No.

In the Supreme Court of the United States

FERNANDO CABRAL-VARELA,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS

Respondent,

APPENDIX

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APPENDIX A – DECISION OF THE MASSACHUSETTS APPEALS COURT AFFIRMING THE PETITIONER'S CONVICTION ON DIRECT APPEAL: *COMMONWEALTH V. CABRAL-VARELA,* 95 MASS. APP. CT. 1102, 2019 MASS. APP. UNPUB. LEXIS 168 (MASS. 2019)

THE COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT OF MASSACHUSETTS

COMMONWEALTH

V.

FERNANDO CABRAL-VARELA

March 7, 2019, Entered

NO. 17-P-987

95 Mass. App. Ct. 1102

Judges: Rubin, Maldonado, & Lemire, JJ.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Defendant Fernando Cabral-Varela was charged and convicted of five crimes relating to the shooting of Robert Sparks: armed assault with intent to murder, G.L. c. 265, § 18 (b); assault and battery by means of a dangerous weapon, G. L. c. 265, § 15A (b); assault and battery by discharging a firearm, G. L. c. 265, § 15E;

unlawful possession of a firearm, G. L. c. 269, § 10 (a); and unlawful possession of a loaded firearm, G. L. c. 269, § 10 (n). He appeals, and we affirm.

1. *Partial courtroom closure*. The defendant first argues that the judge effected a partial court room closure in violation of his right to a public trial under the Sixth Amendment to the United States Constitution. Witness intimidation was a serious concern throughout the proceedings. Before trial began, the Commonwealth filed a motion requesting the judge to require spectators to present identification before they would be permitted to enter the court room. In support of the motion, the Commonwealth recounted several instances of alleged witness intimidation by the defendant and his associates — one of whom had been convicted of witness intimidation in connection with the case — and witnesses' reticence to cooperate with the investigation due to their "fear of involvement in the trial." The judge allowed the motion while retaining the right to admit individuals without identification on a case-by-case basis. Although the defendant objected in the trial court, he does not challenge these measures on appeal.

The Commonwealth called three witnesses on the second day of trial. (Witnesses were not called on the first day.) Two were police officers. The other, a percipient witness named Mariam Barbosa, had testified at the grand jury, but disclaimed any memory of the incident. The judge permitted the

Commonwealth to have her read her grand jury testimony into the record pursuant to *Commonwealth v. Daye*, 393 Mass. 55, 469 N.E.2d 483 (1984). Barbosa's testimony continued into the third day of trial. The only other witness on the third day was another percipient witness, Alberto Daveiga, who identified the defendant in court as the shooter.

The following incidents took place after the court recessed on the third day. Shortly after spectators exited the court room, one spectator, Wilson Mendes, the defendant's nephew, stated in the hallway that Daveiga "is a rat" or "he's ratting." (Mendes had not produced identification when he had attempted to enter the court room, but was nonetheless allowed to enter.) Daveiga was not present when the comment was made, although the prosecutor had escorted him out a different door to prevent him from being confronted. In addition, after returning home, Daveiga noticed a large group of young men congregating outside of and staring at his house, which was not normal. As a result, a police cruiser was stationed near Daveiga's home. The prosecutor also reported that, after her testimony concluded, Barbosa felt she could no longer safely return to her home, and requested that the Commonwealth assist her in moving.[1] As a result, and over the defendant's objection, the judge excluded

[1] There was no evidence that Mendes was one of the men outside Daveiga's house or that he was involved in intimidating Barbosa.

Mendes from the court room and the eighth floor of the court house, where the court room was located, for the rest of the trial. This included the testimony of two percipient witnesses, Erica Moody and Alexia Miranda, two police detectives, an audio-video forensic analyst employed by the Suffolk County district attorney's office, and the victim's treating surgeon. It also included the closing arguments, the jury charge, and the verdicts.

