COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-616

COMMONWEALTH

vs.

KYLE SPENCER.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a jury trial, the defendant was convicted of three counts of rape of a child by force, in violation of G. L. c. 265, § 22A, and three counts of indecent assault and battery on a child under fourteen, in violation of G. L. c. 265, § 13B. In this consolidated appeal, he appeals from his convictions and from the partial denial of his motion for a new trial. We affirm.

Background. We recite the facts the jury could have found, reserving certain details for discussion as they become relevant. Between 2007 and 2009, the defendant, then himself a minor, repeatedly sexually assaulted and raped his younger cousin.[1] In that time, the defendant, then thirteen to fifteen

[1] The defendant was a juvenile when the alleged assaults took place. After a hearing in the Juvenile Court, pursuant to G. L.

years old, lived with his family in a three-family home that was owned by the defendant's grandmother, who lived on the first floor. The defendant, with his parents and siblings, lived on the second floor. The victim, the defendant's younger cousin, would spend almost every weekend with her grandmother on the first floor, and she would play with her cousins who lived on the second floor as well as other children she knew in the neighborhood. The victim testified that, during that time period, the defendant repeatedly groped her, touched her vagina, and forced her to stroke his penis and to perform oral sex on him.

The defendant filed a motion for a new trial, alleging both trial errors and ineffective assistance of counsel; the Commonwealth opposed the motion. After a hearing, the trial judge allowed the motion for a new trial on two of three counts of rape of a child by force because those charges had been bound over improperly from the Juvenile Court.[2] The Commonwealth later moved to dismiss those two indictments. This appeal followed.

Discussion. 1. Direct appeal. a. Prosecutorial misconduct. The defendant first argues that the prosecutor,

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c. 119, § 72A, the defendant's case was bound over to the Superior Court for trial.

[2] Citing Commonwealth v. Mercier, 87 Mass. App. Ct. 809, 817 (2015), the judge concluded that, because those two indictments had not been preceded by a juvenile complaint, they were not valid.

during his opening statement and closing argument, improperly encouraged the jurors to decide the case based on their feelings, and also that he impermissibly vouched for the victim's credibility. Where, as here, trial counsel did not object to the Commonwealth's opening statement or closing argument, we review for a substantial risk of a miscarriage of justice. Commonwealth v. Muller, 477 Mass. 415, 431 (2017); Commonwealth v. Silva, 455 Mass. 503, 514 (2009). The fact that defense counsel did not object, while not dispositive, is "some indication" that the now challenged statements were not unfairly prejudicial (citation omitted). Commonwealth v. Miller, 457 Mass. 69, 79 (2010). "In determining whether an argument was improper, we examine the remarks 'in the context of the entire argument, and in light of the judge's instructions to the jury and the evidence at trial.'" Id., quoting Commonwealth v. Gaynor, 443 Mass. 245, 273 (2005).

During his opening statement, the prosecutor asked the jurors to remember the "feeling" that each of them had when they spoke to the judge at sidebar during jury selection. Later, in his closing argument, the prosecutor asked the jury to "pull . . . out [that feeling] and use it along with your common sense" to reach a verdict. The law is clear that a prosecutor "should not play on the sympathy or emotions of the jury." Commonwealth v. Chukwuezi, 475 Mass. 597, 609 (2016). Further,

a prosecutor must take care to argue the Commonwealth's case in a way that "ensure[s] that the verdict was 'based on the evidence rather than sympathy for the victim.'" Commonwealth v. Tavares, 471 Mass. 430, 443 (2015), quoting Commonwealth v. Mejia, 463 Mass. 243, 253 (2012).

Here, the prosecutor's argument was not an improper appeal to sympathy or emotions. The trial judge, in his findings on the motion for a new trial, concluded that the comment was a reference to the solemnity of jury duty.[3] Moreover, the prosecutor did not suggest to the jury "to only use their 'feelings' to convict [the defendant]" as the defendant claims; rather, the prosecutor reminded the jury to use their common sense in deciding guilt or innocence, an appropriate statement that was consistent with the judge's subsequent jury instructions. Also, the suggestion "to pull out that feeling" was one comment in a lengthy closing argument that otherwise was based on the evidence. Finally, the judge instructed the jury that the opening statements and the closing arguments were not evidence and that they should not be swayed by "prejudice, bias, or by sympathy, or by personal likes or dislikes towards either side"; these instructions usually are adequate to cure any errors in closing arguments. See Commonwealth v. Camacho, 472

[3] The judge did describe the reference as "inartful" and the Commonwealth conceded as much in oral argument.

