Commonwealth of Massachusetts

Supreme Judicial Court for the Commonwealth

Hampden, ss. FAR-28350

Commonwealth

Appellee

v.

Steven P. Flood

Appellant

On Appeal from the denials of a Motion for Post-Trial Discovery, a Motion for New Trial, and a Motion for an Evidentiary Hearing

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Appellant's Corrected Application for Further Appellate Review

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Request for Leave to Obtain Further Appellate Review

Steven Flood applies pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure for further appellate review of the denial of his motion for new trial, the denial of his motion for post-trial discovery and the denial of his motion for an evidentiary hearing all of which were affirmed by the Appeals Court on June 8, 2021.

Statement of the Case

On March 7, 2012, the Grand Jury returned indictments charging Steven Flood with six counts of Statutory Rape and three counts of Indecent Assault and Battery on a Child Under Fourteen based on the allegations of complainant J.L.[1] (docket number 1279CR00240). R.A. I:7,24-31. A second grand jury later returned additional indictments charging Flood with seven counts of Indecent Assault and Battery on a Child Under Fourteen and three counts of Indecent Assault and Battery on a Child Over Fourteen based on the allegations of complainants J.G. and A.W.[2] (docket number 1279CR00771).

The trial on the two indictments began on September 16, 2013, before Judge John Ferrera. The jury returned verdicts of guilty on all counts of both indictments on September 19, 2013. On September 23, 2013, the

[1] A pseudonym pursuant to G.L. c. 265, § 24C.
[2] Pseudonyms pursuant to G.L. c. 265, § 24C.

court sentenced Flood to a lengthy period in state prison and a period of probation following his incarceration.

After the filing of a timely notice of appeal, the direct appeal of Flood's convictions was entered in the Appeals Court, docket number 14-P-1107.[3] After both parties filed their briefs and oral argument was held, the Appeals Court issued a Memorandum and Order Pursuant to Rule 1:28 affirming the defendant's convictions on March 10, 2016.

Flood filed a Motion for New Trial, Motion for Post-Trial Discovery, Motion for an Evidentiary Hearing, and Memorandum of Law in Support on April 29, 2019.[4] The trial court (Ferrera, J.) denied all of Flood's post-trial motions without a hearing on January 6, 2020.

Flood filed a timely Notice of Appeal, and his matter was entered in the Appeals Court. On June 8, 2021, the Appeals Court affirmed the denial of Flood's post-trial motions in a Memorandum and Order Pursuant to Rule 1:28.

Statement of the Facts

1. The allegations

[3] Flood was represented by new counsel in the Appeals Court.
[4] Flood was represented by new counsel during these post-conviction proceedings.

In June 2011, J.L. appeared at the Wilbraham Police Station and told the police Steven Flood sexually assaulted him when he was a child. Flood was the father of one of J.L.'s childhood friends. J.L. claimed Flood sexually assaulted him on numerous occasions in the Flood family home. He also claimed Flood assaulted him in Flood's truck.[5]

J.G., who was also a childhood friend of Flood's son, said he was frequently invited to swim in the pool at the house of Flood's in-laws. On many occasions, the Flood's would also invite J.G.'s sister, K.G. When Flood joined them in the pool, he would sexually assault J.G. He also assaulted J.G. in the bathroom.

J.G. said he did not realize Flood (or anyone else) sexually assaulted him until he was involuntarily committed at Wing Memorial Hospital following a failed suicide attempt. While in the emergency room, J.G. claimed a female therapist talked with him. Through her efforts, J.G. realized he was a victim of sexual assault, and that Steven Flood was the perpetrator. Following this revelation, and while still in the emergency

[5] J.G. also said Flood assaulted him on at least one occasion in a pool at the house of Flood's in-laws. This incident was not the basis for any of the indictments returned by the Grand Jury.

room, J.G. exchanged messages with K.G. over Facebook Messenger and informed her Flood sexually assaulted him as a child.

A.W. also reported to the Wilbraham Police Department that Flood sexually assaulted him. A.W.'s family was friendly with the Flood's through their church. Flood also served as A.W.'s Boy Scout troop leader. A.W. said when he was a child, Flood visited his home on a few occasions when A.W. was alone and the two wrestled. While wrestling, Flood sexually assaulted A.W. On one occasion, A.W. went to the swimming pool at Trinity Church with Flood, Flood's son, and another boy. According to A.W. while he was drying himself off in the locker room, Flood took his towel and helped to dry A.W. While drying him, Flood assaulted A.W. A.W. said Flood assaulted him in full view of multiple people and these "other people" laughed at him.

2. Pre-trial Motions

Prior to trial, the Commonwealth filed a motion to join the two sets of indictments. The Commonwealth claimed the charges involving the three complainants were related under Rule 9 of the Massachusetts Rules of Criminal Procedure because the assaults of all three boys demonstrated a common plan or scheme or pattern of conduct and evidence of assaults on each complainant would be cross-admissible at a trial on each of the

indictments as prior or subsequent bad acts. Flood countered that the three incidents were not related under Rule 9 and the lack of connectedness between the allegations weighed against cross-admissibility as prior or subsequent bad acts. The trial court determined the allegations were not related under Rule 9(a)(1) and denied the Commonwealth's motion. But the court explicitly left open the question of whether the incidents were admissible as prior or subsequent bad acts.

Prior to trial on the first indictment (the one involving only J.L.), the Commonwealth moved to admit the allegations of J.G. and A.W. as prior bad acts for all allowable purposes. Defense counsel opposed the motion and argued the incidents were too remote and dissimilar to be considered pattern of conduct. He also argued he was unprepared to address the complaints of J.G. and A.W. because discovery was still ongoing regarding the indictments involving their allegations. The court stated it was not yet ready to rule on the motion, but it indicated it was inclined to allow the admission of the complaints of A.W. and J.G. as prior bad acts. The court informed counsel it had yet to reach a conclusion but if it determined the allegations were admissible as bad acts it would continue the trial date should defense counsel need more time to prepare. Rather than wait for the court to make a ruling on the Commonwealth's motions, defense

counsel requested the trial court "waive" his opposition to joinder, join the cases for trial, and give him more time to prepare. The court granted defense counsel's request and the cases were joined. The trial was then continued.

The Commonwealth moved to admit the complaint J.G. made to K.G. on Facebook as first complaint evidence. The Commonwealth informed the court it attempted to locate the therapist J.G. claimed he spoke with at the hospital who made him realize Flood sexually assaulted him as a child. The emergency room records subpoenaed by the Commonwealth did not identify any therapist who spoke with J.G. The Commonwealth claimed it attempted to identify this therapist. The Commonwealth stated the police made multiple trips to the hospital and spoke with "numerous employees" of the emergency department hoping to identify the therapist. The Commonwealth also claimed the police "Found photographs of every female employee of Wing Memorial Hospital in that particular department and showed photographs of these females to [J.G.]. He was unable to identify that person." Despite the affirmative obligations imposed on the Commonwealth by the Rules of Criminal Procedure to provide defense counsel with police reports, photographic arrays, and exculpatory evidence in its possession, the Commonwealth did

not provide defense counsel with any materials concerning the investigative steps it took to identify the therapist. Defense counsel never asked for any such reports or the photo array because he assumed if the Commonwealth had any reports, it would have provided them to him.

The Commonwealth also did not obtain or produce the contents of the Facebook Messenger Communications between J.G. and K.G.

Issues on Which Further Appellate Review is Sought

Flood seeks further appellate of review of two issues:

1. The Sixth and Fourteenth Amendments to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights guarantee a criminal defendant with the right to counsel. Did trial counsel's representation deprive Flood of the effective assistance of counsel when: counsel requested joinder of the two indictments after successfully opposing it; counsel failed to request an instruction informing the jury they could not consider evidence of sexual assaults of each complainant for propensity purposes or as proof regarding the allegations of the other complainants; and counsel failed to object to the substitute complaint witness on best evidence grounds?

2. Did the trial court err when it denied Flood's Post-Trial Motion for Discovery for any police reports and any and all documents related the Commonwealth's attempts to discovery the identity of the therapist who assisted J.G.?

Argument

After successfully opposing the Commonwealth's motion for joinder, trial counsel moved to join the indictments charging Flood with sexually assaulting three different boys. This inexplicable decision proved disastrous for Flood. Without trial counsel's request for joinder, the Commonwealth could not have tried the indictments of all three complainants together. Trial counsel compounded this error when he failed to request a limiting instruction and the jury was allowed to consider the allegations of all three complainants as evidence the defendant had an inclination, or propensity, to commit the acts charged. While the defendant raised two additional meritorious claims (the failure to object to K.G.'s testimony on best evidence grounds and the erroneous denial of the defendant's motion for post-trial discovery), the joinder of the cases which allowed the jury to consider the allegations of the three complainants as evidence the defendant had a propensity to sexually assault young boys was the most egregious error and requires the vacation of Flood's convictions.

