

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as 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 23.0 or 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

19-P-1529

COMMONWEALTH

vs.

FROEBEL ANTOINE.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant, Froebel Antoine, was convicted after a jury-waived trial of three counts of indecent assault and battery on his niece, Wanda,¹ a child under fourteen years of age. See G. L. c. 265, § 13B.² On appeal, he contends that counsel was ineffective and that the motion judge, who was also the trial judge, erred in denying his motion for new trial after an evidentiary hearing.³ We affirm.

Discussion. The defendant contends defense counsel was ineffective for failing to (1) present evidence of bias by Wanda and her mother; (2) impeach the Commonwealth's witnesses with prior inconsistent statements; (3) pursue a plausible alibi

¹ A pseudonym.

² The defendant's motion for a required finding of not guilty on an additional count of indecent assault and battery was allowed.

³ No direct appeal is pending.

defense; (4) have a court-certified interpreter present at all client meetings; and (5) properly advise the defendant of immigration consequences in a clear and meaningful manner. He also claims that counsel was ineffective in eliciting testimony regarding the defendant's medical condition that cast doubt on his credibility. We review the denial of a motion for new trial for "a significant error of law or other abuse of discretion." Commonwealth v. Millien, 474 Mass. 417, 429 (2016), quoting Commonwealth v. Grace, 397 Mass. 303, 307 (1986).⁴

"To prevail on a motion for a new trial claiming ineffective assistance of counsel, a defendant must show that . . . 'behavior of counsel [fell] measurably below that which might be expected from an ordinary fallible lawyer,' and that counsel's poor performance 'likely deprived the defendant of an otherwise available, substantial ground of defence.'" Millien, 474 Mass. at 429-430, quoting Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). We grant "special deference to the rulings of a motion judge who was also the trial judge." Commonwealth v. Alcide, 472 Mass. 150, 158 (2015), quoting Commonwealth v. Forte, 469 Mass. 469, 488 (2014).

⁴ "[A] judge's discretionary decision constitutes an abuse of discretion where we conclude the judge made 'a clear error of judgment in weighing the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives'" (citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

1. Evidence of bias. The defendant maintains that Wanda and her mother were biased against him and that counsel was ineffective for failing to address their motives to fabricate. "Where, as here, the defendant's . . . claim is based on a tactical or strategic decision, the test is whether the decision was 'manifestly unreasonable' when made." Commonwealth v. Kolenovic, 471 Mass. 664, 674 (2015), quoting Commonwealth v. Acevedo, 446 Mass. 435, 442 (2006). "Generally, failure to impeach a witness does not amount to ineffective assistance of counsel." Commonwealth v. Norris, 483 Mass. 681, 687 (2019), quoting Commonwealth v. Fisher, 433 Mass. 340, 357 (2001).

At trial Wanda testified to three instances of indecent assault and battery that occurred when she was ages five, seven, and twelve. She did not tell anyone about the assaults at the time because the defendant told her she would get in trouble if she did. At age fifteen she told her Bible study instructor, who was the first complaint witness. The defendant testified, denying the assaults, and stating that he did not live in the house after the year 2000. The theory of the defense at trial was that there was no corroboration of the assaults and that the delayed reporting undermined Wanda's credibility.

The defendant asserts that defense counsel should have cross-examined Wanda as to bias arising from reports to her mother in 2005 that her older brother had engaged in

inappropriate sexual conduct with her. The defendant also claims that Wanda was angry with the defendant because he caught her sneaking out of the house to see her friends and stopped her, and that the mother was angry with him because he refused to do repairs on the house without compensation.

At an evidentiary hearing on the motion, counsel testified that, as a strategic matter, he was "respectful" of minors in indecent assault and battery cases. Where to draw the line in cross-examining a sexual assault victim is a quintessentially strategic judgment, especially where the victim is a minor. Cross-examining Wanda about additional sexual assaults at the hands of a family member (even if she acknowledged them on cross-examination, which defense counsel could not be certain she would do) could very well serve only to heighten the jury's sympathy for her, while doing nothing to undermine the strength of her testimony against the defendant.⁵ If she had acknowledged that the events with her brother took place, this would have opened the door to the suggestion by the Commonwealth that Wanda had learned sexualized behavior from her uncle, as the Commonwealth suggested at the evidentiary hearing. With respect

⁵ In addition, trial counsel testified that he doubted any judge would allow this line of questioning. We need not address the defendant's companion argument that Wanda's brother's alleged inappropriate conduct was admissible as an exception to the Rape Shield Law, G. L. c. 233, § 21B, because the decision not to cross-examine was not manifestly unreasonable when made.

to the other allegations, given the five-year gap between the report and the source of Wanda's alleged bias against the defendant, coupled with the fact that he no longer lived in the house at the time of the report, a reasonable attorney could have found the evidence of her bias to be too stale to be worth the risk of asking a question to which the answer was unknown. Additionally, following this bench trial, the judge's denial of the motion for new trial must be construed to include an implicit finding that this type of challenge to credibility would not have been successful at trial. See Fisher, 433 Mass. at 357 ("absent counsel's failure to pursue some obviously powerful form of impeachment available at trial, it is speculative to conclude that a different approach to impeachment would likely have affected the [judge's] conclusion").

