

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC No. FAR-_____

AC No. 2025-P-0720

COMMONWEALTH OF MASSACHUSETTS,
Appellee,

v.

MICHAEL T. MILAN,
Appellant

On Appeal From the Judgment Following a
Jury Trial Before the Honorable Brent Tingle,
Essex Superior Court No. 2177CR00556

APPLICATION FOR FURTHER APPELLATE REVIEW

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REQUEST FOR FURTHER APPELLATE REVIEW

Petitioner Michael T. Milan ("Milan") seeks further appellate review pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure for the following substantial reasons affecting the interests of justice.

This case presents an opportunity for this Court to clarify that, contrary to the Appeals Court's erroneous conclusion, the fundamental principle of Commonwealth v. Palladino, 358 Mass. 28 (1970), was not abrogated by Commonwealth v. Doughty, 491 Mass. 788 (2023), and that an indictment must allege, as an "essential ingredient," a scienter element that has been added to a statute to ensure its constitutionality.

The indictments charging Milan with violating G.L. c. 272, § 28 (disseminating harmful materials to a minor) failed to allege that the harmful materials he disseminated were to a person he knew or believed to be a minor, an essential scienter element that was added by the Legislature in 2011 after a federal district court judge ruled that, without such an element, the statute infringed on the First Amendment to the United States Constitution. Instead, the indictments against Milan erroneously tracked the language of the statute before

it was amended. In other words, Milan was charged with conduct that has not been a crime since 2011.

Under Palladino, Milan's indictments "charge[d] no crime" because they omitted "statutory language (such as scienter)" that was necessary "to save its constitutionality." 358 Mass. at 31. The requirement that an indictment allege such an "essential ingredient" of a crime is vitally important since, as was true in Milan's case, grand juries are not always given instructions on the elements of the alleged crime and have to rely on the language of the draft indictment presented to them to know what they must find.

The Appeals Court erroneously concluded that Palladino was "disavowed" in Doughty. However, Doughty did not abrogate Palladino, but merely clarified that an indictment that charges no crime violates due process but does not strip a court of subject matter jurisdiction. This Court should affirm that Palladino remains an important protection against grand juries indicting defendants on less than what is required by law.

STATEMENT OF PRIOR PROCEEDINGS

On February 20, 2019, a complaint issued in Ipswich District Court against Milan for six counts of

disseminating harmful materials to a minor in violation of G.L. c. 272, § 28. (R.A.¹ at 17.) On December 15, 2021, he was indicted by an Essex County grand jury on six counts of disseminating harmful materials as well as one count of possessing child pornography in violation of G.L. c. 272, § 29C. (R.A. at 6, 18-29.) The indictments under section 28 alleged that he "did disseminate harmful matter to a minor, knowing said matter to be harmful; or did possess such matter with the intent to disseminate it to a minor." (R.A. at 18-29.) After his motion to suppress evidence was granted, the Commonwealth nolle prossed the possession of child pornography charge on March 28, 2024. (R.A. at 11.)

At the conclusion of a jury trial before Judge Brent Tingle, Milan was convicted on all six counts of disseminating harmful materials on April 5, 2024. (R.A. at 13-14; Tr.² 4/5/24 at 61-64.) He was sentenced to one year in the house of correction on the first count and three years of probation on the other counts. (R.A. at

¹ "R.A." refers to the record appendix filed in the Appeals Court followed by the relevant page number(s).

² "Tr." refers to the trial transcript followed by the relevant date and page number(s).

15; Tr. 5/6/24 at 17-18.) He timely filed a notice of appeal from his convictions. (R.A. at 44.)

On May 14, 2026, the Appeals Court affirmed his convictions. (Exhibit ["Ex."] A.) Neither party has sought reconsideration or modification.

SHORT STATEMENT OF FACTS RELEVANT TO APPEAL

The Background section of the Appeals Court's decision (Ex. A at 14) correctly summarizes the facts relevant to Milan's appeal.

