488 Mass. 575
Supreme Judicial Court of Massachusetts,
Norfolk.

COMMONWEALTH
v.
Marek KOZUBAL.

SJC-13092
|
Argued May 3, 2021.
|
Decided October 15, 2021.

Synopsis

Background: Defendant was convicted in the Superior Court Department, Norfolk County, Robert C. Cosgrove, J., of various charges of indecent assault and battery on a person under the age of 14 by a mandated reporter and indecent assault and battery on a person under the age of 14. Defendant appealed, and the Supreme Judicial Court granted an application for direct appellate review.

Holdings: The Supreme Judicial Court, Cypher, J., held that:

justification for defendant's peremptory challenge of juror was both pretextual and inadequate;

text messages from the defendant to the victim were not admitted for the truth of the matter asserted, and accordingly were not hearsay;

alleged hearsay text exchange was properly admitted as an adoptive admission;

school's written policies pertaining to child abuse and inappropriate sexual relations were admissible under the business records hearsay exception; and

evidence was sufficient to support finding that defendant was a "mandated reporter."

Affirmed in part, vacated in part, and remanded.

***1176** Indecent Assault and Battery. Jury and Jurors. Constitutional Law, Jury. Evidence, Inflammatory evidence, Hearsay, Admissions and confessions, Admission by silence, State of mind, Verbal completeness, Business record. Practice, Criminal, Jury and jurors, Challenge to jurors, Argument by prosecutor, Instructions to jury. Words, "Mandated reporter."

Indictments found and returned in the Superior Court Department on September 9, 2016.

The cases were tried before Robert C. Cosgrove, J.

The Supreme Judicial Court granted an application for direct appellate review.

Attorneys and Law Firms

David J. Nathanson, Boston, for the defendant.

Tracey A. Cusick, Assistant District Attorney, for the Commonwealth.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Opinion

CYPHER, J.

***1177** On July 1, 2019, the defendant, Marek Kozubal, was convicted by a Superior Court jury of various charges of indecent assault and battery on a person under the age of fourteen by a mandated reporter, G. L. c. 265, § 13B 1/2, and indecent assault and battery on a person under the age of fourteen, G. L. c. 265, § 13B. The defendant argues that (1) the judge abused his discretion in denying the defendant's peremptory challenge of a minority juror; (2) the judge improperly admitted text messages between the defendant and the victim; (3) the judge abused his discretion in admitting policies pertaining to child abuse and inappropriate sexual relations from the school's faculty handbook without admitting the entire handbook; (4) the prosecutor's closing argument improperly shifted the burden of proof to the defendant; and (5) the judge improperly instructed the jury on the definition of mandated reporter. We affirm the defendant's convictions, with the exception of two counts where the jury found that the defendant was not acting in his official capacity as a mandated reporter when he committed the offenses. We vacate and set aside the defendant's convictions under G. L. c. 265, § 13B 1/2, as to

those two counts and remand to the Superior Court for entry of judgments of guilty of the lesser included offense of indecent assault and battery on a person under the age of fourteen, G. L. c. 265, § 13B.

Background. We recite the facts that the jury could have found, in the light most favorable to the Commonwealth, see Commonwealth v. Latimore, 378 Mass. 671, 676-677, 393 N.E.2d 370 (1979), reserving certain facts for our discussion of the issues.

1. Facts. The thirty-nine year old defendant was convicted of indecently touching the thirteen year old victim on three separate occasions in 2016: June 24, June 25, and July 6. The touching consisted of kissing, touching the victim's breasts over and under her clothing, and one touching of the victim's vulva area. Tens of thousands of text messages were recovered forensically between the defendant and the victim, many of which had been deleted.

In 2003, the defendant was hired as a faculty member and assistant to the director of a research-grade astronomical observatory at a private school for grades pre-kindergarten through twelve. The observatory housed telescopes and was used by afterschool, community, and club programs. The defendant's duties as a faculty member in 2003 included supporting technology for the observatory programs. By 2016, the defendant was a part-time employee who worked in various afterschool programs, science programs, and outreach programs hosting visitors from other schools and scout troops. Occasionally, the defendant was a substitute teacher in middle school classes, and he worked on the school's lower-school extracurricular activities. The defendant also taught students ***1178** during a summer camp at the school and instructed the amateur radio club, an afterschool program held at the school that was open to students, faculty, and members of the community. The assistant head of the school responsible for faculty and curriculum described the defendant as "a fellow teacher, a fellow faculty member at the school."

The defendant met the victim and her father and stepmother in January 2016 at an adult education radio course held at the observatory. They became friendly, and the victim's parents gave the defendant contact information for each of them. The defendant began exchanging text messages with all three of them and entered into a polyamorous sexual relationship with the victim's stepmother that ended in June 2016. The defendant also began exchanging text messages individually with the victim. Sometimes the defendant instructed the victim to delete text messages between them.

On June 24, 2016, the victim was dropped off at the school to meet the defendant and prepare for a radio event that was to be held on June 25 and 26. The defendant unlocked a classroom and kissed the victim. The defendant told the victim he was "not supposed to do that," he could "get in big trouble," and not to tell anyone. Later, in a stairway, the defendant kissed her again with his tongue and touched her breasts with his hands.

During the course of the event held at the school on June 25 and 26, 2016, the defendant kissed the victim at least three times on her mouth, neck, and ears, and touched her breasts over and under her clothing. One of the incidents took place in a room of the observatory that contained a refrigerator. Again, the defendant told the victim that he could get in trouble for touching her. They later exchanged text messages about the incident, referring to the "room with a fridge" and the events that had transpired there.