1. Flood's trial counsel committed serious errors that deprived him of his right to counsel under the United States Constitution and the Massachusetts Declaration of Rights

The trial court determined counsel's decision to reverse course and request joinder of the cases for trial was rational because trial counsel anticipated the court would allow the Commonwealth's prior bad acts motion and wanted to try the cases together. This conclusion is problematic for several reasons. First, the trial court never addressed why an ordinary fallible defense attorney would choose to join cases after successfully opposing joinder. Second, there was no evidence in the record before the court that counsel's decision was based on a strategic assessment that his client would have benefited from joinder. Indeed, counsel had already opposed joinder because he determined it was not in his client's best interest to try the cases together. Counsel's affidavit did not indicate he had a change of heart about that successful strategic maneuver. Third, the testimony of each complainant was inadmissible at the trial of the others. The Appeals Court concluded evidence of each complainant was admissible "to prove that the defendant had engaged in a pattern of conduct and had an inclination to commit the acts charged." *Commonwealth* v. *Flood*, No. 20-P-277, slip op. at 8 (June 8, 2021). But the evidence of each complainant was not admissible as pattern of conduct

evidence. When the trial court denied the Commonwealth's motion for joinder, it concluded the allegations of each of the three complainants were unrelated, in part, because they did not share a pattern of conduct. The court's decision rejecting joinder was correct. *See Commonwealth* v. *Pillai*, 445 Mass. 175, 180 (2005). *See also Commonwealth* v. *King*, 387 Mass. 464, 472 (1982) (evidence of separate sexual act with another person is inadmissible if it is unconnected in time, place, or other relevant circumstance to the particular sexual offense for which the defendant is being tried); *Commonwealth* v. *Helfant*, 398 Mass. 214, 224-228 (1986) (although a close question, cases properly joined where evidence that showed distinct pattern of conduct relevant and material to disputed issue of defendant's intent). Because the trial court previously denied joinder on the grounds the cases were not related, it had already ruled the allegations were not admissible as pattern of conduct evidence and the allegations of each complaint were not admissible as prior bad conduct on that theory. *See Helfant*, 389 Mass. at 224-228. *See also Commonwealth* v. *Hanlon*, 44 Mass. App. Ct. 810, 818 (1998) (Prior bad acts involving sexual contact with someone other than the victim are only admissible if they from a temporal

and schematic nexus that demonstrates a common course of conduct to the particular sex offense for which the defendant is being tried).[6]

The testimony of each complainant was also not admissible as evidence the defendant was inclined to commit the acts charged. In sexual abuse cases, evidence of uncharged sexual misconduct when it is between the parties and not too remote in time is competent to prove an inclination to commit the acts charged in the indictment because it is relevant to the relationship between the parties. *See Hanlon*, 44 Mass. App. Ct. at 817. But evidence of a sexual assault on a person other than the victim is only admissible if it is connected "in time, place, or other relevant circumstances to the particular sex offense for which the defendant is being tried" *Id* at 818. "When the uncharged offenses are committed against a person other than the complaining victim, there must be both a schematic similarity and a temporal connection for the evidence to be admissible." *Id* at 818. Here, the trial court already concluded that schematic similarity was lacking, and the evidence of each complainant was not admissible at a trial of the others. As a result, the testimony of J.G. and A.W. was not admissible as prior bad acts at a trial on the indictments involving J.L as a matter of law. But, when

[6] This is, of course, the standard for determining that cases are related under Rule 9 of the Massachusetts Rules of Criminal Procedure. *See Helfant*, 389 Mass. at 224-228

trial counsel moved to join the indictments, he essentially stipulated the allegations of all three complaints shared the schematic similarity and temporal connection necessary for admission.

Trial counsel compounded his error when he failed to request an instruction informing the jury they could not consider the evidence of each complaint for propensity purposes. *See Hanlon*, 44 Mass. App. Ct. at 822. In his affidavit submitted in support of Flood's motion for new trial, trial counsel state he did not consider requesting an instruction regarding the use of evidence of each complaint when evaluating Flood's guilt on the others at the time evidence was admitted or during the final charge. In the absence of any request from defense counsel, the court only provided the jury with a boilerplate instruction that it was to consider each charge separately. It did not provide the jury with any limiting instruction at the time the evidence was admitted or during the charge. Because the court did not provide a specific limiting instruction, the jury was allowed to consider the evidence for all purposes including propensity. *See Commonwealth* v. *Veivios*, 477 Mass. 472, 487 (2017) ("The jury are always free to consider evidence without limitation whenever a judge fails to give a limiting instruction under Mass. G. Evid. §404(b).").

Both the trial court and the Appeals Court dismissed the risk the jury considered the evidence for propensity purposes. Both courts concluded that since the evidence was admitted "to prove… the defendant had an inclination to commit the acts charged," any instruction regarding propensity would have been useless since "it was unlikely that a jury could have rationally distinguished the difference between 'inclination' and 'propensity' such that a limiting instruction would have made a meaningful difference." *Flood*, No. 20-P-277, slip op. at 8. But this is exactly why this court has limited inclination evidence in sexual assault cases to evidence of past conduct between the two parties involved. *See Commonwealth* v. *Welcome*, 348 Mass. 68 (1964). And, if evidence of similar conduct with a third party is admissible for purposes other than inclination or propensity, strong limiting instructions are required to prevent a jury from using the evidence for propensity purposes. *See Hanlon*, 44 Mass. App. Ct. at 822. Because the jury could have used the evidence of all three complainants for propensity purposes - a conclusion reached by the trial court and the Appeals Court - Flood's convictions must be vacated.

Trial counsel's failure to object to K.G.'s testimony on best evidence grounds also fell below *Saferian* standards. J.G.'s complaint with K.G. occurred entirely in electronic form over Facebook Messenger. Those

messages were not obtained by the Commonwealth. At trial, K.G. was allowed to testify to her recollection of those electronic communications. The Appeals Court concluded Flood was not harmed by counsel's failure to object because the Best Evidence Rule does not apply to First Complaint evidence because that evidence is not admitted for the truth of the matter asserted. *Flood*, 20-P-277, slip op. at 13. This conclusion rests on a misunderstanding of First Complaint. When the Supreme Judicial Court announced the First Complaint Doctrine in *Commonwealth* v. *King*, it emphasized that it was departing from the rules of most jurisdictions and allowing the Commonwealth to introduce details of the complaint because the Court believed allowing in evidence of the details provided the jury with the greatest amount of information to assess the credibility of both the complaint and the complainant and left nothing "to speculation or surmise." *Commonwealth* v. *King*, 445 Mass. 217, 244 (2005). The Court also noted allowing all details of the complaint into evidence was an important factor protecting the defendant from undue prejudice by allowing him to cross-examine both the first complaint witness and the complainant about details of the complaint "and draw to the jury's attention any discrepancies in the complainant's story that comes to light only as a result of the additional information." *Id* at 245. Because first

complaint relies on the contents of the complaint to provide the fact finder with the maximum amount of information and to protect the defendant from unfair prejudice, the Best Evidence Rule should apply even though the evidence is not admitted for the truth of the matter asserted. The purpose of the Best Evidence Rule is to provide the fact finder with the exact contents of communication so as not to leave it surmise or speculation. This is especially important with first complaint evidence. *See King*, 445 Mass. at 244-245.

2. The court erred when it denied Flood's Post-Trial Motion for Discovery from the Commonwealth regarding its attempts to identify the therapist with whom J.G. allegedly spoke.

To support of his ineffective assistance of counsel claim for failure to seek discovery from the Commonwealth, Flood filed a Motion for Post-Trial Discovery seeking any and all reports or documents, including photographs, related to the Commonwealth's search for the therapist. *See Commonwealth* v. *Vines*, 94 Mass. App. Ct. 690, 692 (2019) (purpose of a postconviction discovery motion is to seek information that may be material or relevant to a motion for new trial thereby allowing a defendant to gather information to support a meritorious claim). Flood claimed the denial of his motion for post-conviction discovery was erroneous because the evidence in the Commonwealth's possession would have challenged

the credibility of J.G. (because the failure of the Commonwealth's extensive efforts to locate the therapist lends itself to the conclusion the therapist, whom J.G. claim was the source of the revelation that he was a victim of sexual assault and Flood was the perpetrator) and therefore, would have materially aided the defendant if explored further by way of the allowance of the motion and production of the documents withheld by the Commonwealth. *See Commonwealth* v *Daniels*, 445 Mass. 392, 401-402, 406-407 (2005). The trial court denied the motion for post-trial discovery because it determined the evidence was unlikely to have any value to the defendant. It is fundamentally unfair for the trial court to conclude the records which remain in the hands of the Commonwealth (and undisclosed) would not assist the defendant without requiring the Commonwealth to produce the records. The records in the possession of the Commonwealth are obviously essential to that determination and Flood's Motion for Post-Trial Discovery should have been allowed on this basis.

Conclusion

For the above-stated reasons, Flood requests this court grant his application for further appellate review.

Respectfully submitted
For Steven Flood
By his attorney,

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Certification of Compliance

I, James A. Reidy, do hereby certify that this Application for Further Appellate Review complies with the rules of court that pertain to the filing of Applications of Further Appellate Review, including but not limited to: Mass.R.A.P. 20(a) and Mass. R.A.P. 27.1.

Compliance with the applicable length limit of Rule 27.1 was ascertained by use of Iowan Old Style size 12, zero non-excluded words, Microsoft Word for Mac Version 16.51. The word count for the argument section of the Application as calculated by Word for Mac, including all headings, footnotes and quotations, is 1934.

Signed under the pains and
penalties of perjury,

James Reidy

James A. Reidy

July 27, 2021

Certificate of Service

I, James A. Reidy, do hereby certify that I have served one pdf copy of the Defendant's Application for Further Appellate Review via the Supreme Judicial Court's E-File system and via electronic mail system on the Commonwealth's to Assistant District Attorney Lee Baker, lee.baker@state.ma.us.

Signed under the pains and penalties of perjury,

_____
James A. Reidy

July 27, 2021

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-277

COMMONWEALTH

vs.

STEVEN FLOOD.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a jury trial, the defendant was convicted of numerous sex offenses against three victims: J.L., J.G., and A.W.[2] The defendant filed a motion for a new trial arguing that his trial counsel was constitutionally ineffective in (1) requesting joinder of the indictments, (2) failing to request a limiting instruction, (3) failing to request certain discovery from the Commonwealth, and (4) failing to object to the

[1] Although nine of the nineteen indictments spell the defendant's first name as "Stephen," at trial, the Commonwealth sought to amend those indictments to reflect the proper spelling of the defendant's name, which is "Steven." We use the proper spelling which is set forth in the other ten indictments.

[2] The defendant was convicted of six counts of statutory rape of a child, G. L. c. 265, § 23, twelve counts of indecent assault and battery on a child under the age of fourteen, G. L. c. 265, § 13B, and one count of indecent assault and battery on a person fourteen years of age or over, G. L. c. 265, § 13H. The judgments were affirmed on appeal. See Commonwealth v. Flood, 89 Mass. App. Ct. 1111 (2016).

testimony of a substitute first complaint witness. He also filed motions for an evidentiary hearing and for posttrial discovery, seeking reports and documents related to the prosecution's attempts to identify a therapist to whom J.G. made his first complaint. The motion judge, who was also the trial judge, denied the three motions. The defendant appealed. We affirm.