Finally, the defendant contends that bias, or perhaps more properly stated, a motive to fabricate, was evident because Wanda inquired during her Sexual Assault Intervention Network (SAIN) interview with the SAIN nurse what would be required of her going forward and what the benefit would be of reporting her allegations to the police. That a child (or her parent) may be hesitant to report a sexual assault to the police is not novel, and a seasoned trial attorney could conclude that cross-examination on this topic would not be persuasive. Cf. Fisher, 433 Mass. at 357.

2. Prior inconsistent statements. The defendant also argues that defense counsel failed to impeach Wanda regarding prior inconsistent statements to Department of Children and Families (DCF) employees about sleeping arrangements in the family home. The defendant further contends that defense counsel failed to impeach the first complaint witness regarding the varying descriptions of the offenses.

As to the first contention, the home visit occurred roughly four years after the last reported assault, which occurred sometime in 2007. Whether to highlight an inconsistency on a four year old collateral matter is a strategic decision for counsel to make.

At the hearing on the motion for new trial, defense counsel acknowledged that he did not question the first complaint witness about the significant discrepancies between what Wanda said in the SAIN interview and testified to at trial, and what she said to the first complaint witness. He acknowledged that raising the discrepancies between her testimony and the allegations "could [have been] a little bit helpful." However, the absence of cross-examination on this point did not fall "measurably below that which might be expected from an ordinary fallible lawyer." Saferian, 366 Mass. at 96. Any discrepancies provided a sound basis for arguing in closing argument that Wanda's testimony was uncorroborated and should not be believed.

3. Alibi. The defendant asserts that he, his brother, and his niece provided defense counsel with evidence that he resided in New York City, working as a cab driver, between 2005 and 2008, and that counsel's failure to introduce this evidence deprived him of an alibi defense, as one of the charged offenses was alleged to have occurred in 2007. Although we do not have the documents in our record, it appears that the family provided a copy of a New York license or other paperwork.

The defendant was unable to testify to the dates he lived in New York, but he did testify that for substantial periods of time he did not live in the home where the assaults occurred. The niece testified at the motion hearing but did not give any dates as to when the defendant lived in New York, although her affidavit did provide the dates.⁶ A license does not constitute an alibi, and neither the testimony nor the affidavits addressed whether the defendant returned to Boston to visit. The testimony at the motion hearing was vague. "Whether to call a witness is a strategic decision." Commonwealth v. Morales, 453 Mass. 40, 45 (2009). On this record we cannot say that defense counsel's decision to forgo further exploration of a marginal alibi was manifestly unreasonable. See Commonwealth v. Cepulonis, 9 Mass. App. Ct. 302, 305 (1980).

⁶ The defendant's brother also provided an affidavit, but he did not testify at the motion hearing.

4. Interpreter. The defendant contends that he was unable to participate in his defense because trial counsel did not provide a court-certified interpreter at out-of-court meetings. A criminal defendant has the right to an interpreter at all in-court proceedings. See Mass. G. Evid. § 604, Massachusetts Rules of Court, at 1195 (Thomson Reuters 2019) ("a non-English speaker has the right to an interpreter throughout the proceedings"). See also G. L. c. 221C, § 2; Mass. R. Crim. P. 41, 378 Mass. 918 (1979). The Committee for Public Counsel (CPCS) Performance Standards Governing Representation of Indigents in Criminal Cases state that "[w]here counsel is unable to communicate with the client because of language differences, the attorney shall take whatever steps are necessary to fully explain the proceedings. Such steps would include obtaining funds for an interpreter to assist with pre-trial preparation, interviews, and investigations as well as in-court proceedings."⁷ CPCS Performance Standard 1(c)(xiv).

⁷ The performance standards that have been provided to us (and were quoted to the motion judge) are undated, and it is not clear whether they were in effect at the time of trial preparation. The current CPCS performance standards state, in relevant part, that "[f]or out-of-court pre-trial preparation, including client interviews, the attorney representing the hearing-impaired or non-English-speaking client should obtain the services of a court-certified or professional interpreter, unless counsel is fluent in the client's language." Committee for Public Counsel Services, Assigned Counsel Manual, at 2.4 (rev. January 2019) (CPCS Manual).

