APPENDIX A

#97

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

1673CR289

In the case no. 20-P-870

COMMONWEALTH

vs.

DANIEL VIVEIROS.

Pending in the Superior Court for the County of Bristol

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

Judgments affirmed.

By the Court,

Joseph F. Stanton, Clerk

Date October 7, 2021.

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COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-870

COMMONWEALTH

vs.

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MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a jury trial, the defendant was convicted of rape and abuse of a child under the age of sixteen, aggravated by more than a five-year age difference, G. L. c. 265, § 23A (a); indecent assault and battery on a child under the age of fourteen, G. L. c. 265, § 13B; indecent exposure, G. L. c. 272, § 53; and dissemination of matter harmful to a minor, G. L. c. 272, § 28.[1] On appeal, the defendant argues that (1) the trial judge erred in allowing the prosecutor to elicit testimony from the victim's mother (as opposed to an expert) making a temporal connection between the victim's physical ailments and the defendant's presence in the home, and (2) the trial

[1] The defendant also pleaded guilty to a related charge of violating an abuse prevention order pursuant to G. L. c. 209A, § 7.

prosecutor impermissibly mischaracterized the evidence in her closing argument and improperly vouched for a witness's credibility. We affirm.

Evidence of physical ailments without expert opinion. On direct examination of the victim's mother, the prosecutor elicited testimony that the victim suffered from frequent stomachaches and "bladder issues" from April 2014 to August 2016, which was the period during which the defendant lived with the victim and the victim's mother. The mother testified that the victim frequently experienced stomach pain and a burning sensation and discomfort with her bladder that would "accompany the stomachaches." The mother also testified that, despite numerous visits to the victim's pediatrician, no one was able to diagnose the cause of the victim's discomfort. The victim was eventually referred to a hospital to see a stomach doctor, who prescribed a stool softener. Nevertheless, the victim's symptoms continued. At this point, the prosecutor asked whether the victim's symptoms eventually subsided, and defense counsel objected on the ground that, without expert testimony, the Commonwealth should not be permitted to introduce testimony suggesting that the victim's stomachaches and bladder issues were physical manifestations of anxiety, or to suggest that those symptoms subsided once the defendant left the home. The judge permitted the prosecutor to ask the victim's mother when,

in her memory, the victim's physical ailments subsided. The mother then testified that the victim's stomachaches stopped in August of 2016, which was when the defendant left the home. The mother said nothing about the bladder issues.

On appeal, the defendant argues it was reversible error to allow this testimony about the victim's stomachaches and bladder pain to be offered without any expert opinion testimony as to the possible causes of these symptoms. Because the defendant timely objected, we review any error under the prejudicial error standard.[2] See Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994). This standard involves "a two-part analysis: (1) was there error; and (2) if so, was that error prejudicial." Commonwealth v. Cruz, 445 Mass. 589, 591 (2005). An error is not prejudicial if it "did not influence the jury, or had but very slight effect." Commonwealth v. Sullivan, 76 Mass. App. Ct. 864, 869 (2010), quoting Cruz, supra at 591.

"Expert testimony is necessary where proof of medical causation lies outside the ken of lay jurors." Commonwealth v. Hamel, 91 Mass. App. Ct. 349, 351 (2017), quoting Pitts v. Wingate at Brighton, Inc., 82 Mass. App. Ct. 285, 289 (2012). Where, however, the determination of causation lies within "general human knowledge and experience," no expert testimony is

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[2] The Commonwealth agrees that this claim of error was properly preserved.

required. Bailey v. Cataldo Ambulance Serv., Inc., 64 Mass. App. Ct. 228, 236 n.6 (2005), quoting Lovely's Case, 336 Mass. 512, 516 (1957).

We accept the proposition that it is within the common knowledge and experience of lay jurors that children may exhibit stomachaches as a result of anxiety or distress. See Commonwealth v. Hudson, 417 Mass. 536, 537-538 (1994) (reciting lay testimony from mother of minor sexual assault victim about victim's frequent stomachaches and nightmares). But the victim's "bladder issues," which included burning and discomfort, stand on different footing because the jury would not have been able to "draw a causal connection between the alleged abuse by the defendant and the [victim's bladder issues] without engaging in 'speculation or conjecture.'" Hamel, supra at 351, quoting Commonwealth v. Scott, 464 Mass. 355, 362 (2013). Thus, the mother's testimony regarding bladder issues should not have been admitted.

We thus ask whether the defendant was prejudiced by the error. Cruz, 445 Mass. at 591. In making this determination, we examine factors such as "the importance of the evidence in the prosecution's case; the relationship between the evidence and the premise of the defense; who introduced the issue at trial; the frequency of the reference; . . . and the weight or quantum of evidence of guilt." Commonwealth v. Dyette, 87 Mass.

App. Ct. 548, 560 (2015), quoting Commonwealth v. Dagraca, 447 Mass. 546, 553 (2006). Here, apart from the single reference during the mother's direct examination, the victim's bladder problems were not again mentioned, either in questioning, testimony, or closing arguments. The Commonwealth's evidence was strong, and the victim's testimony was corroborated in various aspects, including by the first complaint witness, by the mother, and by text messages from the defendant. In the circumstances, we are confident that this erroneously admitted evidence "did not influence the jury, or had but very slight effect." Sullivan, 76 Mass. App. Ct. at 869, quoting Cruz, supra at 591.

Closing argument. The defendant next argues that the prosecutor erred in her closing argument by (1) violating the first complaint doctrine by mentioning multiple conversations between the defendant and the first complaint witness, (2) misstating the evidence, and (3) improperly bolstering the victim's credibility.