Discussion. 1. Motions for new trial and evidentiary hearing. Under Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001), a judge "may grant a new trial at any time if it appears that justice may not have been done." "The judge may rule on the motion for new trial from the face of the affidavits or other supporting material, without an evidentiary hearing, 'if no substantial issue is raised by the motion or affidavits.'" Commonwealth v. Marrero, 459 Mass. 235, 240 (2011), quoting Mass. R. Crim. P. 30 (c) (3), as appearing in 435 Mass. 1501 (2001). "In determining whether to conduct an evidentiary hearing, both the seriousness of the issue raised and the adequacy of the showing on that issue must be considered." Commonwealth v. Muniur M., 467 Mass. 1010, 1011 (2014). "When a substantial issue has been raised, and supported by a substantial evidentiary showing, the judge 'should hold an evidentiary hearing.'" Id., quoting Marrero, supra. We review for an abuse of discretion, giving "special

deference to the action of a motion judge who, as here, was also the trial judge." Commonwealth v. Mercado, 452 Mass. 662, 666 (2008).

As grounds for his motion for a new trial, the defendant argued that his trial counsel was ineffective, which required him to show "'behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer,' and that counsel's poor performance 'likely deprived the defendant of an otherwise available, substantial ground of defence.'" Commonwealth v. Millien, 474 Mass. 417, 430 (2016), quoting Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). While a claim of ineffective assistance "raises 'an issue of constitutional importance' that readily qualifies as a serious issue," Commonwealth v. Denis, 442 Mass. 617, 629 (2004), quoting Commonwealth v. Licata, 412 Mass. 654, 661 (1992), we discern no abuse of discretion in the judge's determination that the defendant's motion for a new trial did not make an adequate showing as to any of the alleged instances of ineffective assistance of counsel such that an evidentiary hearing was required. We address each claim in turn.

a. Request for joinder. The defendant argued in his motion for a new trial that his counsel was ineffective in requesting that the indictments in two separate cases -- docket no. 1279CR00240 (docket no. 12-240), which included nine

indictments for conduct against J.L., and docket no. 1279CR00771 (docket no. 12-771), which included ten indictments for conduct against J.G. and A.W. -– be joined for trial. Originally, defense counsel successfully opposed the Commonwealth's motion to join the cases.[3] However, on the first day scheduled for trial on docket no. 12-240, for the offenses against J.L., the Commonwealth moved in limine to admit evidence of other bad acts to demonstrate that the defendant had engaged in a pattern of conduct. Specifically, the Commonwealth sought to introduce in its case-in-chief testimony from J.G. and A.W. describing the offenses against them that were similar to the assaults on J.L.[4] At the hearing, the judge indicated that he was inclined to admit the evidence but stated that he wanted to research the issue before ruling.[5]

[3] The motion judge denied the motion for joinder but left to the discretion of the trial judge whether "evidence of one offense should be admitted in the trial of the other pursuant to [Mass. G. Evid.] § 404(b)."

[4] Each victim was assaulted by the defendant while they were swimming, or changing into swimming attire, at a pool located next to the defendant's home.

[5] The judge stated,

> "[W]hat I am going to do is I am not going to make a decision off the top of my head. After reading this, I'll think about it overnight, and we can deal with this tomorrow morning. . . . I have to say my inclination is to allow the evidence in, because they are in the pool and do the exact same thing, this is evidence of that that typically the court allows and has repeatedly allowed into evidence in these type of cases, but I would really like to have an understanding of this."

Trial counsel notified the judge that, if J.G. and A.W. were permitted to testify, he was not prepared to go forward for trial on the following day. In response, the judge asked trial counsel how he wished to proceed, again indicating that the testimony would likely be admitted. In anticipation of the unfavorable ruling, trial counsel decided to waive his opposition to joinder, and instead he requested that the cases in fact be joined and that a new trial date be established.

"Decisions regarding joinder fall within the realm of strategic or tactical judgment." Commonwealth v. Hernandez, 63 Mass. App. Ct. 426, 432 (2005). The defendant bore the burden of demonstrating that counsel's decision was "manifestly unreasonable." Id., quoting Commonwealth v. Conley, 43 Mass. App. Ct. 385, 392 (1997). The defendant submitted an affidavit from trial counsel in which counsel stated that he requested the joinder for two reasons: (1) discovery had not yet been completed in docket no. 12-771 and, as a result, he was not ready to cross-examine J.G. and A.W.; and (2) if J.G. and A.W. were permitted to testify at the trial for the conduct against J.L., he preferred to try the cases together. In light of this explanation, the judge acted well within his broad discretion in determining, without an evidentiary hearing, that trial counsel's decision to request joinder was not manifestly unreasonable.

Trial counsel's affidavit explained his reasoning for moving to join the cases, and there is nothing to suggest that testimony from trial counsel at an evidentiary hearing would reveal anything additional. See Commonwealth v. Goodreau, 442 Mass. 341, 348 (2004) ("A judge may also consider whether holding a hearing will add anything to the information that has been presented in the motion and affidavits"). Based on the judge's inclination to admit testimony from J.G. and A.W., defense counsel was suddenly faced with the prospect of defending two trials where the Commonwealth would present substantially the same testimony. In light of this, the judge determined it to be a reasonable strategic decision of defense counsel to request joinder of the cases in order to avoid having to defend against two trials with largely the same evidence, rather than one, which might have proved to be more difficult where the Commonwealth could learn the theory of defense at the first trial and adapt its strategy in its case-in-chief for the second. We discern no abuse of discretion in that determination.

b. Failure to request limiting instruction. The defendant also contended that trial counsel was ineffective for failing to request a limiting instruction to preclude the jury from considering each charge as evidence that the defendant had the propensity to commit the other charges. In his affidavit, trial

counsel stated that the decision not to request such an instruction was not a strategic one. Rather, he "simply did not consider requesting jury instructions on this issue."

We conclude that the judge did not abuse his discretion in deciding the issue without an evidentiary hearing. Because trial counsel admitted in his affidavit that he did not consider requesting a limiting instruction of this nature, and the judge apparently accepted this admission as true, there was nothing to be gained by counsel's testimony on the issue. See Goodreau, 442 Mass. at 348-349. Thus, the judge properly focused his inquiry on whether counsel's failure to consider and request the instruction amounted to ineffective assistance, and whether the defendant was prejudiced as a result. See Millien, 474 Mass. at 430.

The judge determined that, even if trial counsel was ineffective in failing to request a limiting instruction, the defendant was not prejudiced. If the judge had given the limiting instruction, he would have instructed the jury regarding the purpose for which the evidence may be used. See Commonwealth v. Purdy, 459 Mass. 442, 453 (2011). "[W]hen a defendant is charged with any form of [an] illicit sexual [offense], evidence of the commission of similar crimes by the same parties though committed in another place, if not too remote in time, is competent to prove an inclination to commit

the [acts] charged in the indictment." Commonwealth v. King, 387 Mass. 464, 470 (1982). Further, evidence of a sexual offense against a different person may be admissible if connected "in time, place, or other relevant circumstances to the particular sex offense for which the defendant is being tried." Id. Because the assaults on the three victims were committed in a similar manner, around the same time period, when all the victims were of similar age, and when all the victims were under the supervision of the defendant, they were admissible to prove that the defendant had engaged in a pattern of conduct and had an inclination to commit the acts charged. See id. at 470-472.

In determining that the defendant was not prejudiced by the lack of a limiting instruction, the judge considered that it was unlikely that a jury could have rationally distinguished the difference between "inclination" and "propensity" such that a limiting instruction would have made a meaningful difference. See Commonwealth v. Hanlon, 44 Mass. App. Ct. 810, 818 n.5 (1998) (noting that "inclination" and "propensity" are "closely related and in many contexts interchangeable"). Moreover, the judge did instruct the jury that they were required to consider each charge separately and could convict the defendant of a specific charge only if they unanimously agreed "that the defendant committed the offense on at least one specific

occasion within the time frame specified and in the manner specified." Based on this, coupled with the fact that a limiting instruction was provided in relation to uncharged conduct, the judge concluded that the defendant was not deprived of an "available, substantial ground of defence." Millien, 474 Mass. at 432, quoting Saferian, 366 Mass. at 96 ("defense is 'substantial' for Saferian purposes where we have a serious doubt whether the jury verdict would have been the same had the defense been presented"). We perceive no abuse of the judge's discretion.

c. Failure to request discovery from Commonwealth. The defendant also argued that trial counsel was ineffective for failing to request discovery from the Commonwealth concerning its efforts to identify the therapist to whom J.G. made his first complaint. The parties were aware that while J.G. was hospitalized in April 2012, he reported, for the first time, to a therapist at the hospital that he had been sexually assaulted as a child. With J.G.'s authorization, the Commonwealth obtained records from the hospital, and turned those records over to the defendant during discovery. The records provided were records only from the emergency department and did not contain any records from the psychiatric unit. There was, however, a nursing note contained in the records that stated

"[patient] admits to seeing a therapists [sic] to work through recent admission of being molested."

The defendant moved for discovery of the therapist's name, and the motion was allowed by agreement. J.G. was unable to recall the therapist by name but disclosed that she was female. In an attempt to locate the therapist, the Commonwealth spoke to numerous employees at the hospital, and prepared a photographic array of all the female employees in the emergency department and all of the female psychologists at the hospital. After being shown the array, J.G. was still unable to identify the therapist to whom he made his disclosure. Trial counsel subsequently learned that J.G.'s authorization for release had only pertained to the emergency department records, and he moved to obtain the entire record of J.G.'s hospitalization in April 2012. The motion was allowed,[6] but at the hearing on the motion for a new trial, trial counsel represented that the subsequent records he received from the hospital were in fact the same records he received from the Commonwealth.

Trial counsel did not seek discovery of the photographic array prepared by the Commonwealth or any police reports prepared in connection with identifying the therapist. In his affidavit, trial counsel explained that he did not believe that

[6] The motion was originally denied but was subsequently allowed on the defendant's motion for reconsideration.

such police reports existed. We agree with the judge that trial counsel was not ineffective for failing to request discovery of those materials from the Commonwealth, that the defendant was not prejudiced by the failure to request those materials, and that both conclusions could be reached without an evidentiary hearing.

