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COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-106

COMMONWEALTH

vs.

CHRISTOPHER ROCHON.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a jury trial in the Superior Court, the defendant was convicted of numerous sexual offenses against his step-daughter, whom we shall call Sally.<sup>1</sup> The defendant appealed, and while his appeal was pending, he filed a motion for a new trial in which he claimed that he was deprived of the effective assistance of counsel.<sup>2</sup> The motion was denied without an evidentiary hearing by the trial judge in a detailed memorandum of decision and order. Before us is the defendant's

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<sup>1</sup> Specifically, the defendant was convicted of one count of rape of a child in violation of G. L. c. 265, § 23, two counts of rape of a child aggravated by age in violation of G. L. c. 265, § 23A (a), one count of rape of a child with force in violation of G. L. c. 265, § 22A, two counts of rape of a child aggravated by age in violation of G. L. c. 265, § 23A (b), and three counts of indecent assault and battery on a child under the age of fourteen in violation of G. L. c. 265, § 13B.

<sup>2</sup> As we discuss later, the defendant also argued that the judge improperly imposed GPS monitoring as a condition of probation.

consolidated appeal from his convictions and the order denying his motion for a new trial. We affirm the convictions and conclude that the new trial motion was properly denied.

Background. We set forth the facts the jury could have found, reserving additional details for discussion in the context of the issues raised in the defendant's appeal. The defendant moved in with Sally's family when she was four or five years old and later married Sally's mother. Sally did not like the defendant. She believed that he was rude to her and picked on her. Sally testified that the defendant began to sexually abuse her when she was six or seven years old and that the abuse continued until she turned fourteen.<sup>3</sup> She stated that at first, the defendant touched her "butt," "boobs," and "vagina" with his hands, and put his fingers inside her vagina on "multiple" occasions. Later, by the time Sally was ten or eleven years old, the abuse included oral and vaginal penile penetration.

When Sally was approximately ten years old, she told a neighbor, Jane Medeiros, that the defendant had touched her inappropriately. Medeiros testified as the Commonwealth's first complaint witness and stated that she asked Sally if she liked her stepfather, to which Sally replied, "no because when I was little, he came into my room to touch me." Sally did not reveal

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<sup>3</sup> The victim was seventeen years old at the time of trial.

the abuse to anyone else because, as she explained, the defendant told her not to tell anyone because they would get in trouble, and she would be taken away from her family. In addition, Sally testified that she did not think her mother would believe her because when she told her mother that the defendant was "cheating" on her, the mother did not believe it.

The defendant denied the allegations and presented a robust defense. The defense theory at trial was that Sally fabricated the allegations because she wanted the defendant out of the house, she wanted her biological father to reunite with her mother, and she was biased against the defendant because he preferred his own children over her.<sup>4</sup> To this end, multiple witnesses, including Sally's mother, younger half-sister, and aunt testified for the defendant. All three witnesses said they never observed the defendant engage in any sexual misconduct or inappropriate behavior with Sally. In addition, Sally's aunt (the defendant's sister) testified that, in the spring of 2014, she and Sally were talking about a school project on sexual

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<sup>4</sup> During opening statements, defense counsel stated, "This is a teenage girl, ladies and gentlemen, who hates her stepfather and has hated her stepfather since day one . . . She hated him for reasons that even you heard, she had no father in her life at all, she had no biological dad in her life at all. . . . [The defendant] comes along and he's the disciplinarian. . . . No. 2, you're going to see she's very, very emotional about this whole issue of him preferring his, I guess his own kids over her."

abuse when Sally said that she would never let someone sexually abuse her. According to the aunt, Sally eventually apologized to her for what she had done to the family. In addition, the defendant presented expert testimony from Dr. William Stuart, who opined, among other things, that a review of Sally's medical records did not reveal any signs of trauma.

Discussion. 1. The defendant's direct appeal. In his direct appeal, the defendant asserts that the judge made several erroneous evidentiary rulings and that his jury instructions were incorrect or deficient in a number of respects. He also contends that the prosecutor's closing argument was improper. We address each argument in turn.

a. Evidentiary rulings. Prior to trial, the Commonwealth filed two motions in limine. The first motion sought to exclude any reference to a statement attributed to Sally that the abuse consisted of "non-penetrative" acts. The second motion sought to exclude evidence of Sally's sexual orientation and the fact that she was in a same-sex relationship at the time of trial. The judge allowed both motions, with a caveat as to the latter motion that he would reconsider his ruling depending on the evidence admitted at trial.

"A motion in limine is intended to preclude the admission of irrelevant, inadmissible, or prejudicial matters in evidence. Such evidentiary rulings are left to the sound discretion of the

trial judge, and we review only for abuse of that discretion" (citations omitted). Commonwealth v. Arrington, 455 Mass. 437, 441 n.6 (2009). We discern no abuse of discretion in either ruling.