The last incident occurred on July 6, 2016, when the defendant arranged to see the victim at her home. The defendant sent the victim a text message about shaving in anticipation of kissing her. When the defendant arrived, the father went out, leaving the victim and defendant alone. They went to the basement, where the defendant kissed the victim's lips with his tongue, sucked her breasts, and lifted up his shirt and pressed his chest against her bare torso. The defendant also touched the victim's vagina.

The victim and the defendant walked to the park that evening, and the victim did not respond when her father tried to contact her. When they returned, the victim's parents were angry. After the parents took away the victim's electronic devices, the victim's stepmother discovered text messages between the victim and the defendant about love; the stepmother then questioned the victim about her relationship with the defendant. On July 16, 2016, the victim disclosed to her parents that the defendant had kissed her, and on July 18, the victim's parents notified the police.

2. Procedure. The defendant was arraigned in the Superior Court on eight indictments alleging aggravated indecent assault and battery on a child under fourteen by a mandated reporter, G. L. c. 265, § 13B 1/2. The defendant unsuccessfully moved to dismiss on the ground that the grand

jury heard insufficient evidence that the defendant was a mandated reporter.

Prior to trial, the trial judge allowed the Commonwealth's motion to allow portions of the defendant's text conversations with the victim and denied the defendant's motion to exclude text messages. The trial judge also allowed the defendant's motion for a ruling on the construction of the ***1179** statute under which the defendant was charged, G. L. c. 265, § 13B 1/2, and its relationship to the mandated reporter statute with the notation, "the court agrees with the construction of the statute expressed by [the motion judge] in his memorandum of decision on the defendant's motion [to dismiss]."

During jury selection, the judge denied defense counsel's peremptory challenge of juror no. 245. The judge stated, "I noticed that that is a minority juror. I think that's the second challenge of a minority juror. So, I'm going to ask you to justify your challenge, please."[1] Defense counsel immediately responded: "Your Honor, my concern is that this juror has indicated that he has children and nieces and nephews and that while in his experience young children, out of confusion, may make certain allegations that he could see as false, that his initial answer was children [twelve] and up don't have that kind of confusion. And so, my concern is based on being a father and being an uncle and his sort of initial instinctual belief that children of that age wouldn't make false allegations."

1 Although the transcript attributes these remarks to defense counsel, the parties agree that this was an error and that the judge made the remarks.

The judge found that the defendant's justification was pretextual and inadequate and seated the juror over the defendant's objection. The defendant claimed at sentencing that the challenge of the juror was justified because the juror's questionnaire showed that he was applying to be a police officer. However, he did not raise this objection during jury selection.

At the conclusion of the trial, the judge instructed the jurors that a mandated reporter was "a person who is a public or private schoolteacher or a person paid to care for or work with a child in any public or private facility." Verdict slips specified the conduct pertaining to each indictment; three indictments were for acts on July 6, 2016, two were for acts on June 24, 2016, and three were for acts on June 25, 2016. Each verdict slip also included a special question: whether the Commonwealth "proved beyond a reasonable doubt that the defendant was acting in his professional capacity as a mandated reporter at the time of the indecent assault and battery on a child under fourteen." The jury returned guilty verdicts on all indictments and answered the special question in the affirmative as to the indictments related to the incidents that occurred on June 24 and 25, 2016. The jury answered the special question in the negative as to the indictments relating to the incidents that occurred at the victim's home on July 6, 2016.[2]

2 The first indictment stemming from the incidents that occurred on July 6, 2016, was reduced to indecent assault and battery on a person under the age of fourteen, G. L. c. 265, § 13B, to allow the judge to sentence the defendant to probation from and after his release from prison. As discussed infra, the other two indictments stemming from the incidents that occurred on July 6, 2016, also must be reduced pursuant to Commonwealth v. Gomes, 483 Mass. 123, 128-129, 130 N.E.3d 1234 (2019).

The defendant was sentenced to State prison for concurrent terms of from ten years to ten years and one day for each of seven of the convictions, and to a consecutive three-year term of probation from and after his release on the eighth.

Discussion. 1. Denial of peremptory challenge of racial minority juror. The defendant argues that the trial judge improperly denied his peremptory challenge of juror no. 245 because there was no prima facie showing of discrimination, the judge did not explicitly find that the defendant was a member of a discrete group, and defense counsel provided an adequate and ***1180** genuine justification for the challenge. The Commonwealth counters that the judge's finding that the justification for the challenge of juror no. 245 was pretextual and inadequate was within his discretion and supported by the record.

The Fourteenth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights prohibit a party from exercising peremptory challenges on the basis of race, sex, or sexual orientation, among other groupings. See Commonwealth v. Carter, 488 Mass. 191, 201, 172 N.E.3d 367 (2021); Commonwealth v. Henderson, 486 Mass. 296, 311, 157 N.E.3d 1277 (2020); Commonwealth v. Lopes, 478 Mass. 593, 597, 91 N.E.3d 1126 (2018). Striking even a single juror for a discriminatory purpose is prohibited. See Snyder v. Louisiana, 552 U.S. 472, 478, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008); Commonwealth v. Sanchez, 485 Mass. 491, 511, 151 N.E.3d 404 (2020);

Commonwealth v. Issa, 466 Mass. 1, 9, 992 N.E.2d 336 (2013). The issue is not whether there is a pattern of improper challenges, but whether a single challenge is based impermissibly on a juror's membership in a protected group. Commonwealth v. Maldonado, 439 Mass. 460, 463 n.3, 788 N.E.2d 968 (2003). The Commonwealth is equally entitled to "a representative jury, unimpaired by the improper exercise of peremptory challenges by the defense." Commonwealth v. Prunty, 462 Mass. 295, 308, 968 N.E.2d 361 (2012), quoting Commonwealth v. Soares, 377 Mass. 461, 489 n.35, 387 N.E.2d 499 (1979).

