

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. FAR-_____

APPEALS COURT NO. 2024-P-1075

SUFFOLK, SS.

COMMONWEALTH OF MASSACHUSETTS,
Applicant,

v.

JOSE ORTEGA,
Respondent.

APPLICATION FOR LEAVE TO OBTAIN
FURTHER APPELLATE REVIEW PURSUANT
TO MASS. R. APP. P. 27.1

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Request for Further Appellate Review

The applicant Commonwealth of Massachusetts requests that this Court grant further appellate review of the defendant's convictions of two counts of rape of a child and one count of indecent assault and battery on a child which a panel of the Appeals Court reversed in a Memorandum and Order Pursuant to Rule 23.0 on December 10, 2025.

Statement of Prior Proceedings

On February 10, 2014, a Suffolk County grand jury indicted the defendant Jose Ortega on three counts of rape of a child and one count each of indecent assault and battery on a child under 14, indecent assault and battery on a person 14 or older, open and gross lewdness, and dissemination of harmful matter to a minor. The defendant was deported in May of 2014 and in default until his extradition in 2019.

On May 20, 2021, the fifth day of trial (Ullmann, J., presiding), the Commonwealth dismissed one of the rape counts. The next day, the jury convicted the defendant of two counts of rape of a child, indecent assault and battery on a child, open and gross lewdness, and dissemination, and acquitted him of indecent assault and battery on a person 14 or older.

On June 10, 2021, the Commonwealth *nol prossed* the counts charging open and gross lewdness and dissemination.¹ On June 14, 2021, Judge Ullmann sentenced the defendant to concurrent prison terms of nine to 12 years for the rape convictions and a from-and-after probationary term of 10 years for the conviction of indecent assault and battery on a child.

Following entry of the case in the Appeals Court, the defendant filed a motion for new trial, which Judge Ullmann denied on September 23, 2024. The appeal from that ruling was consolidated with the direct appeal.

On December 10, 2025, a panel of the Appeals Court (Henry, Hand, & Tan, JJ.) issued a Memorandum and Order Pursuant to Rule 23.0 vacating the judgments and setting aside the verdicts (the "Decision"). See Commonwealth v. Ortega, --- Mass. App. Ct. ----, No. 2024-P-1075, slip op. at 1-2, 11 (Dec. 10, 2025) ("Slip op.").² Neither party is seeking reconsideration or modification in the Appeals Court.

¹ The statute of limitation for these offenses had expired when the defendant was indicted.

² The Decision is also reported at 2025 WL 3537337 (Mass. App. Ct. Dec. 10, 2025).

Short Statement of Facts Relevant to the Appeal

The Decision contained a very brief statement of facts which was underinclusive and, in one instance, inaccurate, as set forth infra in footnotes four and five. The essential facts relevant to this application follow.

In 2000, the defendant Jose Ortega was in charge of and ran every aspect of a youth boys' baseball league in Boston called the Boston Broncos.³ That year, the nine-year-old victim, Robert (a pseudonym), whose favorite activity was playing baseball, joined the league. For the succeeding five or six years, the defendant sexually abused Robert in the defendant's apartment.⁴

³ The Appeals Court panel's characterization of the defendant as a "coach" on a team in a baseball league, slip op. at 2, was inaccurate and significantly understated his plenary authority to determine how often, when, where, and at what position each boy played.

⁴ The Decision stated only that that the victim testified the defendant "showed [him and other boys] pornography and encouraged them to masturbate while sometimes doing so himself." Slip. op. at 3. The victim also testified that the defendant put his mouth on the victim's penis six or seven times (on one occasion sucking it for at least two minutes), and that he (the victim) touched the defendant's penis once.

Robert testified that the defendant sexually abused five other boys in his presence at the same time and in the same place he sexually abused Robert (the "Bad-Acts Evidence"). ***Two of those boys, and a third boy, testified for the defense that they were never abused by the defendant.***⁵ The defendant did not request, the court did not give, and the defendant did not object to the absence of a limiting instruction in connection with the Bad-Acts Evidence. The issue was never raised at trial.

