NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-1261

COMMONWEALTH

vs.

TONY BUNTON.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury trial, the defendant, Tony Bunton, was convicted of rape, subsequent offense, G. L. c. 265, § 22 (b), armed assault with intent to murder, G. L. c. 265, § 18 (b), assault and battery causing serious bodily injury, G. L. c. 265, § 13A (b), assault and battery by means of a dangerous weapon, G. L. c. 265, § 15A (b), and assault with intent to rape, G. L. c. 265, § 24. He was also subject to sentencing enhancement as a habitual offender. On appeal, the defendant contends that (1) his motion to suppress should have been allowed because he invoked his right to counsel and did not knowingly and intelligently waive his Miranda rights; (2) a specific unanimity jury instruction should have been given sua sponte; and (3) trial counsel was ineffective for putting uncharged bad act evidence before the jury. We affirm.

Discussion. 1. Motion to suppress. "Typically, when reviewing a ruling on a motion to suppress, we accept the [motion] judge's subsidiary findings of fact absent clear error, but conduct an independent review of [the motion judge's] ultimate findings and conclusions of law" (quotations omitted). Commonwealth v. Libby, 472 Mass. 37, 40 (2015). However, where the evidence relied upon is a videotape, "the case for deference to the [motion] judge's findings of fact is weakened. In such circumstances, this court stands in the same position as did the [motion] judge, and reaches its own conclusion unaffected by the findings made by the [motion] judge. . . . Accordingly, we take an independent view of the evidence and analyze[] its significance without deference" (citations and quotations omitted). Id.

The defendant was given his Miranda rights and signed the form. He agreed to speak with the detectives. After some back and forth, and seeing a video, he then asked, "Well, let's say, . . . hypothetical . . . [t]hat, um, I ask to, um, speak with a lawyer. I'm not saying that that's what I am going to do." He then asked how long it would take to get a lawyer.[1] The defendant claims that this constituted a request for counsel.

[1] The exchange was:

THE DEFENDANT: "Well, let's say, uh, let's . . . hy-, hypothetical."

POLICE: "Yup."

"[A]fter a knowing and voluntary waiver of the Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney. To invoke the right to counsel, the suspect must unambiguously request counsel. If a suspect makes reference to counsel in an ambiguous or equivocal manner such that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, the police questioning need not cease" (citations and quotations omitted, emphasis original). Libby, 472 Mass. at 53. The defendant's statement was not an unambiguous request for counsel and the police were not required to terminate their questioning.

THE DEFENDANT: "That, um, I ask to, um, speak with a lawyer. I'm not saying that that's what I'm going to do."
POLICE: "Yup."
THE DEFENDANT: "Let's say that I wanted to speak with a lawyer and run some things over with the lawyer . . ."
POLICE: "Yup."
THE DEFENDANT: ". . . before I talk to you."
POLICE: "Yup."
THE DEFENDANT: "How long would it take to get a lawyer?"
POLICE: "It's . . . you have to make arrangements for your lawyer."
THE DEFENDANT: "Hmm."
POLICE: ". . . [portion omitted] Um, and I think we're done. Are you done?"
THE DEFENDANT: "Well, um, I don't know."
POLICE: "Well, Tony, I . . ."
THE DEFENDANT: "I'm trying to think it through."
POLICE: ". . . listen, think about it for a second. We'll, you know what? We'll leave the room. We'll give you a couple seconds . . ."
THE DEFENDANT: "Well, you don't have to leave the [room]."

The officer responded, "[i]t's . . . you have to make arrangements for your lawyer." The defendant asserts that this answer was so misleading that his waiver of the right to counsel was not knowingly and intelligently made. See Libby, 472 Mass. at 53-54. The motion judge concluded that the defendant was not misled or confused. Based on our independent review, we agree.