A three-step burden shifting analysis is applied to determine whether a peremptory strike of a potential juror is proper. See Batson v. Kentucky, 476 U.S. 79, 94-95, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); Soares, 377 Mass. at 489-491, 387 N.E.2d 499. We presume that peremptory challenges are properly made. Lopes, 478 Mass. at 598, 91 N.E.3d 1126. First, to rebut the presumption that the peremptory challenge is proper, the challenging party " 'must make out a prima facie case' that it was impermissibly based on race or other protected status 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' " Commonwealth v. Jackson, 486 Mass. 763, 768, 162 N.E.3d 48 (2021), quoting Johnson v. California, 545 U.S. 162, 168, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005). Second, if the challenging party makes out a prima facie case, "the burden shifts to the party exercising the challenge to provide a group-neutral explanation for it" (quotations omitted). Jackson, supra, quoting Sanchez, 485 Mass. at 493, 151 N.E.3d 404. Third, "the judge must then determine whether the explanation is both adequate and genuine" (quotations omitted). Jackson, supra, quoting Sanchez, supra.

"An explanation is adequate if it is 'clear and reasonably specific,' 'personal to the juror and not based on the juror's group affiliation' (in this case race) ... and related to the particular case being tried.... An explanation is genuine if it is in fact the reason for the exercise of the challenge. The mere denial of an improper motive is inadequate to establish the genuineness of the explanation." Maldonado, 439 Mass. at 464-465, 788 N.E.2d 968. Because a judge must find that both the genuineness and adequacy of the explanation are satisfied before allowing a peremptory challenge, a determination that either adequacy or genuineness is not met is sufficient to deny the challenge. See Commonwealth v. LeClair, 429 Mass. 313, 323, 708 N.E.2d 107 (1999) (affirming disallowance of challenge where judge found explanation disingenuous).

"We review the denial of a peremptory challenge for abuse of discretion." ***1181** Commonwealth v. Obi, 475 Mass. 541, 551, 58 N.E.3d 1014 (2016). A decision resulting from "a clear error of judgment in weighing the factors relevant to the decision such that the decision falls outside the range of reasonable alternatives" is an abuse of discretion (quotations and citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27, 20 N.E.3d 930 (2014). Trial judges have considerable discretion in ruling on whether a permissible ground for the peremptory challenge has been shown, and reviewing courts will not disturb that ruling so long as it is supported by the record. Snyder, 552 U.S. at 477, 128 S.Ct. 1203 (determinations of credibility and demeanor lie within trial judge's province); Commonwealth v. Oberle, 476 Mass. 539, 545, 69 N.E.3d 993 (2017); Obi, supra (reviewing court defers to trial judge's sound discretion rather than substitute its review of transcript); Maldonado, 439 Mass. at 466, 788 N.E.2d 968 (appellate courts "particularly ill-equipped to assess [explanation's] genuineness"). A defendant does not have an absolute right to a peremptory challenge. Obi, supra at 550, 58 N.E.3d 1014. However, error in the denial of a defendant's peremptory challenge is reversable error without a showing of prejudice. Commonwealth v. Hampton, 457 Mass. 152, 164-165, 928 N.E.2d 917 (2010); Commonwealth v. Hyatt, 409 Mass. 689, 691-692, 568 N.E.2d 1148 (1991).

We agree with the Commonwealth that the judge acted within his discretion in denying the defendant's peremptory challenge of juror no. 245. The judge found the defense attorney's justification of her challenge "to be both pretextual and inadequate." Defense counsel stated, "[M]y concern is that this juror has indicated that he has children and nieces and nephews and that while in his experience young children, out of confusion, may make certain allegations that he could see as false, that his initial answer was children [twelve] and up don't have that kind of confusion. And so, my concern is that based on being a father and being an uncle and his sort of initial instinctual belief that children of that age wouldn't make false allegations, that is the reason."

The judge's finding that the challenge was pretextual and inadequate was supported by the record. Although the challenged juror answered "no" to the question, "Do you think children sometimes make false accusations of sexual assault?" he clarified this response when the judge questioned him. As a father of two and an uncle, juror no. 245 explained that he believed younger children could make false accusations of sexual assault based on extraneous information. With respect to children twelve and older,

however, juror no. 245 said that he would base his verdict on the evidence, explaining that children twelve and older "may [make false accusations] or they may not. It's just based off of the proof of what you have and all the information that comes up, and if there's any witness or what information that they're bringing up, you know, based off of what the story is and what's happening." Thus, juror no. 245 did not suggest that he believed children twelve and older would never make false accusations. Accordingly, the judge was well within his discretion in finding that defense counsel's justification was not adequate or genuine.

The challenge of juror no. 245 was the second peremptory challenge the defense attorney attempted to exercise on a Black juror. Although the Commonwealth did not object to either challenge, the judge inquired after making this observation.[3] A judge has broad discretion to ***1182** move to the second prong without having to decide whether the challenging party met the first prong. See Commonwealth v. Robertson, 480 Mass. 383, 396 n.10, 105 N.E.3d 253 (2018), quoting Lopes, 478 Mass. at 598, 91 N.E.3d 1126. Furthermore, "[a] judge may, of course, raise the issue of a Soares violation sua sponte." Commonwealth v. Fritz, 472 Mass. 341, 348, 34 N.E.3d 705 (2015), quoting Commonwealth v. Smith, 450 Mass. 395, 406, 879 N.E.2d 87, cert. denied, 555 U.S. 893, 129 S.Ct. 202, 172 L.Ed.2d 161 (2008). Here, we view the judge's sua sponte inquiry under the second prong as an implicit finding of a pattern of improper exclusion. See Commonwealth v. Benoit, 452 Mass. 212, 220-221, 892 N.E.2d 314 (2008). We disagree with the defendant's argument that the Commonwealth's failure to object substantiates the defendant's claim. We have "persistently urged, if not beseeched" judges to elicit group-neutral explanations regardless of whether the first prong of the inquiry has been satisfied. Sanchez, 485 Mass. at 515, 151 N.E.3d 404 (Lowy, J., concurring). A judge may inquire into the basis of a peremptory challenge based on his or her own initiative and observations. See Commonwealth v. Wood, 389 Mass. 552, 560-561 n.9, 451 N.E.2d 714 (1983).