**Statement of Point with Respect to Which
Further Appellate Review Is Sought**

The Commonwealth seeks further appellate review to determine whether the absence of a *sua sponte* limiting instruction regarding other bad acts by the defendant created a substantial risk of a miscarriage of justice despite the facts that ***(1) the defendant himself sought admission of the bad-acts evidence and built a strong defense around it; (2) a limiting instruction was counter to the defendant's theory of the case; and (3) reversal for lack of an unrequested limiting instruction requires extraordinary and***

⁵ The prosecutor and defense counsel expected Robert to identify the third boy as a victim as well, but he did not.

patently prejudicial circumstances not remotely present here.

Statement Indicating Why Further Appellate Review is Appropriate

This was a factually distinct if not unique child-sex-abuse prosecution in which evidentiary incentives common in such cases were not in their usual alignment. In its Decision, the Appeals Court panel failed to grasp and account for the atypical dynamics of this case and treated it like the straightforward, child-sexual-abuse case involving other bad acts that it was not. The panel's discussion and analysis were cursory and perfunctory and relied on inapt cases and principles.

There was no error and no prejudice, much less a substantial risk of a miscarriage of justice, and thus no valid basis to set aside the convictions of rape of a child and indecent assault and battery on a child beginning more than 25 years ago. This application is supported by "[s]ubstantial reasons affecting the public interest . . . [and] the interests of justice," Mass. R. App. P. 27.1(a), and should therefore be allowed.

Robert's testimony that the defendant sexually abused other boys was essential to the viable defense of fabrication -- and would have been introduced by the defendant even if the Commonwealth did not do so -- because several boys testified and contradicted the victim's testimony that they had also been abused.

A limiting instruction, which explicitly tells the jury how to consider and use evidence of bad acts *if credited*, was arguably inconsistent with this defense and would likely have hindered it.⁶ As the record does not support a finding that the verdicts were "materially influence[d]" by the lack of a *sua sponte* limiting instruction, there was no substantial risk of a miscarriage of justice. Commonwealth v. Vasquez, 495 Mass. 279, 286 (2025); see also Commonwealth v. Nascimento-Depina, 496 Mass. 1, 9 (2025) ("[w]e have never required a judge to give a limiting instruction in the absence of a request for one, and see no reason to create such a rule in this case").

Prior to trial, the Commonwealth moved *in limine* for admission, subject to a limiting instruction, of

⁶ Hence the Decision's conclusion that there was "[n]o reasonable tactical basis" for the lack of a request for a limiting instruction, slip op. at 9, cannot be sustained. See infra at 12-14.

"contemporaneous uncharged bad acts committed by the defendant against" other victims. At a hearing, Judge Ullmann expressed his view that the evidence was admissible for several reasons and the following colloquy occurred:

DEFENSE COUNSEL: [T]his is a thorny issue, but it's my expectation that [Robert] is going to testify: I was abused, when I was abused these other people were there, they saw and they were themselves abused.

THE COURT: Correct. That's my understanding.

DEFENSE COUNSEL: No, ***I don't have an objection to that coming in. And, as you know, I've located three of those individuals and intended to call them as witnesses.***

THE COURT: Okay. Well, then ***it sounds as if that motion is now moot.***

PROSECUTOR: Yes.

THE COURT: I will endorse it as allowed without objection for the reasons that I identified.

PROSECUTOR: I think just to be clear on the record, the Commonwealth's position, just ***from speaking to [defense counsel], is that if I don't ask about the stuff, he's going to,*** and so, therefore, the motion is essentially to sort of figure out this issue because I want to know whether or not it's something I want to draw this thing about [sic] or not. You know, to get ahead of that. Since he said he's going to ask.