Mass. 587, 609 (2015). We are satisfied that the challenged comments did not give rise to a substantial risk of a miscarriage of justice.

In his closing argument, the prosecutor also asked the jury, "Why would [the victim] put herself in this situation? Why would she choose to talk about these things with a group of strangers, on the record, in this formal setting? . . . I'm not sure there's any motivation that's been offered."[4] A prosecutor may not argue that a witness is credible simply because the witness testified at trial. Commonwealth v. Beaudry, 445 Mass. 577, 587 (2005). However, "[a] prosecutor may marshal the evidence in closing argument, and . . . urge the jury to believe the government witnesses and disbelieve those testifying for the defendant." Id. Also, where, as here, the defense had specifically attacked the credibility of the witness, the prosecutor "may address the witness's lack of motive to lie and do so by asking rhetorical questions." Commonwealth v. Fernandes, 478 Mass. 725, 743 (2018).

The defense theory of the case was that the victim fabricated the allegations of sexual assault because of a longstanding feud between her parents and the defendant's

[4] In his opening statement, the prosecutor told the jury, inter alia, that the witness would be testifying about "some of the most embarrassing, private, personal things imaginable for a young girl."

parents. The prosecutor was entitled to cast doubt on that theory, especially given that the victim had testified that she was not aware of any family discord during the period when she was being sexually assaulted and also that she first reported the sexual assaults years after the alleged feud. We note that, in his closing argument, defense counsel referred to the victim's credibility and believability over thirty-five times. The Supreme Judicial Court in Commonwealth v. Shanley, 455 Mass. 752 (2010), addressed this precise scenario, finding no error: "[T]he substance of the prosecutor's closing argument properly touched on the victim's motivation in appearing to testify because it was a primary issue in the case. . . . [T]he defense strategy was to assail the credibility of the victim by suggesting that he had a motive to fabricate the allegations of abuse . . . . Therefore, the prosecutor was warranted in 'mak[ing] a fair response to an attack on the credibility of a government witness.' Commonwealth v. Senior, 454 Mass. 12, 17 (2009), citing Commonwealth v. Chavis, 415 Mass. 703, 713 (1993). Commonwealth v. Smith, 450 Mass. 395, 408, cert. denied, 555 U.S. 893 (2008) (noting that prosecutor's comment regarding government witnesses[']' motives to lie 'was a legitimate attempt to defend the credibility of these two witnesses')." Id. at 777-778. See also Commonwealth v. Polk, 462 Mass. 23, 39-40 (2012) ("Where, as here, defense counsel in

his closing argument challenged the credibility of the alleged victim, a prosecutor acts properly in inviting the jury to consider whether the victim has a motive to lie, and identifying evidence that demonstrates that the victim's testimony is accurate and reliable").

As we have noted, a prosecutor may not argue that a witness is credible simply because she testified in court. See Beaudry, 445 Mass. at 587. However, to the extent the prosecutor's comments here crossed that line, they did not result in a substantial risk of a miscarriage of justice. Commonwealth v. Riberio, 49 Mass. App. Ct. 7 (2000), on which the defendant relies, is distinguishable. The principal issue in Riberio was whether the judge properly denied the defendant's motion for a mistrial after a prosecutor's opening that arguably contained a number of argumentative and problematic statements. In response to defense counsel's objection after the opening, the judge struck "only the ill-advised comment that a[n] [alleged victim] had no reason to lie." Id. at 9. This court, while affirming the convictions on the ground that the judge had responded appropriately, reiterated that "[t]elling the jury that the victims have no reason to lie is over the line of permissible advocacy." Id. at 10. In the present case, the prosecutor's rhetorical questions came in the closing argument and after the victim's credibility had been attacked repeatedly. Especially

in light of the judge's instruction that closing arguments are not evidence, we see no substantial risk of a miscarriage of justice.

b. Multiple first complaint witnesses. A first complaint witness may testify to the fact of the first complaint and the circumstances surrounding the first complaint. Commonwealth v. King, 445 Mass. 217, 218-219 (2005), cert. denied, 546 U.S. 1216 (2006). "Testimony from additional complaint witnesses is not admissible." Id. at 219. Nor may the victim testify about reporting the assault to anyone other than the first complaint witness. Commonwealth v. Monteiro, 75 Mass. App. Ct. 489, 493 (2009). Where a defendant does not object to the testimony of multiple first complaint witnesses, we review for a substantial risk of a miscarriage of justice. Commonwealth v. Aviles, 461 Mass. 60, 72 (2011).

