

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-1212

COMMONWEALTH

vs.

XAVIER R. WYATT.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant raises three arguments in this direct appeal from his conviction, after a jury trial, of assault and battery on a family or household member, G. L. c. 265, § 13M (a).¹ First, he argues that he was deprived of effective assistance of counsel when trial counsel allowed exhibits to go to the jury despite the fact that redacted text was insufficiently obscured and therefore could still be read by the jury. Second, he argues that the admission of handwritten notations constituting inadmissible hearsay on two photographs, without foundation, caused prejudicial error. Third, he argues that an aspect of the prosecutor's closing argument concerning the victim's delay

¹ The defendant was acquitted of strangulation or suffocation, G. L. c. 265, § 15D (b).

in reporting the attack created a substantial risk of a miscarriage of justice.² We affirm.

Background. We summarize in general terms the evidence before the jury, together with the defendant's theory of the case. The victim and the defendant had been in a long-term relationship and had a child together. During the night of August 4-5, 2018, the victim awoke to find the defendant yelling at her. A physical conflict ensued during which the defendant struck the victim several times and threw her to the ground. Nonetheless, the victim accompanied the defendant to his worksite the following day where she was seen by the defendant's father, who testified he did not observe the victim to have any injuries. The victim took a photograph of her injuries on the day of the attack. She also observed blood in the sink when she washed herself.

Two days after the attack, the victim's mother insisted she go to the hospital after she saw that the victim had two black eyes and blood coming out of her ears. Medical examination revealed that the victim had bruising, a concussion, ruptured blood vessels in her eyes, and a ruptured left eardrum. While

² The defendant also argues that the cumulative effect of these errors requires a new trial. But given our view of the defendant's first three arguments, his claim of cumulative error does not persuade us.

at the hospital, the victim's brother took two photographs of the victim's injuries.

On August 14, 2018, nine days after the attack, the victim reported it to police, who took four photographs of her injuries.

The defense was essentially one of fabrication. The defense was built around the defendant's father's testimony that he did not observe the victim to have any injuries the day after the attack, the victim's delay in reporting the attack, and the suggestion that the involvement of the Department of Children and Families with the couple's child provided a motive for the victim to fabricate. This defense did not suggest that the victim was fabricating her injuries, but rather that the defendant was the cause of them. In other words, the defense did not challenge the proposition that the victim's injuries were caused by someone, but suggested only that they were not caused when and by whom she claimed.

Discussion. Ineffective assistance of counsel. The defendant argues that trial counsel was ineffective for failing to ensure that the redactions to the medical records were sufficient to prevent the jury from reading the text beneath them. The defendant raises his ineffective assistance of counsel claim for the first time on appeal, and without supporting affidavits. The argument is thus raised in its

weakest form. See Commonwealth v. Peloquin, 437 Mass. 204, 210 n.5 (2002) ("[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 and suggestive of strategy contrived by a defendant viewing the case with hindsight"). Specifically, there is no affidavit from trial counsel regarding the redactions at issue, whether the text beneath them was visible to her at the time she agreed that the exhibits were satisfactory to be transmitted to the jury, or why, if indeed the redacted text remained visible, she was nonetheless satisfied to have the exhibits go to the jury.³

Nonetheless, even accepting (without deciding) that this case falls within the narrow exception where a "claim of ineffective assistance may be resolved on direct appeal of the defendant's conviction when the factual basis of the claim appears indisputably on the trial record," Commonwealth v. Zinser, 446 Mass. 807, 811 (2006), quoting Commonwealth v. Adamides, 37 Mass. App. Ct. 339, 344 (1994), the defendant has

³ We have obtained the original trial exhibits, and have observed that the documents were redacted in two different ways. The majority of the redactions were done by some mechanical method and were effective at obscuring the text underneath them. Those few redactions made with a black marker, however, were not as effective, and it is possible to see the redacted text when light reflects a certain way on the page.

failed to show that counsel's performance "likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). "[T]he defendant must show he was deprived of an actual, not hypothetical, otherwise available, substantial ground of defense as a result of his attorney's conduct," Commonwealth v. Urena, 417 Mass. 692, 701 (1994), and "that better work might have accomplished something material for the defense." Commonwealth v. Satterfield, 373 Mass. 109, 115 (1977).

Two of the three redactions were designed to obscure the victim's statements to medical providers that she had been attacked in an episode of domestic violence on a particular date. Even assuming that the statements were hearsay (a matter we do not decide),⁴ they were completely repetitious of the victim's trial testimony, added nothing meaningful to the Commonwealth's case, arguably related to her medical care,⁵ and

⁴ Trial counsel and the Commonwealth agreed to redact from the medical records notations indicating that the victim "report[ed] that she was involved in an alleged domestic assault 3-4 days ago," and that "[s]he was seen three days after she was in a fight."