THE COURT: Well, for the reasons I identified, I may issue a very short written opinion. I believe that this testimony is admissible, and that means that either party can offer it (emphases supplied).⁷

⁷ In a two-page written opinion, Judge Ullmann held that the Commonwealth could introduce the Bad-Acts

Defense counsel exploited the Bad-Acts Evidence throughout trial. He made a very brief and pointed opening statement referring to Robert's allegation that the defendant sexually abused other boys. He meticulously cross-examined Robert about his contention that he saw the defendant sexually assault other boys.⁸ Despite the defendant's complaint in the Appeals Court about the graphic nature of Robert's "testimony regarding masturbation, pornography, and sexual assaults involving five other young Hispanic baseball players," much of that was elicited on cross-examination to highlight the extent to which Robert

Evidence because it (1) was "necessary to give the jury a view of the entire relationship between the defendant and the alleged victim"; and (2) formed a "temporal and schematic nexus" which showed "a common course of conduct." In his view, the "probative value of the evidence [was] clearly not outweighed by the risk of unfair prejudice." In light of the absence of an objection and defense counsel's intended use of the Bad-Acts Evidence, this opinion, though helpful, was not necessary.

⁸ For example:

Q: Okay. And you also saw [the defendant] doing sexual things to [one particular boy]?

A: Yes.

Q: You saw that with your own eyes?

A: Yes.

was willing to lie to ensure the defendant's conviction.

In his closing argument, defense counsel focused on Robert's testimony about the other boys:

He gave us graphic details of what happened to him, not just him, but about these other people, [A], [B], [C]. It's one thing to say this stuff happened to me. It's another thing all together [sic] to say it happened to these other people and we were all in the same room, I saw it, they saw it happening to me. This isn't testimony about, well, were [sic] in the room and they disappeared into a bedroom, and I don't really know what happened. No. This is, we were all there; it happened. And then know [sic] that those gentlemen came up and said, no, it didn't.

Counsel argued that the three defense witnesses "answered direct questions candidly" and the jury should credit them based on their demeanors, the substance of their testimony, and the unlikelihood that they would be "victim[s] of something like that and then come in here and say it didn't happen." This was a relatively strong defense in a case in which, like many others, there was no physical evidence and the sole issue was the credibility of the accuser.⁹

⁹ Cases involving sexual offenses against children are notoriously problematic, both to prosecute and defend, especially following yearslong delayed disclosure, "in large part because there are often no witnesses except the victim." Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987); see also Opinion of the Justices to the

As noted, the issue of a limiting instruction did not arise at trial; none was asked for, none was given. In its Decision, the panel viewed the absence of a limiting instruction as an "apparent oversight" by the judge. Slip op. at 3. This was a critical error. The *only* mention of a limiting instruction was in the Commonwealth's motion *in limine*. When it became clear at the hearing on the motion that defense counsel did not object to the Bad-Acts Evidence and in fact sought its admission, the evidentiary landscape of the case changed and the utility of a limiting instruction to the defendant was minimized if not eliminated. The judge never promised to give the instruction and cannot be faulted for omitting it without a request from either party.¹⁰

Senate, 406 Mass. 1201, 1204-05 (1989) (noting "special difficulty" because victim and defendant "may be the only witnesses" and "corroborative evidence may be absent or inconclusive"). But this case was exceptional. The defendant was able to place evidence before the jury of allegedly percipient witnesses attesting to the falsity of the victim's testimony, providing him with a potentially powerful and corroborated defense unavailable to most similarly situated defendants.