On direct examination, the victim testified that, after she disclosed the assaults to the first complaint witness, she also told some other friends on the same day. On cross-examination, she testified that she told three friends. Finally, in response to a specific question posed by defense counsel,[5] the victim testified that she disclosed the assault to her guidance counselor when she was in eighth grade. The Commonwealth

[5] Counsel asked the victim, "Now, concerning telling an adult, when did you tell an adult about this?"

objected to counsel's subsequent questions about whether she also talked about the details of the assault and the judge sustained the objections.

As the trial judge noted, defense counsel had a strategic purpose for these questions. First, by asking about the friends whom the victim had told, defense counsel highlighted how many children the victim disclosed the assault to before reporting it to an adult or to the police. Counsel emphasized that the victim told four of her friends before telling her parents, her aunt, and her grandmothers. Second, defense counsel asked the victim about the details that she disclosed, highlighting the inconsistencies in her reports. Counsel specifically asked the victim whether she told either the first complaint witness or her guidance counselor that the defendant made her perform oral sex on him.[6] Where defense counsel made strategic use of the inconsistencies in the victim's testimony, we cannot conclude that admitting the testimony created a substantial risk of a miscarriage of justice. See Commonwealth v. Roby, 462 Mass. 398, 409-410 (2012) (no substantial risk of miscarriage of justice in cumulative first complaint testimony where, inter alia, "testimony was brief and provided no details of the

[6] As noted, the witness did not testify about whether she told her guidance counselor that the defendant forced her to perform oral sex because the Commonwealth objected.

alleged sexual encounters"); Commonwealth v. McCoy, 456 Mass. 838, 851 (2010) (no substantial risk of miscarriage of justice in cumulative first complaint witness testimony where testimony benefitted defendant and defendant exploited the testimony).

2. Denial of new trial motion. a. Standard of review. We will not disturb the denial of a motion for a new trial unless there has been a "significant error of law or other abuse of discretion." Commonwealth v. Melo, 95 Mass. App. Ct. 257, 261 (2019). We pay "particular deference" to the rulings of a motion judge who also served as the trial judge in the same case. Commonwealth v. Scott, 467 Mass. 336, 344 (2014). We also note that the trial judge in this case denied the motion in a thoughtful and thorough twenty-five page memorandum.

The defendant argues that his motion for a new trial should have been allowed based, in part, on the alleged incidents of prosecutorial misconduct and errors of law that we have already addressed in connection with his direct appeal. Given our conclusion that none of these claims warrant reversal of his convictions, it follows that the judge did not abuse his discretion in denying the defendant's motion for a new trial based on these same grounds.

b. Ineffective assistance of counsel. The defendant argues that he was deprived of the effective assistance of counsel in several respects. The judge properly analyzed and

rejected this argument as well. "[T]o establish ineffective assistance of counsel, a defendant must show that there has been a 'serious incompetency, inefficiency, or inattention of counsel -- behavior of counsel falling below that which might be expected from an ordinary fallible lawyer,' and that such behavior 'likely deprived the defendant of an otherwise available, substantial ground of defence.'" Commonwealth v. Wilson, 486 Mass. 328, 337-338 (2020), quoting Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). When a defendant's ineffective assistance of counsel 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). Only decisions that a lawyer of ordinary training and skill in criminal law would not consider competent are manifestly unreasonable. Kolenovic, supra.

The defendant first argues that his counsel was ineffective for failing to object to the Commonwealth's opening statement and closing argument, which he alleges improperly appealed to the jury's emotions and impermissibly bolstered the victim's credibility. However, because we have concluded that the prosecutor's comments did not create a substantial risk of a

miscarriage of justice, this argument fails. See Commonwealth v. Oliveira, 431 Mass. 609, 613 n.6 (2000).

The defendant also argues that his counsel was ineffective for introducing additional first complaint testimony. However, because defense counsel strategically used this testimony to impeach the victim, as discussed supra, we cannot say that his decision was so "manifestly unreasonable" as to amount to ineffective assistance of counsel. Kolenovic, 471 Mass. at 674.

The defendant next argues that his counsel was ineffective for failing to interview and call two witnesses, Richard Lunnin and Melanie Perrin, to support the defense. In his new trial affidavit, Lunnin averred that he was prepared to give testimony that would have provided an alibi for the defendant for one specific day in June 2007. Lunnin also averred that he was prepared to testify that he had heard a threat to the defendant uttered by a "female voice" as the victim, her mother, and her sister drove by his house in July 2015. In her affidavit, Perrin stated that she would have testified about the family feud, and a threat made by the victim's sister to her ex-husband that their son "could be next." Perrin also would have corroborated the grandmother's testimony that she and the victim slept in the same bed, arguably rebutting the victim's testimony that she was sexually assaulted at night.

