

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS.

SUPREME JUDICIAL
COURT No. FAR-26879

APPEALS COURT
No. 2016-P-1394

COMMONWEALTH

v.

SUMKIT GRACE

**DEFENDANT SUMKIT GRACE'S AMENDED
APPLICATION FOR FURTHER APPELLATE REVIEW**

The Defendant, Sumkit Grace, respectfully requests that this Honorable Court grant his Application for Further Appellate Review.

Further appellate review is warranted in this case by two fundamental errors that resulted in a miscarriage of justice and severe prejudice to Mr. Grace. The trial court first erred by joining two charges of indecent assault and battery on a person over fourteen years, involving two different victims, despite a lack of sufficient similarity between the cases and without considering that testimony from one case would not have been properly admissible in the other had they been tried separately.

This error was compounded by the second error: failing to instruct the jury concerning the use of evidence from one case and one complainant to decide the charges in the other case, including as evidence of the defendant's character or propensity to commit the crime charged.

Although the Appeals Court acknowledged this error, it declined to find a substantial likelihood of miscarriage of justice based largely on its own assessment of the credibility of the witnesses. It ignored the prejudicial effect that permitting the jury to consider "bad acts" evidence from one case in the other case as character and propensity evidence likely had, particularly where the outcome of the case rested almost entirely on the jury's assessment of the character and credibility of the defendant and complainants.

It is in the interests of justice to grant further review of these decisions, which also raise serious questions of public interest, including whether the failure to instruct the jury on the proper use of "bad acts" evidence against a defendant can ever not create a substantial likelihood of miscarriage of justice when a case depends almost entirely on the witnesses' credibility.

I. Statement of Prior Proceedings

On March 14, 2014, a Criminal Complaint issued against Mr. Grace in the New Bedford District Court charging him with two counts of indecent assault and battery on a person 14 or over, G.L. c.265, §13H, and one count of providing alcohol to a person under twenty-one, G.L. c.138, §34.¹ [R.9].² Those charges arose out of alleged conduct by Mr. Grace directed at the complainant “C.D.”³

On March 21, 2014, a second Criminal Complaint issued against Mr. Grace in the New Bedford District Court, charging him with one count of Indecent Assault and Battery on a person 14 or over, G.L. c.265, §13H, and one count of Open and Gross Lewdness, G.L. c. 272, §16. [R.21]. Those charges arose out of alleged conduct by Mr. Grace directed at the complainant “J.G.”, his daughter, on diverse dates between September 2012 and March 2014. [R.21].

²One of the indecent assault charges was dismissed at the close of the Commonwealth’s case on Defendant’s Motion for a Required Finding of Not Guilty. [R.2]. Grace admitted to sufficient facts on the count of providing alcohol to a person under twenty-one and that charge was continued without a finding.

² References to the Appeals Court Record Appendix are designated “R” followed by the page number. References to the trial transcript are designated “T” followed by the volume and page number. References to additional transcripts are designated as such in the text.

³ The complainants were minors at the time of the alleged events and at the time of trial and are referred to herein as “C.D.” and J.G. respectively.

The Commonwealth filed a Motion for Joinder of the two cases, which defense counsel opposed. [R.26; Joinder Hrg. 6-7]. Following a hearing, the Court allowed the Commonwealth's motion. [R.4,17]. Defense counsel renewed his objection to joinder at the start of trial. [T.1:21].

The joined cases were tried to a jury (Brackett, J. presiding) on April 11-13, 2016. [R.6-8]. The jury convicted Mr. Grace on one Count of Indecent Assault and Battery on a Person 14 or Over for events on December 31, 2013 related to C.D., [R.2], and on the Counts of Indecent Assault and Battery on a Person 14 or Over and Open and Gross Lewdness related to J.G. [R.14].⁴

Mr. Grace was sentenced to concurrent sentences of two and a half year in the Bristol County House of Correction, eighteen months served with the balance suspended, on each of the charges. [R.12,24]. Mr. Grace timely filed a Notice of Appeal. [R.10,25].

Appellant's Brief was filed on or about on or about March 10, 2017. Appellee's Brief was filed on or about October 27, 2017. Following a hearing, the Appeals Court issued its Memorandum and Order, Pursuant to Rule 1:28 ("Order") affirming the trial court result on May 16, 2019. [Addendum, p.23]. Appellant filed a Motion for Reconsideration in the Appeals Court on May 30, 2019.

⁴ Mr. Grace also was charged with one count of witness intimidation, G.L. c.268, §13B. [R.21]. Defendant's Motion for a Required Finding was allowed on this charge at the close of the Commonwealth's case. [T.2:84].

II. Statement of Facts

Mr. Grace was convicted on separate charges of indecent assault and battery on a person over fourteen years of age against his daughter, J.G., and her friend, C.D., and on a charge of open and gross lewdness with respect to J.G. [R.2,14].

A. Charges Against Grace Related to C.D.

C.D. testified that on December 31, 2013, when she was fifteen, she went to her friend J.G.'s house for a sleepover and to celebrate New Year's.

[T.1:143,147,149]. At one point in the evening, C.D. went into the kitchen while J.G. was in the bathroom. [T.1:153]. Mr. Grace followed her into the kitchen.

[T.1:153]. C.D. was "sitting on one of the stools at the table," and Mr. Grace "put his hand under [her] shirt and into [her] bra, took out [her] boob." [T.1:154]. This lasted for one to two minutes. [T.1:155]. C.D. then got up to get water and he "pinned [her] to the fridge," put his hand down her pants, and touched her buttocks. [T.1:155]. This lasted for approximately one minute. [T.1:155].⁵

⁵ C.D. also testified concerning other alleged "bad acts" by Mr. Grace after December 31, 2103, including that on March 9, 2014, Grace was driving her to her cousin's house. [T.1:158-159]. During the drive, Mr. Grace was touching C.D.'s leg on her upper thigh, [T.1:160], and asked C.D. if they had time to stop and "if I would suck his dick or if he could chomp my box." [T.1:159].

The Commonwealth also played a police interview of Mr. Grace for the jury. [T.2:79]. In that interview, he stated with respect to events on December 31, 2013 that:

A: You know, its New Year's Eve, we all said, you know, Happy New Year's, you know, and I grabbed her ass, you know, just like, you know, hugged her up 'cause she was like, you know, standing next to me and my daughter and so we gave – we gave like a group hug, you know, that's [Indiscernible]—

Q: And you purposely grabbed her by the ass to hug her?

A: Well, we – you know, picked her up in the air, you know, and said Happy New Year's.

