also stated at length that it would be unfair, and indeed a violation of their oath, to consider the statement in their deliberations. Indeed, he said, falsely, that the defendant had never been charged with any drug crime when in fact he was once charged, though acquitted, of possession of a class A substance with intent to distribute.¹

Although not dispositive, we also note that [*5] the jurors acquitted the defendant of two charges of child rape, which under our court's case law, is some evidence that the jurors were not swayed by emotion in response to the witness's statement. See *Commonwealth v. Hampton*, 91 Mass. App. Ct. 852, 855, 81 N.E.3d 796 (2017).

¹ We do not condone the provision of false information to jurors or any judge deliberately lying. Neither party in this case voices any objection to the false statement in the judge's curative instruction, however, and therefore, we voice no opinion on its propriety.

In light of our conclusion that the curative instruction was sufficient to address the unfairly prejudicial effect of the witness's testimony, we also conclude that there is no merit to the defendant's claims of denial of his rights to due process and a fair trial.

Judgments affirmed.

By the Court (Rubin, Desmond & Englander, JJ.²),

Entered: October 23, 2020.

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²The panelists are listed in order of seniority.