Trial counsel indeed made numerous unsuccessful efforts to discover the identity of the therapist, and he was fully aware that the Commonwealth was unable to identify the therapist as well. Counsel did not believe, nor did he have reason to believe, that the Commonwealth had prepared police reports addressing their efforts to identify the therapist, and it is unclear what the defense would have gained by the photographic array since it did not produce a positive identification of the therapist. Though the defendant argues that these materials would have been exculpatory and would tend to suggest that J.G. was lying about making the disclosure to a therapist, it is unlikely that the information would have had any real value as impeachment evidence.

First, J.G. did not testify at trial about the complaint he made to the therapist, so there was nothing for trial counsel to impeach. Further, the records that trial counsel did receive contained a nursing note that specifically stated that J.G. had recently disclosed to a therapist that he had been assaulted.

Thus, even if defense counsel had requested and obtained this information and attempted to use it to undermine J.G's credibility, J.G.'s credibility would have been easily rehabilitated with evidence of the nursing note. In any event, the failure to impeach a witness generally "does not prejudice the defendant or constitute ineffective assistance." Commonwealth v. Bart B., 424 Mass. 911, 916 (1997).

d. Failure to object to first complaint testimony. The defendant further argued that trial counsel was ineffective for failing to object, on best evidence grounds, to the testimony of a substitute first complaint witness. After revealing to his therapist that he had been sexually assaulted as a child, J.G. contacted his sister, K.G., via private Facebook message,[7] and told her that he had been sexually assaulted by the defendant. Because the Commonwealth could not identify, and as a result locate, the therapist, K.G. was permitted to testify as a substitute first complaint witness. She testified about the complaint that J.G. had made to her, but the Facebook conversation itself was not introduced in evidence.

In his affidavit, trial counsel stated that he did not object to K.G.'s testimony on best evidence grounds because he

[7] Facebook allows users to send instantaneous private messages to other users on the platform. See Commonwealth v. Meola, 95 Mass. App. Ct. 303, 304 n.1 (2019).

did not believe that such an objection would be successful. As the judge concluded, trial counsel was likely correct. "The best evidence rule provides that, where the contents of a document are to be proved, [a] party must either produce the original [document] or show a sufficient excuse for its nonproduction." Commonwealth v. Revells, 78 Mass. App. Ct. 492, 496 (2010), quoting Commonwealth v. Ocasio, 434 Mass. 1, 6 (2001). See Mass. G. Evid. § 1002 (2021). However, "first complaint testimony is 'not offered to prove the truth of the matter asserted'; rather it is 'an exception to the usual rule that a prior statement of a witness concerning a material fact that is consistent with the witness's trial testimony may only be admitted on redirect examination.'" Revells, supra at 497, quoting Commonwealth v. King, 445 Mass 217, 241 n.1 (2005), cert. denied, 546 U.S. 1216 (2006). Accordingly, because K.G.'s testimony concerning the complaint made by J.G. via Facebook was not offered to prove the contents of the writing, but was admitted only to assist the jury in their assessment of J.G.'s credibility, the best evidence rule did not apply. See King, supra at 247-248; Revells, supra. See also Mass. G. Evid. § 1004(d) (2021) (content of writing or record may be established by evidence other than original if "the writing or record is not closely related to a controlling issue"). The judge therefore properly concluded that counsel was not

ineffective in failing to lodge an objection on best evidence grounds. See Commonwealth v. Cartright, 478 Mass. 273, 283 (2017) ("[f]ailure to raise a nonmeritorious objection does not constitute ineffective assistance").

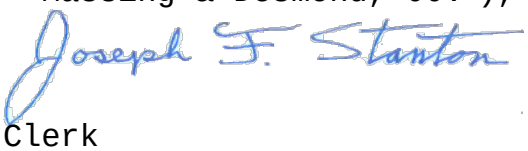
2. Motion for posttrial discovery. "To succeed on a posttrial discovery motion, 'a defendant must demonstrate that it is reasonably likely that such discovery will lead to evidence possibly warranting a new trial,' and 'the defendant must make a prima facie showing that the evidence sought would have materially benefited the defense and would have factored into the jury's deliberations.'" Commonwealth v. Moffat, 486 Mass. 193, 207 (2020), quoting Commonwealth v. Camacho, 472 Mass. 587, 598 (2015). "We review the denial of a motion for posttrial discovery for abuse of discretion." Moffat, supra.

The judge did not abuse his discretion in denying the defendant's motion for posttrial discovery of the photographic array or police reports prepared in connection with identifying the therapist to whom J.G. made his first complaint. For the reasons stated supra, it is unlikely that these items would have materially benefitted the defense. Because the defendant failed

to make his prima facie showing, his motion for posttrial discovery was properly denied.

Orders dated January 6, 2020, denying motions for new trial, evidentiary hearing, and posttrial discovery, affirmed.

By the Court (Vuono, Massing & Desmond, JJ.[8]),



Clerk

Entered: June 8, 2021.

[8] The panelists are listed in order of seniority.

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

HAMPDEN, ss. Docket No. 1279CR00240 and 1279CR00771

COMMONWEALTH

vs.

STEVEN FLOOD,
Defendant

HAMPDEN COUNTY
SUPERIOR COURT
FILED
JAN – 6 2020
CLERK OF COURTS

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL

BACKGROUND

The defendant, Steven Flood, was tried by a jury before me in August and September of 2013 on the above numbered indictments. Flood was convicted of six counts of statutory rape of a child, twelve counts of indecent assault and battery on a child under the age of fourteen, and one count of indecent assault and battery on a person fourteen years of age or over. There were three victims. Flood appealed his convictions and they were affirmed. 89 Mass. App. Ct. 1111, Rule 1:28 Decision, No. 14-P-1107, March 10, 2016. Flood has now moved for a new trial on each of the cases arguing that he was deprived of effective assistance of counsel in violation of rights guaranteed him under the Sixth and Fourteenth Amendments to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights. For the reasons that follow, his motion is denied.

DISCUSSION

A. Standard of Review

"A judge may grant a new trial at any time if it appears that justice may not have been done." Mass. R. Crim. P. 30(b), 378 Mass. 900 (1979); *Commonwealth* v. *Scott*, 467 Mass. 336, 344 (2014). Where a defendant contends that his trial counsel was constitutionally ineffective,

he must show "that '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 that, as a result, the defendant was likely deprived . . . of an otherwise available, substantial ground of defense." *Commonwealth* v. *Millien*, 474 Mass. 417, 430 (2016), quoting *Commonwealth* v. *Saferian*, 366 Mass. 89, 96 (1974).

Flood cites the following instances of alleged ineffective representation by trial counsel: (1) counsel's withdrawal of opposition to joinder of the two cases where joinder had originally been denied; (2) counsel's failure to request a limiting instruction; (3) counsel not requesting discovery regarding the prosecution's attempts to identify a therapist that one of the victims, J.G., may have consulted; and (3) counsel's failure to object to testimony of a substitute first complaint witness as to a Facebook message received from J.G.

B. Trial Counsel's Strategic Decision to Withdraw Opposition to Joinder Was Not Ineffective Assistance of Counsel

Defense counsel represented Flood on both cases. Prior to trial, the Commonwealth moved for joinder and defense counsel opposed the motion. The Commonwealth's motion was denied, but the motion judge (Kinder, J.) specifically left open the question of the admissibility of evidence of sexual misconduct alleged in one case in the trial of the other. When the first case, docket no. 1279CR00240, was reached for trial before another judge (Agostini, J.), the Commonwealth moved for admission of "other bad act" evidence, citing the Massachusetts Guide to Evidence §404(b). Specifically, the Commonwealth sought to introduce evidence of other uncharged sexual conduct between the defendant and the victim in that case, J.L., and testimony of the two alleged victims in 1279CR00771, J.G and A.W. Judge Agostini stated that

the Commonwealth was entitled to the evidence regarding interaction between the defendant and J.L.[1] He also said that he was inclined to allow the motion with respect to the testimony of the complainants in the other case, and later stated that he was likely to do so.[2] Defense counsel said that if the motion was to be allowed, he would withdraw opposition to joinder of the cases but would need a continuance.[3]

After a recess and an opportunity to confer with Flood, trial counsel made a strategic decision to waive his opposition to joinder of the two cases for trial.[4] In an affidavit of trial counsel filed in support of Flood's motion, trial counsel avers:

> "Because discovery was not complete in docket 771, I was unprepared to cross-examine J.G. and A.W. I knew I needed additional time for discovery to be completed if I was to successfully cross-examine J.G. and A.W. I also thought if Judge Agostini was prepared to allow the motion, I would rather try the cases at one time. Due to these twin concerns, I requested the cases be joined before Agostini made his ruling."

Defense Exhibit 28. Judge Agostini did, in fact, allow the Commonwealth's motion for admission of the testimony of J.G. and A.W. in the trial of indictment no. 1279CR00240.

When a defendant's ineffective assistance of counsel claim is based on a tactical or strategic decision of trial counsel, he must show that the decision was "manifestly unreasonable" when made. See *Com.* v. *Kolenovic*, 471 Mass. 664, 674 (2015), and cases cited therein. The inquiry focuses both on the point in time when counsel made the challenged decision and whether it was a decision that lawyers of ordinary training and skill in the criminal law would regard as a competent. *Id.* A defense attorney who makes a strategic decision may be ineffective

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[1] Transcript of Motion Hearing, 6/13/13, p. 18.
[2] Tr. 6/13/13, pp.18-19, 23-24, 28.
[3] Tr. 6/13/13, p. 28-29; Defendant's Exhibit 28, Affidavit of Trial Counsel.
[4] The Appeals Court found that it was a strategic decision in its March, 2016 Decision.

where the decision was manifestly unreasonable, but defense counsel is more likely to be ineffective where there was no strategic judgment exercised. *Commonwealth. v. Glover*, 459 Mass. 836, 845 (2011).