In trial counsel's affidavit, however, he stated that he spoke with Lunnin in the hallway of the courthouse and "determined that he was a character witness only and was not useful for trial purposes." Trial counsel also stated that he spoke with Perrin and concluded that she was not credible. In addition, trial counsel stated that, in both cases, he consulted with the defendant, who agreed not to call either as a witness.[7]

We see no error. Lunnin's alibi testimony for one day in June 2007 would only have helped the defendant minimally because he was accused of assaulting and raping the victim repeatedly over a two-year period. Lunnin also was subject to impeachment for bias as he was the defendant's lifelong friend.[8] Perrin's testimony regarding the household sleeping arrangements would

[7] In his affidavit, the defendant denied approving the decisions not to call these witnesses. He also stated that his trial counsel informed him that he did not use Lunnin as a witness because he "looked like he rolled out of bed." The judge noted that the defendant did not call trial counsel to testify and disclaimed the need for an evidentiary hearing.

[8] Indeed, given Lunnin's bias as the defendant's lifelong friend, the judge discredited the portion of Lunnin's affidavit about the drive-by threat. Crediting trial counsel's affidavit, the judge also refused to second-guess trial counsel's "reasonable" strategic decision not to call Lunnin. The judge was entirely within his rights in doing so. See Commonwealth v. Vaughn, 471 Mass. 398, 405 (2015) ("judge is not required to accept as true the allegations in a defendant's affidavits even if nothing in the record directly disputes them" [citation omitted]). Moreover, as the judge noted, the portion of Perrin's affidavit relating to the threat was based on inadmissible hearsay, and properly discounted on that basis. See id. ("credibility, weight, and impact of the affidavits are entirely within the motion judge's discretion").

have been cumulative of the testimony of the defendant's mother, father, and grandmother. Finally, testimony regarding the family feud would also have been cumulative. See Commonwealth v. Britt, 465 Mass. 87, 94 (2013) ("The decision not to raise cumulative evidence merely for quantity's sake does not constitute ineffective assistance of counsel").

The defendant relies on Commonwealth v. Delacruz, 61 Mass. App. Ct. 445, 449-450 (2004), but that case is distinguishable. In Delacruz, this Court found that defense counsel's decision not to call a witness whose testimony would potentially have exonerated the defendant was not a tactical decision. By contrast, here, testimony from Lunnin and Perrin would have been minimally helpful, cumulative, and arguably not credible. See Commonwealth v. Knight, 437 Mass. 487, 500-501 (2002) (decision not to call witness was tactical where proposed testimony would have been cumulative and witness's credibility was subject to challenge). As such, defense counsel's failure to call these witnesses was not "manifestly unreasonable." Kolenovic, 471 Mass. at 674.

The defendant next argues that his counsel was ineffective in not preparing Pauline Spencer, the defendant's grandmother, to testify. To support this claim, the defendant points to the witness's inability to answer counsel's question about an incident that allegedly had occurred during a 2008 Super Bowl

party. He argues that the witness's inability to answer the question demonstrates that "he had not prepared his witnesses at all." We decline to draw such an inference from the testimony. Further, in trial counsel's affidavit, he states that he "went over" her testimony in his office and gave Spencer a list of questions he planned to ask at the trial, as he did for each defense witness. The trial judge rejected the defendant's inadequate preparation claims outright based on his observation of trial counsel's performance. We cannot say on this record that Spencer's inability to provide a specific answer or trial counsel's preparation likely deprived the defendant of a "substantial ground of defence." Wilson, 486 Mass. at 338.

Finally, the defendant argues that his counsel did not sufficiently cross-examine and impeach the victim. However, our review of the transcript establishes that defense counsel did in fact thoroughly cross-examine the victim, including inquiring about inconsistencies between her trial testimony and her earlier testimony at the transfer hearing pursuant to G. L. c. 119, § 72A, and the sexual assault nurse examiner (SANE) interview. "In general, failure to impeach a witness does not prejudice the defendant or constitute ineffective assistance [of counsel]." Commonwealth v. Garvin, 456 Mass. 778, 791-792 (2010), quoting Commonwealth v. Bart B., 424 Mass. 911, 916 (1997). We cannot say that defense counsel's cross-examination

of the victim likely deprived the defendant of a "substantial ground of defence."[9] Wilson, 486 Mass. at 338.

The judgments are affirmed, as is so much of the order on the motion for new trial as denied the motion.

So ordered.

By the Court (Vuono, Hanlon & Shin, JJ.[10]),

Joseph F. Stanton

Clerk

Entered: June 30, 2021.

[9] We have considered the defendant's remaining arguments, but find nothing requiring discussion. See Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).

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