The first complaint doctrine allows the prosecution to put on testimony about the victim's first complaint of sexual assault in its case-in-chief, but the doctrine is meant to prevent the "piling on" of cumulative evidence by limiting the prosecution to one first complaint witness. Commonwealth v. King, 445 Mass. 217, 242-245 (2005). Where a complainant makes

successive complaints to the first complaint witness, ordinarily only the details of the initial complaint are admissible. Commonwealth v. Arana, 453 Mass. 214, 222-223 (2009). However, the defendant can "open the door" to evidence about successive complaints. See Commonwealth v. Mendez, 77 Mass. App. Ct. 905, 906 (2010). That is what happened here when defense counsel cross-examined the victim about her complaints to the first complaint witness, and then referred to successive complaints in his closing argument to suggest that the victim and the first complaint witness had colluded to fabricate a story about the defendant's conduct. It was not error, therefore, for the prosecutor to also refer to the fact of successive complaints in order to counter the suggestion of collusion.

The defendant's remaining two claims of error are based on the prosecutor's rhetorical question, "But we know there was a conversation about that though, don't we?" In context, the antecedent to "that" was clearly the prosecutor's preceding reference to the victim having reported to the first complaint witness that the defendant "raped" her, which was a statement not supported by the evidence. Where, as here, the defendant did not object to the challenged statement at trial, we review any claim of error only for a substantial risk of a miscarriage of justice. Commonwealth v. Daigle, 379 Mass. 541, 549 (1980).

"[C]losing arguments must be limited to facts in evidence and the fair inferences that may be drawn from those facts." Commonwealth v. Teixeira, 486 Mass. 617, 630 (2021), quoting Commonwealth v. Rutherford, 476 Mass. 639, 643 (2017). Comments attributing testimony to a witness that the witness did not actually say are improper. See Commonwealth v. Walters, 472 Mass. 680, 703 (2015). It is also improper for a prosecutor to "blur the boundaries between judge, prosecutor, and jury by placing himself in the jury box as a supplemental or standby juror." Commonwealth v. Burts, 68 Mass. App. Ct. 684, 689 (2007). Here, it was error for the trial prosecutor to suggest to the jury that "we know" there was a conversation about "that," where the antecedent of "that" was "rape," not only because the statement was unsupported by the evidence, but also because the prosecutor's use of the first person plural pronoun aimed to draw the jurors into the prosecutor's incorrect recitation of the evidence. See Fitzpatrick v. Wendy's Old Fashioned Hamburgers of New York, Inc., 96 Mass. App. Ct. 410, 431 (2019), S.C., 487 Mass. 507 (2021) (improper to use the phrase "we know" in a manner that would ally the prosecution with the jurors, or "draw the jurors into the position of the [victim]"); Burts, 68 Mass. App. Ct. at 688-689 (prosecutor's use of "we" in closing argument "conveyed, at least

inferentially, the prosecutor's belief or opinion about either certain evidence or the credibility of certain witnesses").

Nonetheless, we perceive no substantial risk of a miscarriage of justice resulting from the error in the closing. See Commonwealth v. Grandison, 433 Mass. 135, 143 (2001). The improper rhetorical question was only one passing comment; it did not go to the heart of the case. Furthermore, as we have stated above, the Commonwealth's case was strong. On this record, we are left with no "uncertainty that the defendant's guilt has been fairly adjudicated." Commonwealth v. Azar, 435 Mass. 675, 687 (2002) (citation omitted).[3]

Judgments affirmed.

By the Court (Wolohojian, Sullivan & Ditkoff, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: October 7, 2021.

[3] In light of our disposition, we do not separately discuss the defendant's additional argument of cumulative error. See Commonwealth v. Liptak, 80 Mass. App. Ct. 76, 89 n.11 (2011).

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

APPENDIX B

SUPREME JUDICIAL COURT
for the Commonwealth
Case Docket

COMMONWEALTH vs. DANIEL VIVEIROS
THIS CASE CONTAINS IMPOUNDED MATERIAL OR PID
FAR-28541

CASE HEADER

Case Status	FAR denied	**Status Date**	12/21/2021
Nature	Crime: Sexual Offense	**Entry Date**	10/28/2021
Appeals Ct Number	2020-P-0870	**Response Date**	11/11/2021
Appellant	Defendant	**Applicant**	Defendant
Citation	488 Mass. 1109	**Case Type**	Criminal
Full Ct Number		**TC Number**	
Lower Court	Bristol Superior Court	**Lower Ct Judge**	Karen F. Green, J.

INVOLVED PARTY	ATTORNEY APPEARANCE
Commonwealth Plaintiff/Appellee	David B. Mark, A.D.A. Mary E. Lee, A.D.A.
Daniel Viveiros Defendant/Appellant	Robert R. Herrick, Esquire

DOCKET ENTRIES

Entry Date	Paper	Entry Text
10/28/2021		Docket opened.
10/28/2021	#1	FAR APPLICATION filed for Daniel Viveiros by Attorney Robert Herrick.
12/21/2021	#2	DENIAL of FAR application.

As of 12/30/2021 10:20am

Supreme Judicial Court for the Commonwealth of Massachusetts

RE: Docket No. FAR-28541

COMMONWEALTH
vs.
DANIEL VIVEIROS

Bristol Superior Court No. 1673CR00289, 1873CR00010
A.C. No. 2020-P-0870

NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW

Please take note that on December 21, 2021, the application for further appellate review was denied.

Francis V. Kenneally Clerk

Dated: December 21, 2021

To: David B. Mark, A.D.A.
Mary E. Lee, A.D.A.
Robert R. Herrick, Esquire