

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

19-P-117

COMMONWEALTH

vs.

WINIESHA BURTON.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Winiesha Burton, appeals from her conviction in the Superior Court of making a bomb threat, in violation of G. L. c. 269, § 14 (b) (1). She claims that she received ineffective assistance of counsel at trial.<sup>1</sup> We affirm.

Background. On June 14, 2016, at 10:54 A.M., Evelyn Medina of the District Court probation department in Springfield received an anonymous telephone call during which the caller stated that there were three bombs "strategically placed around the courthouse." At precisely the same time, Robin Milano, a 911 dispatcher for the city of Springfield, likewise received another bomb threat regarding the same court house. Members of the Springfield Fire Department, the Springfield Police Department, and the Massachusetts State Police arrived at the

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<sup>1</sup> The ineffective assistance claim is brought pursuant to Commonwealth v. Moffett, 383 Mass. 201, 208 (1981).

court house, investigated the threats, and did not locate any bombs.

A State trooper assigned to the Hampden County State Police detective unit conducted an immediate investigation and learned that the 911 call originated from a public telephone, located at the Peter Pan bus station. Through Verizon records and other information, it was determined that the call to the probation department originated from another public telephone situated right next to the first one.

Surveillance video recordings showed the defendant and a male, later identified as Donald Jordan, simultaneously using the two telephones at 10:54 A.M. on June 14, 2016. A Verizon records keeper confirmed at trial that the first telephone was used to call 911 at 10:54 A.M. on June 14, 2016, and that the second telephone was used to place a call at 10:54 A.M. on June 14, 2016. The trooper also took a screenshot of the video recordings depicting the users of the 8497 and 8381 telephones, and sent it to Leonard Johnson, the chief court officer at the District Court in Springfield, in case the individuals therein showed up at the court house. Johnson later saw the defendant and Jordan at the court house and relayed that information to the trooper, who went to the court house to investigate further. The trooper saw the defendant and Jordan, who were wearing the same clothing as the individuals in the surveillance video

recording, and took photographs of them, which were introduced at trial.

Discussion. To prevail on a claim of ineffective assistance of counsel, the defendant must establish that there has been "serious incompetency, inefficiency, or inattention of counsel -- behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer" and that, as a result, the defendant was "likely deprived . . . of an otherwise available, substantial ground of defence."

Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). See Commonwealth v. Millien, 474 Mass. 417, 432 (2016) (prejudice standard under second prong of Saferian test met when reviewing court has "serious doubt whether the jury verdict would have been the same had the defense been presented"). The defendant did not raise this claim through the preferred method of a motion for new trial accompanied by affidavits, and thus presents her claim "in its weakest form 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" (quotations and citation omitted). Commonwealth v. Diaz, 448 Mass. 286, 289 (2007). "Because the defendant raises [her] claim[] for the first time on direct appeal, [its] factual basis must appear 'indisputably on the trial record' for us to resolve [it]." Commonwealth v. Dargon, 457 Mass. 387, 403

(2010), quoting Commonwealth v. Zinser, 446 Mass. 807, 811 (2006). This is not such a case.

The defendant claims that trial counsel was ineffective for, among other things, failing to investigate claims that another party called in the bomb threat; failing to present evidence in the form of an affidavit from Jordan; improperly advising her to seek a jury trial rather than a jury-waived trial; and failing to properly correspond with her. The claims lack any legal or factual support.<sup>2</sup> The defendant has not explained how Jordan's alleged affidavit, if admissible, would have provided an otherwise available, substantial defense.

We again note, in the present case, the absence of a motion for new trial supported by an affidavit from trial counsel. See Commonwealth v. Hoyle, 67 Mass. App. Ct. 10, 11 (2006) (noting "conspicuous[]" absence of affidavit from plea counsel). "While we could speculate about defense counsel's rationale for proceeding the way he did, the proper mechanism for advancing the defendant's ineffective assistance claim is through a motion for a new trial, which provides the opportunity for an evidentiary hearing and findings related to the trial attorney's performance." Commonwealth v. Ramos, 66 Mass. App. Ct. 548, 552 (2006). In short, we are not confronted here with the

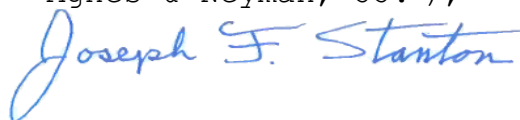
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<sup>2</sup> The defendant filed her own brief (hereinafter, second brief) in addition to the brief filed by her appellate counsel. The second brief lacks citation to any legal authority.

"exceptional" case where the factual basis for the defendant's appellate claims appear "indisputably on the trial record" (citation omitted). Zinser, 446 Mass. at 809 n.2, 811. In view of the overwhelming and clear evidence of guilt, and for the reasons stated in the Commonwealth's brief, the defendant's claims are unavailing.<sup>3</sup>

Judgment affirmed.

By the Court (Wolohojian,  
Agnes & Neyman, JJ.<sup>4</sup>),



Clerk

Entered: January 21, 2020.

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<sup>3</sup> Other points that the defendant argued, but are not discussed in this decision, have not been overlooked. "We find nothing in them that requires discussion." Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).

<sup>4</sup> The panelists are listed in order of seniority.