[Grace Int. 26-27].

B. Charges Against Grace Related to J.G.

The charges against Mr. Grace related to J.G. were alleged to encompass various acts over diverse dates. J.G. testified that from her fourteenth birthday⁶ to

⁶ At the start of trial, the Court ordered that evidence of Mr. Grace's conduct toward J.G. be limited to the time period after her fourteenth birthday, [T.1:13-16, 128], but at trial, J.G. testified that incidents where Mr. Grace inappropriately touched her dated back to when she was "probably around eight years old." [T.1:197]. At the close of the evidence, the jury was instructed that:

you've heard mention of acts allegedly done to [J.G.] prior to the dates alleged in the complaint. Specifically, prior to September 26, 2012. You cannot consider such evidence as proof that the Defendant has a propensity to commit the crimes charged or has evidence of bad character. You may consider such evidence to the extent you find it relevant solely on the issue of whether the Defendant acted

March 2014, there were occasions where Mr. Grace “would try to reach up my shirt and play with my breasts.” [T.1:201]. In addition, on one occasion J.G. had a note from her boyfriend in her pocket, which Grace saw. [T.1:202]. He “went to go reach for the note but [J.G.] kinda kept it in [her] pocket.” [T.1:202]. The two struggled over the note and Mr. Grace’s “hands were down [J.G.’s] pants, above the underwear,” in the “vaginal region.” [T.1:203]. Mr. Grace’s hand remained there for under a minute until J.G. gave him the note. [T.1:204]. Additionally, Mr. Grace “flicked [J.G.’s] nipple once.” [Grace Int. 62].⁷

J.G. also testified that Grace exposed his penis in front of her “probably around 50” times, and that he had masturbated in front of her. [1:205-206, 208].

C. The Commonwealth’s Motion for Joinder of the Cases.

The Commonwealth moved to join the two cases, asserting that joinder was proper because the “trial of the second case would necessarily include evidence elicited in the trial of the first case, as evidence of the prior bad acts of the

intentionally and not because of some mistake, accident, or other innocent reason.

[T.3:36].

⁷Mr. Grace testified at trial that this incident occurred during an argument between Grace and J.G. concerning a shirt worn by J.G. that Grace felt was inappropriate, and was an accident. [T.2:108-109].

Defendant, to establish his state of mind . . . toward the victims.” [R.28]. Defense counsel objected to joinder at the hearing on the motion and again at trial. [Joinder Hrg. 6-7, T.1:21]. The court allowed the motion and the cases were tried together.

D. Closing Statements

In his closing argument, the Prosecutor asserted that the credibility of the defendant was an important issue in the case. [T.3:24-26, 29]. Referencing Mr. Grace’s testimony concerning the various charged and uncharged incidents that the Commonwealth introduced at trial, [T.3:25-27] the Prosecutor told the jury: “I ask you to consider that when assessing Mr. Grace’s credibility.” [T.3:27]. He went on to argue that all of the evidence from the two cases should be considered together to decide Mr. Grace’s guilt, stating:

Do you believe the testimony of the two girls or the excuses that this man came up with? And I’d ask you to consider all the evidence together and come to the true and just verdict and convict this man of all three charges.

[T.3:30].

III. Issues for which Further Appellate Review is Sought.

The Appellant seeks further appellate review with respect to two issues:

1. Whether it was an abuse of discretion to join the separate Complaints against Mr. Grace for trial, where (1) the assaults did not occur in the same manner or share other common characteristics sufficient to support a finding that the cases were related, (2) the Court did not consider whether testimony from one case would have been admissible in the other case had the cases been tried separately, and (3) the Commonwealth's stated reason for seeking to join the cases was to use evidence from one case "as evidence of the prior bad acts of the Defendant, to establish his state of mind . . . toward the victims." [R.28]. These circumstances raise important questions whether it was an abuse of discretion to join the cases that it is in the interests of justice and the public interest that this Court resolve.

2. Whether, after allowing joinder of the two Complaints for trial, the trial court's failure to give a limiting instruction on the use of evidence from one case in the other case, and specifically its failure "to instruct the jury to not use evidence of one of the charged offenses as evidence of the defendant's propensity to commit the other offense," [Order, p. 3; Add. 25], created a substantial likelihood of miscarriage of justice, particularly since the only evidence was testimony and statements of the defendant and victims, making the credibility of those witnesses the key issue in the case.

IV. Argument in Favor of Further Appellate Review

A. The two Complaints against Mr. Grace were improperly joined.

This Court should grant further review of the decision to join the charges against Mr. Grace. “The propriety of joinder is a matter within the sound discretion of the trial judge,” Commonwealth v. Sullivan, 436 Mass. 799, 803 (2002), but the judge's decision will be reversed if there has been an abuse of that discretion.

Commonwealth v. Allison, 434 Mass. 670, 679 (2001), Commonwealth v. Walker, 442 Mass. 185, 199 (2004). Abuse of discretion exists where “the prejudice resulting from a joint trial is so compelling that it prevent[ed][the defendant] from obtaining a fair trial.” Commonwealth v. Clarke, 418 Mass. 207, 217 (1994).

Massachusetts Rule of Criminal Procedure 9(a)(3) provides that:

[i]f a defendant is charged with two or more related offenses . . . [t]he trial judge shall join the charges for trial unless he determines that joinder is not in the best interests of justice.

Key is the requirement that the offenses be “related.” This Court has said that offenses are related if “the evidence in its totality shows a common scheme and a pattern of operation that tends to prove all the indictments.” Commonwealth v. Feijoo, 419 Mass. 486, 494 (1995).

Here, there was no common scheme or pattern and the acts themselves were not the same except in the broadest sense. Instead, the Appeals Court found commonality based primarily on the gender and age of the complainants, the fact

that they were friends and went to school together, and because the alleged crimes occurred in Mr. Grace's home. (Order, p. 2-3).

While these factors are ones a court may consider when deciding whether to join two cases, see Commonwealth v. Silva, 93 Mass. App. Ct. 609, 618 (2018), they do not alone establish a common scheme or pattern. Other than testimony by both complainants that Mr. Grace had grabbed their breast during the events for which he was charged, there was no similarity between the cases and no basis for finding the cases were related. Commonwealth v. Brusgulis, 406 Mass. 501, 507 (1990) (finding commonality based on factors "characteristic of numerous assaults on women" and that were "less than unique or distinct" . . . "would be unfair to defendants and inconsistent with our well-established law on the use of evidence of prior bad acts").

