

FIRST COMPLAINT

The jury should be instructed on the limited use of such evidence both when it is admitted and again during final instructions. This is not a per se requirement, however, and the omission of contemporaneous instructions is evaluated on a case-by-case basis. Commonwealth v. Licata, 412 Mass. 654, 660, 591 N.E.2d 672, 675 (1992); Commonwealth v. Lorenzetti, 48 Mass. App. Ct. 37, 716 N.E.2d 1067 (1999).

The alleged victim is also known as the “complainant.” In sexual assault cases we allow testimony by one person whom the complainant told of the alleged assault. We call this “first complaint” evidence. The complainant may have reported the alleged sexual assault to more than one person. However, our rules normally permit testimony only as to the complainant's first report.

(The next witness will testify) (During this case you heard a witness testify) about the complainant’s “first complaint.” You may consider this evidence only for specific limited purposes: first, to establish the circumstances in which the complainant first reported the alleged offense, and then to determine whether that first complaint either supports or fails to support the complainant’s own testimony about the crime.

You may not consider this testimony as evidence that the assault in fact occurred. The purpose of this “first complaint” evidence is to assist you in your assessment of the credibility and reliability of the

complainant's testimony here in court.

In assessing whether this “first complaint” evidence supports or detracts from the complainant's credibility or reliability, you may consider all the circumstances in which the first complaint was made. The length of time between the alleged crime and the report of the complainant to this witness is one factor you may consider in evaluating the complainant's testimony, but you may also consider that sexual assault complainants may delay reporting the crime for a variety of reasons.

Commonwealth v. King, 445 Mass. 217, 247, 834 N.E.2d 1175, 1200 (2005), cert. denied, 546 U.S. 1216 (2006). The instruction should be given both before the first complaint witness testifies and again during the final instructions. *Id.*, 445 Mass. at 248, 834 N.E.2d at 1201; *Commonwealth v. Licata*, 412 Mass. 654, 591 N.E.2d 672, 675 (1992).

SUPPLEMENTAL INSTRUCTION

When non-sexual crime also charged.

You may consider any such statements made after the incident only to corroborate the complainant's present testimony about the alleged sexual assault. They are not relevant to the alleged [non-sexual offense] at all, and you may not consider them in evaluating the victim's testimony about that alleged offense.

NOTES:

1. **Fresh complaint doctrine abolished and first complaint doctrine recognized.** *Commonwealth v. King*, 445 Mass. 217, 834 N.E.2d 1175 (2005), cert. denied, 546 U.S. 1216 (2006), abolished the fresh complaint doctrine and substituted for it the doctrine of “first complaint.” The change applies to all cases tried after the rescript in the *King* case issued on October 27, 2005. *King*, 445 Mass. at 218, 834 N.E.2d at 1180.

Relevance and admissibility. First complaint testimony is limited to the specific purpose of assisting the jury in determining the credibility of the complainant's own testimony about the alleged sexual assault and therefore admissible except “where neither the occurrence of a sexual assault nor the complainant's consent is at issue.” It is not admissible to prove the truth of the allegations, or in cases where the sole issue is the identity of the perpetrator. *Id.*, 445 Mass. at 247-248, 834 N.E.2d at 1200-1201.

Delay now goes to weight, not admissibility. Unlike the prior rule, first complaint evidence should not be excluded because of a delay in reporting the alleged assault. Any delay is only one factor the jury may consider in weighing the complainant's testimony. *Id.*, 445 Mass. at 242, 834 N.E.2d at 1197.

Commonwealth limited to one first complaint witness or substitute. Only one first complaint witness may testify, since the testimony of multiple witnesses “likely serves no additional corroborative purpose, and may unfairly enhance a complainant's credibility as well as prejudice the defendant” Generally the first complaint witness must be “the first person told of the assault.” If that person is unable to testify (e.g., unavailable, incompetent, or too young to testify meaningfully), the Commonwealth may file a motion in limine and the judge may, in his or her discretion, admit testimony of a single substitute complaint witness. *Id.*, 445 Mass. at 243-244, 834 N.E.2d at 1197-1198. The judge may also allow a substitute when the victim's first encounter “does not constitute a complaint” (e.g., when the victim expresses upset but does not actually state that she has been sexually assaulted) or where the first person encountered has an obvious bias or motive to minimize or distort the victim's remarks. The substitute “should in most cases be the next complaint witness, absent compelling circumstances justifying further substitution.” The Commonwealth may not “pick and choose among various complaint witnesses to locate the one with the most complete memory, the one to whom the complainant related the most details, or the one who is likely to be the most effective witness Generally, a voir dire is the appropriate mechanism by which to make the preliminary determinations required by such a decision.” The judge should make any necessary findings of fact on which a substitution decision is dependent. *Commonwealth v. Murungu*, 450 Mass. 441, 879 N.E.2d 99 (2008). See *Commonwealth v. Lyons*, 71 Mass. App. Ct. 671, 673-674, 885 N.E.2d 848, 850-851 (2008) (after admitting complainant's tape-recorded 911 call as first complaint testimony, reversible error also to admit complaint to responding officer).

Permissible scope of witness's testimony. The first complaint witness may testify to the details provided by the complainant about the assault, as well as the witness's own observations of the complainant during the complaint, and “the events or conversations that culminated in the complaint; the timing of the complaint, and other relevant conditions that might help a jury assess the veracity of the complainant's allegations or assess the specific defense theories as to why the complainant is making a false allegation.” *Id.*, 445 Mass. at 244, 834 N.E.2d at 1198.

Permissible scope of complainant's testimony. Unlike the prior law, see *Commonwealth v. Peters*, 429 Mass. 22, 30, 705 N.E.2d 1118, 1123 (1999), the complainant herself or himself is no longer limited to testifying only that a complaint was made and to whom. If a first complaint witness or substitute testifies, the complainant may now also testify as to the details of the first complaint (i.e., what he or she told the first complaint witness) and why the complaint was made at that time. If no first complaint witness or substitute testifies, the complainant may not testify to the fact of the complaint or its details unless the witness is absent for a compelling reason that is not the Commonwealth's fault. *King*, 445 Mass. at 245 & n.24, 834 N.E.2d at 1198 & 1199 n.24. The complainant may not testify about whom else she told in addition to the first complaint witness, even if the details of those conversations are omitted, since “the jury are likely to assume, and reasonably so, that the complainant repeated the substance of her testimony to each person to whom she complained.” The judge should not allow a description of the investigative process, which is irrelevant to guilt and prejudicial. *Commonwealth v. Stuckich*, 450 Mass. 449, 879 N.E.2d 105

(2008).

Defense not limited to one rebuttal witness. The defense is not limited to one witness in attempting to show that the first complaint was misleading, inaccurate or false, that the proffered first complaint witness was not in fact the first person complained to, or that the complainant did not complain at the time, to the person, or in the detail one would expect. *Commonwealth v. Murungu*, 450 Mass. 441, 879 N.E.2d 99 (2008).

2. **Expert on general characteristics of abused children.** “Notwithstanding the theoretical right of a qualified [first] complaint witness also to testify [as an expert] to the general characteristics of sexually abused children, . . . prosecutors would be well advised to avoid such juxtaposition and, if it occurs, trial judges should be alert to its considerable prejudicial potential.” *Commonwealth v. Swain*, 36 Mass. App. Ct. 433, 444-445, 632 N.E.2d 848, 856 (1994).