

Commonwealth v. Harding

Appeals Court of Massachusetts

July 2, 2021, Entered

19-P-1786

Reporter

2021 Mass. App. Unpub. LEXIS 496 *; 99 Mass. App. Ct. 1132; 170 N.E.3d 720; 2021 WL 2774702

COMMONWEALTH vs. SHANE E. HARDING.

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. Harding*, 488 Mass. 1103, 2021 Mass. LEXIS 569, 173 N.E.3d 1101 (Mass., Sept. 14, 2021)

Disposition: Judgments affirmed.

Judges: Green, C.J., Blake & Lemire, JJ. [*1]

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

On September 30, 2014, the defendant set out on an increasingly desperate string of criminal acts spanning New York and Massachusetts. By the time of his apprehension the next day he had committed a botched robbery in New York, kidnapped and raped his brother's girlfriend in Massachusetts, returned to New York, planned additional crimes, and coerced a lifelong friend into assisting an attempted escape to Canada. For the segment of his spree that occurred in Massachusetts, a Superior Court jury convicted the defendant of three counts of rape and a single count of kidnapping. See G. L. c. 265, §§ 22 (b), 26. On appeal, he contends that the trial judge erred in admitting evidence of certain prior and subsequent bad acts. We affirm the convictions.

The Commonwealth may not introduce evidence of a defendant's prior or subsequent bad act to prove bad character or a propensity to commit the crimes charged. See *Commonwealth v. Peno*, 485 Mass. 378, 385, 150 N.E.3d 314 (2020). Such evidence may, however, be introduced for certain permissible purposes, provided that its probative value is not outweighed by the risk of unfair prejudice to the defendant. See *id.* For example, bad acts evidence may be admissible to show [*2] motive, intent, or state of mind. See *id.*; *Commonwealth v. Keown*, 478 Mass. 232, 243, 84 N.E.3d 820 (2017), cert. denied 138 S. Ct. 1038, 200 L. Ed. 2d 292 (2018). Likewise admissible is evidence of bad acts that are "inextricably intertwined with the description of events . . . of the [crime]." *Commonwealth v. Bryant*, 482 Mass. 731, 734, 128 N.E.3d 40 (2019), quoting *Commonwealth v. Marrero*, 427 Mass. 65, 67, 691 N.E.2d 918 (1998). We review a judge's decision to admit bad acts evidence for abuse of discretion, and such a decision will stand unless "a clear error of judgment" causes it to be "outside the range of reasonable alternatives." *Peno, supra* at 386, quoting *Commonwealth v. Facella*, 478 Mass. 393, 407, 85 N.E.3d 665 (2017).

The defendant argues that the jury should not have heard evidence of his bad acts both preceding and following the kidnapping and rape of the victim, but the argument does not recognize that all of the defendant's acts that day were one "inextricably intertwined" course of conduct.¹ His failed armed robbery in New York caused him to seek a ride from the victim. His desperation to avoid the police caused him to force her to drive to Massachusetts, where he raped her, believing he was about to die. She escaped only by convincing him that her absence would be noticed, and that he should ask his friend and roommate for help. That friend, forced to drive the defendant around New York while he plotted additional crimes

¹ We reject the defendant's argument that the trial judge admitted the bad acts evidence solely because it was the subject of an unsuccessful motion to suppress. The record makes clear that the judge knew that the motion's constitutional test was distinct from the bad acts inquiry faced at trial.

in furtherance of a planned escape to Canada, [*3] ultimately gained his freedom and gave police the information that led to the defendant's arrest. Each of these events informs the others, and all happened in less than twenty-four hours. Not only is the Commonwealth "entitled to present as full a picture as possible of the events surrounding the incident itself," but evidence of these interlinked acts was essential to the jury's comprehension of the charged crimes; without the challenged evidence they would be left with "an essentially inexplicable act of violence."² *Commonwealth v. Bradshaw*, 385 Mass. 244, 269-270, 431 N.E.2d 880 (1982).

Moreover, the probative value of this evidence must be weighed against the risk of *unfair* prejudice. See *Peno*, 485 Mass. at 386. Had the defendant's desperate flight occurred wholly in Massachusetts, it is all but certain that he would have faced further Massachusetts criminal charges based on his complained-of bad acts.³ Those related charges could be appropriately tried together with the existing four, and at that trial all of the challenged evidence would be admissible. See Mass. R. Crim. P. (9) (a), 378 Mass. 859 (1979) (joinder presumptively appropriate for related offenses that "arise out of a course of criminal conduct or series of criminal episodes connected together"); *Commonwealth v. Hernandez*, 473 Mass. 379, 394, 42 N.E.3d 1064 (2015) (joinder supported by fact that evidence [*4] of two crimes would be mutually admissible if tried separately because bad acts showed motive and were "inextricably intertwined"). Given that, any prejudice from admission of the bad acts evidence here can hardly be called unfair; the defendant cannot expect to avoid evidence of bad acts that were uncharged solely by reason of the cartological accident of a State boundary separating them.⁴ There was no abuse of discretion in admitting the bad act evidence.⁵

Judgments affirmed.

² Furthermore, the defendant's immediately prior and immediately subsequent acts are probative of his motive to commit the charged crimes. The evidence tends to show why and how badly he wanted to leave the country and, with respect to the rapes, his perceived need to commit those acts before being killed or apprehended. See *Commonwealth v. Bradshaw*, 385 Mass. 244, 269-270, 431 N.E.2d 880 (1982) (earlier same-day bad acts admitted as probative of motive of subsequent crime); *Commonwealth v. Pagels*, 69 Mass. App. Ct. 607, 617, 870 N.E.2d 645 (2007) (subsequent threatening telephone calls to victim admissible as probative of motive of assault two months earlier).

³ The record indicates that, at the time of trial, the defendant was incarcerated in New York for charges brought there that were related to the same series of events.

⁴ "Bad acts, although occurring outside the State, may come in as ancillary to the proof of the commission of crimes within the State." *Commonwealth v. Frank*, 51 Mass. App. Ct. 19, 24, 742 N.E.2d 586 (2001).

⁵ Even if admission of the evidence had been error, the judge gave specific limiting instructions to the jury both contemporaneously and in the final charge. "[T]he application of [limiting] instructions ordinarily renders any potentially prejudicial evidence harmless." *Commonwealth v. Crayton*, 470 Mass. 228, 251, 21 N.E.3d 157 (2014), quoting *Commonwealth v. Donahue*, 430 Mass. 710, 718, 723 N.E.2d 25 (2000).

By the Court (Green, C.J., Blake & Lemire, JJ.⁶),

Entered: July 2, 2021.

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⁶The panelists are listed in order of seniority.