In this regard, cases have noted that an important consideration is whether, if tried separately, "evidence pertaining to one victim would have been allowed in a trial based on the complaint of the other victim." Commonwealth v. Souza, 39 Mass. App. Ct. 103, 110-112 (1995). Neither the trial court nor Appeals Court considered this issue, even though it is unlikely testimony from one case would have been admissible in the other had the cases been tried separately.

Moreover, both courts ignored that the Commonwealth's stated reason for seeking joinder of the cases was that "trial of the second case would necessarily

include evidence elicited in the trial of the first case, as evidence of the prior bad acts of the Defendant, to establish his state of mind . . . toward the victims,” [R.28], and that the Commonwealth used the testimony in precisely that manner. [T.3:30 “Do you believe the testimony of the two girls? . . . I’d ask you to consider all the evidence together and come to the true and just verdict and convict this man of all three charges”].

This use of testimony from the separate cases was improper. Feijoo, 419 Mass. at 494 (“evidence at each trial of the defendant's conduct charged in the indictments not then being tried would be inadmissible if its only relevance to the case on trial would be to show the defendant's criminal disposition”). By allowing the jury to use the evidence from the two cases in this manner, there was a significant risk that “because a defendant appears to be a bad man capable of, and likely to commit, such a crime as that charged, a jury might be led to dispense with proof beyond a reasonable doubt that he did actually commit the crime charged.” Id. Because this risk was ignored by both the trial court and the Appeals Court, this Court should grant further appellate review with respect to this issue.

B. The failure to give a limiting instruction on the use of evidence from one case in deciding the defendant's guilt in the other case created a substantial likelihood of miscarriage of justice.

Even if joinder of the Complaints against Mr. Grace was not on its own reversible error, the failure to instruct the jury concerning the allowable use of the evidence from the separate charges was such an error.

As the Appeals Court recognized:

evidence supporting the charges pertaining to one victim was simultaneously other bad act evidence of the charges pertaining to the other victim. This overlap could have been addressed by a clear instruction to the jury on how to parcel evidence but the judge did not so "instruct the jury with [such] particular care."

Addendum, p. 26 (quoting Commonwealth v. Mills, 47 Mass. App. Ct. 500, 505 (1999)).

In Mills, the Appeals Court addressed a similar situation, concluding that the failure to give such instructions created a substantial likelihood of miscarriage of justice, and noting that "it was quite important that the judge should instruct the jury of the limited purposes for which such evidence could properly be considered." Mills, 47 Mass. App. Ct. at 506-507. See also Brusgulis, 406 Mass. at 506, n.7 (reversing conviction where judge permitted evidence of prior assaults; if judge permits introduction of bad acts evidence, "he must give proper limiting instructions to the jury"); Commonwealth v. Facella, 478 Mass. 393 (2017) (no error in admission of bad acts evidence where "the judge . . . gave the jury forceful

limiting instructions on the narrow purpose for which they could consider” that evidence).

Here, the judge gave the jury no instructions at all concerning the separate charges and evidence, much less any instruction that testimony by one complainant could not be considered in deciding Mr. Grace’s guilt with respect to the other, as evidence of his character or to find that he had a propensity to commit the alleged acts. This failure allowed the jury to use the evidence for such improper purposes, and created a “substantial risk of miscarriage of justice.”⁸ Commonwealth v. Cancel, 394 Mass. 567, 568 (1985).

Yet despite recognizing the error, the Appeals Court found no substantial likelihood of miscarriage of justice because “the Commonwealth had a strong case, and the judge’s other instructions served to mitigate the error.” [Order, p. 4, Add. 26]. This conclusion was incorrect and should be reviewed in two respects.

First, the Commonwealth’s case relied almost entirely on the testimony of the complainants, on the jury’s assessment of their credibility, and its assessment of the credibility and character of Mr. Grace. In that situation, permitting the jury to consider “bad acts” evidence from the two cases to determine the truthfulness and character of the witnesses and defendant was particularly likely to be

⁸ Because the failure to give such instructions was not objected to at trial, the error was reviewed to determine whether it created a “substantial risk of miscarriage of justice.” Cancel, 394 Mass. at 568.

prejudicial. See Commonwealth v. Clark, 23 Mass. App. Ct. 375, 381-82 (1987) (substantial risk of miscarriage of justice because improperly admitted evidence enhanced complaining witness's credibility).

Second, the Appeals Court identified three instructions that it concluded "properly alerted the jury to proper use of the bad act evidence" and mitigated the error: instructions (1) "on unanimity," (2) on the jury's "duty to separately evaluate the evidence in each of the offenses," and (3) "against the use of the other prior bad act evidence that came in at trial as propensity evidence for the charged conduct." [Order, p. 4].

These findings were erroneous, as the instructions in question either (1) were never actually given to the jury, or (2) could not have alerted the jury "to proper use of bad act evidence" when viewed in context. Thus, while the judge did instruct the jurors that their verdict must be unanimous, [Tr. 3:42-44], the requirement of unanimity simply had no bearing on what evidence the jury could consider. To the contrary, the instructions left the jury free to consider evidence from one case as propensity and character evidence in determining Mr. Grace's guilt in the other.

The second finding -- that the judge instructed the jury on "their duty to separately evaluate the evidence in each of the offenses" -- simply has no support in the record. [T.3:30-44, Add. 33]. The nearest the judge came to this issue was an

instruction concerning the counts related to J.G. which were alleged in the Complaint to have occurred on various dates. There, the judge instructed the jury that it must find “that the Commonwealth has proved beyond a reasonable doubt that the Defendant committed the offense . . . on at least one of these specific occasions.” [T.3:42]. This instruction did not address what evidence the jury could consider, or how evidence related to one complainant could be used in the other case, and so could not have mitigated the court’s error.

Finally, the Appeals Court found that “the judge instructed the jury against the use of other prior bad acts evidence that came in at trial as propensity evidence for the charged conduct.” [Order, p.4]. Again, this finding is not supported by the record. While evidence about numerous other alleged “bad acts” by Mr. Grace before and after the events charged in this case was admitted during the trial, no general instruction was given to the jury on the permissible use of this evidence. The *only* instruction concerning bad acts evidence was that jurors could not consider “acts allegedly done to [J.G.] . . . prior to September 26th of 2012,” her fourteenth birthday, “as proof that the Defendant has a propensity to commit the crimes charged or as evidence of bad character.” [Tr.3-36].