The defendant argues that the judge's exclusion of Mendes constituted a partial court room closure in violation of his Sixth Amendment right to a public trial. The Commonwealth concedes that Mendes's exclusion constituted a partial closure, which we will assume without deciding for purposes of this appeal.

A partial closure does not violate the Sixth Amendment if the following four factors are satisfied: (1) there is a "substantial reason" to justify the closure, (2) the closure is "no broader than necessary to protect [that] interest," (3) the judge considers "reasonable alternatives to closing the proceeding," and (4) the judge makes "findings adequate to support the closure" (citations omitted). *Commonwealth v. Fernandes*, 478 Mass. 725, 732-733, 89 N.E.3d 1130 (2018).

The first, third, and fourth factors are easily satisfied. Witness intimidation is an interest sufficiently substantial to justify a partial closure, *see id.* at 733-734, and the Commonwealth's motion and

the incidents described above indicate that it was a genuine cause for concern in this case. The judge also excluded Mendes to maintain order, noting that he would not "permit those sorts of comments to be made in the public areas of this court house and in a manner in which they may be overheard by others." The need to maintain order is also a sufficiently substantial interest to justify a partial closure. *See Commonwealth v. Caldwell*, 459 Mass. 271, 283, 945 N.E.2d 313 (2011). Next, the judge not only considered reasonable alternatives to excluding Mendes, but had already implemented one – the identification requirement – that had failed to address the concerns about intimidation and the need to maintain order adequately. Finally, the judge found that Mendes had acted as described above and excluded him "[b]ased on that conduct and based on all of the circumstances surrounding the trial of this case and witnesses' expressions of fear leading up to their testimony in this case." These findings are adequate.

The defendant's principal argument, then, is that the closure was broader than necessary. Specifically, he argues that all of the concerns regarding witness intimidation related to the intimidation of the percipient witnesses, who were all members of a small community in Dorchester. According to the defendant, there was no demonstrated risk that justified excluding Mendes for the testimony of the nonpercipient witnesses or the portions of trial

that followed the close of the evidence. Therefore, he argues, whatever substantial reason might have existed to justify Mendes's initial exclusion from the court room did not apply to these parts of the trial, and Mendes should have been allowed to observe them. *See Commonwealth v. Cohen (No. 1)*, 456 Mass. 94, 114-115, 921 N.E.2d 906 (2010) (closure initially justified by lack of space was broader than necessary because court room was not opened after space became available).

We agree with the defendant that a closure can be broader than necessary if the substantial reasons that originally justified it cease to apply, but disagree that the substantial reasons ever ceased to apply in this case. To begin with, the trial judge reasonably could have found that Mendes's public comments evinced a substantial enough risk of intimidation with respect to the nonpercipient witnesses, counsel, and the jury to justify Mendes's exclusion for the rest of the trial. *See Driggins v. Lazaroff*, U.S. Dist. Ct., No. 1:14CV949, slip op. at 61 (N.D. Ohio Sept. 28, 2015) (Sixth Amendment not violated by exclusion, apparently for rest of trial, of four individuals who were heard intimidating witness outside court room). *Cf. United States v. Addison*, 708 F.3d 1181, 1188 (10th Cir. 2013) ("[I]t was proper in this case for the court to exclude St. Clair from the entire trial because more than one witness complained of intimidation. Indeed, protecting the participants in a trial is an integral part of protecting the integrity of the trial itself").

Furthermore, the trial judge evidently concluded that Mendes's outburst outside the court room created a substantial risk to the orderliness of the proceedings, and we see no error in this conclusion. The trial judge is permitted to act to protect the participants in a trial and the order of the court, and "some measure of deference is owed to the trial judge's discretionary decisions in this regard." *Fernandes*, 478 Mass. at 735. "A judge need not wait for a witness to be intimidated, the court room to be disrupted, or a specific threat before taking appropriate steps to address the risk of such misconduct." *Id.*, quoting *Commonwealth v. Maldonado*, 466 Mass. 742, 753, 2 N.E.3d 145 (2014). The trial judge did not err by excluding Mendes for the rest of the trial.