**STATEMENT OF POINTS WITH RESPECT TO WHICH
FURTHER APPELLATE REVIEW IS SOUGHT**

THE FUNDAMENTAL HOLDING OF PALLADINO WAS NOT "DISAVOWED" IN DOUGHTY, CONTRARY TO THE APPEALS COURT'S ANALYSIS, AND THEREFORE THE INDICTMENTS AGAINST MILAN FOR DISSEMINATING HARMFUL MATERIALS TO A MINOR FAILED TO STATE A CRIME BECAUSE THEY DID NOT ALLEGE SCIENTER, WHICH WAS AN "ESSENTIAL INGREDIENT" THAT THE LEGISLATURE ADDED TO THE STATUTE TO PRESERVE ITS CONSTITUTIONALITY.

On direct appeal, Milan asserted that his indictments under G.L. c. 272, § 28, were fatally flawed because they failed to specifically allege the requisite scienter -- i.e., that he disseminated harmful materials to "a person he knows or believes to be a minor," an element that the Legislature added to the statute in

2011 to preserve its constitutionality.³ This conclusion was compelled by the Supreme Judicial Court's decision in Palladino, which held:

In most cases an indictment repeating the words of the statute would include all the elements of the crime intended to be punished, and thus be sufficient. Where judicial construction of a statute, however, has added an element not included in the statutory language (such as scienter) to save its constitutionality, an indictment worded solely in the statutory language charges no crime, for an essential ingredient of the offence is missing.

358 Mass. at 31. See Commonwealth v. Mayotte, 475 Mass. 254, 264 (2016) ("[A]n indictment that entirely omits a charge or does not conform to the substance of the statutory language defining the elements of the crime does not offer a defendant adequate notice of the nature of the charges against him or her [emphasis added].")

This requirement is not merely a matter of form, but ensures that a grand jury does not indict a defendant unless they find all the essential elements of the alleged crime. As Milan noted during briefing in the Appeals Court, in his own case the prosecutor never

³ In 2010 a federal district court enjoined enforcement of G.L. c. 272, § 28, on the ground that, without a scienter requirement, the statute violated the First Amendment to the United States Constitution. American Booksellers Found. for Free Expression vs. Coakley, No. 10-11165-RWZ (D. Mass. Oct. 26, 2010).

instructed the grand jury on the elements of G.L. c. 272, § 28. Thus, the only information the grand jury had about what conduct constituted a crime was the draft indictments themselves. Since those draft indictments omitted the element that Milan knew or believed the recipient of harmful materials was a minor, the grand jury had no way to know that they had to find this scienter in order to indict him, and it is entirely possible that they would not have done so if they had been properly guided, either by the prosecutor's instructions or the charging language itself. Thus, Palladino and Mayotte serve as an important check against a grand jury indicting a defendant without having found the essential elements of the crime.

In rejecting Milan's reasoning, the Appeals Court erroneously concluded that Palladino was "disavowed" by the Supreme Judicial Court in Doughty, 491 Mass. at 805-806 & n. 26. (Ex. A at 18 n.3.) On the contrary, the fundamental principle of Palladino -- that a scienter element essential to the constitutionality of a statute must be specifically alleged in an indictment -- has never "disavowed" or abrogated.

To be sure, Doughty did clarify in a footnote that, although Palladino and other cases characterize an

indictment's failure to allege a crime as a question of subject matter jurisdiction, the issue properly should be understood as one of due process. 491 Mass. at 805 n.26. However, in no way did Doughty abrogate Palladino's fundamental holding that, where a statute would violate a defendant's constitutional rights without a scienter element (and therefore could not allege a crime), that element must be alleged in an indictment.⁴

In erroneously concluding that Milan's indictments adequately alleged a crime, the Appeals Court minimized the significance of the Legislature's 2011 scienter amendment by suggesting that, "even under the pre-2011 version of § 28, a defendant could properly be charged with dissemination in cases where the recipient was actually an adult posing as a minor," citing

⁴ In Doughty, the court found that the indictments were sufficient to satisfy due process. There the defect identified by the defendant was that the word "dwelling" was missing from the charging language. However, the court noted that the indictment included the missing word in the caption, and, thus, when read as a whole, the indictment alleged all the elements of the crime. 491 Mass. at 806. Here, in contrast, the captions in the indictments read simply, "Dissemination of Harmful Materials to a Minor." (R.A. at 18-29.) The missing language -- Milan's alleged scienter -- is nowhere to be found in the indictments, even when they are read in conjunction with their captions.