The statement about penetration was contained in a referral completed by the Director of Areas of the Department of Children and Families (DCF) to the district attorney pursuant to G. L. c. 119, § 51B (k) and § 51E. Under the section titled, "Comments," on the first page of a preprinted form, the director wrote: "[Sally] reports that the abuse consisted of non-penetrative sexual acts involving touching the breast, buttocks and vagina over and under clothing." That statement is followed by a reference to a copy of the DCF report, which was attached to the referral as Exhibit A. As the Commonwealth argued in support of its motion, the content of the report contradicted the statement at issue. The report makes clear that Sally did in fact report acts involving penetration, including telling an emergency response worker that "he [the defendant] raped her" and "put his penis in her vagina." In addition, the statement in question was not based on the director's first-hand knowledge as she did not interview Sally. For these reasons, the judge properly concluded that the statement did not meet the requirements for admissibility as a prior inconsistent

statement, and that its introduction in evidence would have been misleading.

Next, the defendant argues that he should have been permitted to cross-examine Sally regarding her sexual orientation. As noted, the judge initially denied the Commonwealth's motion in limine to exclude this evidence, but he revisited his ruling at the defendant's request during the course of defense counsel's cross-examination of Sally. Defense counsel asserted that the evidence was relevant and sought to question Sally about the subject. As he explained:

"Number two is the issue of the lesbianism that I have to address. I agree that she said in the SANE [sic] interview that she was embarrassed, and she also told the police that she -- she also said to the police she was embarrassed; I want to be able to say that she told her mother and father that she liked girls instead of boys, because if she's not embarrassed about that -- that's a pretty embarrassing thing too, and it undermines, I think it undermines her credibility as to her being embarrassed and to tell her parents about that. That's a big issue; that's not a small thing."

The judge disagreed, reasoning as follows: "I'm not going to allow the questions about whether she was embarrassed about telling her parents about -- I don't think that's the same, that's not the same; there's lots of things you might be embarrassed about and that's not on the same level" as being embarrassed for suffering years of sexual abuse. After the judge gave his ruling, defense counsel responded, "All right."

Assuming, without deciding, that the issue is preserved, we, again, discern no abuse of discretion. Evidence of Sally's sexual orientation had marginal relevance and carried the potential for prejudice. Accordingly, contrary to the defendant's assertion, exclusion of this evidence did not deprive him of a fair trial.

Lastly, the defendant contends that the judge violated his right to present a defense by restricting the testimony of his expert, Dr. Stuart, an emergency room specialist, who testified at length about the signs of trauma and injury generally seen in children who have been sexually abused. He also testified that based on his review of Sally's medical records, there was no evidence of trauma.<sup>5</sup> However, the judge precluded Dr. Stuart from answering two questions related to treatment of a sexually abused child. First, trial counsel asked: "After discovery in this case and after your review of this case, would you have done a pelvic exam in this case?" And second, trial counsel

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<sup>5</sup> Specifically, trial counsel was permitted to make the following inquiries, among others: "Did you see any signs of trauma through your review of [Sally's] medical records," to which Dr. Stuart replied, "No, I did not." Trial counsel went on to ask, "What percentage of cases do you not do a pelvic exam on cases alleging sexual abuse," to which Dr. Stuart replied, "Sometimes if I have a patient that's like four years old and I already can see external signs of trauma, and I'm referring the patient to pediatrics, and I talk with the referring child abuse specialty at Children's Hospital, I wouldn't do a complete pelvic examination on a child like that."

asked: "So with respect to a normal genital exam during a well check visit, would you look for signs of trauma when you're doing the general exam?" The judge sustained the Commonwealth's objection to the first question, and Dr. Stuart did not reply. As to the second question, the Commonwealth objected part way through Dr. Stuart's response. Dr. Stuart began his answer by stating: "Well, if it's a routine pediatric yearly visit, probably not. But I think if a pediatrician was suspicious, then they would[.]" Dr. Stuart did not complete his answer as the Commonwealth's objection was sustained, and trial counsel then went on to ask a different question.

"[A] trial judge has the discretion to control the scope of the examination of witnesses . . . and can exclude witnesses whose testimony is cumulative, repetitive, or confusing" (quotation and citations omitted). Commonwealth v. Mulgrave, 472 Mass. 170, 182 (2015). The judge did not abuse his discretion in the circumstances presented. Dr. Stuart was neither a pediatrician nor a doctor with expertise in child sexual abuse. Accordingly, he was not qualified to answer the first question and was properly precluded from completing his answer to the second one once he began to opine about what a pediatrician would do in the circumstances.

b. Jury instructions. For the first time on appeal, the defendant challenges the judge's limiting instruction to the

jury regarding the extent to which they could consider portions of Sally's interview with the Sexual Abuse Intervention Network (SAIN). