COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1157

COMMONWEALTH

vs.

STEPHEN LINCOLN MEYER.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

A jury convicted the defendant, Stephen Lincoln Meyer, of two counts of assault and battery by means of a dangerous weapon under the theory of joint venture. In this consolidated appeal from his convictions and from the denial of his new trial motion, the defendant argues that his counsel provided ineffective assistance in failing to interview and call his codefendant, Peter Harris, as a witness.[1] He also claims that trial counsel was ineffective in failing to file a motion to dismiss for violations of his right to a speedy trial and that the prosecutor made improper statements in his closing argument. We are not persuaded by counsel's claim under Mass. R. Crim P. 36, 378 Mass. 909 (1979), and find no substantial risk of a

[1] Harris pleaded guilty on May 31, 2018.

miscarriage of justice based on the prosecutor's closing statement. However, we conclude that the defendant proffered a substantial issue of fact entitling him to an evidentiary hearing on the issue of failing to interview and potentially call Harris as a witness. Therefore, we vacate the order denying the motion for a new trial and remand for an evidentiary hearing.

Background. On June 5, 2015, the defendant and Harris were homeless and living under a bridge over Route 2, near the Alewife MBTA Station and Thorndike Field in Arlington. That same evening, a little after 10 P.M. two friends, Andrew O'Halloran and Nicholas Pappas, drove to Thorndike Field and parked in the lot. O'Halloran was in the driver's seat and Pappas was in the passenger seat.

The parking lot at Thorndike Field was dark but at some point, Pappas looked up from his cell phone and saw two men walking toward them from the direction of Alewife Station. He made note that one of the men was wearing a darker colored sweatshirt. Pappas, not particularly concerned, turned back to his phone. The next time he looked up, he saw a man (later identified as Harris) about five to ten feet from the passenger side of the car. Harris was wearing a LED headlight and he was acting as if he was a police officer. Harris opened the passenger door and told Pappas and O'Halloran he was going to

search the vehicle because he heard a woman screaming. Some conversation occurred between Pappas and Harris, but ultimately O'Halloran popped open the trunk to permit a search.

When Harris went to the back of the vehicle, Pappas locked the doors of the car and instructed O'Halloran to start the engine. As soon as O'Halloran started the vehicle, the defendant, who was wearing a dark colored sweatshirt, stepped in front of the car. The defendant did not speak or gesture to Harris but stood there, staring expressionless into the car.

Harris returned to the passenger side and pointed a firearm at the car. Pappas told O'Halloran to drive away and O'Halloran did so, striking the defendant who remained in front of the car. As the victims drove away, Harris fired several rounds, striking Pappas in the face and O'Halloran on his right side.

Pappas and O'Halloran drove about one-half mile before they called 911. They were ultimately transported to the hospital. Meanwhile, police officers arrived at Thorndike Field to investigate and found the defendant sitting on a wooden guardrail. The defendant requested medical attention, telling the officers that he had been hit by a car. When asked about a possible shooting in the area, the defendant denied knowing anything about anyone being hurt. The defendant was transported to the hospital for his injuries and later charged.

The police officers who remained on scene at Thorndike Field found Harris on the bike path near the Alewife Station. He was breathing heavily and when the officers approached him and asked where he had been, he told them that his friend was just hit by a car. The officers saw a gun magazine hanging from the waist of his pants and placed him in handcuffs. As he was being placed in custody, Harris told the officers that they should be helping his friend who was hit by a car.

The case proceeded to trial six months after Harris pleaded guilty. At trial, the defendant did not call any witnesses. Instead, trial counsel's strategy was to challenge the sufficiency of the evidence supporting the Commonwealth's theory of joint venture by thorough cross-examination and argument. Defense counsel admitted that the defendant was present at the scene but claimed he was not involved in the crime in any way and that Harris shot the victims spontaneously of his own accord. In essence, the defense was that the defendant was in the proverbial "wrong place at the wrong time."

The jury returned guilty verdicts on two counts of assault and battery by means of a dangerous weapon. Thereafter, the defendant filed a motion for a new trial in which he claimed, among other issues, that his trial counsel provided ineffective assistance by failing to interview and call Harris as a defense witness. He requested an evidentiary hearing.