2. *Habit evidence*. The most hotly contested issue at trial was the identity of the shooter. The Commonwealth sought to establish the defendant's identity in part by introducing a security video of the shooting that showed the shooter wearing a white T-shirt and eliciting evidence that that was what the defendant habitually wore. This evidence consisted of testimony to that effect from a percipient witness, Erica Moody, a police officer, Kevin Swan, who was familiar with the defendant, and a police detective, Kevin Doogan, who had participated in the investigation and had viewed the defendant's social media pages. Doogan also authenticated two social media photographs of the defendant wearing white T-

shirts. The defendant argues on appeal that this was inadmissible habit evidence.

"[E]vidence of personal habit is inadmissible 'to prove that a person acted in accordance with his . . . habit on the occasion in issue.'" *Commonwealth v. Williams*, 450 Mass. 879, 886, 883 N.E.2d 249 (2008), quoting *Palinkas v. Bennett*, 416 Mass. 273, 276, 620 N.E.2d 775 (1993). The witnesses' testimony on the defendant's dressing habits was introduced for precisely this purpose, as revealed by the prosecutor in closing: "And you know from Erica that he wears distinctive clothing, pretty much always in that white shirt." The Commonwealth argues that the testimony was admissible because it was introduced to prove the defendant's identity, not to show conformity to a habit, but this argument fails. The testimony could prove his identity only via an inference that, on this particular occasion, he conformed to his habit of wearing white T-shirts — precisely the inference the rule forbids. The judge thus erred in admitting the testimony.

We discern no error, however, in the admission of the photographs. The judge admitted them because they were posted close in time to the shooting and "show something about the defendant's appearance, his build," the relevance of which does not depend on the forbidden habit inference. The judge also found that nothing in the photographs would prejudice the defendant, which was not an abuse of discretion. *See Commonwealth v. Facella*, 478 Mass. 393, 407, 85

N.E.3d 665 (2017) (appellate court reviews trial judge's balancing of probative value and unfair prejudice for abuse of discretion).

The parties dispute the standard of review with respect to the habit testimony. The defendant argues that the issue was preserved and that the standard of review is for prejudicial error; the Commonwealth argues that it was not, and that the standard of review is for a substantial risk of a miscarriage of justice. We agree with the Commonwealth. The prosecutor twice asked Swan whether the defendant typically wore any particular type of clothing. Defense counsel objected to the first question, without stating his grounds, and the judge stated, "[s]ustained as to foundation." The prosecutor immediately laid a foundation and asked the question a second time, defense counsel again objected without stating his grounds, and the judge overruled the objection. In these circumstances, it is clear that the overruled objection was based on foundation grounds, which is insufficient to preserve an objection on habit grounds. *See Commonwealth v. Fowler*, 431 Mass. 30, 41 n.19, 725 N.E.2d 199 (2000). While defense counsel objected at sidebar shortly before Doogan's testimony, the objection was only to the introduction of the photographs, not Doogan's testimony, and was on cumulativeness grounds, which is also insufficient to preserve the issue for appeal. There was no objection at all to Moody's testimony.

In any event, even applying the standard of review more favorable to the defendant, that of prejudicial error, we are convinced that the error "did not influence the jury, or had but very slight effect." *Commonwealth v. Flebotte*, 417 Mass. 348, 353, 630 N.E.2d 265 (1994), quoting *Commonwealth v. Peruzzi*, 15 Mass. App. Ct. 437, 445, 446 N.E.2d 117 (1983). Barbosa, Daveiga, and Moody all testified that the defendant was, in fact, wearing a white T-shirt on the day of the shooting. There was no evidence to the contrary. Evidence of the defendant's habit was therefore a sideshow and, as defense counsel argued at trial in his effort to exclude the photographs, cumulative of the much more probative testimony of these three witnesses.