The officers reviewed the Miranda waiver form with the defendant, and told him that he was entitled to an attorney before and during questioning. Throughout the questioning the defendant was alert and focused. He displayed a sophisticated knowledge of the criminal justice system, offered exculpatory answers to various questions, and he even anticipated some defenses, telling the officers that they would have to prove penetration to charge him with rape. At the end of the interview he volunteered, "[s]ome lawyer is going to kill me," in reference to his decision to speak to the police, and expressed in profanity-laced terms his dislike of attorneys. This case is therefore inapposite to Libby, where a tired and disheveled defendant was patently confused by a police officer's statement that he would be appointed an attorney at arraignment, little understanding that he was entitled to counsel then and there. The defendant here understood his rights and made a knowing and intelligent waiver.

2. Specific unanimity. For the first time on appeal, the defendant argues that the judge should have given a specific unanimity instruction. "Where there was no objection to the absence of an instruction on specific unanimity, we need not decide whether the judge could have or should have provided such an instruction in this case. It is sufficient that we conclude that the absence of such an instruction did not create a substantial risk of a miscarriage of justice." Commonwealth v. Shea, 467 Mass. 788, 798 (2014).

"[A] specific unanimity instruction indicates to the jury that they must be unanimous as to which specific act constitutes the offense charged." Commonwealth v. Matos, 95 Mass. App. Ct. 343, 351 (2019), quoting Commonwealth v. Keevan, 400 Mass. 557, 566-567 (1987). Our cases often address the situation in which there is a single charge covering multiple acts, "where evidence of separate incidents is offered to the jury and any one incident could support a conviction." Id., quoting Commonwealth v. Conefrey, 420 Mass. 508, 513 (1995). See Commonwealth v. Santos, 440 Mass. 281, 285-286 (2003).

Here, by contrast, the defendant was charged with multiple offenses in separate indictments. The facts underlying the offenses were segregable. In closing argument, defense counsel drew distinctions between the factual basis of the rape indictment and the assault with intent to rape indictment. The

prosecutor outlined the separate factual basis for the indictment for armed assault with intent to murder. No argument has been made that there is a risk of duplicative convictions with respect to these or the remaining convictions. Cf. Commonwealth v. Kelly, 470 Mass. 682, 699-702 (2015).

Moreover, the case was tried as an all or nothing case, pitting one version of events against another. The defense was that the defendant did not commit the acts alleged, and that he acted in self-defense, as evidenced by the lack of certain forensic evidence. The verdicts of guilt on all counts indicate that the jury credited the victim's account in full, and disbelieved the defendant's in its entirety. Cf. Commonwealth v. Sanchez, 423 Mass. 591, 600 (1996).

The lack of a specific unanimity instruction did not create a substantial risk of a miscarriage of justice.

3. Ineffective assistance. The defendant contends that his lawyer's cross-examination of the victim suggested that the defendant had stolen money from her. In the absence of a motion for a new trial, "we review the trial record alone to determine whether a defense counsel's strategic or tactical decision questioned on appeal was manifestly unreasonable when made and, if so, whether the unreasonable decision resulted in a substantial likelihood of a miscarriage of justice. . . . We keep in mind that an ineffective assistance of counsel challenge

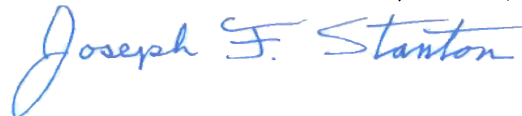
made on the trial record alone is the weakest form of such a challenge because it is bereft of any explanation by trial counsel for his actions and suggestive of strategy contrived by a defendant viewing the case with hindsight" (quotation omitted). Commonwealth v. Brown, 462 Mass. 620, 629 (2012).

Counsel's cross-examination highlighted the fact that the victim had less money on her person than she claimed to have had. The inquiry was designed to elicit evidence that the victim had accepted payment for sexual acts and ended up serving as impeachment of her testimony based on faulty memory. No suggestion was made by any witness or the prosecutor that the defendant took money from her. The decision to cross-examine regarding the inconsistency was a quintessentially strategic decision that was not "manifestly unreasonable" when made. Commonwealth v. Kolenovic, 471 Mass. 664, 674-675 (2015). Accordingly, counsel's cross-examination did not fall "measurably below that which might be expected from an ordinary

fallible lawyer." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).

Judgments affirmed.

By the Court (Milkey, Sullivan & Ditkoff, JJ.[2]),



Clerk

Entered: December 13, 2019.

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