Without a general instruction on the use of bad acts evidence, there is no reasonable way to extrapolate that the jury understood that bad acts evidence generally, and the testimony of each complainants specifically, could not be used

as character or propensity evidence in the other case. To the contrary, the reasonable inference the jury would have drawn from being told that it may not consider one specific category of bad acts evidence for a particular purpose, but not being told the same as to other bad acts evidence, was that it may use that other evidence for such a purpose. Compare Commonwealth v. Crayton, 470 Mass. 228, 251(2014) (while courts “generally presume that a jury understand and follow limiting instructions” on bad acts evidence, “we cannot so easily presume this to be true where the limiting instruction regarding the “bad acts” evidence effectively told the jury not to consider the evidence with respect to issues in dispute and to consider it only with respect to issues not in dispute. . . the danger is great that a jury would make the powerful natural (and forbidden) inference”).

Because the Appeals Court’s reasons for denying relief from the errors in this case are not supported by the law or the factual record, this Court should review whether, viewing “the case as a whole,” there is “uncertainty that the defendant’s guilt has been the fairly adjudicated.” Commonwealth v. Chase, 433 Mass. 293, 299 (2001). Because the primary evidence for the charges against the defendant was the testimony of the two complainants, and the outcome of the case depended heavily on an assessment of the complainants’ and the defendant’s credibility, the Court should find that the errors created a substantial risk of miscarriage of justice requiring reversal. See Commonwealth v. Clark, 23 Mass.

App. Ct. 375, 381-82 (1987) (substantial risk of miscarriage of justice because improperly admitted evidence enhanced complaining witness's credibility).

V. Conclusion

For these reasons, this Honorable Court should allow the Appellant's Motion for Further Appellate Review.

Respectfully submitted,
By the Appellant
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Dated: June 6, 2019

Certificate of Compliance

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CERTIFICATE OF SERVICE

I, Brad A. Compston, hereby certify that on June 6, 2019, I filed the attached documents through the Electronic Filing Service Provider (Provider) for electronic service to the following registered Users:

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ADDENDUM

Addendum Table of Contents

	<u>Page</u>
Rescript and Memorandum and Order Pursuant to Rule 1:28	23
Trial Transcript, Volume 3, pages 30-45.	33

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 16-P-1394

COMMONWEALTH

vs.

SUMKIT GRACE.

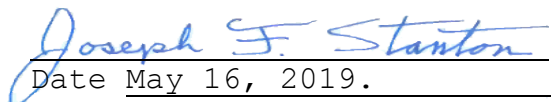
Pending in the New Bedford District

Court for the County of Bristol

Ordered, that the following entry be made on the docket:

Judgments affirmed.

By the Court,

, Clerk
Date May 16, 2019.

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

16-P-1394

COMMONWEALTH

vs.

SUMKIT GRACE.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A jury convicted the defendant, Sumkit Grace, of two counts of indecent assault and battery on a person over fourteen years of age (one involving his daughter, J.G., and one involving his daughter's friend, C.D.), G. L. c. 265, § 13H; and one count of open and gross lewdness, G. L. c. 272, § 16.¹ On appeal, the defendant contends: (1) the judge abused her discretion in joining the charges; (2) the judge erred in not instructing the jury on using prior and subsequent bad act evidence for the various charges; (3) the judge improperly admitted prior and

¹ The Commonwealth also charged the defendant with additional charges of another count of indecent assault and battery on a person over fourteen years of age, delivering liquor to a person under age twenty-one, and witness intimidation. The judge allowed the defendant's motion for required findings of not guilty on the additional indecent assault and battery and witness intimidation charges. The judge continued without a finding the charge of delivering liquor.

subsequent bad act evidence; and (4) his trial counsel was prejudicially ineffective. We affirm.

Discussion. 1. Joinder. We review claims of misjoinder for an abuse of discretion. See Commonwealth v. Clarke, 418 Mass. 207, 217 (1994). To prevail, the defendant must show "that the offenses were unrelated, and that prejudice from the joinder was so compelling that it prevented him from obtaining a fair trial." Commonwealth v. Pillai, 445 Mass. 175, 180 (2005), quoting Commonwealth v. Gaynor, 443 Mass. 245, 260 (2005). Whether charges involving multiple victims of sexual assault are related depends on "whether the victims were of similar age and gender, or shared other characteristics; the proximity in time of the assaults; and whether there were similarities in the details of the crimes -- for example, in terms of location, the manner in which the defendant gained access, or the acts themselves." Commonwealth v. Silva, 93 Mass. App. Ct. 609, 618 (2018).

We are satisfied these factors were met in the context of this case. Here, both victims were teenage girls who attended the same high school and were good friends. The defendant, therefore, had virtually equal access to both girls by virtue of his role as a parent of one of the two friends. The assaults occurred mostly in the same place (his home) and around the same time period (the girls' early high school years). The assault

of his daughter's friend arose at least in part out of his relationship to his daughter. Accordingly, the judge did not abuse her discretion in joining the two cases for trial.

2. Jury instructions. While the defendant correctly asserts the judge erroneously failed to instruct the jury to not use evidence of one of the charged offenses as evidence of the defendant's propensity to commit the other offense, we are not persuaded that the error created a substantial risk of a miscarriage of justice.

A jury may not use "'other bad acts' evidence" as proof of "the defendant's bad character or propensity to commit the crimes charged." Commonwealth v. Crayton, 470 Mass. 228, 249 (2014). Whenever a jury hears such evidence, the judge must "instruct the jury with particular care what to do in order to avoid diversionary misuse of the material." Commonwealth v. Mills, 47 Mass. App. Ct. 500, 505-506 (1999). Because the charges involving the two separate victims were joined, evidence supporting the charges pertaining to one victim was simultaneously other bad act evidence of the charges pertaining to the other victim. This overlap could have been addressed by a clear instruction to the jury on how to parcel evidence but the judge did not so "instruct the jury with [such] particular care." Id.

In the absence of an objection, however, we must determine whether the omission "created a substantial risk of a miscarriage of justice." Commonwealth v. McCray, 93 Mass. App. Ct. 835, 845-846 (2018). We are tasked to "review the evidence and the case as a whole, considering the strength of the Commonwealth's case, as well as the nature and significance of the alleged errors," and reverse only when "we are left with uncertainty that the defendant's guilt has been fairly adjudicated." Commonwealth v. Chase, 433 Mass. 293, 299 (2001). We are left with no such uncertainty here. The Commonwealth had a strong case, and the judge's other instructions served to mitigate the error.

