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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

SANTOS RUIZ

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

APPENDIX

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DISTRICT OF COLUMBIA COURT OF APPEALS

No. 16-CM-1238

SANTOS RUIZ, APPELLANT,

v.

UNITED STATES, APPELLEE.

FILED
May 16, 2018
DISTRICT OF COLUMBIA COURT OF APPEALS

Appeal from the Superior Court
of the District of Columbia
(DVM-1263-15)

(Hon. Danya A. Dayson, Trial Judge)

(Argued April 24, 2018 Decided May 16, 2018)

Before FISHER and THOMPSON, *Associate Judges*, and FARRELL, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: A jury found appellant guilty of misdemeanor sexual abuse of a child or minor. D.C. Code § 22-3010.01. On appeal, he mainly contends that the trial court wrongly allowed the government to introduce as substantive evidence out-of-court statements made by the child J.R. to three witnesses identifying acts of "sexually suggestive conduct," D.C. Code § 22-3010.01 (b), appellant had committed against her. The court admitted the evidence under D.C. Code § 14-102 (b)(3) as statements of identification,[1] but, according to appellant, breached the statute by admitting particulars about the crime itself, when (in appellant's words) "no detail beyond the actual identification of [the defendant] as the person who committed the charged crime is [admissible as] substantive evidence" under the

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[1] As relevant here, D.C. Code § 14-102 (b)(3) provides that a statement is not hearsay and is admissible as "substantive evidence" if "the declarant testifies at the trial . . . and is subject to cross-examination concerning the statement and the statement is . . . (3) an identification of a person made after perceiving the person."

statute. We hold that several of the statements of identification were properly admitted and that, while the admissibility of others is more questionable, any error in that regard did not affect the fairness of the jury's verdict. Rejecting appellant's other arguments for reversal as well, we affirm.

I.

On repeated occasions before trial, J.R. told police and others that appellant, her father, had engaged in sexually suggestive conduct toward her when she was twelve years old. At trial, J.R. admitted having made the accusations but now claimed that they were false – that she had made them up to force her father to address his drinking problem. The trial court, over objection, allowed the prosecutor to present, as substantive evidence of guilt, testimony by three witnesses to whom or in whose presence J.R. had made the accusatory pretrial statements.[2] The testimony was essentially as follows:

--- J.R.'s brother Francisco testified that, while crying and upset, J.R. told him that "she was sexually abused by my dad."

--- J.R.'s mother testified that, and demonstrated how, J.R. had told her that appellant touched her on her inner thigh.

--- Metropolitan Police Detective Lori Oxenreider-Murphy testified that she had witnessed J.R. tell a Children's Advocacy Center (CAC) official that appellant "tried to rape [her]," specifically that he first "tried to have sex with [her]" but then "touched her on the breast and on the vagina."

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[2] Citing *Fletcher v. United States*, 524 A.2d 40 (D.C. 1987), and *In re L.D.O.*, 400 A.2d 1055 (D.C. 1979), appellant argues that J.R.'s denial on the stand of having spoken truthfully made the prior statements inadmissible. The statute, however, "speaks categorically" in making statements of identification admissible "without limitation" if its requirements are met, *Johnson v. United States*, 820 A.2d 551, 559 (D.C. 2003); and in *Sparks v. United States*, 755 A.2d 394, 399 (D.C. 2000), the court stated that "[c]urrent case law," including D.C. Code § 14-102 (b)(3) and "virtually identical" federal evidentiary law, "does not support" an argument identical to the one appellant makes. A succession of this court's decisions, cited in part II, *infra*, have applied § 14-102 (b)(3) without regard to whether the statements contradicted the declarant's testimony.

II.

In disputing the admission of this testimony, appellant argues that "identification" within the meaning of § 14-102 (b)(3) has been understood by this court to "refer[ ] to who committed the crime, not what the perpetrator did." The trial court thus erred, in appellant's view, by letting the prosecutor "elicit[ ] details" from the three witnesses "that did nothing to contribute to the identity of the alleged perpetrator." Although appellant admits the witnesses could properly have testified that J.R. "identified her father . . . as the person who had committed the crime against her" or, indeed, that "J.R. previously identified her father as the person who sexually abused her," the court erred, he maintains, in letting the prosecutor "elicit specifics" such as that J.R. told the detective "that 'he tried to rape me,' 'he tried to have sex with me,' [or] 'he touched her on the breast and on the vagina'." Moreover, even if the statute made these details relevant, appellant asserts, their probative value was outweighed by their potential to prejudice his defense, since appellant "did not deny that he was the person who[ ] J.R. initially claimed had touched her inappropriately."

