COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1677

COMMONWEALTH

vs.

BRIAN EMANUEL, JR.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury trial, the defendant was convicted of two counts of rape and one count of assault and battery.[1] A panel of this court affirmed his convictions on direct appeal in Commonwealth v. Emanuel, 83 Mass. App. Ct. 1108 (2013). In 2017, the defendant filed a motion for new trial in which he claimed he received ineffective assistance from his trial counsel and that newly available evidence entitled him to a new trial.[2] The defendant appeals from the denial of that motion. We affirm.

1. Ineffective assistance. The defendant claims that his trial counsel provided ineffective assistance when he conceded

[1] The jury acquitted the defendant of kidnapping.

[2] This was the defendant's second motion for new trial. His first such motion was filed in 2014 and was consolidated with the current motion for new trial. The closed court room issue from the first motion is not pressed on appeal.

in his opening statement that the defendant had been physical with the victim. The defendant also claims counsel was deficient by failing to elicit from the Sexual Assault Nurse Examiner (SANE) that the victim's medical records contained no entries indicating facial or head injuries. Neither claim has merit.

Pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001), "a judge may grant a motion for a new trial any time it appears that justice may not have been done. A motion for a new trial is thus committed to the sound discretion of the judge." Commonwealth v. Scott, 467 Mass. 336, 344 (2014). "The defendant has the burden of proving facts upon which he relies in support of his motion for a new trial." Commonwealth v. Chatman, 466 Mass. 327, 333 (2013).

Here, the defendant's trial counsel filed an affidavit in which he averred that he improperly conceded that "there had been a physical incident" between the defendant and the victim. At trial, however, what counsel told the jury was that "[j]ust because you think somebody might have been hit doesn't mean that somebody was raped."

In denying the motion for new trial, the motion judge was not required to -- and did not -- credit counsel's characterization of his opening statement. Instead, the motion judge properly focused on counsel's actual words, in the context

of the whole opening statement and the entirety of the trial. Considered in context, counsel did not admit that the defendant had struck the victim. Rather, as the motion judge found, counsel merely pointed out that the indictments must be considered separately and a finding of guilt on a less serious indictment did not compel such a finding on a more serious one. See Commonwealth v. Vaughn, 471 Mass. 398, 404 (2015) ("the credibility, weight, and impact of the affidavits are entirely within the motion judge's discretion").[3]

Relative to defense counsel's purported ineffectiveness in failing to use the absence of notations of injuries in the medical records, the defendant is correct that counsel did not elicit this from the SANE. However, his claim that counsel "did not use" the records to argue that the victim and Amy Drown were lying is contradicted by the record as well as this court's decision on direct appeal. In his closing argument, as noted in our decision on direct appeal, counsel attacked the victim's credibility and stressed that the medical records refuted the victim's account as well as Drown's claim that the victim had been raped vaginally and anally. The judge did not abuse his discretion by rejecting the defendant's claims.

[3] Even if defense counsel had conceded, this would not have been a manifestly unreasonable tactic. See Commonwealth v. Denis, 442 Mass. 617, 625-626 (2004). Given the indictments, it would not have been manifestly unreasonable for counsel to have urged the jury to convict the defendant of only a misdemeanor.

2. Newly available evidence. The defendant also claims that the motion judge erred in denying the motion for new trial where his father's affidavit constituted "newly available" evidence, and that, had his father testified, his testimony would have been a real factor in the jury's deliberations. We disagree.

"The standard applied to a motion for a new trial based on newly available evidence is the same as applied to one based on newly discovered evidence." Commonwealth v. Cintron, 435 Mass. 509, 516 (2001). See Commonwealth v. Figueroa, 422 Mass. 72, 78-79 (1996). "The judge must determine, with a view to the evidence, whether there is a substantial risk that a jury would reach a different conclusion if presented with the newly available evidence." Cintron, supra. See Commonwealth v. Grace, 397 Mass. 303, 306 (1986). "In the absence of constitutional error, the granting of a motion for a new trial on the ground of newly discovered evidence rests in the sound discretion of the judge." Cintron, supra at 517. See Commonwealth v. Brown, 378 Mass. 165, 170-171 (1979). On appeal, we will examine the motion judge's decision and "will reverse only to avoid manifest injustice." Cintron, supra.

Here, the motion judge was justified in not crediting the father's affidavit. First, as the motion judge found, the defendant's father has a natural bias toward his son and would

likely do his best to help his son, given that he had failed to do so at trial, having claimed a Fifth Amendment privilege. Second, as the motion judge found, the defendant's father was not a percipient witness to the defendant's criminal behavior and would only have been able to testify to how people appeared that night. This would amount to additional impeachment evidence, and would not provide grounds for a new trial. See Commonwealth v. Simmons, 417 Mass. 60, 72 (1994). Finally, whatever the defendant's father could have added to the defense would have itself been impeached given the father's crack cocaine use during most of the relevant time period. The motion was properly denied as the defendant has failed to establish the existence of a manifest injustice based merely on what might have influenced the jury. See Cintron, 435 Mass. at 517.

Order denying motion for new trial affirmed.

By the Court (Vuono, Meade & Sullivan, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: November 13, 2019.

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