COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-8

COMMONWEALTH

vs.

MANUEL PENA.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant appeals, after a Superior Court jury trial, from his convictions of home invasion and of assault and battery by means of a dangerous weapon resulting in serious bodily injury (ABDW-SBI). He also appeals from the trial judge's order denying his motion for a new trial claiming ineffective assistance of counsel. We affirm.

Background. Viewing the evidence under the familiar standard of Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), the jury could have found the following facts. In August 2014, the victim, a fifty-seven year old man, lived in the first floor front apartment of a four-unit building in Peabody. The defendant's grandmother had recently moved from one of the second floor apartments to the first floor rear apartment, but some of her belongings were still upstairs. The victim's

bedroom window looked out over a side porch, which was divided in two by an exterior staircase leading to the second floor units. The grandmother used the rear portion of the porch. Beyond the porch was a parking lot. The victim had on occasion helped the grandmother with her car, and she in turn had brought him some meals; the victim said they had no trouble getting along.

On the night of August 10, 2014, the victim went to bed for the evening between 8 P.M. and 9 P.M. He left his bedroom window open to allow his cat to come and go. Later that evening he was disturbed by the grandmother and her guests making noise on the porch outside his bedroom, so, at about 10:30 P.M., he went outside and asked her to be quieter. The grandmother replied to him, "That's enough, that's enough, that's enough," which caused the victim to express some upset. The victim looked through the grandmother's open front doorway and saw the defendant walk from the living room to the kitchen. The defendant made eye contact and gave the victim a "mean look," "like there was going to be trouble." The victim returned to his apartment and lay down on his bed.

From that position, the victim could see out his open window into the parking lot beyond the porch. He noticed a car pull into the parking lot with two women inside. He saw the defendant come from the direction of the grandmother's apartment

and get into the car, which then departed. The victim did not see the car itself return that night.

He did, however, see the defendant again. At about 11:30 P.M., the victim saw the defendant standing on the stairway outside the victim's bedroom window. The defendant "went upstairs, then came back down." The victim saw his window open further; the defendant climbed in and began beating the victim with a baseball bat, including on his head and elbow. The victim, bleeding, fled the bedroom into the front hallway, with the defendant pursuing and continuing to beat him. The defendant opened the front door and a masked man entered, also carrying a baseball bat. The victim ran into his kitchen and out his back door, knocked on a neighbor's window, and asked them to call the police. In the meantime, the victim saw the defendant and the masked man run away down the street.

When police arrived, they found the victim standing outside his front door, bleeding. The victim told Officer Antonio Santos that one of the intruders was his neighbor's grandson. The victim was taken by ambulance to a hospital and treated for head and arm injuries. The next day, the victim picked the defendant out of a photographic array as the man who had hit him with the baseball bat.[1]

[1] The masked intruder was never apprehended or identified.

The victim's trial testimony was, as the Commonwealth acknowledges, "at times inconsistent, confusing, and contradicted by his prior statements." He was effectively cross-examined about his varying descriptions of the attackers, of how many times he had been hit with the bat, and of what he had said to the defendant. He also was cross-examined about his ability, while lying down on his bed, to see the car in the parking lot and the defendant on the stairs, particularly after having taken prescription morphine for a pain condition, and while not wearing his glasses. The defense theory was that the victim's account of the attack was not credible and that his identification of the defendant as his assailant was mistaken or falsified.

The jury found the defendant guilty of both home invasion and ABDW-SBI. The defendant appealed and obtained a stay of appellate proceedings in order to file a motion for a new trial, the factual basis for which we describe infra. The trial judge denied the motion without an evidentiary hearing. The defendant appealed from that ruling, and the appeals were consolidated for determination.

Discussion. 1. Motion for a new trial. We begin, as does the defendant's brief, with his motion for a new trial asserting ineffective assistance of counsel. On appeal of a ruling on a motion for a new trial, we review for "a significant error of

law or other abuse of discretion," and we "extend[] special deference to the action of a motion judge who was also the trial judge," as was the case here. Commonwealth v. Grace, 397 Mass. 303, 307 (1986). To prevail on a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell "measurably below that which might be expected from an ordinary fallible lawyer" and "likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). "A strategic or tactical decision by counsel will not be considered ineffective assistance unless that decision was 'manifestly unreasonable' when made." Commonwealth v. Acevedo, 446 Mass. 435, 442 (2006), quoting Commonwealth v. Adams, 374 Mass. 722, 728 (1978).