Contrary to appellant's argument, admission of prior identification statements under the statute is not restricted to "who committed the crime, not what the perpetrator did." Although "an account of the complaining witness' description of the offense itself is admissible under [the statute] only to the extent necessary to make the identification understandable to the jury," this means that "[s]ome limited reference in the identification to the criminal act is permissible." *Porter v. United States*, 826 A.2d 398, 410 (D.C. 2003). That is because "[t]o be understandable and therefore probative, an identification must have context . . . ." *Johnson*, *supra* note 2, 820 A.2d at 559 n.4. Thus, in *Porter* we found "persuasive[ ]" the government's argument that portions of the identification evidence "identif[ying a codefendant's] role in the several crimes" were admissible, specifically a victim's having "identified [that defendant] . . . as the person who took the marijuana and pager and the person who shot at him." *Porter*, 826 A.2d at 410. Appellant makes the valid point that this testimony served to differentiate one alleged perpetrator in that case from the other (hence was identification evidence narrowly understood), but the court's holding that the statements were admissible to "identify [the defendant] as a participant in [the crimes]" did not appear to turn on that fact, *id.*, most likely because the defendants were all charged as aiders and abettors of "the overall criminal venture." *Id.* at 406.

Moreover, in *Brown v. United States*, 840 A.2d 82 (D.C. 2004), an appeal partly from convictions for sexual abuse on several child victims, the court admonished that the prior identification exception does not allow admission of "detailed accounts of the actual crime," *id.* at 89, but held admissible testimony that one victim had told police "she was assaulted by [appellant]"; that another victim had told an officer she was "tired of [her] stepfather" and that he "had beaten her and had been having sex with her"; and that a victim also told medical personnel that "Tim" had "sexually abused her . . . [that she] was molested at his home after school, and [that] it happened a lot of times." *Id.* The court found greater difficulty with, but no need to decide, the admissibility of statements by a victim that she had "had intercourse with her stepfather yesterday" and regularly ("two to three times per week in the basement and in the living room"); these statements "reveal[ed] details about the actual crimes," and the court could not "be certain from the record that the trial judge regarded those details as necessary to the jury's understanding of the identifications." *Id.* at 90.

The gist of these decisions is that the details of prior identification statements are admissible under D.C. Code § 14-102 (b)(3) "to the extent necessary to provide context to the identifications," *Graham v. United States*, 12 A.3d 1159, 1165 (D.C. 2011), and thereby make the identifications "understandable and therefore probative" to the trier of fact. *Johnson*, *supra* note 2, 820 A.2d at 559 n.4. In light of these principles, appellant does not take issue with the testimony by J.R.'s brother Francisco that J.R. told him "she was sexually abused by my dad." But appellant does dispute the admissibility of J.R.'s statement to her mother that appellant touched her on her inner thigh and her statement in Detective Oxenreider-Murphy's presence that appellant "tried to have sex with [her]" and then "touched her on the breast and on the vagina." The trial court, we conclude, did not err in admitting these statements as well.

J.R. was fifteen years old when she made the disputed statements. A reported statement by a child–declarant that she was "sexually abused" by a person may leave the jury uncertain of what she meant by the accusation and thus how probative the identification was. Her claim that someone "sexually abused" (or "assaulted") her may prompt the question, for example, whether this was indeed her own understanding of what happened or whether those descriptions—generic-sounding and legal in nature—were instead terms that she had heard or were told to her later. By contrast, a child's limited description of, or pointing to, where she was touched may more naturally be seen by a jury as how she would report such experiences, and so make her statement of identification more probative. The declarations by a victim in *Brown* of the defendant's repeatedly "having [had] sex with her" or "molest[ing her] at his home after school" are not materially less "detailed," under our cases, than J.R.'s descriptions of having been touched by appellant on the inner thigh or the breast and vagina. At least in the case of a child declarant, the latter no less than the former fit within the "limited reference in the identification to the criminal act," *Porter*, 826 A.2d at 410, that can be critical to a jury's "context" assessment and thus how probative the identification is.