⁵ The timing and source of a victim's injuries fall under the statements for medical diagnosis exception to the hearsay rule "even though incidentally the facts recorded may have some bearing on the question of liability." Commonwealth v. Torres, 479 Mass. 641, 653 (2018), quoting Commonwealth v. Dube, 413 Mass. 570, 573 (1992). See Mass. G. Evid. § 803(4) (2019). See also Commonwealth v. Cole, 473 Mass. 317, 324 (2015) ("The amount of time that had elapsed since the patient had sustained the wound, the exact nature of the wound, and the circumstances of its occurrence, which could give rise to concerns about

did not detract from the theory of the defense. We acknowledge that repetition alone may add some quantum of weight to a victim's credibility, but we conclude in this case that counsel's failure to ensure that the redactions effectively prevented the jury from seeing the duplicative statements did not deprive the defendant of a substantial ground of defense.

The third redaction was intended to obscure the mother's statement to medical providers that she was concerned because of previous episodes of domestic violence by the defendant.⁶ This hearsay statement of prior bad acts should not have been admitted, and the Commonwealth does not contend otherwise. Nonetheless, no use was made of it during the trial; the Commonwealth did not draw the jury's attention to it in any fashion and, indeed, both parties sought to keep the information from the jury by redacting it (albeit imperfectly). For this reason, as well as the strength of the evidence, we conclude that the defendant was not deprived of a substantial ground of defense by failing to ensure the efficacy of the redaction.

Handwritten notations on photographs. We agree (as does the Commonwealth), with the defendant's claim that the

infection, were all important factors that would have a direct bearing on his treatment at the hospital").

⁶ The medical records showed that the victim's "mother reports concern because this has happened multiple times now and wants social work/police involvement."

handwritten notations on some of the photographs of the victim's injuries should have been redacted both because there was no foundation as to who made them⁷ and because they were inadmissible hearsay. The notations at issue indicated that the first photo was taken "Sat night Sun morning Aug 4-5, 2018 Dorchester" and the second was taken "Aug. 7, 2018 @ 9p St. Lukes [sic] hospital in New Bedford." The defendant objected to the admission of the handwriting when the photographs were offered into evidence, and the judge indicated that he might redact the handwriting. No redaction, however, ultimately was made, and the unredacted exhibit was submitted to the jury with defense counsel's assent. The same information was put before the jury through the unobjected-to testimony of the victim.

For our purposes here, we assume that the defendant's argument was preserved and we therefore review the conviction to be "sure that the error did not influence the jury, or had but very slight effect" (citation omitted). Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994). We discern no prejudice here. The handwritten notations were neutral and not inflammatory (indeed, their impact paled in comparison to the injuries depicted in the photographs on which they appeared),

⁷ Although there was no testimony establishing who wrote the notations on the photographs, the prosecutor at sidebar informed the judge that the victim made them.

and they did not introduce new or extraneous information into the case. The fact that the jury acquitted the defendant of the more serious strangulation or suffocation charge demonstrated that they were not carried away by passion. Finally, the evidence against the defendant was strong.

Closing argument. The defendant contends that the prosecutor impermissibly argued to the jury that they were not to consider the victim's delay in reporting the assault. The defendant points specifically to the prosecutor's statement:

"You are all here to decide what happened in the early morning of August 5, 2018, and none of us were there. You're here to decide whether the defendant is guilty of assault and battery on a family household member and strangulation. The question you're here to answer is not why the victim reacted the way she did, not why she waited to report it to the police, not why she waited to go to the hospital. You're only here to decide whether or not the defendant committed those acts. And what information do you have to decide that?"

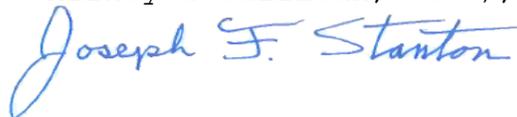
The defendant did not object to the statement at trial and we therefore review it to determine whether there was error and, if so, whether it created a substantial risk of a miscarriage of justice. Commonwealth v. Burns, 49 Mass. App. Ct. 677, 680 (2000) (unpreserved error in closing argument).

We do not consider a remark during closing argument in isolation, but rather in the context of the entire closing argument. Commonwealth v. Foxworth, 473 Mass. 149, 161 (2015). Here, the statement was made at the outset of the prosecutor's

closing, following on the heels of the defendant's closing, which had ended by focusing on the victim's delay. In context, the prosecutor's remark was designed merely to turn the jury's attention from the victim's delay and instead to the question of whether the defendant committed the assault. Furthermore, the jury would not have reasonably understood the prosecutor's comment to mean that they were to disregard entirely the fact that the victim did not immediately report the assault. Indeed, such an interpretation would make no sense given that the prosecutor continued her argument by outlining for the jury the reasons for the victim's delay.

Judgment affirmed.

By the Court (Wolohojian,
Milkey & Sullivan, JJ.⁸),



Clerk

Entered: November 19, 2020.

⁸ The panelists are listed in order of seniority.