Here, the defendant argued in his motion that trial counsel had been ineffective in failing to impeach the victim (a) with two letters of reference that police officers wrote on his behalf and (b) with evidence that the victim was hostile to the defendant's grandmother. We consider these arguments in light of the principle that, although a "defendant is entitled to reasonable cross-examination of a witness for the purpose of showing bias . . . failure to use particular methods of impeachment at trial rarely rises to the level of ineffective assistance of counsel" (citation omitted). Commonwealth v.

Goitia, 480 Mass. 763, 770 (2018). "Impeachment of a witness is, by its very nature, fraught with a host of strategic considerations, to which we will . . . show deference. Furthermore, absent counsel's failure to pursue some obviously powerful form of impeachment available at trial, it is speculative to conclude that a different approach to impeachment would likely have affected the jury's conclusion." Commonwealth v. Fisher, 433 Mass. 340, 357 (2001).

a. The officers' letters of reference. Attached to the new trial motion was a memorandum that the prosecutor sent to defense counsel at the end of the first day of trial (at which the jury were empanelled but no evidence was presented). The memorandum stated that the prosecutor had just learned from the victim that Officer Santos, who was expected to testify, had written a letter to assist the victim in obtaining new housing in another city. The prosecutor did not yet have a copy of the letter but expected the victim to bring it to court the next day. Also attached to the new trial motion was the letter from Officer Santos, stating that he had known the victim for several years and that the victim was "a person you can trust with keeping safety in the neighborhood." The letter continued, "He has also been a big asset to me in the past . . . . I hope he finds a new home and I am sure he will keep a watchful eye on the neighborhood he will reside in. I am sure he will continue

to work with the police department where his apartment is located." In addition, the new trial motion attached a copy of a similar letter from another Peabody police officer, Fred Wojick, who had no known connection to the case against the defendant. Wojick's letter, dated about three months after the assault on the victim and addressed to the Salem Housing Authority, stated that he had known the victim for approximately ten years and that the victim had "always been helpful and reliable."[2]

In his motion the defendant argued that trial counsel should have used these letters to suggest that the victim, out of gratitude to the officers for helping him obtain new housing, was shading his testimony to help the Commonwealth. But this line of attack would have had limited value, because the victim had already definitively identified the defendant as his

[2] Although trial counsel provided an affidavit stating that he did not recall receiving the letters, the defendant acknowledges, in a brief filed pursuant to Commonwealth v. Moffett, 383 Mass. 201 (1981) (Moffett brief), that the letters were in the file he received from trial counsel. In these circumstances, there is no support for the defendant's claim in his Moffett brief that the prosecutor violated her discovery obligations by failing to turn the letters over to trial counsel. Moreover, in light of our conclusion infra that trial counsel's failure to use the letters at trial did not constitute ineffective assistance, the defendant has not shown that any delay in the prosecutor's disclosure was prejudicial. See Commonwealth v. McMillan, 98 Mass. App. Ct. 409, 415 (2020). Although the judge may have erred in finding that the letters were provided on the first day of trial, that finding is of no importance to our analysis.

assailant, both on the night of the incident and the next day, months before the letters were written. Also, the judge reasoned that use of the letters could have backfired, by allowing the jury to learn that the police considered the victim to be reliable and trustworthy. Moreover, the judge observed, trial counsel had already subjected the victim to extensive cross-examination regarding his inability to perceive parts of the attack and the numerous inconsistencies in his various versions of the incident. In these circumstances, the judge concluded, quoting Fisher, 433 Mass. at 357, that "speculative evidence regarding the victim's potential bias in favor of the police [was] not 'some obviously powerful form of impeachment' such that 'a different approach to impeachment would likely have affected the jury's conclusion[].'" The judge thus ruled that counsel's performance did not deprive the defendant of any substantial ground of defense.