In support of his motion were numerous e-mails between trial counsel and appellate counsel as to whether Harris was interviewed and why trial counsel did not call Harris as a witness at the defendant's trial. After a series of e-mail requests and what appears likely a telephone conversation, trial counsel declined to provide an affidavit in support of the motion for a new trial. Also included for the motion judge to review was an affidavit from Harris dated October 2, 2019, in which Harris claimed that he was solely responsible for the crimes and that the defendant had no knowledge of his intentions.[2]

The Commonwealth filed an opposition, requesting the motion be denied without a hearing since it was not supported by an affidavit of trial counsel admitting that he had not interviewed

[2] The affidavit indicated that Harris and the defendant were sheltering under the Route 2 bridge at the time of the crimes and that Harris's interaction with the defendant was limited, other than to give the defendant his prescription to alleviate a skin infection. Harris stated that he heard a woman screaming and he and the defendant went over to the area of Thorndike Field where he saw two people slouched down in a car. Harris noted that the two occupants of the vehicle were not being very cooperative and that he displayed a handgun to compel their compliance. At this point, according to Harris, the vehicle quickly accelerated in the direction of the defendant, who was standing in front of it. Fearing for the defendant's life, Harris fired his handgun. Harris denied ever communicating with the defendant or sharing his intentions with the defendant. According to Harris, the defendant was not involved in his attempts to gain access to the vehicle and was too far away from him to hear any of the conversation between Harris and the victims.

Harris. In a supplemental affidavit filed the same day as the Commonwealth's opposition, Harris averred that he "was never interviewed by anyone representing" the defendant at trial, even though he was "always willing[] to provide [his] recollection of the . . . events." He also averred that he "remain[s] willing to testify." The motion judge discredited this second affidavit on the ground that it "was likely prepared to rebut the Commonwealth's opposition" and denied the motion for a new trial without an evidentiary hearing.

Discussion. 1. Ineffective assistance of counsel. The defendant claims he was entitled to an evidentiary hearing to determine whether trial counsel was ineffective in failing to interview Harris and call Harris as a witness at trial. He also claims that his trial counsel was ineffective in failing to object to various continuances and failing to file a motion to dismiss on his perceived violations of his right to a speedy trial.

A court may allow a motion for a new trial under Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001), where "it appears that justice may not have been done." Commonwealth v. Wheeler, 52 Mass. App. Ct. 631, 635 (2001). On review, we consider whether the motion judge committed a significant error of law or abuse of discretion in denying the defendant's motion for a new trial. Commonwealth v. Kolenovic, 471 Mass. 664, 672

(2015). "Under the abuse of discretion standard, the issue is whether the judge's decision resulted from a clear error of judgment in weighing the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives" (quotation and citation omitted). Id. Since the motion judge was not the trial judge, we can independently assess the trial record. See Commonwealth v. Wright, 469 Mass. 447, 461 (2014); Commonwealth v. Masonoff, 70 Mass. App. Ct. 162, 166 (2007).

A defendant is not automatically entitled to a hearing on a motion for a new trial. To receive a hearing, the defendant must first raise a "substantial issue" of fact by the motion or affidavits. See Mass. R. Crim P. 30 (c) (3), as appearing in 435 Mass. 1501 (2001).

The judge deciding the motion has discretion to review the motion and affidavits and determine whether a substantial issue has been raised. The judge must look to the "seriousness of the issue asserted" and to "the adequacy of the defendant's showing." Commonwealth v. Stewart, 383 Mass. 253, 257-258 (1981). See Commonwealth v. Martinez, 86 Mass. App. Ct. 545, 550 (2014) ("when the defendant raises a substantial issue of fact, it is the better practice to conduct an evidentiary hearing").