¹⁰ As this Court has held time and again, a defendant is not entitled to a limiting instruction regarding other bad acts (or in other circumstances) unless he asks for it, and the lack of a *sua sponte* limiting instruction is rarely reversible error. See, e.g., Commonwealth v. Nascimento-Depina, 496 Mass. 1, 9

A limiting instruction would have informed the jurors that they were not permitted to consider the Bad-Acts Evidence as proof of the defendant's bad character or propensity to commit crimes but, rather, on issues such as "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Mass. G. Evid. § 404(b). As noted, the judge thought the evidence was "necessary to give the jury a view of the entire relationship between the defendant and the alleged victim" and showed "a common course of conduct." In other words, the instruction would have told the jury what to do *if it believed the Bad-Acts Evidence*. The defense, which centered on testimony from alleged

(2025) ("[w]e have never required a judge to give a limiting instruction in the absence of a request for one"); Commonwealth v. Colina, 495 Mass. 13, 36 (2024) ("no requirement that the judge give limiting instructions sua sponte . . . and the defendant did not request one") (quotation marks omitted); Commonwealth v. Teixeira, 486 Mass. 617, 629 n.7 (2021) ("It was not necessary for the judge, without any request from either party, specifically to instruct on the limited permissible uses of the prior bad act evidence."); Commonwealth v. Cruzado, 480 Mass. 275, 279 (2018); Commonwealth v. Washington, 449 Mass. 476, 488 (2007).

victims disclaiming any abuse, was that *no one was abused*.¹¹

To give the jury an alternative view of the matter -- that is, effectively to argue that the defendant did not abuse these other boys, but, on the other hand, if he did, he did not abuse Robert -- would have been counterproductive. “[D]efense counsel may reasonably have concluded that more harm than good would come from calling attention” to the possibility that the defense witnesses had in fact been abused by the defendant and gave false testimony. Commonwealth v. Williams, 450 Mass. 879, 890-91 (2008); see also Commonwealth v. Paige, 488 Mass. 677, 682 (2021) (“defense attorney, as a matter of trial tactics, might not want to request a consciousness of guilt charge because it would not assist the defendant’s case to have the judge focus the jury’s attention on such matters”).¹²

¹¹ From the defendant’s perspective, Robert’s testimony that he abused other boys was strong evidence of Robert’s *propensity to lie about sexual abuse*.

¹² See also Commonwealth v. Washington, 449 Mass. 476, 488 (2007) (“calling further attention to the hearsay statements by a limiting instruction could have undermined the strategy of defense counsel”); Commonwealth v. Gil, 104 Mass. App. Ct. 124, 134 (2024) (“experienced defense counsel did not request a limiting instruction, suggesting that she did not want

And, of course, reasonable, effective counsel is under no obligation to offer conflicting defenses to the jury. See Commonwealth v. Fratantonio, 495 Mass. 522, 533 (2025) (“counsel is not required to raise every conceivable defense” and, “in particular, is not required to ride two horses”) (brackets and quotation marks omitted).

Lastly, “the jury’s nuanced verdict,” acquitting the defendant of indecent assault and battery on a person 14 older in the absence of definitive testimony that abuse occurred after Robert’s fourteenth birthday, “suggests that they did not consider the [Bad-Acts Evidence] as evidence of his character or propensity to commit crimes.” Commonwealth v. Correia, 492 Mass. 220, 234 (2023).

For these reasons, the Commonwealth respectfully requests that this Court grant further appellate review.

to call further attention to this testimony”), citing Commonwealth v. Lao, 460 Mass. 12, 21 (2011).

RESPECTFULLY SUBMITTED
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Certification of Compliance

I, Kenneth E. Steinfield, counsel for the Commonwealth, hereby certify that this brief complies with the rules of Court pertaining to the filing of applications for further appellate review. The monospaced font, Courier New, uses 10 characters per inch and the statement indicating why further appellate review is appropriate consists of nine pages.

/s/Kenneth E. Steinfield
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Certificate of Service

I hereby certify that on December 31, 2025, I caused the within document to be served by electronic mail on Andrew P. Power, Esq., counsel for the defendant, at appower@powerappeals.com.

/s/ Kenneth E. Steinfield
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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 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

24-P-1075

COMMONWEALTH

vs.