We see no abuse of discretion in this conclusion.[3] In particular, we do not accept the defendant's contention that the

[3] The judge also concluded that counsel's performance had not been shown to be deficient. Although we are inclined to agree, we need not rest our decision on that ground. Relatedly, we need not reach the defendant's challenges to some of the judge's multiple reasons for concluding that impeachment with the letters would not have been effective. The reasons we have set forth above provide ample basis to affirm the judge's decision that impeachment with the letters would not have been a substantial ground of defense.

risk perceived by the judge -- that the jury might take the letters as evidence of the officers' belief in the victim's reliability -- could have easily been eliminated by a limiting instruction. To the contrary, any such instruction would have risked calling additional attention to the statements in the letters expressing the officers' belief in the victim's reliability. Evidence of "official belief in the complainant . . . is extremely prejudicial." Commonwealth v. Stuckich, 450 Mass. 449, 457 (2008). The danger of putting such evidence before the jury, even with a limiting instruction, would at least have offset, and likely outweighed, whatever value the letters might have had in showing a possible motive for the victim to shade his testimony.

b. The grandmother's evidence. The defendant argued in his motion for a new trial that trial counsel had also been ineffective in failing to impeach the victim with evidence that he was hostile to the defendant's grandmother. Attached to the motion was an affidavit from the grandmother contradicting the victim's trial testimony that the two had a good relationship prior to the night of the attack. The affidavit described the victim as "consistently mean and rude" and as someone who frequently made unreasonable and aggressive complaints about her

and the visitors to her apartment.[4] The affidavit also asserted that the victim had once offered to fix the brakes on the grandmother's car if she bought certain supplies, but that after she did so, the victim's efforts failed -- because, as the defendant told her, the victim knew nothing about auto repair -- and so the car ended up being junked. The defendant argued that counsel should have called the grandmother as a witness to impeach the victim's credibility, by showing both (1) that his portrayal of his good relationship with the grandmother was false and (2) that he was biased against the defendant's family.

The judge ruled that use of the grandmother's testimony carried clear risks and therefore was not such an obviously powerful form of impeachment that the failure to use it warranted a new trial. Specifically, evidence of persistent animosity between the victim and the grandmother would have provided more of a motive for the defendant to attack the

[4] The affidavit further stated that the grandmother would have been willing to testify to these matters at trial but was never contacted by trial counsel. The defendant filed his own affidavit stating that he had suggested to trial counsel that the grandmother be called to testify for this purpose but that counsel told him it was unnecessary. Counsel's affidavit stated that he had no memory of the defendant specifically suggesting the grandmother as a witness. Counsel did, however, recall deciding not to call any of the defendant's family members as witnesses, because he believed that their testimony would be peripheral to the main thrust of his defense, mistaken identification. The judge credited this assertion.

victim.[5] Moreover, calling the grandmother as a witness would have exposed her to cross-examination, giving the Commonwealth an opportunity to bolster the victim's otherwise uncorroborated testimony that the grandmother hosted a gathering on the night in question, that the victim complained about it, and that the defendant was present. Finally, the jury could well have viewed the grandmother as biased, in favor of the defendant and against the victim, and therefore have discounted her testimony.

We see no abuse of discretion or other error in the judge's conclusion that the grandmother's testimony would not have provided such powerful impeachment of the victim as to warrant a new trial. See Goitia, 480 Mass. at 770; Fisher, 433 Mass. at 357. "Impeachment evidence is not ordinarily the basis of a new trial, . . . and [the key witness's] testimony was subjected to considerable impeachment in any event." Commonwealth v. Almeida, 452 Mass. 601, 616 (2008). In essence, the grandmother's testimony would not have provided the defendant

[5] The defendant maintains that the judge overstated this risk, given that the victim had already provided a motive by testifying that the defendant gave him a "mean look" when he complained about the noise. Plainly, however, animosity lasting over a period of time would have provided the defendant a stronger motive than animosity based on a single unpleasant interaction. The prosecutor, in her closing, acknowledged that it might be difficult to understand why the defendant had so viciously attacked the victim based solely on the interaction earlier that evening. The grandmother's testimony could have helped fill this gap in the Commonwealth's case.

with a "substantial ground of defence," and thus counsel was not ineffective in failing to offer it.[6] Saferian, 366 Mass. at 96.

2. Prosecutorial misconduct. The defendant argues, for the first time on appeal, that the prosecutor elicited testimony from the victim that she knew or should have known was false. Specifically, he argues, based on a diagram of the victim's bedroom that was admitted in evidence, that it was impossible for the victim to have seen what he testified to seeing through his window while lying in his bed, and that the prosecutor knew or should have known of this falsity.

We are not persuaded. The victim testified that the diagram was a "rough" one; he had neither drawn it nor been present when it was drawn, and there was no testimony that it was drawn to scale. The diagram's depictions of the relative locations of the bed and window are contradicted by a photograph introduced by the Commonwealth as exhibit six, which shows the bed being much closer to the window than does the diagram, and which the victim testified was an accurate portrayal of how the area appeared on the date of the assault.[7] We reject the

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[6] As with the failure to use the officers' letters of reference for impeachment, we are also inclined to agree that counsel's performance in failing to use the grandmother's testimony has not been shown to be deficient, but we need not finally resolve that issue. See notes 3, 4, supra.

