COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-101

COMMONWEALTH

vs.

BRIAN J. SMITH.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a jury trial, the defendant, Brian J. Smith, was convicted of rape, and acquitted of assault and battery on a family or household member, his ex-girlfriend. See G. L. c. 265, § 22 (b); G. L. c. 265, § 13M. In this direct appeal, the defendant contends that trial counsel was ineffective because of the manner in which he cross-examined the nurse who performed the sexual assault examination (SANE nurse), and because he did not object to parts of the prosecutor's closing argument. We affirm.

Discussion. 1. Ineffective assistance of counsel. The defendant contends that trial counsel was ineffective because he did not cross-examine the SANE nurse regarding "abrasions" she found in the defendant's ex-girlfriend's vagina, and because he did not object to the Commonwealth's reference to the abrasions

in closing arguments. To show ineffective assistance of counsel, the defendant must demonstrate that "there has been serious incompetency, inefficiency, or inattention of counsel" that has "likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). See Commonwealth v. Leng, 463 Mass. 779, 781 (2012). "[T]he preferred method for raising a claim of ineffective assistance of counsel is through a motion for a new trial." Commonwealth v. Zinser, 446 Mass. 807, 810 (2006). Where, as here, the claim is brought on direct appeal, "counsel's inadequate performance must 'appear[] indisputably on the trial record.'" Commonwealth v. Morales, 461 Mass. 765, 785 (2012), quoting Zinser, supra at 811.

At trial, the defense was that the ex-girlfriend consented to sexual intercourse.[1] The SANE nurse testified that she observed vaginal abrasions, which the nurse described as akin to a scraped knee. The prosecutor asked whether such abrasions were "naturally occurring in the vagina." The defendant objected and the judge sustained the objection. On appeal, the defendant now argues that trial counsel should have cross-

[1] At first the defendant denied sexual contact with his ex-girlfriend, but after learning that a rape kit had been performed, he told the police that they had consensual sex. The recorded interview was played for the jury and entered as an exhibit at trial.

examined the SANE nurse to establish that abrasions "are not necessarily indicative of forced sex."

"[A]n 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." Morales, 461 Mass. at 785, quoting Commonwealth v. Peloquin, 437 Mass. 204, 210 n.5 (2002). The record before us demonstrates that the lack of cross-examination on this point may well have been part of a strategic decision to prevent the prosecutor from eliciting testimony concerning the cause of such abrasions.

"We determine whether [such] a decision was manifestly unreasonable by 'search[ing] for rationality in counsel's strategic decisions, taking into account all the circumstances known or that should have been known to counsel . . . and not whether counsel could have made alternate choices.'" Commonwealth v. Lally, 473 Mass. 693, 706 (2016), quoting Commonwealth v. Kolenovic, 471 Mass. 664, 674-675 (2015). Trial counsel's decision to steer clear of causation was a reasonable one. The nurse was in no position to know if the penetration was forced or consensual and would not have been permitted to give an opinion as to guilt or innocence. See Commonwealth v. Almele, 474 Mass. 1017, 1019 (2016) (testimony impermissibly offered opinion as to defendant's guilt). At best, if allowed,

the nurse may have given an opinion as to whether the abrasion was consistent with forced or unforced penetration or both. The cross-examination that the defendant now suggests would have opened the door on redirect examination to permit the prosecutor to elicit evidence that the abrasions were consistent with forced penetration. See Commonwealth v. Parreira, 72 Mass. App. Ct. 308, 318 (2008). See also Commonwealth v. O'Brien, 35 Mass. App. Ct. 827, 834 (1992). The defendant has not established that trial counsel's decision was manifestly unreasonable when made.

In closing arguments, the prosecutor referenced the nurse's testimony regarding the abrasions.[2] The defendant now contends that counsel was also ineffective for not objecting to this portion of the prosecutor's closing argument. The prosecutor's remarks summarized facts in evidence; no claim has been or could be made that the testimony was inadmissible. The argument was based on the evidence. See Commonwealth v. Casbohm, 94 Mass.

[2] "Then you heard about the physical examination of her genital area, how this nurse had to use her hands to do a physical pelvic inspection of this woman. How she started swabbing from the outside, then using a speculum to swab on the inside of her vagina. And it's there that this nurse sees that abrasion, that abrasion inside of her vagina, an abrasion -- a depiction of which you'll have an opportunity to view in evidence. It was characterized and put down on paper by this nurse, the abrasion she sees inside this woman's vagina after doing this examination. And you heard about the swabs."

App. Ct. 613, 622 (2018). See Mass. G. Evid. § 1113(b)(2) (2021). The absence of objection did not constitute representation falling "measurably below that which might be expected from an ordinary fallible lawyer." Commonwealth v. Millien, 474 Mass. 417, 430 (2016), quoting Saferian, 366 Mass. at 96.

2. SANE nurse testimony. At trial, the prosecutor asked the SANE nurse to describe the ex-girlfriend's demeanor during the physical examination. The nurse responded, "She was very direct, she had very good eye contact, she was very upset but she -- she was there with a purpose. She -- she had -- she needed this story to be told for --." The defendant objected to the latter statements and the judge sustained the objection. The judge told the witness, "[T]hat is a conclusion, just what you observed physically about her, not -- not any interpretation please." The nurse then testified that she observed that the ex-girlfriend was upset but answered the nurse's questions directly, and that "she had no trouble with talking with me about what had occurred."

Although the defendant's objection to the improper testimony was sustained, trial counsel did not move to strike. As in Almele, the question was proper, but the answer was not. See Almele, 474 Mass. at 1019. In the absence of a motion to strike, we review for error creating a substantial risk of a

miscarriage of justice. Id. See generally Commonwealth v. Grady, 474 Mass. 715, 721-722 (2016). The judge's instruction to the witness was prompt, precise, and educated both the witness and the jury as to the proper scope of her testimony. For this reason, there was no substantial risk of a miscarriage of justice.

Judgment affirmed.

By the Court (Vuono, Rubin & Sullivan, JJ.[3]),

Joseph F. Stanton

Clerk

Entered: April 1, 2021.

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