The statements just discussed were therefore admissible under D.C. Code § 14-102 (b)(3). We further reject appellant's argument that, under traditional balancing, the statements should have been excluded as more prejudicial than probative because he "did not deny he was the person whom J.R. had [earlier] alleged assaulted her and J.R. did not deny on the stand that she had identified him previously." The issue before the jury was not appellant's identity as someone "alleged" to have committed the acts, but whether in fact he had engaged in "sexually suggestive conduct" toward J.R., D.C. Code § 22-3010.01 (a), despite her denial on the stand that he had done so. J.R.'s prior descriptions of his conduct discussed above were integral to the proof that he engaged in the prohibited acts.

At the same time, other statements by J.R. admitted in evidence were more troublesome. Her statement from what the detective "recall[ed]" that appellant "tried to rape me" went beyond the "sexually suggestive conduct" needed to prove the misdemeanor violation, and was potentially more inflammatory than probative. Also, the trial court allowed the detective to testify to what J.R.'s mother declared J.R. had told her about having been "touched all over her body" by appellant – double hearsay that seemingly exceeded the "personal knowledge" of the declarant required by the statute. *Foreman v. United States*, 114 A.3d 631, 639 (D.C. 2015).[3] Nevertheless, we are reviewing what we conclude on the entire record was a conscientious endeavor by the trial court to "limit[ ] what the government could elicit from its witnesses with respect to [the statutory] exception." *Taylor v. United*

[3] Eliciting from Francisco J.R.'s further statement that she had been abused "by the person she trusted most" seems yet another instance of the prosecutor's piling on unnecessary detail.

States, 866 A.2d 817, 823 (D.C. 2005).[4] The combined weight of the correctly admitted identification evidence from three witnesses, including two whose obvious reluctance to testify bespoke sincerity the jury might well have equated with trustworthiness, persuades us that any improperly admitted statements were not so prejudicial to appellant as to require reversal. *See Kotteakos v. United States*, 328 U.S. 750, 776 (1946); *Taylor*, *supra*, 866 A.2d at 823-24 (applying *Kotteakos* harmless-error test to arguably erroneous admission of prior consistent statements of witnesses).

At the same time, we admonish the government against overplaying its hand regarding the substantive use of prior statements of identification. Treading as close to the line as it did here reflects insensitivity to the limits we have placed on the admission of § 14-102 (b)(3) evidence.[5]

III.

Appellant further argues that the trial court improperly allowed the prosecution to impeach J.R.'s trial testimony with other answers she had given to questions during her CAC interview. In appellant's view, because the prosecutor had no reason to believe J.R. would affirm her pretrial accusations when she took the stand, the impeachment violated the rule that "[i]mpeachment of one's own witness cannot be permitted where employed as a mere subterfuge to present to the jury evidence not otherwise admissible." *Smith v. United States*, 26 A.3d 248, 263 (D.C. 2011) (internal quotation marks omitted); *id*. (impeachment improper when questioning party has "exhibited bad faith by calling a witness sure to be unhelpful to its case").

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[4] As to J.R.'s interview by an official from CAC, for instance, the trial court's repeated concern that the interview video could include excessive details of the sexual abuse caused the government to agree to introduce other parts of the interview only as impeachment evidence. See part III, *infra*.

[5] The statements of identification the jury properly heard and considered as substantive evidence make appellant's separate challenge to the sufficiency of the evidence unavailing. His suggestion in brief and at oral argument that such statements can only lead to conviction if accompanied by other, separately introduced evidence of guilt has no support in our decisions.

In permitting the impeachment of J.R., however, the trial court twice rejected appellant's assertion of subterfuge or bad faith. The court stated that, although it had heard representations from others that J.R. "plan[ned] to repudiate" her allegations of misconduct, J.R had not withdrawn them "under oath" and had not "herself . . . made any statements . . . that she [was] going to repudiate" the allegations if called to testify. Therefore, when J.R. denied on the stand the truth of four things she had asserted in the CAC interview, the trial court allowed her to be impeached with contrary statements from the interview. The court then instructed the jury that it could consider any inconsistency between the portions of the interview and the child's trial testimony only to assess her credibility, not as substantive evidence that "what she said in the earlier statement is true." We find no abuse of discretion in the court's handling of this matter.