Here, both victims gave unequivocal testimony concerning the offenses perpetrated on them. The defendant also gave a statement to the police, which was played to the jury, in which he admitted to grabbing C.D.'s buttocks and flicking his daughter's nipple, and the judge instructed the jury on unanimity and their duty to separately evaluate the evidence in each of the offenses. Further, the judge instructed the jury against the use of the other prior bad act evidence that came in at trial as propensity evidence for the charged conduct. The judge's instruction in this other context properly alerted the jury to proper use of the bad act evidence.

3. Remaining claims. a. Admission of other bad act evidence. The defendant raises a separate challenge to the admission of the other bad act evidence.² This claim also lacks merit, as the evidence was properly admitted to establish opportunity and "lack of mistake" when committing the sexual assaults. Commonwealth v. Vera, 88 Mass. App. Ct. 313, 321 n.5 (2015).

b. Improper police testimony. We also see no merit to the defendant's claim that in the recorded police interrogation played for the jury, the police accused him of lying and having inculpatory evidence beyond what was before the jury. While such statements could be problematic, Commonwealth v. Amran, 471 Mass. 354, 360 (2015), our review of the transcript of this interrogation does not reveal any such statements.

c. Other alleged assaults on J.G. The defendant also challenges J.G.'s testimony about assaults committed outside the time period named in the complaint.³ J.G. referred to this conduct only once, the judge instructed the jury that they could

² Specifically, Grace complains about C.D.'s claim that on March 9, 2014, Grace asked "if [she] would suck his dick or if he could chomp on [her] box" while he touched her leg and upper thigh. The Commonwealth also introduced statements Grace made to the police in which he stated that "there's [sic] creepy old guys out there, dirty old men, you know, they'll tell you, you know, you can suck my dick, do all this, that and the other thing."

³ The complaint alleged inappropriate contact on "diverse dates and times," after J.G.'s fourteenth birthday.

not use such testimony as propensity evidence, and we presume the jury to abide by the judge's instruction. Commonwealth v. Johnston, 467 Mass. 674, 692 (2014). We discern no prejudice.

d. C.D.'s testimony regarding a second indecent assault and battery charge. The defendant's challenge to the admission of C.D.'s testimony regarding a separate indecent assault and battery that resulted in a required finding of not guilty is also unavailing. At the time, the evidence was properly admitted in support of one of the charges in the complaint, and, once the judge removed the charge from the jury's consideration, he properly instructed the jury to confine themselves to the remaining charges. In any event, this evidence was admissible to show lack of mistake for the remaining charge involving C.D. See Vera, 88 Mass. App. Ct. at 321 n.5.

e. Struck testimony. The defendant claims he was prejudiced by the admission of inadmissible first complaint testimony even though the judge struck the evidence and instructed the jury to disregard it. We presume the jury to have followed the judge's instructions to disregard a witness's testimony, see Silva, 93 Mass. App. Ct. at 615, and we see no extraordinary circumstances that would cause us to conclude otherwise. See id.

4. Ineffective assistance of counsel. The defendant contends, for the first time on appeal, that his trial counsel

was prejudicially ineffective for failing to object to the admission of other bad act evidence, for failing to object to the prosecutor's mention of C.D.'s testimony regarding the indecent assault and battery charge that did not go to the jury, and for failing to request an instruction on separating the evidence for each charge. We disagree. Of all the evidence the defendant now challenges, trial counsel only failed to object to J.G.'s testimony about the assaults before her fourteenth birthday and the admission of the recorded interrogation. Trial counsel was not ineffective in either scenario.

To prevail on this claim, the defendant must show that his "attorney's performance fell measurably below that which might be expected from an ordinary fallible lawyer and . . . [that] such ineffectiveness has likely deprived the defendant of an otherwise available substantial defense." Commonwealth v. Seino, 479 Mass. 463, 472 n.12 (2018), citing Commonwealth v. Saferian, 366 Mass. 89, 96-97 (1974). However, counsel is never ineffective for failing to raise a futile objection, see Commonwealth v. Boria, 460 Mass. 249, 253 (2011), or one that "would not have accomplished anything for the defense." Commonwealth v. Connolly, 454 Mass. 808, 829 n.24 (2009).

Here, an objection to the police recording would have been futile because the defendant's statements were all admissible hearsay, and the judge clearly instructed the jury that the

police officers' questions were not evidence. Similarly, an objection to J.G.'s impermissible testimony would not have accomplished anything for the defense given how brief the statement was and the judge's proper limiting instruction.

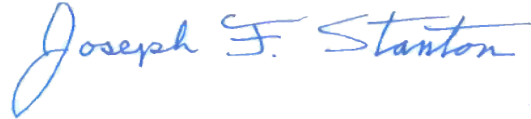
Where the prosecutor's references to C.D.'s testimony in closing argument were not improper, counsel was not ineffective for failing to object to it. Here, the prosecutor properly argued the "testimony submitted at trial and its logical conclusions." Commonwealth v. Freeman, 430 Mass. 111, 118 (1999). Furthermore, the prosecutor only used that testimony to show lack of mistake and the defendant's state of mind, which are proper uses for other bad act evidence. Vera, 88 Mass. App. Ct. at 321 n.5.

Finally, even if counsel should have requested that the judge give an instruction on separating the evidence of the various charges, we discern no resulting prejudice. As we noted earlier, the Commonwealth's case was sufficiently strong such that counsel's mishap was not "likely to have influenced the jury's conclusion." Commonwealth v. Silva, 455 Mass. 503, 526

(2009), quoting Commonwealth v. Wright, 411 Mass. 678, 682
(1992).

Judgments affirmed.

By the Court (Green, C.J.,
Hanlon & Maldonado, JJ.⁴),



Clerk

Entered: May 16, 2019.

⁴ The panelists are listed in order of seniority.

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS.

NEW BEDFORD DISTRICT COURT
DOCKET NO: 1433CR1508
1433CR1620

COMMONWEALTH

)

)

JURY TRIAL

V.

)

April 13, 2016

)

SUMKIT GRACE

)

Before the Honorable Cynthia Brackett

APPEARANCES:

For the Commonwealth:

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1 | there isn't any type of scientific DNA, for example, evidence.
2 | It happened in a living room, years ago. People -- At least
3 | most people, don't have security footage in their kitchen.
4 | They don't have security footage in their cars. It's not audio
5 | recorded. So what we do have are two now 17-year-old girls,
6 | one this man's daughter, the other his daughter's friend, who
7 | came in and said "This man did this to me." And I would
8 | suggest to you the only time that I saw them even make any type
9 | of eye contact or even look at him was when I asked them to
10 | identify him. Otherwise, there were blinders on. They weren't
11 | looking over towards this man. Courtney was practically hiding
12 | behind this wall right here. And I would ask you to consider
13 | that when assessing the overall credibility. Do you believe
14 | the testimony of the two girls or the excuses that this man
15 | came up with? And I'd ask you to consider all the evidence
16 | together and come to the true and just verdict and convict this
17 | man of all three charges. Thank you.