JOSE ORTEGA.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a jury trial in the Superior Court, the defendant was convicted of two counts of rape of a child, G. L. c. 265, § 23, and one count each of indecent assault and battery on a child under fourteen, G. L. c. 265, § 13B, open and gross lewdness, G. L. c. 272, § 16, and dissemination of matter harmful to minors, G. L. c. 272, § 28. In this consolidated appeal from the convictions and from the orders denying defendant's motions for a new trial and for postconviction discovery, the defendant argues, among other things, that the judge erred in admitting evidence of the defendant's uncharged bad acts without giving a limiting instruction. We agree that, absent a limiting instruction, the bad acts evidence in question was more

prejudicial than probative and was therefore inadmissible. Because we conclude that the omission of a limiting instruction at trial resulted in a substantial risk of a miscarriage of justice, we must vacate the judgments and set the verdicts aside. Given that conclusion, we need not and do not address the defendant's remaining challenges to the orders denying his motions for a new trial and for postconviction discovery.

Background. The charges against the defendant stem from allegations by the alleged victim, whom we shall call Martin,¹ that the defendant sexually assaulted him between 2000 and 2006, when he played in a youth baseball league for which the defendant was a coach. Before trial, the Commonwealth moved to admit evidence of contemporaneous uncharged bad acts -- testimony from Martin that he observed the defendant sexually assaulting several other boys. In its motion in limine, the Commonwealth argued that the evidence was admissible for three limited purposes -- to show the defendant's motive and state of mind, to establish the defendant's pattern of conduct, and to present "as full and accurate a picture as possible of the events surrounding" the defendant's abuse of Martin -- and requested that the judge instruct the jury accordingly. The judge allowed the motion after concluding that the evidence was

¹ A pseudonym.

admissible to show the context of the defendant's relationship with Martin, that it was inadmissible to prove the defendant's propensity to commit crime, and that the probative value of the evidence was not outweighed by the risk of unfair prejudice.

At trial, Martin testified, as expected, that the defendant had sexually assaulted him, as well as several other players in the baseball league. On direct examination by the prosecutor, Martin described a "routine" in which the defendant invited Martin and up to five other boys to his home, where he showed them pornography and encouraged them to masturbate while sometimes doing so himself.² In an apparent oversight, the judge did not give the limiting instruction the Commonwealth had originally requested; the Commonwealth did not reiterate its earlier request for such an instruction, nor did the defendant request one. Neither party objected to the instructions given in the final jury charge at trial; those instructions did not provide a limiting instruction on the bad acts evidence, either.

After the Commonwealth rested, the defendant called three witnesses who had played in the baseball league at the same time as Martin, including two witnesses whom Martin testified to

² On cross-examination, defense counsel also elicited Martin's confirmation that in the same timeframe, he saw the defendant do "sexual things" to other boys, including touching other boys' penises, as well as kissing and then putting his penis in one boy's mouth.

seeing the defendant sexually assault. The three witnesses testified that they were never sexually assaulted by the defendant, nor had they ever seen the defendant sexually assault Martin or anyone else.

On May 21, 2021, the jury found the defendant guilty on five counts, including open and gross lewdness and dissemination of matter harmful to minors. The defendant appealed shortly after. On June 10, 2021, the Commonwealth nol prossed the charges for open and gross lewdness and dissemination of matter harmful to minors.³ The defendant was sentenced to nine to twelve years in state prison for two counts of rape of a child, as well as to ten years of probation for indecent assault and battery on a child.

On May 1, 2024, the defendant filed motions for a new trial and for postconviction discovery. The judge denied both motions, and the defendant appealed. That appeal, consolidated with the defendant's direct appeal, is before us now.

Discussion. 1. Admissibility of bad acts evidence. Because the error the defendant claims on appeal was not preserved, we review for a substantial risk of a miscarriage of justice. See Commonwealth v. Almeida, 479 Mass. 562, 568

³ The statute of limitations for those two counts had expired before indictment. As we note infra, the Commonwealth cannot retry the defendant on those counts.

