

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-871

COMMONWEALTH

vs.

KEITH WINFIELD.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

A jury convicted the defendant, Keith Winfield, of one count of indecent assault and battery on a child under fourteen years of age, one count of assault and battery by means of a dangerous weapon causing serious bodily injury, and two counts of rape of a child with force. G. L. c. 265, §§ 13B, 22A. The judgments of conviction were affirmed on the defendant's direct appeal. Commonwealth v. Winfield, 76 Mass. App. Ct. 716 (2010). A motion judge, who was not the trial judge, granted the defendant's motion for a new trial after determining that the defendant received ineffective assistance when his trial counsel did not consult an independent medical expert to challenge the Commonwealth's assertion that the victim suffered burn injuries. We conclude that, in the circumstances of this case, trial counsel's decision was reasonable. As such, we reverse.

Discussion. An appeal from an order granting a new trial motion is reviewed for abuse of discretion. Commonwealth v. Grace, 397 Mass. 303, 307 (1986). Because the motion judge was not the trial judge, however, "we defer only to the judge's credibility determinations and 'regard ourselves in as good a position as the motion judge to assess the trial record.'" Commonwealth v. Wright, 469 Mass. 447, 461 (2014), quoting Commonwealth v. Weichell, 446 Mass. 785, 799 (2006). Where a claim of ineffective assistance of counsel is based on a failure to investigate, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Commonwealth v. Conley, 43 Mass. App. Ct. 385, 392 (1997), quoting Strickland v. Washington, 466 U.S. 668, 691 (1984). Thus, "[w]hile counsel certainly has 'a duty to make reasonable investigations,' counsel is also afforded the opportunity to 'make a reasonable decision that makes particular investigations unnecessary.'" Commonwealth v. Denis, 442 Mass. 617, 629 (2004), quoting Strickland, supra at 691.

In this case, several reputable physicians, including doctors from two world renowned hospitals -- Children's Hospital and Shriners' (burn) Hospital -- diagnosed the victim with burn

injuries to her vaginal and anal areas.<sup>1</sup> The defendant asserts counsel was ineffective for failure to investigate and challenge that these were burns rather than a dermatological condition. However, unlike other medical conditions, the existence of a burn is not a highly debated area of medicine. Contrast Commonwealth v. Epps, 474 Mass. 743, 744-745 (2016) (where heated medical debate existed as to whether shaking baby could cause injuries described, failure to consult medical expert constituted ineffective assistance); Commonwealth v. Millien, 474 Mass. 417, 418 (2016) (same). Indeed, the defendant's own proffered expert has written that "the diagnosis of a burn generally presents little diagnostic difficulty." Accordingly, in the absence of any reason to question the diagnoses, trial counsel was entitled to rely on the victim's medical records to conclude that the injuries reported were in fact burns. See Commonwealth v. Morgan, 453 Mass. 54, 60 (2009) (decision not to investigate DNA evidence was reasonable where evidence was consistent with defense and "the DNA testing had been done at a reputable independent laboratory, and there was no reason to suspect that its findings were in error").

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<sup>1</sup> While the initial examining doctor, a pediatrician from the victim's regular practice, did not diagnose the injuries, she did suspect sexual abuse and referred the child to Children's Hospital.

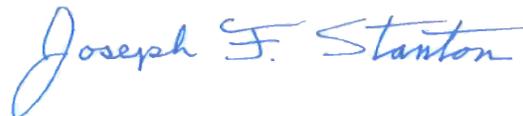
Trial counsel could have reasonably anticipated that any challenge to the medical diagnosis would result in the Commonwealth presenting a parade of experts to counter the defendant's theory -- a tactic that would likely call undue attention to the child's gruesome injuries and prejudice the defendant. Using his professional judgment, an attorney in trial counsel's position could reasonably conclude that a defense which hinged on refuting the diagnoses of multiple doctors was unlikely to be successful. Accordingly, no further investigation into the nature of the injuries was required. See Commonwealth v. Kolenovic, 471 Mass. 664, 675 (2015) (decision to forego investigation into defendant's mental state was reasonable where counsel believed defense of diminished capacity was unlikely to succeed).

As such, trial counsel cannot be faulted for pursuing what he perceived to be the strongest line of defense. See, e.g., Commonwealth v. Walker, 443 Mass. 213, 228 (2005) (noting that it is "well-known and time-honored approach" to select only best and most direct theory of defense). Here, the Commonwealth presented no direct evidence linking the defendant to the injuries. Rather, the Commonwealth relied on circumstantial evidence in which only a small window of time gave the defendant sole access to the child. Their expert witness provided a twelve-hour time frame in which the injuries could have been

inflicted and, within that time frame, the defendant was alone with the child for only forty-five minutes to one hour -- roughly only five to eight percent of that time. Furthermore, the victim's medical records evidenced other injuries suggestive of prior abuse that could not be linked to the defendant. On this evidence, counsel mounted a strong defense that someone other than the defendant had inflicted the injuries. This defense was likely stronger than the easily refutable defense that the injuries were not burns at all. Because we cannot conclude that trial counsel's decision to forego investigating the existence of a burn injury was unreasonable, we cannot uphold a determination that trial counsel's assistance was ineffective.

Order allowing motion for new trial reversed.

By the Court (Maldonado, Blake & Lemire, JJ.<sup>2</sup>),



Clerk

Entered: July 31, 2020.

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<sup>2</sup> The panelists are listed in order of seniority.