Appellant refers to the "letter immunity" that the prosecutor (with the aid of the District's Attorney General) had secured for J.R.'s trial testimony as proof positive that the government knew J.R. would not confirm her prior allegations on the stand.[6] But the trial court was well aware of the immunity granted and correctly, in our view, saw it as no evidence undermining a determination of good faith on the prosecutor's part. Although the letter was not made part of the record, appellant does not dispute that it offered no promise of immunity to J.R. for other than her truthful testimony on the stand. The letter is thus consistent with the prosecutor's belief, credited by the court, that under oath the child might yet confirm the truth of the allegations she had previously made, not deny it. Had the trial court viewed the letter immunity as evidence of *indifference* by the prosecutor to whether J.R. told the truth or not on the stand so long as she testified, we are confident the court would not have made the finding it did that the prosecution called J.R. to the witness stand in good faith.

IV.

Finally, appellant contends that the trial court erred by allowing Dr. Ellen Levin, a licensed social worker clinician, to testify as an expert on the subject of child sexual abuse, specifically the phenomenon of delayed allegations of such abuse by children. Following a *voir dire*, the court admitted the testimony under

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[6] J.R. was represented by counsel at the time, and the logical inference from the record is that counsel had insisted on her receiving the letter as a condition of her cooperating by testifying.

the then-prevailing test of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and *Dyas v. United States*, 376 A.2d 827 (D.C. 1977). After conviction in this case, but during pendency of the appeal, this court in *Motorola Inc. v. Murray*, 147 A.3d 751 (D.C. 2016) (en banc), replaced the *Frye/Dyas* test with the standards for admissibility articulated in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), as embodied in Federal Rule of Evidence 702. The *Motorola* court left open whether the Rule 702 standard "applies to cases that have already been tried but are not yet final on direct appeal." *Motorola*, 147 A.3d at 759.

Nor need we decide that issue in this case. Assuming, with appellant, that *Daubert* and Rule 702 should govern the admissibility of Dr. Levin's testimony, we perceive no need for a remand and reconsideration by the trial court of its admissibility decision under those standards. As the court pointed out in *Motorola*, quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), "'the trial judge must have considerable leeway [under *Daubert*] in deciding in a particular case how to go about determining whether particular expert testimony is reliable.'" 147 A.3d at 755 (quoting *Kumho Tire*, 526 U.S. at 152). Dr. Levin's testimony on *voir dire* and before the jury gave the trial court abundant reason for concluding that her discussion of delayed disclosure by victims of child sexual abuse was reliable. Dr. Levin described on the stand research studies she had reviewed dealing with the subject; moreover, her twenty-six years of clinical experience involving over 4,000 child cases in Montgomery County, 85-90% of which were child sexual abuse referrals, as well as her previous qualification as an expert on the subject in courts, provided a firm foundation for her judgment that delayed disclosure of sexual abuse is common among children, including those in the age thirteen-to-seventeen range.

Appellant takes specific aim at Dr. Levin's reference to a "study that looked at other studies" concerning delayed disclosure of abuse by Hispanic girls, in which "cultural factors and the close-knit[ted]ness of the family" were mentioned as factors contributing to the delay. We find no error in the court's allowing the expert to bring that study to the jury's attention. In *voir dire* appellant had objected that Dr. Levin "has no expertise on child sexual abuse or allegations of child sexual abuse in the Latin American community." Her familiarity with research literature directed to that subject was relevant to the jury's evaluation of her opinion about delayed disclosure, particularly in light of appellant's present faulting of her for "not stat[ing] how many of the 4000 children she had worked with . . . were Hispanic females, their ages or their family circumstances . . . ."

Altogether, the trial court properly exercised its discretion, *see Perkins v. Hansen*, 79 A.3d 342, 344 (D.C. 2013), in concluding that it was unnecessary "to displace the normal tools of the adversary system" by excluding the expert testimony, *Motorola*, 147 A.3d at 754, and that appellant's objections to Dr. Levin's expertise on delayed disclosure went to the weight to be accorded her testimony by the jury.

Affirmed.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

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