(2018); Commonwealth v. Proia, 92 Mass. App. Ct. 824, 828

(2018). Thus, we must assess the case and the evidence as a whole and ask:

"(1) Was there error? (2) Was the defendant prejudiced by the error? (3) Considering the error in the context of the entire trial, would it be reasonable to conclude that the error materially influenced the verdict? (4) May we infer from the record that counsel's failure to object or raise a claim of error at an earlier date was not a reasonable tactical decision?" (citations omitted).

Commonwealth v. Randolph, 438 Mass. 290, 297-298 (2002).

a. Error prejudicial to defendant. Evidence of a defendant's uncharged bad acts "is not admissible to show a defendant's bad character or propensity to commit the charged crime, but may be admissible if relevant for other purposes such as 'common scheme, pattern of operation, absence of accident or mistake, identity, intent or motive.'" Commonwealth v. Dwyer, 448 Mass. 122, 128 (2006), quoting Commonwealth v. Marshall, 434 Mass. 358, 366 (2001). See Mass. G. Evid. § 404(b) (2025). "In sexual assault cases, some evidence of uncharged conduct may be admissible to give the jury a view of the entire relationship between the defendant and the alleged victim" Dwyer, supra at 128-129. "However, such evidence should not be admitted if its probative value is outweighed by the risk of unfair prejudice to the defendant." Commonwealth v. Nascimento-Depina, 496 Mass. 1, 9 (2025), cert. denied, U.S. Supreme Ct., No. 25-5267 (Oct. 6, 2025).

The evidence in question here was relevant to show that the defendant built his relationship with Martin by including him in a group treated by the defendant as "the elite players of the league." The evidence helped the jury to understand why Martin continued to follow the defendant's direction despite his testimony that he did not want to do so. See Commonwealth v. Childs, 94 Mass. App. Ct. 67, 71-72 (2018) (evidence of defendant's past sexual abuse of child victim relevant to show entire relationship between them and to help jury understand victim's "actions and reactions" to defendant's conduct). We also agree with the judge's determination that the bad acts evidence was relevant to demonstrate a common course of conduct. See Commonwealth v. Hanlon, 44 Mass. App. Ct. 810, 818 (1998) ("Evidence offered for the purpose of showing a common plan or course of conduct can be admitted where each incident is part of an ongoing plan" if it is sufficiently connected to charged offense). The probative value of the evidence to the Commonwealth's case was thus substantial.

The bad acts evidence was also certainly prejudicial to the defendant. See Commonwealth v. Barrett, 418 Mass. 788, 795 (1994) ("It is implicit in the general rule regarding the inadmissibility of prior bad acts evidence that the admission of such evidence carries with it a high risk of prejudice to the defendant"). Although the evidence was central to the jury's

understanding of Martin's testimony, it could not be used to show the defendant's bad character or propensity to sexually assault children, and a limiting instruction would have been an important part of balancing probative value against prejudicial effect. See Commonwealth v. Brusgulis, 406 Mass. 501, 506 n.7 (1990) ("the judge must weigh the probative value . . . against the prejudice to the defendant of evidence of his prior bad acts, and, if the judge admits the evidence, he must give proper limiting instructions to the jury"). See also Commonwealth v. Gomes, 475 Mass. 775, 785 (2016) (highlighting special importance of limiting instruction where evidence of bad acts was admissible).

The omission of a limiting instruction is particularly significant in this case, where Martin's testimony was the Commonwealth's primary evidence and evidence about other bad acts comprised a significant portion of that testimony. Cf. Nascimento-Depina, 496 Mass. at 9 (finding no abuse of discretion where "risk of prejudice was slight given the prosecutor's limited inquiry into the subject" and testimony lacked detail); Commonwealth v. Pierre, 486 Mass. 418, 426 (2020) ("any risk of unfair prejudice" created by prior bad acts evidence "was reduced by the Commonwealth's limited use of the evidence" [emphasis added]). In this case, the risk of unfair prejudice was not mitigated by a limiting instruction and thus