In finding that the defendant did not establish trial counsel's failure to interview Harris, the motion judge relied on the absence of an affidavit from trial counsel and as mentioned, discredited Harris's supplemental affidavit. However, because the defendant made an adequate showing of a substantial factual issue by submitting the series of e-mail messages between trial counsel and appellate counsel with his motion, an evidentiary hearing should have been conducted. In an e-mail to trial counsel dated September 16, 2019, appellate counsel wrote, "could you please advise if you or your investigat[or] interviewed Peter Harris. If you did, could you please send me your notes from the interview." Several days later, trial counsel wrote that he would be "reachable by phone [at a certain time the next day]" to talk about the matter, and appellate counsel replied that he would call at that time. Then, on November 1, 2019, appellate counsel wrote:

> "[The defendant] has chosen to move forward with a motion for new trial and has secured an affidavit from [Harris] regarding Harris's recollections of the incident. We are hoping that you can provide an affidavit that can be included with [the defendant's] motion for a new trial that explains your reasons for not interviewing Harris or calling him as a witness. I know that many trial attorneys can have trepidation about providing affidavits for former clients who seek new trials. In [the defendant's] case, he is requesting nothing more than your reasoning behind not speaking with or calling Harris as a witness."

On November 7, 2019, trial counsel replied, "[a]t this juncture I am not inclined to provide an affidavit."

It is reasonable to infer from this exchange that appellate counsel and trial counsel had a conversation in September 2019 during which trial counsel indicated that he had not interviewed Harris. While it would have been better for appellate counsel to submit an affidavit on this point, the e-mails still "contain sufficient credible information to cast doubt on the issue." Commonwealth v. Upton, 484 Mass. 155, 162 (2020), quoting Commonwealth v. Goodreau, 442 Mass. 341, 348 (2004).

While the e-mails alone raise a substantial factual issue, the judge nonetheless rejected Harris's supplemental affidavit. To be sure, a motion judge has the discretion to discredit an affidavit, even where, as here, he did not preside at trial. See Commonwealth v. Vaughn, 471 Mass. 398, 405 (2015). But "in such cases it is important that the judge provide some reasons for . . . rejecting a particular affidavit . . ., to assist the appellate court in understanding whether the judge acted within his or her discretion." Id.

The defendant's motion fairly asserted, based on the e-mails already in the record, that trial counsel did not interview Harris. The Commonwealth responded by arguing that an affidavit from trial counsel was necessary to create a substantial issue, without mentioning that he had declined to provide an affidavit. In these circumstances, even assuming that Harris's supplemental affidavit was prepared to rebut the

Commonwealth's argument, that was not enough of a reason to necessarily discredit the substance of Harris's allegations without an evidentiary hearing. Cf. Commonwealth v. Chatman, 466 Mass. 327, 336-337 (2013) (judge erred by drawing negative inference from omission of affidavit without considering context in which it was prepared).

At this stage, we cannot conclude that this is a case where trial counsel's failure to investigate can be deemed a reasonable tactical decision. In both cases relied on by the Commonwealth for this proposition, Commonwealth v. White, 409 Mass. 266, 273 (1991), and Commonwealth v. Conley, 43 Mass. App. Ct. 385, 393 (1997), the motion judge was able to determine that the decision was strategic because trial counsel testified at an evidentiary hearing. See White, supra at 269-270; Conley, supra at 388-389. But nothing in this record provides insight into whether trial counsel's failure to interview Harris was strategic or whether he even knew the story that Harris would tell. Nor were the facts of Harris's story already before the jury. The jury did not hear that Harris decided on his own to approach the victims' car, that he never discussed his intentions with the defendant, that the defendant was too far away to hear Harris's conversation with the victims, or that Harris made a split-second decision to fire the gun in an attempt to protect the defendant.

To prevail on his claim, the defendant must also demonstrate that trial counsel was ineffective for failing to call Harris to testify at trial. See White, 409 Mass. at 273 ("failure to interview [witnesses] is of no import if it was not also ineffective for counsel to fail to call . . . them as a witness at trial"). The defendant has made a substantial showing on this issue as well, warranting an evidentiary hearing. Harris was potentially a critical witness, and the facts attested to in his first affidavit, if credited after an evidentiary hearing, are exculpatory. Had Harris testified to those facts, his testimony would have contradicted the Commonwealth's theory that he acted in concert with the defendant and would have supported the defense theory that he shot the gun spontaneously.[3] See Commonwealth v. Hill, 432 Mass. 704, 718-719 (2000) (manifestly unreasonable not to call witness who would have cast doubt on "Commonwealth's entire theory of how the crime occurred").