Commonwealth v. Ericson, 85 Mass. App. Ct. 326, 336 n.13 (2014) (Ex. A at 19 [emphasis added].) This is an incorrect statement of the law based on the Appeals Court's misreading of Ericson.

In Ericson, the defendant was convicted of sending nude photographs to a police officer impersonating a minor. However, he was not convicted of disseminating harmful materials to a minor, but of possession with intent to disseminate such materials. Id. at 327. It is obvious that, under a possession theory, the Commonwealth does not have to prove that an actual minor was involved, since the defendant's possession of harmful materials coupled with his intent to disseminate them completes the crime. Nothing in Ericson suggests that, before the Legislature amended G.L. c. 272, § 28, by adding a scienter element, a defendant could have been prosecuted on a dissemination theory if the recipient of harmful materials was not a minor but an undercover police officer.

In contrast, Milan was prosecuted and convicted on a dissemination theory, not on a possession theory.⁵ On

⁵ The jury was instructed to deliberate only on a dissemination theory. (Tr. 4/5/24 at 15-17.)

the facts of this case, he could not have been convicted on a dissemination theory under the previous version of section 28. Thus, the Legislature's 2011 amendment -- requiring the Commonwealth to prove a defendant disseminated harmful materials to a person he knew or believed was a minor -- made critically important changes to section 28. It both narrowed the prohibited conduct (by adding a scienter element) and broadened it (by allowing a defendant to be prosecuted for disseminating harmful materials to an undercover police officer, not just a minor). In effect, it created a different crime, since conduct that was not illegal prior to 2011 became illegal after 2011 and vice versa.

Because the indictments against Milan omitted "an essential ingredient of the offence" that was required "to save its constitutionality," Palladino, 358 Mass. at 31, and failed to "conform to the substance of" section 28, Mayotte, 475 Mass. at 264, his convictions must be reversed.

CONCLUSION

For all of these reasons, Milan requests that this Court grant further appellate review.

Respectfully submitted,
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EXHIBIT A

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25-P-720

Appeals Court

COMMONWEALTH vs. MICHAEL T. MILAN.

No. 25-P-720.

Essex. March 16, 2026. - May 14, 2026.

Present: Meade, Hodgens, & Allen, JJ.

Obscenity, Dissemination of matter harmful to minor. Social Media. Constitutional Law, Indictment. Waiver. Practice, Criminal, Instructions to jury, Waiver, Loss of evidence by prosecution. Evidence, Best and secondary.

Indictments found and returned in the Superior Court Department on December 15, 2021.

The cases were tried before Brent A. Tingle, J.

David M. Osborne for the defendant.
Kristen W. Jiang, Assistant District Attorney, for the Commonwealth.

MEADE, J. After a jury trial, the defendant was convicted of six counts of disseminating harmful material to a minor. On appeal, he claims that defects in his indictments require his convictions to be reversed; the indictments were improperly amended; the judge abused his discretion in not giving a

requested jury instruction; and the judge abused his discretion by fashioning an inadequate remedy for the Commonwealth's loss or destruction of potentially exculpatory evidence. We affirm.

Background. In 2019, twenty-two year old Ipswich police Officer Kelly Phelan, acting in an undercover capacity, created a social media account in which she posed as a fourteen year old girl, "Crayon Mia." Phelan joined an online social media group and posted a message. While she did not remember the exact wording of the message, it was Phelan's practice to state, "I'm Mia. I'm 14 years old. I'm from Massachusetts. Anyone want to chat?" She did not preserve this initial message or her associated profile photograph. Phelan stated that it was not her "practice" to do so at the time. She feared that if she "burn[ed] the undercover account," which took some time to establish as authentic, she would be unable to use it in future investigations. Phelan admitted that this was an "investigatory mistake" as she had graduated from the police academy only a few months prior to this investigation.

Several hours after her initial post, at 1:13 A.M., Phelan received a private message from the thirty-three year old defendant, who used the profile name "Magic Mike." Over the course of two months, the defendant exchanged frequent messages with "Crayon Mia." In these messages, Phelan repeatedly told

the defendant that she was fourteen years old, had never had a boyfriend, and that she was sexually inexperienced.

Over time, the defendant's messages became increasingly sexual in nature. On five separate occasions, the defendant sent Phelan photographs of his erect penis, and on one occasion he sent a photograph of a naked woman. He also asked Phelan to send intimate photographs of herself and described a variety of sexual acts he wished to do with her. The defendant noted that he did not live far away, suggested that they could meet, and he offered to "be [her] practice."