Defense counsel filed a motion for funds for a court-certified interpreter, which was allowed. Trial counsel did not use a certified interpreter in the two out-of-court client meetings he had with the defendant, instead relying on the defendant's family and friends to translate at those meetings.⁸ He used the court-certified interpreter when meeting with the defendant at the court house during pretrial hearings and at trial. The performance standards supplied do not require that interpreters be used in client meetings.⁹ Moreover, no prejudice to the defendant has been shown. The defendant has not identified any misunderstanding that occurred as a result of the failure to provide an interpreter, or any evidence that the defendant would have proffered had he been able to communicate more effectively with his trial counsel. In the absence of such a showing, we cannot say that defense counsel was ineffective or that the defendant was deprived of an otherwise available, substantial ground of defense.

5. Immigration consequences. The defendant asserts that defense counsel did not advise him of the immigration

⁸ On one occasion the defendant's niece, whose native language is Haitian-Creole and who immigrated to the United States in 2004 as a teenager, served as an interpreter. Counsel also met separately with her on two or more occasions.

⁹ While the CPCS Manual is persuasive authority regarding the standards of representation for assigned counsel, it is not binding. Commonwealth v. Marinho, 464 Mass. 115, 126 n.16 (2013).

consequences of conviction. "[D]efense counsel [has] a duty to inform a noncitizen client that conviction, whether by plea or by trial, may carry adverse immigration consequences" (citation omitted). Commonwealth v. Sylvain, 466 Mass. 422, 436 (2013).

The defendant faced charges of four counts of indecent assault and battery of a child, a crime of moral turpitude. See 8 U.S.C. § 1227(a)(2)(A)(ii) (2008). Trial counsel testified that he used the court interpreter to communicate warnings of immigration consequences to the defendant during court appearances. He did not recall how this warning may have been phrased, but he regularly told his noncitizen clients that they "could be deported or deprived of the right to become a U.S. citizen."

We do not have the benefit of findings from the motion judge as to whether counsel gave the warnings described. Moreover, the record and the briefing before us is simply inadequate to assess whether deportation for these offenses would have been presumptively mandatory, and thus whether a warning of the type described, if credited, would or would not have satisfied the attorney's obligations to his client. See Padilla v. Kentucky, 559 U.S. 356, 368-369 (2010).

Alternatively, were we to assume, without deciding, that either no warnings or inadequate warnings were given, there has been no showing of prejudice. See Commonwealth v. Clarke, 460 Mass. 30,

46-47 (2011). No plea was offered or negotiated. The defendant has not shown that a different warning regarding immigration consequences would have changed the fact that the case went to trial, or otherwise might have accomplished something material for the defense. See generally Commonwealth v. Marinho, 464 Mass. 115, 128-130 (2013).

6. Head injury. The defendant's final contention is that defense counsel's introduction of evidence that the defendant suffered a head injury allowed the Commonwealth to cross-examine him regarding his memory, and thus call into question his credibility. He maintains that the evidence was not relevant and prejudiced him before the judge.

"Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence and (b) the fact is of consequence in determining the action." Mass. G. Evid. § 401 (2020)." Commonwealth v. Mason, 485 Mass. 520, 533 (2020). At trial, defense counsel explained in pretrial discussions that his client had suffered a brain injury, was on medication, and suffered memory problems. The defendant so testified at trial.¹⁰ In general, his testimony was brief and lacking in detail. He had difficulty recalling the

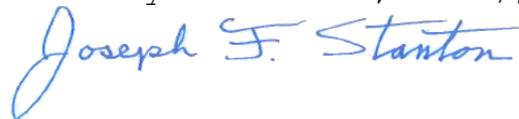
¹⁰ Counsel also represented that the defendant was diagnosed with schizoaffective disorder, but no evidence of that diagnosis was offered.

dates of some events. A cold record cannot convey demeanor,¹¹ but the transcript reveals that the defendant's testimony lacked the kind of context or depth that might otherwise be expected. Counsel asked for permission to lead the witness but that request was denied.

Under these circumstances, we cannot say that it was manifestly unreasonable to provide some explanation to the trial judge for the brevity of the defendant's answers. That the defendant was cross-examined on his lack of memory reflects the facts on the ground, not a failure of counsel. The defendant has not shown how omitting this testimony would have strengthened his defense, or that its introduction influenced the judge who heard the case as fact finder and denied the motion for new trial after an evidentiary hearing.

Order denying motion for new
trial affirmed.

By the Court (Wolohojian,
Milkey & Sullivan, JJ.¹²),



Clerk

Entered: January 21, 2021.

¹¹ In this respect findings by the motion judge would have been particularly helpful.

¹² The panelists are listed in order of seniority.