In rejecting the defendant's claim, the motion judge accepted various tactical reasons posited by the Commonwealth why trial counsel could have decided not to call Harris to

[3] Following oral argument, the defendant filed Harris's plea hearing transcripts, at the panel's request. Consistent with his affidavit, Harris averred at the plea hearing that he shot the victims because he was trying to protect the defendant from being run over.

testify. But once again, it is impossible to determine on this record whether trial counsel made a tactical decision and, if he did, whether that decision was reasonable. For instance, the Commonwealth argues that calling Harris to testify would have opened him up to cross-examination about his relationship with the defendant, whether he showed the defendant the gun, and whether he had any conversation with the defendant while walking to the victims' car. But without knowing how Harris would respond to these questions, it is speculative to conclude that his answers would have undermined the defense. Likewise, the record reveals nothing about trial counsel's knowledge of Harris's criminal history or whether it factored into any strategic decision not to call him to testify.

Moreover, that Harris could be impeached on some basis would not alone excuse trial counsel's failure to call him, if the value of his testimony outweighed the risk of impeachment. These are all issues that should be explored at an evidentiary hearing. See Commonwealth v. Delacruz, 61 Mass. App. Ct. 445, 449-451 (2004), S.C., 443 Mass. 692 (2005). Cf. Hill, 432 Mass. at 719.

Finally, the defendant has raised a substantial issue as to whether Harris's testimony would have materially aided the defense. The facts attested to by Harris potentially undercut the Commonwealth's theory of the case and are not cumulative of

the evidence at trial. Contrary to the Commonwealth's suggestion, the arguments made by trial counsel in closing were not a substitute for evidence.

The defendant raises a second claim of ineffective assistance of counsel. He claims that trial counsel was ineffective in acquiescing to continuances and in failing to file a motion to dismiss under Mass. R. Crim. P. 36. While a defendant is entitled to a trial within one year of his or her arraignment, many periods of time are excludable. See Mass. R. Crim P. 36 (b) (1).

The motion judge painstakingly examined the docket entries and determined that of the 1,200 days between arraignment and trial, 1,182 days were excludable. The defendant broadly challenges the judge's ruling on the ground that trial counsel should have objected to some of the continuances that were included in the excludable time. But the defendant has not identified with any specificity the continuances that are at issue and has thus failed to demonstrate that trial counsel was ineffective for failing to object to them. For the same reason, the defendant has failed to demonstrate that trial counsel was ineffective for not filing a motion to dismiss under Mass. R. Crim. P. 36. See Commonwealth v. Shippee, 83 Mass. App. Ct. 659, 668 (2013) (failure to raise "futile" arguments does not constitute ineffective assistance). There was no error.

2. Admission of testimony that the defendant was Harris's friend. The Commonwealth filed a motion in limine to admit Harris's statement to police that "my friend" was hit by a car. The defendant filed a written opposition. At the motion hearing, the defendant claimed that the statement was hearsay and that the unfair prejudicial effect far outweighed its probative value. The trial judge allowed the Commonwealth's motion, but also provided a curative instruction to the jury prior to deliberations, instructing them as follows:

> "[Harris's] statement is not offered for the truth of what was said or what was stated. That evidence has a limited purpose. You may consider such evidence, if you find it credible, on the issue of Mr. Harris's state of mind or knowledge concerning what occurred at Thorndike Field and any reasonable inferences that you may draw from that evidence. That is the only purpose for which you may consider that statement."

On appeal, the defendant does not challenge the judge's ruling but claims that the Commonwealth, in its closing argument, improperly used the first portion of Harris's statement ("my friend") to prove the truth of the matter asserted -- that Harris and the defendant had a preexisting friendship. However, the judge's curative instruction negated this possibility. We presume that the jury followed the judge's instruction and thus did not use the statement to draw an inference about the defendant's and Harris's relationship. See Commonwealth v. Donahue, 430 Mass. 710, 718 (2000).

Furthermore, we discern no substantial risk of a miscarriage of justice[4] because the evidence that the defendant had Harris's medication in his pocket already established that they had a preexisting relationship, and the judge instructed the jury in any event that "mere association with the perpetrator of the crime" is insufficient to prove joint venture.

Conclusion. The judgments are affirmed. The order denying the motion for a new trial is vacated and the case is remanded for further proceedings consistent with this memorandum and order.

So ordered.

By the Court (Meade, Shin & Walsh, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: November 22, 2021.

[4] The defendant acknowledged at oral argument that our review is for a substantial risk of a miscarriage of justice.

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