"Decisions regarding joinder fall within the realm of strategic or tactical judgment. See, e.g., *Bear Stops* v. *United States,* 204 F.Supp.2d 1209, 1231 (S.D.2002), cert. denied, 540 U.S. 1094, 124 S.Ct. 970, 157 L.Ed.2d 803 (2003); *People* v. *Peterson,* 656 P.2d 1301, 1304 (Colo.1983). See also ABA Standards for Criminal Justice Joinder and Severance § 13, Introduction at 5 (2d ed.1982)." *Commonwealth* v. *Hernandez*, 63 Mass. App. Ct. 426, 432 (2005). Flood and his counsel were faced with the prospect of two trials in which the Commonwealth would be presenting substantially the same testimony through the same witnesses. It is unclear from the record if trial counsel actually consulted with Flood, as Judge Agostini gave him the opportunity to do,[5] before informing the Court of the decision to withdraw opposition to joinder. There is no affidavit from Flood addressing that point and the affidavit of trial counsel is silent on the issue. Separate trials might have benefitted either party. Both the prosecutor and defense counsel would have had transcripts of witness testimony from the first trial for preparation of examinations and cross-examinations in a second trial. The transcripts would be available for impeachment if testimony in the second trial was inconsistent with testimony in the first. However, if there were two trials, Flood faced the prospect of needing two acquittals. In a second trial the Commonwealth would have had a preview of Flood's defense, and witnesses would have already experienced testifying and might be better prepared and more

[5] Tr. 6/13/13, p. 25.

comfortable with the process. The strategic decision to withdraw opposition to joinder of the two cases under the circumstances presented was not manifestly unreasonable.[6]

C. Trial Counsel Was Not Ineffective For Failing to Request A Limiting Instruction and Flood Was Not Prejudiced By the Absence of the Instruction He Now Proposes

Flood argues that trial counsel's decision to withdraw his opposition to joinder of the offenses resulted in the cross-admissibility of all evidence in each case, and that the prejudice of joinder was compounded by the absence of a limiting instruction telling the jurors that they could not "review the allegations collectively...determining that Flood had a propensity for sexually assaulting young boys."[7] He argues that it was required that the jury be instructed that "it could not consider evidence proffered by each complainant when assessing the credibility or veracity of the others in strong and careful terms required to mitigate the prejudice inherent when cases involving multiple complainants are joined for trial," citing *Commonwealth* v. *Brusgulis*, 406 Mass. 501, 506 n.7 (1990).[8]

The footnote that Flood cites is inapplicable to his case. *Brusgulis* involved the admission of evidence of other crimes committed by the defendant to establish his *modus operandi* for identification purposes, to show that he was the perpetrator of the offense charged. See *id.* at 505-506. Introduction of "other bad acts" evidence for purposes of identification is particularly problematic. It requires preliminary findings by a trial judge and limiting

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[6] Examples of strategic decisions found not to be manifestly unreasonable include: (1) a decision to forego a psychiatric defense that was potentially available, but not likely to succeed, *Kolenovic*, 471 Mass. at 675; (2) a decision not to call alibi witnesses where counsel thought their testimony would be weak and/or they would not be credible, *Commonwealth* v. *Morales*, 453 Mass. 40, 46 (2009); and (3) a decision not to request an instruction on "reasonable provocation" with a potential involuntary manslaughter verdict where arguing the point might have undermined a claim of self-defense, *Glover*, 459 Mass. at 844.

7 Defense Memorandum, p. 17.

[8] Defense Memorandum, p. 23.

instructions to mitigate the potential prejudice. It was in that context that the SJC made clear the need for limiting instructions in all such cases. See *id.* at 506 n.7. There was no identification issue in this case.

There was a limiting instruction given as to evidence of certain uncharged conduct between Flood and the victims, specifically, the showing of pornographic images to two of the victims and an uncharged sexual assault on J.L. The jurors were instructed that they could consider that evidence "solely on the limited issues of the nature of the relationship between the defendant and the complainants and as evidence of a pattern of conduct," and that they could not "consider it as proof that the defendant has a criminal personality or bad character."[9]

The motion judge's decision to admit testimony of J.G. and A.W. in the trial of the charges relating to J.L. was a proper exercise of discretion. Their testimony bore on Flood's opportunity, motive, intent, and mode of conduct with respect to J.L. See Mass. G. Evid. § 404(b)(2).

> "We have held that when a defendant is charged with any form of illicit sexual intercourse, evidence of the commission of similar crimes by the same parties though committed in another place, if not too remote in time, is competent to prove an inclination to commit the [acts] charged in the indictment ... and is relevant to show the probable existence of the same passion or emotion at the time in issue. Evidence of similar misconduct may also be used to show the relationship between the defendant and the victim."
>
> "When a court is presented with evidence of uncharged conduct by the defendant toward a child other than the complainant, the conduct in issue, to be admissible, must be closely related in time, place, and form of acts to show a common course of conduct by the defendant toward the two children so as to be logically probative."

[9] Trial Tr. 9/19/13, Vol. IV, p. 100.

Commonwealth v. *Barrett*, 418 Mass. 788, 794 (1994) (internal citations and quotation marks omitted) (emphasis added). Flood's sexual assaults on the three victims were similar in that each of the victims was a friend of Flood's son, each child was under Flood's supervision at the time of the assaults, they were all in the same age range when the assaults occurred, and Flood touched each of their penises. The sexual assaults on each victim occurred over a period of time. Two of the victims were assaulted by Flood when they were swimming and there was an instance where the third victim was assaulted while he was getting dressed after swimming with Flood. Two of the victims were assaulted while in Flood's truck. There was only a two-year age difference between the youngest and oldest victim, so the assaults occurred within the same timeframe.

Since the testimony of the victims was admissible to prove a pattern of conduct, it is unclear that a limiting instruction was required as to the cross-admissibility of their testimony. However, even if trial counsel should have requested the limiting instruction that Flood now suggests, I find that Flood was not prejudiced. In giving the instruction the court would have told the jury of the purpose for the admitted evidence. A jury could not have rationally distinguished between evidence admitted to show Flood's "intent" and his "inclination to commit the [acts] charged" from evidence admitted to show "propensity." The terms "inclination" and "propensity" are synonymous. Merriam Webster's Collegiate Dictionary, 10th Edition, 1995.

The jurors were instructed that each offense charged was an accusation of a different crime, that they had to consider each charge separately, and could only return a guilty verdict if they unanimously agreed that "the defendant committed the offense on at least one specific

occasion within the time frame specified and in the manner specified."[10] I explained the verdict slips to the jurors before they began their deliberations and instructed that "[t]he verdict slips will specify the offense charged, the identity of the alleged victim, the specific manner or way in which it is alleged the offense occurred, and the time frame within which it is alleged to have occurred."[11] I am satisfied that the absence of an instruction as now proposed by Flood did not deprive him of "an otherwise available, substantial ground of defense." *Millien*, 474 Mass. at 433.

D. Defense Counsel Was Not Ineffective for Failing to Request Certain Discovery

Defense Counsel was not ineffective for failing to request discovery regarding the prosecution's attempts to identify a possible first complaint witness, a therapist that one of the victims, J.G., may have consulted. J.G. testified before the grand jury that the first person he spoke to about being sexually abused was a female therapist when he was hospitalized for depression at Wing Memorial Hospital ("Wing").

J.G. was hospitalized at Wing on April 12, 2012, and again on April 21, 2012 for suicidal ideation. He was twenty-three years old.[12] On April 20, 2012, he went to the Wilbraham Police Department and reported that he had been sexually abused by Flood. Subsequently, Wilbraham Police Officer Shawn Baldwin requested J.G.'s records from Wing for April, 2012, using an authorization signed by J.G.[13] The records received were produced in discovery. However, Officer Baldwin requested only "ER" records and within those records it was noted that J.G. had under gone a psychiatric evaluation and the records produced were not all of the records for

[10] Trial Tr. 9/19/13, Vol. IV, pp. 115-116.
[11] Trial Tr. 9/19/13, Vol. IV, pp. 116-117.
[12] Def. Exhs. 16, 20.

J.G.'s two hospitalizations that month.

Defense counsel moved to discover the name and address of the therapist and the motion was allowed by agreement.[14] J.G. could not identify the therapist, so the Commonwealth obtained the names and photographs of female employees in the emergency department at Wing and every female psychologist on the staff of Wing and showed the photographs to J.G.[15] He did not identify any of them as the person to whom he made the disclosure. Defense counsel moved for records of J.G. from Wing and that motion was also allowed.[16] Wing mailed the requested records to the Hampden County Superior Court Clerk's Office, and they were available to defense counsel.[17] Flood now represents that these were the same records as had been produced by the Commonwealth.

Flood argues in his memorandum that, "Defense counsel filed pre-trial motions related to the identity of this therapist.... In these motions, defense counsel did not inform the court Parker North was the psychiatric unit of Wing Memorial Hospital or that J.G. spoke with the psychiatric team from Parker North while hospitalized." Defense counsel's affidavit does not state that he knew that Parker North was the name of the psychiatric unit of Wing. In his pre-trial motions defense counsel did indicate that the only records that had been produced were emergency room records, that J.G. had been evaluated by a psychiatric team, and he was seeking those psychiatric evaluation records. It may be that the summons that issued to Wing for records was not directed

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[13] Def. Exhs. 16, 20.
[14] Defense Exh. 1, docket entries for 1279CR0771, p. 4, Doc. #11; Def. Exh. 23.
15 Def. Exh. 25, p. 3; Def. Exh. 26, p. 11.
[16] It was initially denied, but allowed upon reconsideration after defense counsel filed a sufficient affidavit and it was represented to the Court (Rup, J.) that J.G. had signed a release. See Def. Exh. 1, p. 5, Doc. #16.
[17] See Def. Exh. 1, p. 5, entries on 8/12/13 and 8/15/15.

to the Parker North Unit, or that the Keeper of Records did not think to check for those records, but it would not have been unreasonable for counsel to assume that a summons to the hospital for records would yield records from all departments. A failure to learn of the name of the psychiatric unit or to designate it in the summons does not constitute "serious incompetency, inefficiency, or inattention of counsel" and is not "behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer." *Saferian*, 366 Mass. at 96.