[7] The victim testified on cross-examination that there was a "problem" in that a "picture" shown to him by defense counsel showed the bed "in the wrong spot," but from the context it is

defendant's claim that any testimony inconsistent with the diagram was "objectively and demonstrably false."

The defendant's next argument is premised on the victim's vacillation regarding whether he was lying in bed or standing near the window when he saw certain events through the window. The defendant argues that cross-examination definitively established that the victim was standing; therefore, he continues, when the prosecutor elicited testimony on redirect examination that the victim was lying down, the prosecutor knew or should have known that this testimony was false.

We do not agree. "Simply because a witness alters some portion of his testimony at the time of trial is not a sufficient reason to conclude that the new testimony is false, or that the Commonwealth knew or had reason to know that it was false." Commonwealth v. Fritz, 472 Mass. 341, 354 (2015), quoting Commonwealth v. McLeod, 394 Mass. 727, 743, cert. denied, 474 U.S. 919 (1985). "That a prosecution witness contradicted [himself] is insufficient to show that the Commonwealth knowingly used perjured testimony" (citation

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unclear whether the victim was referring to the diagram or to the photograph. Later in the cross-examination, the victim testified that he now remembered that "the day before," he had "moved the room around" and that defense counsel's understanding of the layout of the room was correct. What the victim was referring to in each of these instances is not entirely clear from the transcript.

omitted). Commonwealth v. Vaughn, 471 Mass. 398, 410 (2015). "It was for the jury to decide whether or not to credit the witness." Fritz, supra. "[T]he jury may believe part of a witness's testimony and reject part or believe all or reject all." Commonwealth v. Perez, 390 Mass. 308, 314 (1983), S.C., 442 Mass. 1019 (2004).[8]

The defendant further argues that the prosecutor misstated the evidence by supposedly asserting in her closing argument that the victim, from his bed, saw "the defendant return to the parking lot at the time of the attack," which the defendant asserts was impossible given the bedroom's layout. The prosecutor said no such thing. She stated that the victim, from his bed, saw the defendant "coming back," but she did not say, "to the parking lot." The victim testified that sometime after the defendant left in the car, he saw the defendant standing briefly on the exterior stairs; the defendant then "went upstairs, came back down," opened the window further, and climbed in and began the beating. The prosecutor's argument that the victim saw the victim "coming back" was fairly based on this evidence.

[8] We also reject the argument in the defendant's Moffett brief that the prosecutor coached the victim to give false testimony. There is no evidence whatsoever of any coaching, and none of the victim's testimony has been shown to be false.

Finally, we see no merit in the defendant's challenge to the prosecutor's argument that, as a matter of common experience, "the visibility that you have when you're laying in your bed and you're flat on your bed and looking out a window is a lot further and a lot different than even the visibility that you have when you're standing up in that same place in your bedroom." This was a permissible argument, "grounded in common sense, not expertise."[9] Commonwealth v. Oliveira, 431 Mass. 609, 613 (2000), S.C., 438 Mass. 325 (2002). Moreover, the victim testified that he could see "2,000 feet away" while lying in bed. Although the jury might well have viewed this as hyperbole, it provided an evidentiary basis for the prosecutor's argument. In any event, the judge instructed the jury that closing arguments were not evidence. We see no error in the

[9] The defendant misplaces reliance on Commonwealth v. Fredette, 56 Mass. App. Ct. 253 (2002). There, the court concluded: "The prosecutor's sweeping proposition that victims of sexual (or any other) abuse commonly delay disclosure of that abuse and maintain relationships with their abuser had not been the subject of testimony at trial, and the record is devoid of anything to support it. Such matters are beyond the common knowledge of jurors and would have required expert opinion to establish them." Id. at 263. Here, in contrast, the prosecutor's argument that looking out a window while lying in bed gives a different vantage point than looking while standing up is far more likely to be within jurors' common experience and did not require support in expert testimony.

argument and thus no substantial risk of a miscarriage of justice.[10]

Judgments affirmed.

Order denying motion for new trial affirmed.

By the Court (Neyman, Sacks & Lemire, JJ.[11]),

Joseph F. Stanton

Clerk

Entered: May 3, 2021.

[10] We likewise reject the defendant's claim that trial counsel was ineffective in failing to object to the argument.

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