3 During jury selection, the judge did not specify to which protected group juror no. 245 belonged and referred to him as a "minority" juror. We previously have noted that this type of "unfocused" characterization can "confuse[ ] matters." Commonwealth v. Jackson, 486 Mass. 763, 772, 162 N.E.3d 48 (2021). "The test in [Commonwealth v.] Soares[, 377 Mass. 461, 387 N.E.2d 499 (1979),] and Batson [v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986),] does not apply to challenges to members of all minority ethnic or racial groups lumped together, but instead applies to challenges to 'particular, defined groupings in the community.' " Commonwealth v. Lopes, 478 Mass. 593, 600 n.5, 91 N.E.3d 1126 (2018), quoting Commonwealth v. Prunty, 462 Mass. 295, 307 n.17, 968 N.E.2d 361 (2012).
In this case, the record reveals that the particular group in question was Black jurors and that the judge understood this to be the case. In discussing the defendant's motion for a stay after trial on July 8, the judge noted that juror no. 245 was "a second [B]lack juror. He may have been a [B]lack Hispanic."
Given this support from the record, we focus our analysis on the cognizable group of Black jurors. We conclude that although the judge in this case did not make a finding on the record as to the challenged juror's race, he considered whether defense counsel's explanation was a pretext for discrimination against the discrete group of Black jurors, not only against "minority" jurors. We emphasize, however, that trial judges should identify the cognizable group for the purpose of a Batson challenge on the record.

It also is significant that the defendant did not challenge two jurors with similar characteristics and responses to juror no. 245. Both juror no. 31 and juror no. 53 answered "no" to the question, "Do you think children sometime make false accusations of sexual assault?" The responses of those jurors about children making false allegations of sexual assault substantially were the same as juror no. 245's response, yet the defendant did not challenge them. Juror no. 31, like juror no. 245, also had two children. Based on the totality of the relevant facts, it was reasonable for the judge to infer a discriminatory purpose. See Sanchez, 485 Mass. at 511, 151 N.E.3d 404. Further, the judge was within his discretion in denying the challenge after finding that defense counsel's justification was not adequate or genuine.

2. Admission of text messages between defendant and victim. The defendant argues that admission of some text messages he exchanged with the victim was prejudicial error. He does not contest authentication of the text messages, but instead argues that some specific text message exchanges were inadmissible hearsay. Conversely, the Commonwealth argues that the admission of the text messages was proper under the hearsay exemption ***1183** for statements by a party opponent, as well as to show the defendant's state of mind. We agree with the Commonwealth.

The Commonwealth moved to allow portions of the defendant's extensive text conversations with the victim. Specifically, the Commonwealth sought to introduce all

messages from June 24 to July 11, 2016, as well as messages discussing the defendant as a teacher or mandated reporter; discussing the defendant's request that the victim delete certain messages; discussing the defendant's getting in trouble for the relationship or telling the victim not to tell anyone about the relationship; involving flirting; and discussing the victim's age. The defendant moved to exclude the text messages on hearsay and relevance grounds. The judge found the text messages from the defendant admissible as statements of a party opponent. The judge found the text messages from the victim to be admissible under the doctrine of verbal completeness to render the defendant's statements comprehensible, to show the relationship of the parties, and to show that some of the defendant's text messages were adoptive admissions.

"The hearsay rule prohibits the admission only of out-of-court assertions offered to prove the truth of the matter asserted." Commonwealth v. Siny Van Tran, 460 Mass. 535, 550, 953 N.E.2d 139 (2011), citing Mass. G. Evid. § 801(c) (2011). If a statement is offered to show that the statement was made, and not to prove the facts asserted in it, it is not hearsay. See id. See also Commonwealth v. Fiore, 364 Mass. 819, 824, 308 N.E.2d 902 (1974), citing Wigmore, Evidence § 1766 (3d ed. 1940) (out-of-court utterances constitute hearsay only when offered "for a special purpose, namely, as assertions to evidence the truth of the matter asserted"). Additionally, "[a]n extrajudicial statement made by a party opponent is an exception to the rule against the introduction of hearsay, and is admissible unless subject to exclusion on other grounds." Commonwealth v. Spencer, 465 Mass. 32, 46, 987 N.E.2d 205 (2013). See Mass. G. Evid. § 801(d)(2)(A) (2021). The hearsay exemption of the party opponent encompasses any extrajudicial statement made by a party opponent, not just statements that are inculpatory or against the party's interest. Spencer, supra. Finally, statements may be admissible under the hearsay exemption of adoptive admission. See Commonwealth v. Ferreira, 481 Mass. 641, 658, 119 N.E.3d 278 (2019); Mass. G. Evid. § 801(d)(2)(B).

First, the messages from the defendant to the victim, which included declarations of love and wanting to be with the victim, were not admitted for the truth of the matter asserted, and accordingly, such statements are not hearsay. Messages between the defendant and the victim that recounted their sexual encounters were highly relevant at a trial for indecent assault and battery of a person under fourteen by a mandated reporter. See Commonwealth v. Gilman, 89 Mass. App. Ct. 752, 753, 757-758, 54 N.E.3d 1120 (2016). The messages also were relevant to the defendant's profession and whether he was a mandated reporter. In the text messages, the defendant referenced being a teacher and discussed his relationship with students.

We agree with the motion judge that text messages sent from the defendant to the victim were admissible under the hearsay exemption for a party opponent's statements. We also agree that the victim's messages were admitted properly to provide important context for the defendant's text messages. See Commonwealth v. Barnett, 482 Mass. 632, 638, 125 N.E.3d 724 (2019) (accusatory text message to defendant properly admitted to ***1184** provide necessary context to defendant's admissible statements).

The defendant specifically challenges the admission of a deleted text message exchange spanning a period of seventeen minutes on July 7, 2016. The defendant contends that this exchange was improperly admitted as an adoptive admission. "To prove that a statement was an adoptive admission on the basis that a defendant remained silent in the face of an accusation, the Commonwealth must establish that (1) the defendant heard and understood the statement; (2) the defendant had an opportunity to respond; and (3) the context was one in which an individual would have been expected to respond to an accusation of criminal conduct." Ferreira, 481 Mass. at 658, 119 N.E.3d 278.

In the text message exchange, the defendant adoptively admits to being in the basement at the victim's home the day before, on July 6, 2016. The victim stated, "I've been thinking of last night in the basement," and the defendant responded, "Yeah it was a very good talk." The victim then stated, "I was thinking about the more silent things in the basement." The victim sent three more text messages, after which the defendant responded with a smiley face emoji.[4]

4 "An emoji is 'any of various small images, symbols, or icons used in text fields in electronic communication (as in text messages, [electronic]mail, and social media) to express the emotional attitude of the writer, convey information succinctly, communicate a message playfully without using words, etc.' " Commonwealth v. Castano, 478 Mass. 75, 78 n.2, 82 N.E.3d 974 (2017), quoting Merriam-Webster Online Dictionary, https://www.merriamwebster.com/dictionary/emoji [https://perma.cc/QUC5-SA8E].

This exchange of text messages was properly admitted as an adoptive admission. It is obvious from the exchange that

the defendant "heard" and understood the statement and had an opportunity to respond. See Ferreira, 481 Mass. at 658, 119 N.E.3d 278. Furthermore, in the context of the conversation, the defendant would have understood that the victim was referring to the sexual encounter that occurred in the basement and would have been expected to respond to it as an accusation of criminal conduct. See id.

We agree with the defendant that a conversation via text messages substantially is different from an in-person conversation, and recognize that "evidence of this nature," especially digital evidence, "must be approached with caution." Commonwealth v. Olszewski, 416 Mass. 707, 719, 625 N.E.2d 529 (1993). We disagree, however, that the facts of this case are comparable to Ferreira, 481 Mass. at 658-659, 119 N.E.3d 278, where we concluded that hanging up the telephone after an accusation of criminal conduct was not an adoptive admission. Here, it is apparent that the defendant received the message because he eventually responded to the victim with a smiley face emoji, albeit after she sent several more text messages. Regardless of whether the defendant's text message was in response to the victim's message that she was "thinking about the more silent things in the basement," it was in no way a denial of the accusation of criminal conduct.

Several other text message exchanges were admitted over the same objection. The defendant argues that the following messages were admitted improperly as adoptive admissions because the victim stated that some of the text messages in this exchange from the defendant "all came at once":

> The victim: "I'm just remembering being alone with you the last few days
>
> ***1185** "It really is awesome being with you like that
>
> "Even when we're not having nice things
>
> "It's just amazing being with you alone
>
> "Doesn't matter what we're doing"
>
> The defendant: "You can let your walls down."
>
> The victim: "Yes
>
> "And so can you
>
> "Even tho we're listening for people we can still be ourselves."
>
> The defendant: "Yeah
>
> "Hope you liked what you saw of me"

The defendant argues that because the messages may have been delayed, it is difficult to tell to which statements the defendant was responding. In the context of these messages, we disagree that any delay rendered the messages inadmissible. Regardless of whether the defendant's responses were delayed, he did not deny that he was alone with the victim in any of his responses.

The defendant argues that the following exchange also was improperly admitted as an adoptive admission:

> The victim: "Actually thinking of when we were on the fifth floor yesterday and we went into a room with a fridge and I asked if you were getting food from it ... and you said, 'No, I'm getting you.' And then you pulled me inside against the table, and niced[5] me passionately"
>
> The defendant: "You did it again."

The defendant then instructed the victim to delete the text message. Again, in the context of the conversation, the defendant's response of "[y]ou did it again" was not a denial of the criminal conduct the victim described in her message. The same is true of his next statement instructing the victim to delete her message. Given that the defendant previously had sent the victim text messages that he could "get in trouble" for his behavior toward her, the defendant's intent in telling the victim to delete the messages is clear.

5 The victim testified that this meant "kissed."

The defendant's text messages about showering and getting his things together also were admitted properly as statements of a party opponent. In many of the text messages, the defendant encouraged the victim to communicate with him and exploited her feelings for him. Such statements were relevant to the declarant's state of mind, and therefore were not hearsay. See Commonwealth v. Qualls, 425 Mass. 163, 167, 680 N.E.2d 61 (1997). His text messages remarking on the victim's beauty, asking her to dress up for him, requesting a "whole body shot," and stating, "Oh god you're learning to become a better tease" were relevant to the nature of his relationship with the thirteen year old victim. The defendant's instructions to the victim to delete certain messages describing sexual encounters between them were admissible as statements of a party opponent.

Even if admission of any of the isolated text messages to which the defendant objected were error, there was no

prejudice to him given the cumulative nature of the evidence, including the admission of the many text messages between the defendant and the victim that the defendant does not contest.

3. Admission of school policies. The defendant argues that the judge erred in admitting the school's written policies pertaining to child abuse and inappropriate sexual relations, absent the entire school faculty handbook. Specifically, the defendant contends that the doctrine of verbal completeness required the judge to review the entire faculty handbook before admitting ***1186** the policies pertaining to child abuse and inappropriate sexual relations. At trial, the defendant argued that the school's policies were not business records and that "if this is a 200-page document or whatever it is -- What the Commonwealth is trying to elicit here is that the [d]efendant was aware of this. And just giving it to the jury in this form, with just these provisions, is problematic in that respect." The Commonwealth counters that the judge did not abuse his discretion in finding there was a sufficient foundation for the school policies to be admitted under the hearsay exception for business records.

The business records hearsay exception provides that "a writing or record ... made as a memorandum or record of any act, transaction, occurrence or event, shall not be inadmissible in any civil or criminal proceeding as evidence of the facts therein stated because it is transcribed or because it is hearsay or self-serving." G. L. c. 233, § 78. See Commonwealth v. Fulgiam, 477 Mass. 20, 39, 73 N.E.3d 798 (2017); Mass. G. Evid. § 803(6)(A). A record falls within the scope of the business records hearsay exception "if the judge finds that it was (1) made in good faith; (2) made in the regular course of business; (3) made before the action began; and (4) the regular course of business to make the record at or about the time of the transaction or occurrences recorded" (citation omitted). Fulgiam, supra. "If such findings are made, the record 'is presumed to be reliable and therefore admissible.' " Id., quoting Wingate v. Emery Air Freight Corp., 385 Mass. 402, 406, 432 N.E.2d 474 (1982).

At trial, the school's director of human resources testified that the policies had been part of the faculty handbook issued in 2013 and in effect until 2017. Consequently, the judge found that the policies were admissible as business records. We review the admission of the documents for abuse of discretion. See Commonwealth v. Denton, 477 Mass. 248, 250, 75 N.E.3d 589 (2017). That the policies were described as "excerpts" from the handbook did not subject them to the doctrine of verbal completeness. We agree with the judge that the excerpts of the handbook were made in the regular course of business, before this action began. Printing parts of preexisting documents without altering the text does not amount to creating a document for litigation. See Commonwealth v. Andre, 484 Mass. 403, 410-411, 142 N.E.3d 60 (2020) (record created by searching for and copying account information into new document permissible). The evidence showed that the defendant was familiar with the policies because they were provided to all faculty members. Furthermore, the defendant referred to the policies in his text messages with the victim.

Although the defendant contends that the Commonwealth did not possess the full faculty handbook, he does not identify anything further in the handbook that was relevant to his defense. Moreover, he did not make the handbook a part of the record, and he provides only speculation that the absence of the complete handbook made the policies that were admitted misleading. We also note that, as the Commonwealth points out, before trial, the defendant did not move pursuant to Mass. R. Crim. P. 17, 378 Mass. 885 (1979), or otherwise attempt to obtain the school's complete faculty handbook. Mere speculation that the school policies about sexual contact were misleading, without more, is not a sufficient basis for us to conclude that the judge erred in admitting excerpts of the handbook. Accordingly, we conclude that the judge did not abuse his discretion in admitting the school's policies regarding ***1187** child abuse and inappropriate sexual relations in evidence.[6]

6 We also note that the defendant's suggestion that the judge should have reviewed the entire handbook is a misapplication of the doctrine of verbal completeness. "When a party introduces a portion of a statement or writing in evidence the doctrine of verbal completeness allows admission of other relevant portions of the same statement or writing which serve to 'clarify the context' of the admitted portion" (citation omitted). Commonwealth v. Carmona, 428 Mass. 268, 272, 700 N.E.2d 823 (1998). Even if the doctrine of verbal completeness were applicable, it would not require judicial review of the entire writing, rather it would require additional portions of the writing to be admitted where necessary to give context to the excerpted statements.

4. Closing argument. The defendant argues that the prosecutor's closing argument misrepresented testimony and improperly shifted the burden of proof to the defendant. The

Commonwealth argues that the prosecutor drew permissible inferences from the evidence, and that she appropriately responded to the defendant's closing argument. The defendant did not object to the prosecutor's closing argument; therefore, we determine whether there was an error and, if so, whether the error created a substantial risk of miscarriage of justice. Commonwealth v. Miranda, 458 Mass. 100, 114, 934 N.E.2d 222 (2010), cert. denied, 565 U.S. 1013, 132 S.Ct. 548, 181 L.Ed.2d 396 (2011).

First, the defendant argues that the prosecutor misstated evidence relating to testimony from the assistant head of the school where the defendant worked. The prosecutor stated that the "[assistant head of school] said that the [d]efendant was acting in his capacity as a faculty member when the public came ... into their facility, as a faculty member needed to be present to use those facilities." The defendant argues that the witness never testified that a faculty member needed to be present to use the facilities, and that this evidence directly concerned an element of the crime. We conclude that this statement was based in evidence and was a logical inference from the witness's testimony that the school held community programs staffed by the school's faculty. See Commonwealth v. Lewis, 465 Mass. 119, 129, 987 N.E.2d 1218 (2013), quoting Commonwealth v. Kozec, 399 Mass. 514, 516, 505 N.E.2d 519 (1987) (prosecutor's closing argument may be based on "inferences that may reasonably be drawn from the evidence").

Next, the defendant argues that the prosecutor attempted to shift the burden of proof by underscoring the defendant's failure to testify. An attempt to shift the burden of proof occurs when the prosecution suggests that the defendant has "an affirmative duty to bring forth evidence of his innocence" (citation omitted). Commonwealth v. Witkowski, 487 Mass. 675, 686, 169 N.E.3d 496 (2021). A prosecutor may respond and comment on the defense's argument and point to weaknesses in the argument so long as it focuses on the argument as a whole and not the defendant's failure to testify. Id. Prosecutors "may be critical of the tactics utilized by trial counsel in defending a case" (citation omitted). Commonwealth v. Rutherford, 476 Mass. 639, 644, 71 N.E.3d 481 (2017).

Here, the prosecutor did not suggest that the defendant had to demonstrate his innocence. Rather, the prosecutor's argument responded to the defendant's closing argument while arguing for permissible inferences. The defense argues the following phrases shifted the burden of proof to the defendant: "the defense does not tell you [that the defendant was paid to work with children]" and the "[d]efendant says that he wasn't ***1188** her teacher" (emphasis added). All potentially erroneous phrases should be read in the context in which they were stated. Commonwealth v. Whitman, 453 Mass. 331, 347, 901 N.E.2d 1206 (2009). When viewed in the context of the record as a whole, the prosecutor's statements do not attempt to fault the defendant's lack of testimony. Instead, the prosecutor pointed to the defendant's status as a teacher instead of a mere faculty member because he was paid to work with children. The prosecutor's statements in closing argument did not seek to bring attention to the defendant's failure to testify, but rather to the basis of the defense's argument that he was only a faculty member and not a teacher.

The prosecutor's statement that the "[d]efendant says that he wasn't her teacher" was also a proper response to the defendant's closing argument. Defense counsel described the defendant as a "tech guy" rather than a teacher and a mandated reporter by highlighting his specialized knowledge of the telescope and the lack of a specific job title. Additionally, the defense drew from certain portions of the assistant head of school's testimony, which stated that the defendant operated within his capacity as a faculty member while working in the school, not as a teacher. Accordingly, the prosecutor directly addressed the assistant head of school's testimony describing the defendant as "a fellow teacher." We conclude that there was no error in the prosecutor's closing argument.

5. Jury instruction on mandated reporter. The defendant argues that the judge's instruction to the jury that a mandated reporter is "a person who is a public or private schoolteacher or a person paid to care for or work with a child in any public or private facility" was improper. Specifically, the judge instructed the jury:

> "[T]he Commonwealth must prove that at the time of the offense, the Defendant was a mandated reporter as defined by the laws of Massachusetts. Now, the [L]egislature has designated any number of categories of mandated reporters in the statute, including, for example: police officers, foster parents, nurses, pediatrists. But for purposes of this case, the relevant statutory categories are a person who is a public or private schoolteacher or a person paid to care for or work with a child in any public or private facility."

In relevant part, G. L. c. 119, § 21, defines "mandated reporter" to include:

> "A person who is: ... (ii) a public or private school teacher, educational administrator, guidance or family counselor,

> child care worker, person paid to care for or work with a child in any public or private facility, or home or program funded by the commonwealth or licensed under [G. L. c.] 15D that provides child care or residential services to children or that provides the services of child care resource and referral agencies, voucher management agencies or family child care systems or child care food programs, licensor of the department of early education and care or school attendance officer ...."

The defendant argues that the jury instructions were incorrect because defining a mandated reporter as a "person paid to care for or work with a child in any public or private facility" truncates a portion of a statutory clause and leads to an erroneous construction of the statute. The defendant contends that "any public or private facility" is modified by "funded by the commonwealth or licensed."

We agree with the Commonwealth that the Legislature did not intend for "any public of private facility" to be modified by "funded by the commonwealth or ***1189** licensed under [G. L. c.] 15D." A plain reading of the statute suggests that the phrase "funded by the commonwealth or licensed under [G. L. c.] 15D" modifies only "home or program." "[T]he general rule of statutory as well as grammatical construction is that a modifying clause is confined to the last antecedent unless there is something in the subject matter or dominant purpose which requires a different interpretation" (citation omitted). Bednark v. Catania Hospitality Group Inc., 78 Mass. App. Ct. 806, 812, 942 N.E.2d 1007 (2011). We further agree with the Commonwealth that comma placement in the statute is some evidence of the Legislature's intent. The placement of the comma between "person paid to care for or work with a child in any public or private facility" and "home or a program funded by the commonwealth or licensed under [G. L. c.] 15D" is evidence that the Legislature intended the modifying clause "funded by the commonwealth or licensed under [G. L. c.] 15D" to apply only to "home or program."

In interpreting statutes, we seek to ascertain and effectuate the intent of the Legislature in a way consonant with sound reason and common sense. See Commonwealth v. Gomes, 483 Mass. 123, 127, 130 N.E.3d 1234 (2019); Commonwealth v. Wassilie, 482 Mass. 562, 573, 125 N.E.3d 682 (2019). The purpose of mandated reporting is the protection of children. See G. L. c. 119, § 1. The definition of "mandated reporter" was added to G. L. c. 119, § 21, in 2008. St. 2008, c. 176, § 83. To protect children, mandated reporting responsibilities are assigned to many categories of adults who are able to observe and detect signs of child abuse or neglect. See G. L. c. 119, § 21; Matter of a Grand Jury Investigation, 437 Mass. 340, 353 n.23, 772 N.E.2d 9 (2002). To construe the statute the way the defendant argues would severely limit the class of adults overseeing children who are required to report signs of child abuse or neglect and thereby contravene the purpose of the statute: to protect children. The defendant's argument that the judge's construction of the statute would make employees of restaurants, video game stores, and amusement parks into mandated reporters is misguided. These employees are not directly responsible for the care of children, unlike the class of mandated reporters defined by G. L. c. 119, § 21. See Matter of a Grand Jury Investigation, supra ("The stringent reporting requirements and the protections the statute accords mandated reporters further the Legislature's intent to protect children from physical and emotional damage at the hands of the persons in whose care they are entrusted").

The defendant also argues that there was ambiguity regarding whether he was considered a "school teacher" for the purposes of the statute. The defendant contends that even if the jury could have rationally concluded that the defendant was a "private school teacher," reversal is required because the judge erred in instructing the jury that they may also convict on the theory that a mandated reporter is a "person paid to care for or work with a child in any public or private facility." The defendant argues that because the jurors were not asked to differentiate on the theory of guilt on their verdicts slips, the verdict could have rested on either theory.

First, we address the defendant's claim that there was ambiguity regarding whether the defendant's job fell under one of the categories of mandated reporter defined in the statute. Although there is some question as to the defendant's job title at the time of the incident, the record is clear that the defendant worked at an afterschool program. As part of this job, ***1190** he worked with a radio club that was run by faculty, students, and an outside organization. As an adult employee working at an afterschool program, there is no question the defendant was part of the class of adults who are able to observe and detect signs of child abuse or neglect. See G. L. c. 119, § 21. Based on these facts, as the judge instructed, the jury reasonably could have found that the defendant was "a person who is a public or private schoolteacher or a person paid to care for or work with a child in any public or private facility."

Although it is unclear whether the jury found that the defendant was a teacher or an individual paid to care for or work with children, we disagree that the jury instruction

caused reversible error. In Commonwealth v. Vizcarrondo, 427 Mass. 392, 392, 693 N.E.2d 677 (1998), S.C., 431 Mass. 360, 727 N.E.2d 821 (2000) and 447 Mass. 1017, 856 N.E.2d 821 (2006), the defendant was convicted of murder in the first degree by reason of extreme atrocity or cruelty. There, we concluded that because " 'the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected,' the verdict must be set aside." Id. at 398, 693 N.E.2d 677, quoting Commonwealth v. DiRenzo, 44 Mass. App. Ct. 95, 100-101, 688 N.E.2d 468 (1997). The judge instructed the jury that malice, an element of murder, could be inferred where the defendant knew, or should have known, that there was a plain and strong likelihood that death or grievous bodily harm would follow from his act. Vizcarrondo, supra at 395, 693 N.E.2d 677. This instruction improperly permitted jurors to infer malice from conduct that "involves a high degree of likelihood that substantial harm will result to another." Id. at 396, 693 N.E.2d 677, quoting Commonwealth v. Sires, 413 Mass. 292, 303-304 n.14, 596 N.E.2d 1018 (1992). A conviction made on this ground is insufficient to support a conviction for murder based on the third prong of malice.

Here, as discussed, the judge's instructions allowed the jury to find that the defendant was a mandated reporter if he was a private school teacher or if he was a person paid to care for or work with a child in any public or private facility. Vizcarrondo is not applicable to this case because the verdict was supportable on both grounds mentioned in the jury instruction. Both grounds were sufficient to find that the defendant was a mandated reporter.

Finally, the defendant contends that the judge erred in asking the jury to decide whether the defendant was acting in his professional capacity in the form of a special jury question rather than through a standard jury instruction and in failing to define professional capacity. In addition to listing the special question on the verdict slip, the judge instructed the jury that they would need to answer a special question if they "found the defendant guilty of indecent assault and battery on [sic] a mandated reporter." The judge stated:

> "And the question is this: ... has the Commonwealth also proved beyond a reasonable doubt that the Defendant was in his professional capacity as a mandated reporter at the time the indecent -- at the time of the indecent assault and battery on a child under [fourteen]? Your answer to this question should be unanimous. Consider all of the evidence and circumstances surrounding the incident and the reasonable inferences you draw from them in arriving at your answer."

The special question combined with the judge's explanation of the special question appropriately required the jury to consider whether the defendant committed the offense ***1191** while acting as a teacher or an individual paid to work with children.

In Gomes, 483 Mass. at 127, 130 N.E.3d 1234, the defendant was employed as a police officer and was, by statute, considered a mandated reporter. However, when the defendant assaulted the victim, he was off duty wearing plain clothes. Id. We concluded that "[u]nder the plain language of the statute, the Legislature thus restricted application of G. L. c. 265, § 13B 1/2 (b), only to those defendants who were mandated reporters 'at the time of commission' of the offense." Id. at 128, 130 N.E.3d 1234. Cf. Garney v. Massachusetts Teachers' Retirement Sys., 469 Mass. 384, 394, 14 N.E.3d 922 (2014) (concluding teacher's private possession of child pornography did not directly involve his position as teacher). In Gomes, we did not explicitly define "professional capacity." We conclude that it was similarly unnecessary for the judge in this case to define this term either in the special question or in the jury instructions. It is implied that professional capacity specifically refers to the category of mandated reporter listed in the statute that is applicable to the defendant. The question appropriately asked the jury to consider whether the defendant was acting in his capacity as a teacher or as an individual paid to work with children at the time of the incident or, like in Gomes, whether the defendant was "off duty." See Gomes, supra.

Unlike in Gomes, the record is clear that the defendant in this case was operating in his capacity as a mandated reporter during several of the charged incidents. The incidents at issue occurred during a radio club event at the school on June 24, 2016, and June 25, 2016. The jury's finding that the defendant was acting in his professional capacity on the indictments stemming from incidents that occurred on those days was amply supported by the record, as he assaulted the victim at the school where he was a faculty member. Furthermore, those assaults took place during the school's amateur radio club's field day, which the defendant was coordinating. Given this overwhelming evidence that the defendant was acting in his professional capacity, the judge's failure to instruct on and define "professional capacity" would not have influenced the jury's decision.

Conclusion. We affirm the defendant's convictions stemming from the incidents that occurred on June 24, 2016, and June 25, 2016. Pursuant to our ruling in Gomes, 483 Mass. at 130, 130 N.E.3d 1234, we vacate and set aside the defendant's convictions under G. L. c. 265, § 13B 1/2, stemming from the incidents that occurred on July 6, 2016, where the jury found that the defendant was not acting in his official capacity as a mandated reporter when he committed the offenses. As to those two counts, we remand to the Superior Court for entry of a judgment of guilty of the lesser included offense of indecent assault and battery on a person under the age of fourteen, G. L. c. 265, § 13B, and resentencing.

So ordered.

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