No therapist that J.G. may have spoken to at Wing was ever identified by the Commonwealth or defense counsel. Flood argues that counsel was ineffective for failing to seek discovery of the photographs shown to J.G. by the Commonwealth and any police reports regarding efforts to identify the person. Trial counsel avers in an affidavit that he did not request the police reports because he did not think that they existed.[18] Flood argues that those materials would have been exculpatory because:

> "If the therapist did not exist, J.G. either lied about the therapist being the catalyst for his realization of victimhood or he was hallucinating. In any event, such evidence was vitally important to assessing J.G.'s credibility and would have bolstered the defense case that J.G. fabricated the sexual assaults."

There are problems with the premises underlying Flood's argument. A nursing note from Wing dated April 21, 2012 states, "Pt admits to seeing a therapists [sic] to work through recent admission of being molested."[19] It is unclear from that note if this therapist worked at Wing. However, it appears more likely that J.G. did speak to a therapist and the parties were simply unable to identify that person, than that J.G. lied to a nurse, the police, and a grand jury about having seen a therapist.

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[18] Def. Exh. 28, par. 18.

Furthermore, experienced trial counsel are reticent to impeach a witness with a possible prior inconsistent statement when the statement, in and of itself, is harmful to their client. The decision to impeach J.G. with evidence that police had been unable to identify the therapist would have required trial counsel to weigh the value of that evidence against its prejudicial impact. The potential impeachment benefit would depend upon jurors concluding that no therapist existed. Otherwise, that strategy would simply yield evidence of J.G.'s additional complaint of sexual assaults and the implication that he had suffered serious, long-standing psychological harm as a consequence. "In general, failure to impeach a witness does not prejudice the defendant or constitute ineffective assistance. Impeachment of a witness is, by its very nature, fraught with a host of strategic considerations, ... Furthermore, absent counsel's failure to pursue some obviously powerful form of impeachment available at trial, it is speculative to conclude that a different approach to impeachment would likely have affected the jury's conclusion." *Commonwealth v. Garvin*, 456 Mass. 778, 791–92 (2010) (internal citations and quotations omitted).

E. Trial Counsel's Failure to Object to Testimony Regarding a Facebook Message Communications as First Complaint Was Not Ineffective Assistance

The Commonwealth moved to substitute J.G.'s sister, K.G., as a first complaint witness and the motion was allowed. K.G. testified as to Facebook messages she received from her brother in April, 2012. Her testimony was simply that he told her that he had been sexually assaulted by Steven Flood when they had first moved to Wilbraham. Flood argues that trial counsel was ineffective for failing to object to that testimony based on the "best evidence" rule,

[19] Def. Exhs. 16, 20.

which generally requires production of an original writing to prove its content, or a sufficient excuse for its non-production, such as loss of the original through no fault of the proponent. See Mass. G. Evid. § 1002. "The 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." *Commonwealth* v. *Ocasio*, 434 Mass. 1, 6 (2001) (internal citation omitted).

Trial counsel avers in his affidavit that he did not object to K.G.'s testimony on "best evidence" grounds because he thought it would be overruled. It is highly likely that trial counsel is correct. I do not know if the messages had been preserved and were available at the time of trial. Both J.G. and K.G. testified as to the Facebook message exchange. Flood does not contest that the Facebook messaging occurred. The message recounted by K.G. was so simple that the possibility she misstated its content is negligible, and the best evidence rule may not have applied for that reason. See Mass. G. Evid. § 1002, citing *Commonwealth* v. *Blood*, 77 Mass. 74, 77 (1858).

K.G. would have been permitted to testify as to a similar telephone communication with her brother. The same credibility assessment regarding K.G.'s testimony would have been applicable to either form of communication. It seems anachronistic to require preservation of Facebook or other social media messages of such a simple nature in order to prove their content, particularly when a recipient may not understand that failure to preserve the message might have some evidentiary significance.

Furthermore, "[t]he best evidence rule is applicable to only those situations where the contents of a writing are sought to be proved." *Commonwealth* v. *Balukonis*, 357 Mass. 721, 725

(1970). K.G.'s testimony was offered to prove the fact of the complaint by J.G. regarding Flood, rather than the allegation made. "[F]irst complaint testimony is not offered to prove the truth of the matter asserted; rather it is an exception to the usual rule that a prior statement of a witness concerning a material fact that is consistent with the witness's trial testimony may only be admitted on redirect examination. In these circumstances, the best evidence rule does not preclude the testimony of the mother regarding the letter's contents without express best evidence findings by the judge." *Commonwealth* v. *Revells*, 78 Mass. App. Ct. 492, 497 (2010) (internal citations omitted).

Finally, I have a clear memory of this trial and the testimony of J.G. and I am satisfied that even if the testimony of K.G. had been excluded, it would not have had an impact on the verdicts.

F. Flood's Pleadings Fail to Raise a Substantial Issue Warranting An Evidentiary Hearing

Flood has requested an evidentiary hearing on his motion. A judge may rule on a motion for a new trial after review of the motion, memorandum, affidavits or other supporting material, without an evidentiary hearing "if no substantial issue is raised by the motion or affidavits." Mass. R. Crim. P. 30(c)(3); *Commonwealth* v. *Marrero*, 459 Mass. 235, 240 (2011). "In determining whether a motion for a new trial warrants an evidentiary hearing, both the seriousness of the issue itself and the adequacy of the defendant's showing on that issue must be considered." See *Commonwealth v. Denis*, 442 Mass. 617, 628 (2004). Having carefully reviewed and considered Flood's filings and arguments, I am satisfied that he has failed to raise a substantial issue that warrants an evidentiary hearing.

ORDER

For the foregoing reasons,

(1) the Defendant's Motion for New Trial (# 87 in 1279CR00240 and # 59 in 1279CR00771) is **DENIED**, and

(2) the Defendant's Motion for an Evidentiary Hearing (#89 in 1279CR00240 and #62 in 1279CR00771) is **DENIED**.

Dated: January 6, 2020

John S. Ferrara
Justice of the Superior Court

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

Superior Court Department
of the Trial Court
Indictment Nos. 12-240
12-771

HAMPDEN COUNTY
SUPERIOR COURT
FILED
JAN 10 2013
CLERK OF COURTS

COMMONWEALTH
v.
STEVEN FLOOD

COMMONWEALTH'S MOTION TO JOIN INDICTMENTS UNDER MASSACHUSETTS RULE OF CRIMINAL PROCEDURE 9

Now comes the Commonwealth of Massachusetts through Jane E. Mulqueen, its Assistant District Attorney for Hampden County, and hereby moves this Honorable Court, pursuant to Mass. R. Crim. P. 9 (a)(1) and/or 9 (a)(3) to join Indictment Nos. 12-240 and 12-771 for trial. As grounds therefore, the Commonwealth submits that the offenses alleged in these indictments are related offenses and thus should be tried together.

After hearing and consideration of the pleadings I conclude, essentially for the reasons set forth in the defendant's written opposition, that the offenses charged in cases 12-240 and 12-771, although similar in nature, are not related offenses as that term is defined by Rule 9 (a)(1). Therefore, the motion for joinder of cases 12-240 and 12-771 is DENIED. The issue of whether or not evidence of one offense should be admitted in the trial of the other pursuant to section 404(b) of the Mass Guide to Evidence is left to the discretion of the trial judge.

1/22/13

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS

Jane E. Mulqueen

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COMMONWEALTH OF MASSACHUSETTS

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DENIED. See endorsement in case no. 12-240, pleading #9.
JKirb
1/22/13

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COMMONWEALTH
v.
STEVEN FLOOD

COMMONWEALTH'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO JOIN INDICTMENTS UNDER MASSACHUSETTS RULE OF CRIMINAL PROCEDURE 9

Now comes the Commonwealth of Massachusetts through Jane E. Mulqueen, its Assistant District Attorney for Hampden County and hereby files this memorandum of law in support of its motion to join the above numbered indictments for trial.

FACTS

The defendant is charged in Indictment 12-240 with six (6) counts of rape and abuse of a child in violation of M.G.L. c. 265 section 23 and three (3) counts of indecent assault and battery on a child under 14 in violation of M.G.L. c. 265 section 13B. The victim in this indictment is J.L. whose date of birth is [redacted] The offenses are alleged to have occurred. One count of rape and one count of indecent assault and battery are alleged to have occurred on a date between October 23, 1997 and October 23, 1999, making the alleged victim between the ages of nine (9) and eleven (11). The other five (5) counts of rape and abuse of a child and two (2) counts of indecent assault and battery are alleged to have occurred on diverse dates and times between October 23, 1997 and December 31, 2002.

The allegation in Counts I and II are that the defendant performed oral sex on J.L. in the defendant's bedroom at his home in Wilbraham. The allegation in Count III is that the defendant performed oral sex on the victim in the kitchen of the defendant's home. In Count IV, the Commonwealth alleges that the defendant performed oral sex on the victim in the defendant's truck. Count V alleges oral sex on the defendant's living room couch. Count VI alleges that the defendant inserted his finger into J.L.'s anus. Counts VII and VIII allege that the defendant touched the victim's penis with his hand and Count IX alleges that the defendant made J.L. touch the defendant's penis.

The defendant is charged in Indictment 12-771 with eight (8) counts of Indecent Assault and Battery on a Child in violation of M.G.L. c. 265 section 13B, and two (2) counts of Indecent Assault and Battery on a person who had attained 14 years of age in violation of M.G.L. c. 265 section 13H. Counts I through V involve victim J.G. (DOB 12/9/88). Counts I through III are alleged to have occurred on diverse dates and times between August 1997 and November 1997 at the defendant's house in Wilbraham. Counts IV and V are alleged to have occurred on diverse dates and times between December 9, 2004 and December 9, 2006 at the defendant's home. Count I specifically alleges that the defendant touched and fondled J.G.'s penis in the defendant's pool. Count II alleges that the defendant touched the victim's buttocks with his hand in the pool. In Count III, the Commonwealth alleges that the defendant touched and fondled the victim's penis in the defendant's bathroom. Count IV alleges that the defendant grabbed the victim's penis while working on cars at the defendant's house and Count V alleges that the defendant would rub his penis against the victim's hand while working on cars.