outweighed the probative value of the evidence; the bad acts evidence should not have been admitted without such an instruction.⁴

b. Material influence on the verdict. As we have noted, the evidence was highly prejudicial to the defendant, and we conclude that it is likely that the extensive evidence of contemporaneous bad acts materially influenced the verdict. Cf. Dwyer, 448 Mass. at 128 (where victim's testimony about uncharged bad acts "overwhelmed" evidence of charged incidents, judge erred in admitting such testimony, even with limiting instruction). However, analysis of this question is complicated by the fact that trial counsel for the defendant intended to elicit the same evidence from Martin, regardless of whether the Commonwealth did so. See Randolph, 438 Mass. at 298 (error must be considered "in the context of the entire trial" to determine whether it materially influenced verdict). From the perspective of the defendant, the contemporaneous bad acts evidence was necessary to create a foundation to impeach Martin's credibility with contradictory testimony from defense witnesses. Without a limiting instruction, however, the jury was free to consider

⁴ With a limiting instruction, as requested in the motion in limine, to "render potentially prejudicial evidence harmless," the bad acts evidence would likely have been admissible. See Commonwealth v. Bryant, 482 Mass. 731, 737 (2019), citing Commonwealth v. Donahue, 430 Mass. 710, 718 (2000).

Martin's extensive testimony about the uncharged bad acts as evidence of the defendant's bad character. Cf. Commonwealth v. Bryant, 482 Mass. 731, 737 (2019) (noting effectiveness of limiting instructions to limit jury consideration of bad acts evidence). The considerable quantity of testimony about the defendant's contemporaneous bad acts, in the absence of a limiting instruction, could have convinced the jury of the defendant's propensity for sexual assault. Compare Dwyer, 448 Mass. at 128-129 (overwhelming quantity of uncharged bad acts evidence should not have been admitted, even with limiting instruction), with Nascimento-Depina, 496 Mass. at 8-9 (in judge's discretion to permit brief, four-question inquiry into prior bad acts without limiting instruction when none was requested).

c. No reasonable tactical basis. The failure to object at trial to the lack of a limiting instruction was not a "reasonable tactical decision" because a limiting instruction could only have helped the defendant. Cf. Commonwealth v. Donahue, 430 Mass. 710, 718 (2000) (presumption that juries understand and follow limiting instructions). Martin's testimony about other bad acts allowed the defendant to impeach Martin with testimony from his witnesses, but a limiting instruction would not have undercut the value of the evidence

for that purpose.⁵ See, e.g., Nascimento-Depina, 496 Mass. at 8-9 (bad acts evidence may be admitted "where it is relevant for a nonpropensity purpose").

Thus, because the admission of the bad acts evidence sans limiting instruction⁶ could have had a material effect on the jury's verdicts, we conclude the omission resulted in a substantial risk of a miscarriage of justice. See Randolph, 438 Mass. at 297-298.

2. Open and gross lewdness. The defendant argues that there was insufficient evidence to prove the defendant guilty of open and gross lewdness. However, as a general matter, "no appeal may come before us until after judgment, which in criminal cases is the sentence." Commonwealth v. Delgado, 367 Mass. 432, 438 (1975). Because the Commonwealth nol prossed that count prior to sentencing, we need not address the sufficiency argument. See id. Moreover, the Commonwealth has confirmed that it will not seek to re prosecute the defendant on

⁵ And, as discussed, complete exclusion of the evidence would not have been reasonable in the context of the trial, where both parties had an incentive to seek the admission of that evidence.

⁶ Or, put differently, if the bad acts evidence had been admitted with a proper limiting instruction.

that charge, nor can it, given that the statute of limitations has expired. See G. L. c. 277, § 63.

Judgments vacated.

Verdicts set aside.

By the Court (Henry, Hand &
Tan, JJ.⁷),

A handwritten signature in blue ink, appearing to read "Paul Little".

Clerk

Entered: December 10, 2025.

⁷ The panelists are listed in order of seniority.