At trial, the defendant did not dispute that he had distributed harmful matter in his online communications with Phelan, but rather argued that he did not believe that "Crayon Mia" was actually a minor. Relative to this contested issue, the Commonwealth provided the jury with numerous screen shots of their conversations in which "Crayon Mia" identifies herself as being fourteen years old and mentions her sexual inexperience. Two of the screen shots included photographs of Phelan.

In his defense, the defendant testified that he believed that "Crayon Mia" was an adult engaging in sexual role play, i.e., "someone playing the part of a 14-year-old." In support, the defendant claimed the platform users had to certify that they were eighteen years old or older to be admitted to the online social media group, which was known for role playing. In

addition, in his view, the photographs on Phelan's profile depicted not a minor, but a woman in her early twenties. He also testified that "Crayon Mia" was sexually suggestive from the beginning of their communications and told him, "I'll do anything you want."

The defendant also highlighted Phelan's failure to preserve her profile photograph and the initial message she posted. He later argued to the jury that Phelan had intentionally destroyed those items because they undercut the Commonwealth's theory of the case and supported the defendant's claim that he believed he was role playing with an adult.

1. The indictments. Each indictment charged that the defendant "did disseminate harmful matter to a minor, knowing said matter to be harmful; or did possess such matter with the intent to disseminate it to a minor."¹ This tracked the language found in an older version of G. L. c. 272, § 28, as appearing in St. 1982, c. 603, § 2. In 2011, the statute was amended to add the requirement that the defendant "purposely disseminates to a

¹ A "matter is harmful to minors if it is obscene or, if taken as a whole, it (1) describes or represents nudity, sexual conduct or sexual excitement, so as to appeal predominantly to the prurient interest of minors; (2) is patently contrary to prevailing standards of adults in the county where the offense was committed as to suitable material for such minors; and (3) lacks serious literary, artistic, political or scientific value for minors." G. L. c. 272, § 31.

person he knows or believes to be a minor any matter harmful to minors." See G. L. c. 272, § 28, as amended by St. 2011, c. 9, § 19. For the first time on appeal, the defendant claims that because his indictments did not contain the knowledge or belief element, relative to dissemination to a minor, and that his charged conduct postdated 2011, his indictments failed to charge a crime. We disagree.²

General Laws c. 277, § 47A, provides, in pertinent part:

"In a criminal case, any defense or objection based upon defects in the institution of the prosecution or in the complaint or indictment, other than a failure to show jurisdiction in the court or to charge an offense, shall only be raised prior to trial and only by a motion in conformity with the requirements of the Massachusetts Rules of Criminal Procedure. The failure to raise any such defense or objection by motion prior to trial shall constitute a waiver thereof, but a judge or special magistrate may, for cause shown, grant relief from such waiver" (emphasis added).

To avoid waiver, the defendant first claims that his challenge is based on "a failure to show jurisdiction in the court or to charge an offense," i.e., the claim relates to the Superior Court's subject matter jurisdiction. However, this is

² The defendant claims the prior version of the statute is unconstitutional. This is incorrect. To the extent a Federal District Court judge held otherwise, we are not bound by that decision. See Commonwealth v. Pon, 469 Mass. 296, 308 (2014). In any event, in Commonwealth v. Jones, 471 Mass. 138, 144-146 (2015), the Supreme Judicial Court determined that the prior version of the statute contained an implied element of knowledge, even if not explicitly stated therein, and upheld its constitutionality.

incorrect. "Subject matter jurisdiction concerns the power of the court to entertain a particular category of case."

Commonwealth v. Doughty, 491 Mass. 788, 805 (2023). "The Superior Court has 'original jurisdiction of all crimes.'" Id. at 805-806, quoting G. L. c. 212, § 6. "[A] defect in an indictment is not a question concerning the subject matter jurisdiction of the court." Doughty, supra at 806.³ Because the defendant did not raise this issue prior to trial, and it is not based on subject matter jurisdiction, it cannot be a basis to avoid statutory waiver. See Commonwealth v. Lamont L., 438 Mass. 842, 845 (2003); Commonwealth v. Hrycenko, 417 Mass. 309, 312 (1994).

However, the second exception to waiver under G. L. c. 277, § 47A, i.e., a claim that his indictments do not charge crimes, does apply to the defendant. Although not waived, the claim is without merit. "An indictment will not be dismissed 'if the offense is charged with sufficient clarity to show a violation of law and to permit the defendant to know the nature of the accusation against him.'" Commonwealth v. Sullivan, 82 Mass.

³ The defendant claims that this case is controlled by Commonwealth v. Palladino, 358 Mass. 28, 31 (1970), as well as others to which he cites in support of his jurisdiction claim, see, e.g., Commonwealth v. Garrett, 473 Mass. 257, 264 (2015); Commonwealth v. Senior, 454 Mass. 12, 14 (2009); Commonwealth v. Andler, 247 Mass. 580, 581-582 (1924). However, the contrary conclusions in all of these cases have been disavowed by Doughty, 491 Mass. at 805-806 & n.26.

App. Ct. 293, 295-296 (2012), quoting Commonwealth v. Fernandes, 430 Mass. 517, 520 (1999), cert. denied sub nom. Martinez v. Massachusetts, 530 U.S. 1281 (2000). "It is not necessary for the Commonwealth to set forth in the . . . indictment every element of the crime to withstand a motion to dismiss" (citation omitted). Sullivan, supra at 296.

Here, pursuant to G. L. c. 272, § 28, as set forth in the indictments, the defendant had adequate notice that he was charged with dissemination of harmful materials to a minor. Even if the charging language in the indictments did not exactly track the language added by the Legislature in 2011, each indictment, when read as a whole, "identifie[d] that the offense charged is a violation of [G. L. c. 272, § 28], which is a crime." Doughty, 491 Mass. at 806. See G. L. c. 277, § 34. Finally, even under the pre-2011 version of § 28, a defendant could properly be charged with dissemination in cases where the recipient was actually an adult posing as a minor. See Commonwealth v. Ericson, 85 Mass. App. Ct. 326, 336 n.13 (2014).

The defendant also claims his convictions must be vacated because he was convicted of crimes not charged by the grand jury. Specifically, the defendant claims that the prosecutor's opening statement constructively amended his indictments, over

his objection,⁴ by stating that the evidence would show that the defendant "sent explicit messages, not to a minor, but to an undercover police officer posing as a fourteen-year-old." We disagree.

As stated above, the indictments properly charged the crime of dissemination under G. L. c. 272, § 28, under which the defendant could have been prosecuted even prior to the Legislature clarifying in 2011 that the defendant must know or believe that the intended recipient is a minor. See Commonwealth v. Jones, 471 Mass. 138, 144-146 (2015) (prior version of § 28 contained implied element of knowledge [or belief] that recipient was minor). Accordingly, the prosecutor, in laying out the expected evidence, did not amend the indictments by explicitly stating that which the Supreme Judicial Court had held was fairly implied in § 28. In other words, the "knows or believes to be a minor" language was not essential to the description of the crime charged, nor did it add an essential element to the crime. Contrast Commonwealth v. Ruidiaz, 65 Mass. App. Ct. 462, 463-464 (2006). For these reasons, the judge properly denied the defendant's motion for a required finding of not guilty.

⁴ At the conclusion of the prosecutor's opening statement, the defendant moved for a required finding of not guilty based on this claim.

2. Jury instruction. The defendant also claims that the judge was required to give his requested jury instruction on the definition of "belief," which would have informed the jury that:

"[T]he Commonwealth must prove beyond a reasonable doubt that the defendant was convinced to a moral certainty that the recipient was a minor. It's not enough for the Commonwealth to prove that the [d]efendant merely suspected that there was a probability that the recipient was a minor."

We disagree.

The requested jury instruction confused the requirement that the Commonwealth prove the elements beyond a reasonable doubt and the meaning of a defendant's belief. A defendant need not believe a proposition beyond a reasonable doubt to believe it, as a reasonable doubt is not equivalent to disbelief. Rather, the proper instruction was that the Commonwealth had to prove beyond a reasonable doubt that the defendant believed the recipient to be a minor.

At the charge conference with the parties, the judge explained that he declined to give the instruction as requested because his intended definition of reasonable doubt would be tied to all the elements. Because the defendant objected to the judge's ruling denying that instruction, we review for prejudicial error. See Commonwealth v. Kelly, 470 Mass. 682, 687 (2015).

"A trial judge is not required to instruct the jury in the terms requested by a defendant so long as the substance of the requested instructions is adequately covered." Commonwealth v. Sinai, 47 Mass. App. Ct. 544, 547 (1999). Indeed, "[j]udges have broad discretion in framing jury instructions, including determining the appropriate degree of elaboration." Commonwealth v. Toolan, 490 Mass. 698, 708 (2022).

Here, the judge properly instructed the jury that they were required to find, beyond a reasonable doubt, in addition to the other elements, "that the defendant intentionally disseminated the [harmful] matter to a person he knew or believed to be a minor." He repeated this when he defined the elements. Important to the defendant's claim, the judge also instructed the jury that "beyond a reasonable doubt" requires the jurors have in their "minds an abiding conviction to a moral certainty that the charge is true," and that "[i]t is not enough for the Commonwealth to establish a probability, even a strong probability, that the defendant is more likely to be guilty than not guilty." This was a correct statement of the law, and adequately conveyed the substance of the correct portion of the requested instruction. See Sinai, 47 Mass. App. Ct. at 547. There was no error.

3. Lost or destroyed evidence. Finally, the defendant claims that the judge erred in three ways, delineated below, in

how he addressed the Commonwealth's failure to preserve pieces of potentially exculpatory evidence, which included the original profile photograph used by Officer Phelan on the social media platform account and that officer's original post to the online group.

First, the defendant claims that the judge abused his discretion by denying the motion to dismiss his indictments based on the Commonwealth's failure to preserve the above-noted pieces of evidence. We disagree.

"We will not disturb a judge's decision regarding the proper remedy for the loss of evidence absent a clear abuse of discretion." Commonwealth v. Meas, 467 Mass. 434, 448, cert. denied, 574 U.S. 858 (2014), quoting Commonwealth v. Carr, 464 Mass. 855, 870 (2013). For charges to be dismissed due to the loss or destruction of potentially exculpatory evidence, the defendant bears an initial burden to establish a "reasonable possibility, based on concrete evidence rather than a fertile imagination," Commonwealth v. Neal, 392 Mass. 1, 12 (1984), quoting State v. Michener, 25 Or. App. 523, 532 (1976), that the evidence would have been favorable to him. See Commonwealth v. Rios, 496 Mass. 11, 31 (2025); Commonwealth v. Olszewski, 416 Mass. 707, 714 (1993), cert. denied, 513 U.S. 835 (1994). "If the defendant meets that initial burden, 'a balancing test is employed to determine the appropriateness and extent of remedial

action.'" Commonwealth v. Moore, 480 Mass. 799, 811 (2018), quoting Commonwealth v. Willie, 400 Mass. 427, 432 (1987), abrogated in part on other grounds by Commonwealth v. Williams, 455 Mass. 706, 714-719 (2010). The judge 'must weigh the culpability of the Commonwealth, the materiality of the evidence, and the potential prejudice to the defendant.'" Moore, supra, quoting Willie, supra.

As an initial matter, relative to the missing profile photograph,⁵ as the Commonwealth notes, in fashioning a jury instruction on the matter, the judge did not appear to have properly analyzed the defendant's initial burden. The judge told the parties that "the defendant has sustained [his] initial burden, at least, of demonstrating that [the] missing evidence . . . [is] potentially relevant here" Mere relevance, however, differs in kind from evidence that provides a reasonable possibility that the missing photograph would have been favorable to the defendant. See Neal, 392 Mass. at 12.

The missing profile photograph would have been favorable to the defense only if Phelan appeared to be older than she appeared in the other two photographs that were before the jury. In similar fashion, the original post to the online group would

⁵ Relative to Phelan's original post to the online group, the judge stated he was "less persuaded" that it satisfied the "standard of being potentially exculpatory."

have been favorable to the defendant only if it gave credence to his argument that he and the undercover officer were simply engaging in "role-play," or if the original post was markedly different in tone from the officer's initial direct messages with the defendant in which she asks the defendant his age, where he was from, and whether he was "good" with her being "14."

Relative to these matters, the defendant was able to use the missing evidence to his benefit through his own testimony. The defendant testified that he thought the person he was communicating with was an adult posing as a child. He claimed that she looked older in the missing profile photograph, and he claimed that her initial post was more explicit, stating that she would "do anything [he] want[ed]." At bottom, this did not establish a "reasonable possibility, based on concrete evidence rather than a fertile imagination," that the missing evidence would have been favorable to him (citation omitted). Neal, 392 Mass. at 12.

Even if the defendant did meet his original burden, his claim does not survive the balancing test. As to the Commonwealth's culpability, contrary to the defendant's claim, the judge found that the officer was not "morally culpable" for the destruction which resulted from her lack of experience. This was supported by the officer's testimony. Even though the

judge believed that she could have preserved the account without deleting the photograph, he did not find her to be dishonorable in purpose. In the end, this amounts to negligence, and the defendant failed to establish bad faith. See Commonwealth v. Heath, 89 Mass. App. Ct. 328, 337 (2016). See also Willie, 400 Mass. at 432 (Commonwealth not required "to prove good faith or earnest efforts to preserve the evidence").

The remaining components of the balancing test, materiality and potential prejudice, do not redound to the defendant's benefit. While the missing items could have been material to whether the defendant believed Phelan was actually an adult, the defendant capitalized on the absence of evidence to further his theory that he knew he was communicating with an adult. See Commonwealth v. Kee, 449 Mass. 550, 555-557 (2007) (no prejudice where defendant used unpreserved evidence to aid defense). In the end, the denial of the motion to dismiss was not an abuse of discretion, nor was the denial of the motion without an evidentiary hearing.⁶

Second, the defendant claims that the judge abused his discretion by permitting Phelan to testify regarding the original message that she posted to the online social media

⁶ The defendant has failed to cite to relevant legal authority for his argument that the judge ought to have conducted an evidentiary hearing on this issue.

group. For the first time on appeal,⁷ the defendant claims this violated the best evidence rule which mandates reversal of his convictions. We disagree.

"The best evidence rule provides that, where the contents of a document are to be proved, the party must either produce the original or show a sufficient excuse for its nonproduction." Commonwealth v. Ocasio, 434 Mass. 1, 6 (2001). See Mass. G. Evid. § 1002 (2026). A sufficient excuse for nonproduction may arise when evidence is "lost or destroyed, and not by the proponent acting in bad faith" (citation omitted). Commonwealth v. Connolly, 91 Mass. App. Ct. 580, 585 (2017).

The defendant claims that Phelan's practice of introducing herself as a fourteen year old went to the heart of the issue the jury had to decide, i.e., whether the defendant believed she was a minor. Even assuming the Commonwealth used the testimony to prove the content of the posting, and the rule therefore applied, the exception may be applied for nonproduction because the original post was lost or destroyed, and that destruction

⁷ At trial, the defendant objected to Phelan's testimony because he did not have copies of the social media post. He did not claim her testimony violated the best evidence rule. The Commonwealth argues that the claim is not preserved and may be reviewed only to determine if a substantial risk of a miscarriage of justice was created. In his reply brief, the defendant does not argue to the contrary.

was not done in bad faith. See Connolly, 91 Mass. App. Ct. at 585.

The defendant correctly maintains that for the exception to apply, the judge must have made findings that the original posting once existed, its loss or destruction was not due to the "serious fault" of the Commonwealth, and that a reasonable search had been made for the post. See Ocasio, 434 Mass. at 6-7, quoting Fauci v. Mulready, 337 Mass. 532, 540 (1958). While the judge did not expressly make these findings, the lack of an objection and a request for such findings is undoubtedly the reason why. In any event, the one-time existence of the posting was never in dispute, nor that it no longer existed because it had been deleted. The judge did find that the officer had not acted in bad faith and stated that he did not find her to be "morally culpable." In fact, when the judge denied the defendant's objection to Phelan's testimony about what she wrote, the judge told the defendant, "Well, I've ruled that I'm not going to dismiss the indictment based upon that." In this light, the judge did not abuse his discretion by admitting the officer's testimony as a substitute for the original posting.⁸

⁸ Relying on Commonwealth v. Salyer, 84 Mass. App. Ct. 346, 356 n.10 (2013), the defendant claims that oral testimony is not permitted to prove the contents of a document. While this is true in general applications of the rule, we noted in Salyer that "none of the exceptions that permit the use of secondary evidence was applicable." Id. In other words, Salyer did not