Counts VI through X involve victim A.W. (DOB [redacted]). Counts VI through VIII each allege that on a date between 6/27/97 and 6/27/99 the defendant, on three separate occasions,

fondled the victim's penis in the living room of the victim's home in Wilbraham. Counts IX and X allege that the defendant touched A.W's buttocks and A.W's penis while swimming in the pool at Trinity Church in Springfield.

On December 16, 2011 at approximately 5:15 PM Nancy Lingenfelter entered the Wilbraham Police Department asking to speak to an officer about a past sexual assault on her 22 year old son, J.L., when he was much younger. Statements were taken from Nancy Lingenfelter and others. On December 19, 2011, a statement was taken from J.L. He indicated that when he was approximately ten (10) years old, he met the defendant's son, Chris Flood, as they rode the bus to school together. He began to spend time at the defendant's home. A few months into his friendship with Chris Flood, J.L. was spending considerable time at the Flood home on Tinkham Road in Wilbraham. On one occasion the defendant called the victim into his bedroom and showed him pictures of a nudist group from a book. The defendant encouraged the child to touch himself while looking at the pictures. The next time, the defendant showed J.L. a pornographic movie and again encouraged the child to touch himself and the defendant touched and fondled the victim's penis. As the relationship progressed, the defendant performed oral sex on the child, penetrated the child's anus with his finger and had the victim touch the defendant's penis. The defendant also performed oral sex on J.L. in the pool. The defendant continually told J.L. that he was special, that what they shared was special and that J.L. was lucky to have someone in his life to do these things for him.

The defendant was indicted and arraigned on the charges involving J.L. in March 2012.

On April 20, 2012 at 12:54 PM, J.G, the victim in Indictment 12-771 Counts I through V, came to the Wilbraham Police Department with his mother to speak about sexual assaults that had occurred in the past. J.G. disclosed that his family moved to Wilbraham in the summer of

1997. J.G. was approximately nine (9) years old and entering the third grade. J.G. tried out for a soccer team and met the defendant's son, Chris, at tryouts. Immediately after meeting Chris, J.G. began spending time at the Flood home in Wilbraham playing soccer, swimming and engaging in other play activities, all of which the defendant participated in. J.G. was also involved in Boy Scouts, as was the defendant, and their troops sometimes did activities together. J.G. stated that after being friends with Chris Flood for about one month, inappropriate things began to occur with the defendant. Initially the defendant would spy on J.G. while he was changing into his swimsuit and take photographs of him. He progressed to touching J.G.'s penis. J.G. also disclosed that while swimming in the pool the defendant would swim naked. He would swim next to J.G. so as if to get the child's hands to touch defendant's penis. The defendant would swim under J.G. and pull down his swim trunks. The defendant would fondle J.G.'s penis and testicles and also try to push his penis into J.G.'s "butthole". J.G. described an incident (uncharged as it occurred outside of this court's jurisdiction) when the defendant took J.G. and Chris to a beach. While there, J.G. needed to use the bathroom and the defendant picked J.G. up because he was too short to reach the urinal. The defendant held J.G.'s penis to "teach him" how to hold and shake his penis after urinating.

J.G. stopped spending time with the defendant until he was about 16 years old and developed an avid interest in cars. The defendant, being a very good mechanic, helped J.G. with his cars. While under the guise of helping with the car, the defendant would rub his penis against J.G.'s buttocks when he was bent over; brush his penis up against J.G.'s hand; grab J.G.'s penis with his hand and poke J.G. in the buttocks.

On June 15, 2012 A.W. (DOB [redacted]) entered the Wilbraham Police Department and requested to speak to an officer regarding a past sexual assault. A.W. stated that when he was

between the ages of 11 and 13 he was sexually assaulted by the defendant. The offenses occurred at A.W's house in Wilbraham and the Trinity Church in Springfield.

A.W. stated that he and his mother became friends with the defendant through the Trinity Church and Boy Scouts as the defendant was A.W.'s boy scout leader. A.W. stated that the defendant first started talking to him and other members of his boy scout troop about sexually inappropriate activities such as masturbating, sex and girls, and he would play dirty songs with sexual content.

The first time the defendant touched A.W. was when he stopped at A.W.'s house and his mother was not home. A.W. lived across the street from where the defendant was working at the time. The defendant started rough-housing and wrestling with A.W. While doing so, the defendant pulled down A.W.'s pants and underwear and fondled the victim's penis. This occurred on at least three occasions.

The defendant would also take A.W. swimming at Trinity Church in Springfield. He would make the boys change in front of him while he watched. After swimming the defendant would dry A.W. off and touch his legs and buttocks under his shorts and also touch his penis.

ARGUMENT

Mass. R. Crim. P. 9 (a)(3) states that "if a defendant is charged with two or more related offenses, either party may move for joinder of such charges. The trial judge shall join the charges for trial unless he determines that joinder is not in the best interests of justice". Two or more offenses are related offenses if they are based on the same criminal conduct or episode or arise out of a course of criminal conduct or series of criminal episodes connected together or constituting parts of a single scheme or plan. Mass. R. Crim. P. 9 (a)(1).

The offenses in Indictment 12-240 and 12-771 are related offenses within the meaning of Mass. R. Crim. P. 9 (a)(1) and should be joined for trial. The defendant participated in a series of criminal episodes that, despite slight factual variations, are sufficiently connected to support allowance of the Commonwealth's motion to join. In each of these incidents, the defendant befriended young boys who were age mates of his son. He fostered a relationship with each boy, making the child feel special and unique, insuring that the boys thought of him as a "cool adult". The defendant engaged in grooming these boys by breaking down their inhibitions about nudity and sexual stimulation and he ultimately sexually assaulted them. The defendant engaged in a common plan to prey upon young boys to whom he had easy access through his son; introduce them to sexual feelings and pleasures as an age when awareness of such feelings is beginning to emerge; and groom them until he could use them for his own sexual gratification and engage in conduct that constituted sexual assault. See **Commonwealth v. Mamay**, 407 Mass. 412, (1990) (joinder of six indictments alleging indecent assault and battery or rape by a doctor upon different female patients was permissible since offenses were series of criminal episodes which were part of scheme whereby defendant used his position of authority and trust to commit sexual crimes upon female patients, there was similarity in method of commission of crimes, and all offenses took place in same location); **Commonwealth v. Walker**, 442 Mass. 185 (2004) (In each episode the defendant brought women to his home, drugged them with a drink containing a sleep medication and then engaged in conduct that could be construed as a sexual assault or attempted sexual assault).

In the instant case, the similarity between the victims (all prepubescent male friends of the defendant's son between the ages of 9 and 11 when the abuse started); the manner and circumstances in which each had been engaged by the defendant (friends of his son invited to

spend time with defendant's family); and the manner in which the defendant abused them support a finding of common scheme and relatedness of offenses. See **Commonwealth v. Gaynor**, 443 Mass. 245, 248 (2005). See Also **Commonwealth v. Feijoo**, 419 Mass. 486, 494-495 (1995) (Offenses are related if the evidence "in its totality shows a common scheme and pattern of operation that tends to prove all the indictments").

The appropriateness of joinder often turns on whether evidence of the other crimes would be admissible in a separate trial of each indictment. **Commonwealth v. Gallison**, 383 Mass. 659, 672 (1981). Evidence of other criminal conduct, not admissible to prove propensity, may, for purposes of joinder, be used to show a common scheme or pattern of operation. **Commonwealth v. Feijoo**, *supra*. The Commonwealth submits that evidence supporting each indictment would constitute admissible other bad act evidence in the trial of each other indictment as each instance has a temporal and schematic nexus and shows a common scheme and pattern of conduct. The offenses against J.L. happened in a similar time frame to the offenses against J.G. and A.W., and the sexual abuse of all victims was by a similar method employed by the defendant. The Commonwealth submits that J.L. would be a witness in the trial of the indictments involving J.G. and A.W., as well as J.G. and A.W. being witnesses in the trial of the indictment involving J.L., regarding pattern of conduct on the part of the defendant. The circumstances of each of the charged offenses are sufficiently similar to show that the defendant was acting pursuant to a common scheme, and are relevant to the questions of intent and motive. **Commonwealth v. Gaynor**, *supra* at 248 ("There is no requirement that the circumstances of the cases be identical). The fact that not all of the offenses occurred in the same place does not change the analysis. See **Commonwealth v. Walker**, 442 Mass 185, 200 n.28 (2004) (Courts

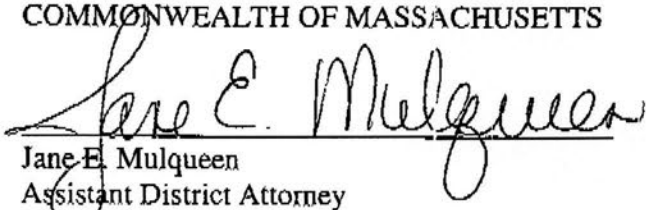
allow considerable differences with respect to...factors [such as time and location]and other factual circumstances).

The offenses alleged in all indictments are related offenses within the meaning of Mass. R. Crim. P. 9 (a)(1) and should therefore be joined for trial. Additionally, no prejudice to the defendant will result from joinder of these indictments. The fact that evidence of most of the offenses would be admissible at the trial of the other offenses defeats any claim that prejudice to the defendant would result from joinder. See **Commonwealth v. Rushworth**, 60 Mass. App. Ct. 145, 148 (2003). See Also **Commonwealth v. Gaynor**, *supra* ("The judge also considered whether proof of the defendant's guilt as to one offense might be used improperly to convict him of a second offense. He noted that much of the evidence in each case would be admissible in the other cases not only on the question of common scheme, but also as to the issues of the defendant's premeditation, his intent to kill and his motive, and correctly concluded that there was little chance of 'seepage...of evidence not otherwise admissible'"). Finally, joinder of thes offenses for trial will not foreclose or substantially impair the defendant's presentation of a particular defense. **Commonwealth v. Gallison**, *supra* at 672.

Based on the above facts and argument, the Commonwealth respectfully requests that this motion be ALLOWED.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS



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COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
Indictment Nos. 12-240
12-771

COMMONWEALTH)
)
V.)
)
STEPHEN FLOOD)

DEFENDANT'S OPPOSITION TO COMMONWEALTH'S MOTION TO JOIN INDICTMENTS UNDER MASSACHUSETTS RULE OF CRIMINAL PROCEDURE 9

The Commonwealth's motion should be denied because, under Rule 9(a)(1), the offenses alleged in No. 12-240 are unrelated to the offenses alleged in No. 12-771. The offenses are based on distinct, separate, acts, and they are not part of a single scheme or plan. Because only related offenses may be joined, the Commonwealth's motion should be denied.

COMMONWEALTH'S ALLEGATIONS

While the Commonwealth attempts to fit the offenses into the "related" category of Rule 9 by contending the offenses can be viewed as part of a single scheme or plan, the discovery provides little evidence of the required nexus and cohesion of repeated incidents. See Commonwealth v. Jacobs, 52 Mass.App.Ct. 38, 39 (2001). These cases not only lack factual similarity but also lack any showing of similarity of method used to commit the offenses to make joinder permissible.

The discovery belies the Commonwealth's contention that the alleged abuse constituted a single scheme or plan. The Commonwealth contends Mr. Flood "fostered a relationship with each boy, making the child feel special and unique, insuring that the boys thought of him as a 'cool adult'." It claims, in contradiction to the discovery, that he "engaged in grooming these boys by breaking down their inhibitions about nudity and sexual stimulation and he ultimately sexually assaulted them." Finally, it argues that Mr. Flood

"engaged in a common plan to prey upon young boys to whom he had easy access through his son."

Indictment number 12-240 alleges that the victim, J. L., met Mr. Flood's son on the school bus and became friendly with him. J. L. was about ten years old at the time. He began visiting the Flood home on Tinkham Road in Wilbraham. J. L. claims Mr. Flood would ask to see him out of his son's presence. He claims Mr. Flood began showing him pornographic books and then videos, used baby oil on him, and then began performing oral sex on him. Mr. Flood also allegedly put his finger in J. L.'s anus.

These alleged assaults all took place in the Flood home on Tinkham Road and in Mr. Flood's truck. Mr. Flood's son was not present during any of the alleged assaults. The alleged assaults occurred between 1997 when J. L. was about ten years old and 2002, when he began high school. J. L. is the only alleged victim who claims Mr. Flood told him he was special.

Indictment number 12-771 alleges two victims. The first, J. G., befriended Mr. Flood's son at soccer when he was about nine years old. J. G. claims that most of the assaults occurred in a swimming pool at the son's grandparents' home next door to the Flood home on Tinkham Road. These assaults took place in the presence of Mr. Flood's son. There were no private conversations between Mr. Flood and J. G.

J. G. claims that Mr. Flood, his son and he would be swimming in the pool and Mr. Flood would pull down J. G.'s swim trunks and attempt to put his finger in J. G.'s anus, and touch his penis. He also claims that Mr. Flood would take his own trunks off and swim next to him, trying to get J. G. to touch his penis. Mr. Flood's son was allegedly present at the pool and aware of this behavior.

J. G. also alleges abuse in the Flood home at a Halloween costume party when he was about thirteen years old. Mr. Flood, his wife, his son, J. G., and J. G.'s cousin were present. J. G. alleges that after Mr. Flood helped him put on a pull-up diaper in front of all these witnesses, he took J. G. to the bathroom and helped him urinate.

Finally, J. G. alleges that when he was about sixteen years old he would visit the Flood home to work on his car with Mr. Flood. While working on his car, Mr. Flood

allegedly rubbed his penis on J. G.'s buttocks while both were clothed, and put his crotch near J. G.'s hand. J. G. does not allege any oral sex.

J. G.'s allegations of abuse not only are factually different from J. L.'s in terms of place, the manner alleged is completely different. Where J. L. alleges being told he was special and abused in private, first being shown books, then videos, then rubbed with oil before Mr. Flood engaged in oral sex, J. G. alleges unsubtle removal of swim trunks in Mr. Flood's son's presence without ever reaching the point of oral sex.

The second alleged victim in No. 12-771 is A. W., who claims a completely different set of circumstances surrounding the abuse. A. W. does not claim to have befriended Mr. Flood's son, rather he says his mother and Mr. and Mrs. Flood were friendly through Boy Scouts and he was introduced to them through her when he was about eleven years old.

A. W. alleges that Mr. Flood worked at a towing company across the street from A. W.'s home on Bungalow Point in Wilbraham. Mr. Flood visited A. W.'s home and when A. W. indicated that his mother was not home, Mr. Flood began wrestling with him, pulled down A. W.'s pants and underwear and fondled his penis. A. W. claims Mr. Flood came to his home on two other occasions and behaved similarly.

A. W. also claims he was assaulted at the Trinity Church pool in Forest Park. A. W.'s mother encouraged him to go to the pool with Mr. Flood, his son and one of his son's friends. There, Mr. Flood allegedly slapped his buttocks and touched his crotch area while drying him.

The different facts and method alleged by A. W. further militates against being joined with No. 12-240. First, the facts are dissimilar. A. W. does not claim to be a friend of Mr. Flood's son. He was not "groomed" with books, videos or baby oil. Mr. Flood did not perform oral sex on him. The alleged abuse did not take place at Mr. Flood's home. Second, the facts belie the Commonwealth's contention that Mr. Flood engaged in a common scheme or pattern of operation.

The Commonwealth is attempting to fit three separate scenarios of alleged abuse into Rule 9's requirement of a "single scheme or plan" with the only common elements being that the alleged victims were about the same age and that they were not unknown to Mr. Flood.

Numbers 12-240 and 12-771 are not related offenses and therefore should not be joined under Rule 9(a)(3).

ARGUMENT

Only "related offenses" may be joined for trial. Related offenses are those that are 1) based on the same criminal conduct or episode or 2) arise out of a course of criminal conduct or series of criminal episodes connected together or constituting parts of a single scheme or plan. Rule 9(a)(1). The Commonwealth makes no argument, nor can it make an argument, that Numbers 12-240 and 12-771 are based on the same criminal conduct or episode. These two indictments are based on distinct acts. Because of the lack of similarity of method by which the Commonwealth contends these acts were perpetrated, joinder under the single scheme category of related offenses must also fail.

1. Indictment Numbers 12-240 and 12-771 Lack the Schematic Nexus Required for Joinder

Cases in which joinder has been allowed are very materially different from the indictments the Commonwelth seeks to join here. The evidence in these cases showed a pattern of operation that would tend to prove all the indictments. See Commonwealth v. Feijuo, 419 Mass.486, 494-95 (1995). In Commonwealth v. Mamay, 407 Mass.412, 415-17 (1990) six indictments were joined for trial. The method and nexus of the separate acts were strikingly similar. Each victim was a patient of the defendant doctor. Each victim was alone with the doctor in an examination room. Each victim was abused in the course of medical treatment. The doctor asked each victim about her sexual practices and committed unwanted sexual acts on the patient while engaging in lascivious banter.

In Commonwealth v. Feijuo, 419 Mass.486, 487-90 (1995) the indictments that were joined alleged a pattern of behavior that was virtually identical in all aspects. The defendant karate instructor led nine male students to believe that he was a "Ninja", highly skilled in karate, led each boy to believe he would become his protégé, pressured the boys to succeed by overcoming their fears, breaking through barriers to become gay, and thereby have sex with him.

In Commonwealth v. Ferraro, 424 Mass.87, 88-89 (1997) indictments were joined when seven boys between the ages of eleven and fifteen were sexually abused in the evening at the same location. The defendant wore a hooded sweatshirt and mask. He knocked each boy down and demanded money. He would then sexually assault them. He telephoned many of the boys on the first anniversary of the attack.

By comparison the incidents in No. 12-240 and 12-771 lack the nexus, cohesion, and similarity to warrant joinder. This case is more like Commonwealth v. Jacobs, 52 Mass.App.Ct.38 (2001) where joinder was denied. The Commonwealth attempted to join two complaints of impermissible sexual touching against a chiropractor. Both victims were patients undergoing treatment. Because of the lack of consistent method, the lack of temporal proximity, and lack of cross-admissibility of evidence, the court held that the claims were unrelated under Rule 9(a)(1).The Commonwealth has failed to show these indictments fall within the "single scheme or plan" category of Rule 9(a)(1).

2. Evidence in these Indictments would not be Cross-admissible

The Commonwealth contends that J. L. would be a witness in the trial involving J. G. and A. W. and vice-versa in an attempt to buttress its argument for joinder. This contention is not dispositive for joinder. Commonwealth v. Sylvester, 388 Mass.749, 757 (1983). Further, the lack of connectedness and absence of any markedly distinctive method of operation would weigh strongly against the admission of bad act evidence in either case. See Commonwealth v. Jacobs, 52 Mass.App.Ct.38 44 (2001).

Where, as here, the defendant has simply denied the charges, evidence of other offenses would not tend to prove an essential element of any charge. There is no question of identity, and none of the alleged victims can provide any direct corroborative evidence of the offenses committed against the other two.

The sole use of the purported bad act evidence would be to show a pattern of conduct. There is, however, no distinctive method of operation which would make pattern of conduct relevant. The Commonwealth could only use other bad acts for the prohibited purpose of proving Mr. Flood had a propensity to commit sexual crimes.

Here multiple offenses are alleged to have taken place at different locations involving three victims. All victims claim to know Mr. Flood through some child-related activity. Identity is not an issue. Mr. Flood's state of mind is not an issue. The critical issue at a separate trial for the offenses against any one victim will be whether the offenses actually occurred. Admission of offenses against another child could only tend to prove the defendant had a disposition to commit sexual offenses against children, which is unfairly prejudicial to Mr. Flood.

CONCLUION

Because Indictment Numbers 12-240 and 12-771 are "unrelated" under the "single scheme or plan" category of Rule 9(a)(1), the Commonwealth's motion to join these indictments should be denied.

Respectfully submitted,
STEPHEN FLOOD, Defendant
By his attorney,

Date: January 22, 2013

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CERTIFICATE OF SERVICE

I hereby certify that I delivered a copy of this motion in hand to Jane E. Mulqueen, ADA, 50 State Street, Springfield, MA 01103 on January 22, 2013.

James J. Bregianes