18 | THE COURT: All right. Thank you, counsel.

19 | **JURY CHARGE**

20 | THE COURT: All right. Members of the jury, you're now
21 | about to begin your final duty, which is to decide the fact
22 | issues in this case. And I'm now going to instruct you on the
23 | law.

24 | It was obvious to me throughout the trial that you
25 | faithfully discharged your duty to listen carefully to all the

1 evidence and to observe each of the witnesses. I'm now gonna
2 ask you just to give me that same close attention as I instruct
3 you on the law.

4 My function as the judge has been to see that the trial
5 was conducted fairly, orderly and efficiently, and it was my
6 responsibility to rule on what you may consider as evidence and
7 to instruct you on the law that applies to this case. It's
8 your duty as jurors to accept the law as I state it to you.
9 You should consider all my instructions as a whole. You may
10 not ignore any instruction or give special attention to any one
11 instruction. You must follow the law as I give it to you
12 whether you agree with it or not.

13 Now, your function as the jury is to determine the facts
14 of the case and you are the sole and the exclusive judges of
15 the facts. You alone determine what evidence to accept, how
16 important any evidence is that you do accept, and what
17 conclusions to draw from all the evidence. You must apply the
18 law as I give it to you to the facts as you determine them to
19 be in order to decide whether the Commonwealth has proved the
20 Defendant guilty of these charges.

21 You should determine the facts based solely on a fair
22 consideration of the evidence. You're to be completely fair
23 and impartial and you're not be swayed by prejudice or by
24 sympathy, by personal likes or dislikes toward either side.
25 You're not to allow yourselves to be influenced because the

1 offenses charged are popular or unpopular with the public.
2 You're not to decide this case based on anything you may have
3 read or heard outside of the courtroom. You're not to engage
4 in any guesswork about any unanswered questions that remain in
5 your mind or to speculate about what the real facts might or
6 might not have been. You shouldn't consider anything that I
7 have said or done during the trial, in ruling on motions or
8 objections, or any questions I posed to witnesses, or in
9 setting forth the law in these instructions as any indication
10 of my opinion as to how you should decide the Defendant's guilt
11 or innocence. If you believe that I have expressed or hinted
12 at an opinion about the facts of this case, please disregard
13 it. I have no opinion about the facts or what your verdict
14 ought to be. That's solely and exclusively your duty and your
15 responsibility. In short, you're to confine your deliberations
16 to the evidence and nothing but the evidence.

17 Now, it was the duty of both of the lawyers in this case
18 to object when the other side offered evidence which that
19 lawyer believed was not admissible under our rules of evidence.
20 And they also had an obligation to ask to speak to me over at
21 the sidebar about questions of law, which the law requires me
22 to rule on out of your hearing. The purpose of such objections
23 and rulings isn't to keep relevant information from you. It's
24 actually just the opposite. It's to make sure that what you
25 hear is relevant to the case and that the evidence is presented

1 in a way that gives you a fair opportunity to evaluate its
2 worth. You shouldn't draw any inference, favorable or
3 unfavorable, to either attorney or his client for objecting to
4 proposed evidence or asking you to make such rulings. That's
5 the function and the responsibility of the attorneys in this
6 case.

7 Now, you're to decide what the facts are solely from the
8 evidence admitted in this case and not from any susp -- not
9 from suspicion or conjecture. The evidence consists of the
10 testimony of the witnesses as you recall it and any documents
11 that were received into evidence as exhibits. Of course, the
12 quality or strength of the proof is not determined by the sheer
13 volume of evidence or the number of witnesses. It's the weight
14 of the evidence, it's strength intending to prove the issue at
15 stake that is important. You might find that a smaller number
16 of witnesses who testified to a particular fact are more
17 believable than a larger number of witnesses who testified to
18 the opposite.

19 Some things that occur during a trial are not evidence and
20 you may not consider them as evidence in deciding the facts of
21 the case. The complaint itself is not evidence. A question
22 put to a witness is never evidence. Only the answers are
23 evidence. Similarly, you heard the audio of the interview of
24 the Defendant at the police station. The questions posed to
25 him, any statements made by the officers, that's not evidence.

1 The answers that the Defendant gave to the police with regard
2 to those questions that were posed to him is evidence. Also,
3 you may not consider any answer that I struck from the record
4 and told you to disregard. Do not consider such answers. You
5 may not consider any item that was marked for identification
6 but was never received in evidence as an exhibit. Anything
7 that you may have seen or heard when the court was not in
8 session is not evidence. Now I know there were some diary
9 entries that were marked for identification. Those were not
10 entered as an exhibits. But counsel certainly brought out what
11 was contained within those entries and argued to you in closing
12 and you can certainly consider that.

13 Now, the opening statements and the closing arguments of
14 the lawyers are not a substitute for the evidence. They're
15 only intended to assist you in understanding the evidence and
16 the contentions of the parties. My instructions, anything that
17 I've said in passing during the trial are not evidence. And if
18 your memory of the testimony differs from the attorneys, you're
19 to follow your own recollection. Consider the evidence as a
20 whole. Don't make up your mind about what your verdict should
21 be and after you've gone to the jury room to decide the case
22 and you and your fellow jurors have discussed the evidence.
23 Keep an open mind until then.

24 All right. Now, there are two types of evidence that you
25 may use to determine the facts of a case. There's direct

1 evidence and there's circumstantial evidence. You have direct
2 evidence where a witness testifies directly about the fact
3 that's to be proved based on what he claims to have seen or
4 heard or felt with his own senses and the only question is
5 whether you believe the witness. You have circumstantial
6 evidence where the witness can't testify directly about the
7 fact that's to be proved but you're presented with evidence of
8 other facts and you're asked to draw reasonable inferences from
9 them about the fact which is to be proved.

10 So let me give an example. You go home after being at
11 work all day. You have a friend who's staying at your house
12 and your friend says to you, "Geez while I was at the house
13 today I saw the mailman come to the house. He walked up the
14 walkway and put the mail in the mailbox." Well, that's direct
15 evidence that the mailman was there. Your friend saw the
16 mailman delivering the evidence -- I mean, the mail.

17 On the other hand, the n -- following day after you've
18 already taken the mail out of the mailbox the day before, you
19 go home, there's no one staying at your house. But you go to
20 your mailbox and again there's mail in it. Although no one
21 actually saw the mailman delivering the mail, you can infer,
22 reasonably infer that the mailman's been there because there's
23 mail in the mailbox. And that's circumstantial evidence, an
24 example of it.

25 Now, the law allows either type of proof in a criminal

1 trial. But there are two things to keep in mind about
2 circumstantial evidence. The first one is that you may draw
3 inferences and conclusions only from facts that have been
4 proved to you. The second rule is that any inferences or
5 conclusions which you draw must be reasonable and natural based
6 on your common sense and experience of life. In a chain of
7 circumstantial evidence, it's not required that every one of
8 your inferences and conclusions be inevitable, but it's
9 required that each of them be reasonable, that they all be
10 consistent with one another, and that together they establish
11 the Defendant's guilt beyond a reasonable doubt. Now, if the -
12 - whether the evidence is direct or circumstantial, the
13 Commonwealth must prove the Defendant's guilt beyond a
14 reasonable doubt from all the evidence in the case.

15 Now, the Defendant is not charged with committing any
16 crimes other than those charged in the complaint. And you've
17 heard mentioned of acts allegedly done to Jenelle Grace prior
18 to the dates alleged in the complaint. Specifically, prior to
19 September 26th of 2012. You cannot consider such evidence as
20 proof that the Defendant has a propensity to commit the crimes
21 charged or has evidence of bad character. You may consider
22 such evidence to the extent you may find it relevant solely on
23 the issue of whether the Defendant acted intentionally and not
24 because of some mistake, accident, or other innocent reason.

25 Now, it's your duty to decide any disputed questions of

1 fact. You will have to determine which -- You will have to
2 determine, excuse me, which witnesses to believe and how much
3 weight to give their testimony. You should give the testimony
4 of each witness whatever degree of belief and importance that
5 you judge it is fairly entitled to receive. You are the sole
6 judges of the credibility of the witnesses and if there any
7 conflicts in the testimony, it's your function to resolve those
8 conflicts and to determine where the truth lies. You may
9 believe everything a witness says, or only part of it, or none
10 of it. If you do not believe a witness's testimony that
11 something happened, of course, your disbelief is not evidence
12 that it did not happen. When you disbelieve a witness, it just
13 means that you have to look elsewhere for credible evidence
14 about that issue.

15 In deciding whether to believe a witness or how much
16 importance to give a witness's testimony, you must look at all
17 the evidence, drawing on your own common sense and experience
18 of life. Often it may not be what a witness says but how he
19 says it that might give you a clue whether or not to accept his
20 version of an event as believable. You may consider a
21 witness's appearance and demeanor on the witness stand, his
22 frankness, or lack of frankness in testifying, whether his
23 testimony is reasonable or unreasonable, probable or
24 improbable. You may take into account how good an opportunity
25 he had to observe the facts about which he testifies, the

1 degree of intelligence he shows, whether his memory seems
2 accurate. You may also consider his motive for testifying.
3 Whether he displays any bias in testifying, and whether or not
4 the witness has any interest in the outcome of the case.

5 When you consider whether to believe a witness or how much
6 weight to give his or her testimony, you may consider whether
7 that witness said or wrote something earlier that differs in
8 any significant way from his present testimony in the
9 courtroom. It's for you to say whether there's a difference
10 and how significance -- significant any difference is. Please
11 note that you may not use the witness's earlier statement as
12 proof that something said in it is true. So, if, for example,
13 if a witness testified here that he found a donut but had
14 earlier written or said that he found a bagel, that earlier
15 statement would not prove that he found a bagel but it might
16 raise a doubt as to whether he was truthful or accurate when he
17 testified he found a donut. The earlier statement is brought
18 to your attention for the sole purpose of discrediting or
19 casting doubt on the accuracy of the witness's present
20 testimony here at trial, and it's for you to decide whether it
21 does so.

22 Now, you've heard over and over again throughout this
23 trial that the burden is on the Commonwealth to prove beyond a
24 reasonable doubt that the Defendant is guilty of the charges
25 made against him. So what is proof beyond a reasonable doubt?

1 The term is often used and it's probably pretty well
2 understood, though it's not easily defined. Proof beyond a
3 reasonable doubt does not mean proof beyond all possible doubt,
4 for everything in the lives of human beings is open to some
5 possible or imaginary doubt. A charge is proved beyond a
6 reasonable doubt if, after you have compared and considered all
7 of the evidence, you have in your minds an abiding conviction
8 to a moral certainty that the charge is true. When we refer to
9 moral certainty, we mean the highest degree of certainty
10 possible in matters relating to human affairs based solely on
11 the evidence that has been put before you in this case. I have
12 told you that every person is presumed to be innocent until he
13 or she is proved guilty and that the burden of proof is on the
14 prosecutor. If you evaluate all the evidence and you still
15 have a reasonable doubt remaining, the Defendant is entitled to
16 the benefit of that doubt and must be acquitted. It's not
17 enough for the Commonwealth to establish a probability, even a
18 strong probability that the Defendant is more likely to be
19 guilty than not guilty. That's not enough. Instead, the
20 evidence must convince you of the Defendant's guilt to a
21 reasonable and a moral certainty, a certainty that convinces
22 your understanding and satisfies your reason and judgment as
23 jurors who are sworn to act conscientiously on the evidence.
24 So this is what we mean by proof beyond a reasonable doubt.

25 All right. I'm now going to give you some instruction on

1 the offenses to which the Defendant is charged.

2 Could I just have a glimpse of the complaints?

3 The Defendant is charged with indecent assault and
4 battery. And there are two counts of indecent assault and
5 battery. One of those counts relates to Courtney Dargon, date
6 of offense being March -- I'm sorry, December 31st of 2013. The
7 other indecent assault and battery on a person over 14 relates
8 to Jenelle Grace, and it's alleged to have occurred at diverse
9 dates and times.

10 Now, to prove the Defendant guilty of this offense, the
11 Commonwealth must prove four things beyond a reasonable doubt.
12 First, that the alleged victim was at least 14 years of age at
13 the time of the alleged events. Second, that the Defendant
14 committed an assault and battery on the alleged victim.
15 Assault and battery is essentially the intentional touching of
16 another person without legal justification or excuse. So in
17 order to prove an intentional assault and battery, the
18 Commonwealth must prove beyond a reasonable doubt that the
19 Defendant intended to touch the alleged victim, in the sense
20 that the Defendant consciously and deliberately intended the
21 touching to occur and that the touching was not merely
22 accidental or negligent. Please keep in mind that the
23 Commonwealth must prove beyond a reasonable doubt that what
24 occurred was not an accident. If the Commonwealth has failed
25 to prove to you beyond a reasonable doubt that what occurred

1 was not an accident, then you must find the Defendant not
2 guilty. An accident is defined as an unexpected happening that
3 occurs without intention or design on the Defendant's part. It
4 means a sudden unexpected event that takes place without the
5 Defendant's intending it.

6 Now, the third element that the Commonwealth must prove
7 beyond a reasonable doubt with regard to indecent assault and
8 battery on a person over 14 is that the assault and battery was
9 indecent as that word is commonly understood, measured by
10 common understandings and practices. An indecent act is one
11 that is fundamentally offensive to contemporary standards of
12 decency. An assault and battery may be indecent if it involves
13 touching portions of the anatomy commonly thought private, such
14 as a person's genital area or buttocks, or the breasts of a
15 female.

16 The fourth element the Commonwealth must prove beyond a
17 reasonable doubt is that the alleged victim did not consent.
18 If the Commonwealth has proved all four of these elements
19 beyond a reasonable doubt, you should find the Defendant
20 guilty. If the Commonwealth has failed to prove any of those
21 four elements beyond a reasonable doubt, you must find the
22 Defendant not guilty.

23 Now, with regard on the indecent assault and battery over
24 14 that relates to Jenelle Grace, the Commonwealth has charged
25 that the Defendant committed this offense on two different

1 occasions. You may find the Defendant guilty only if you
2 unanimously agree that the Commonwealth has proved beyond a
3 reasonable doubt that the Defendant committed the offense on at
4 least one specific occasion. It's not necessary for the
5 Commonwealth to prove or for you all to be agreed that the
6 offense was also committed on the other occasion, but you must
7 unanimously agree that the Commonwealth has proved that the
8 Defendant committed the offense on at least one of these
9 specific occasions.

10 The Defendant is also charged with open and gross
11 lewdness. So in order for the Commonwealth to prove the
12 Defendant guilty of this offense, the Commonwealth must prove
13 five things beyond a reasonable doubt. First, that the
14 Defendant exposed his genitals to one or more persons. Second,
15 that he did so intentionally. Third, that the Defendant did so
16 openly. That is that he either intended exposure or he
17 recklessly disregarded a substantial risk of exposure to
18 another who might be offended by such conduct. Fourth, that
19 the Defendant's act was done in such a way as to produce, alarm
20 or shock in that one or more persons -- I'm sorry -- Fourth,
21 that the Defendant's act was done in such a way as to produce
22 alarm or shock. And the fifth element is that one or more
23 persons were, in fact, alarmed or shocked by the Defendant's
24 thus exposing himself. Those are the five elements.

25 Also with regard to that offense, the Commonwealth has

1 charged that the Defendant committed this offense on several
2 occasions. And you may find the Defendant guilty only if you
3 unanimously agree that the Commonwealth has proved beyond a
4 reasonable doubt that the Defendant committed the offense on at
5 least one specific occasion. It's not necessary for the
6 Commonwealth to prove or for all of you to be agreed that the
7 offense was also committed on other occasions. But you must
8 unanimously agree that the Commonwealth has proved that the
9 Defendant committed the offense on at least one of these
10 specific occasions. If the Commonwealth has proved to you
11 beyond a reasonable doubt, all five elements beyond a
12 reasonable doubt, you should find the Defendant guilty. If the
13 Commonwealth has not proved any one of those elements, you must
14 find the Defendant not guilty.

15 As I told you at the beginning of the trial, the complaint
16 against the Defendant, it's only an accusation. It's not
17 evidence. The Defendant has denied that he's guilty of the
18 crimes charged in the complaint. The law presumes the
19 Defendant to be innocent of the charges against him. This
20 presumption of innocence is a rule of law that compels you to
21 find the Defendant not guilty unless and until the Commonwealth
22 produces evidence, from whatever source, that proves the
23 Defendant's guilty beyond a reasonable doubt. The burden of
24 proof never shifts. The Defendant's not required to call any
25 witnesses or produce any evidence since he's presumed to be

1 innocent. The presumption of innocence stays with the
2 Defendant unless and until the evidence convinces you,
3 unanimously as a jury, that the Defendant is guilty beyond a
4 reasonable doubt. It requires you to find the Defendant not
5 guilty unless his guilt has been proved beyond a reasonable
6 doubt. Your verdict, whether it's guilty or not guilty, must
7 be unanimous.

8 Counsel, want to see me at sidebar?

9 MR. McCOLGAN: Please.

10 [On the record discussions at sidebar at 10:11:00 a.m.]

11 THE COURT: Okay.

12 MR. McCOLGAN: Judge, I'm -- on indecent, it has to be a
13 general criminal intent there. I know you gave there has to be
14 --

15 THE COURT: Right.

16 MR. McCOLGAN: -- intentional touching is --

17 THE COURT: Right.

18 MR. McCOLGAN: -- but I never heard the words that it's --

19 THE COURT: I mean, I read --

20 MR. McCOLGAN: -- it's a general --

21 THE COURT: -- I read --

22 MR. McCOLGAN: -- [Indiscernible] --

23 THE COURT: -- I read the instruction, it has written in
24 the --

25 MR. McCOLGAN: If you look at the paragraphs after that --

1 THE COURT: I'll --

2 MR. McCOLGAN: -- it actually has -- words that -- I'll
3 point it out to you.

4 Yeah. And there was a paragraph after it, [Indiscernible]
5 had the --

6 THE COURT: Yeah.

7 MR. McCOLGAN: -- it talks about [Indiscernible] -- Yeah,
8 it talks about --

9 THE COURT: Right.

10 MR. McCOLGAN: [Indiscernible] --

11 THE COURT: Right. And so --

12 MR. McCOLGAN: -- [Indiscernible] --

13 THE COURT: -- the general [Indiscernible] do that, which
14 the law prohibits. Indecent assault and battery is not a
15 specific intent. It [Indiscernible] have been done for the
16 purpose of sexual gratification or arousal. And I think --

17 MR. McCOLGAN: This is -- You think that covers it?

18 THE COURT: I do.

19 MR. McCOLGAN: Okay.

20 THE COURT: Yes. I do.

21 MR. McCOLGAN: That's fine, Judge.

22 THE COURT: All right.

23 MR. McCOLGAN: Just note my objection.

24 THE COURT: I do. We will.

25 MR. McCOLGAN: Thank you.