3. *Consciousness of guilt.* The judge admitted, over the defendant's objection, recordings of two telephone calls the defendant made while in jail. The Commonwealth sought to introduce these calls because they contain statements by the defendant that show his consciousness of guilt. The defendant argues that the calls were substantially more unfairly prejudicial than probative, constituted inadmissible hearsay, and violated his confrontation clause rights.[2]

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[2] The defendant also argues that the judge erred by allowing the jury to read uncertified transcripts of the calls, which included translations of Cape Verdean terms contained in the calls. The defendant did not object to this at trial, and has provided us with no reason to believe the translations

The first call was between the defendant and his girlfriend, Maria Depina. The Commonwealth claims that the defendant's statement on the call that Erica Moody, who had testified at the grand jury, is "gonna be the key to my fucking, she's gonna be the key to my case," evidences his consciousness of guilt. This evidence is admittedly weak – a potential witness's fabricated inculpatory statements would also be the key to a defendant's case – and for that reason we see no abuse of discretion in the judge's determination that no risk of unfair prejudice to the defendant outweighed its probative value.

In the second call, the defendant spoke with both Depina and his friend, Brian Cardoso. The defendant instructed Cardoso to "get on your shit with your cuz man," and, in response to Cardoso's statements about how the cousin was acting, said, "He's acting weird like its [In Cape Verdean — "Fla" — he told?]"[3] The defendant also said, in response to Cardoso's comment that suggested witness Alexia Miranda recorded the shooting, "Chill, chill, chill, chill, chill. Whatever it is, just tell Teresa when, she's coming to see me

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are not accurate. The judge also instructed the jury that the transcript is not evidence and that, "[t]o the extent you hear something that is different from what is on the transcript, please ignore what is on the transcript." We decline to reverse on this basis.

[3] The translation in this quotation was in the transcript provided to the jury.

tomorrow." We agree with the Commonwealth that these comments are strong evidence of the defendant's consciousness of guilt, and hold that the judge did not abuse his discretion in finding that the probative value of this evidence was not substantially outweighed by unfair prejudice.[4]

Finally, we disagree with the defendant that Depina's and Cardoso's statements in the calls constituted inadmissible hearsay or that their admission violated his confrontation rights. Whether or not the statements at issue were testimonial (a prerequisite for a Confrontation Clause violation), "[t]he admission of a testimonial statement without an adequate prior opportunity to cross-examine the declarant...violates the confrontation clause only if the statement is hearsay, that is, offered to prove the truth of the matter asserted." *Commonwealth v. Hurley*, 455 Mass. 53, 65 n.12, 913 N.E.2d 850 (2009). But the statements at issue were admitted to show their effect on the defendant's state of mind, not for their truth. *See Commonwealth v. Mejia*, 88 Mass. App. Ct. 227, 238, 36 N.E.3d 612 (2015) (statements made by others in jail call were not hearsay, and their admission did not constitute Confrontation Clause violation, because they "provided context for the relevant and admissible statements made by the defendant in the same

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[4] For this reason, we also reject the defendant's argument that there was insufficient evidence in the record to support a consciousness of guilt instruction.

conversation"). The prosecutor emphasized this point in closing: "As the weeks progress, he's arrested. The grand jury investigation starts, you start to hear conversations between the defendant, his girlfriend and Brian Cardoso, that shows to you that he's concerned about the witnesses in this case, because they know the truth." Therefore, the statements were not hearsay and their admission did not violate the defendant's confrontation rights.

Judgments affirmed.

APPENDIX B – DECISION OF THE MASSACHUSETTS SUPREME JUDICIAL COURT DENYING FURTHER APPELLATE REVIEW: *COMMONWEALTH V. CABRAL-VARELA,* 482 MASS. 1103, 2019 MASS. LEXIS 312 (MASS. 2019)

THE COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

COMMONWEALTH

V.

FERNANDO CABRAL-VARELA

June 6, 2019, Decided

482 Mass. 1103

OPINION

Further appellate review denied.