Even if the judge "made a clear error of judgment in weighing the factors relevant to the decision such that the decision falls outside the range of reasonable alternatives" (quotation and citation omitted), L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014), the defendant has failed to establish that the testimony created a substantial risk of a miscarriage of justice. In addition to the strength of the Commonwealth's case, we keep in mind that the best evidence rule is "a doctrine of evidentiary preference 'principally aimed, not at securing a writing at all hazards and in every instance, but at securing the best obtainable evidence of its contents'" (emphasis omitted). Ocasio, 434 Mass. at 6, quoting 2 McCormick, Evidence § 237 (5th ed. 1999). In the posture of preference over prohibition, we also return to the effect of the testimony, and, as stated above, how the defendant used it in

involve lost or destroyed evidence. Moreover, there is no blanket prohibition on utilizing oral testimony as secondary evidence. See Commonwealth v. Brea, 488 Mass. 150, 159 n.12 (2021) (permitting testimony as secondary evidence of content of record); O'Connor v. Boston Retirement Bd., 304 Mass. 471, 472-473 (1939) (retiree's written change of beneficiary form and acknowledgement that could not be located by board "properly shown by oral evidence"); Grover v. Smead, 295 Mass. 11, 13 (1936) (car owner's oral testimony regarding contents of original certificate of registration that had been lost or destroyed was properly admitted). See also 20 W.G. Young, J.R. Pollets & C. Poreda, Evidence § 1008.1 (2d ed. 1998) ("Massachusetts does not recognize 'degrees of secondary evidence . . .'").

his defense, including his testimony that he thought he was communicating with an adult posing as a child.

Third, the defendant claims the judge abused his discretion in his jury instruction regarding lost or destroyed evidence because the instruction mentioned only the profile photograph and not Phelan's introductory text messages.⁹ We disagree.

The judge explained that the instruction referenced only the photograph, and not the text messages, because he was not convinced of the potential exculpatory nature of the messages. In contrast to the profile photograph, the text messages did not relate to the harmful materials, and were merely preliminary conversations that did not go "directly to the issue of how someone goes about determining whether they're dealing with a minor." Furthermore, the judge noted that defense did not argue entrapment, which he thought might have made the text messages exculpatory. On the other hand, he stated that the profile photograph went directly to the issue of the defendant's belief regarding "Crayon Mia's" age.

Given the judge's determination that the introductory text messages did not possess a potential exculpatory value and his

⁹ The judge instructed as follows: "Lost or Destroyed Exculpatory Evidence. You have heard that the initial [social media platform] profile photo[graph] utilized by Officer Phelan for the profile at issue in this case was not preserved by her. You may but are not required to infer that if this evidence had been preserved, it would have been favorable to the defendant."

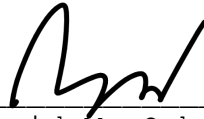
finding that the defendant, "as a practical matter," was able to testify as to his recollections of what the messages stated as part of his defense, the judge concluded that he would leave it to the jury to decide what to credit. On this record, in fashioning the instruction, we cannot conclude that the judge "made a clear error of judgment in weighing the factors relevant to the decision such that the decision falls outside the range of reasonable alternatives" (quotation and citation omitted).

L.L., 470 Mass. at 185 n.27.

Judgments affirmed.

CERTIFICATE OF COMPLIANCE WITH RULE 16(k)

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, I hereby certify that this brief complies with all applicable rules of court that pertain to the filing of applications for further appellate review, including but not limited to Mass. R. A. P. 27.1 (applications for further appellate review) and Mass. R. A. P. 20 (form of briefs, appendices, and other papers). This brief consists of ten non-excluded pages in twelve-point Courier New font (ten characters per inch).



David M. Osborne

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

_____	)	
COMMONWEALTH OF MASSACHUSETTS	)	
	)	
v.	)	No. 2025-P-0720
	)	
MICHAEL T. MILAN	)	
_____	)	

CERTIFICATE OF SERVICE

Pursuant to Rule 13(d) of the Massachusetts Rules of Appellate Procedure, I hereby certify under the penalties of perjury that, on June 2, 2026, I caused the foregoing document to be served through the Massachusetts Court System's Odyssey File and Serve Site on the following person:

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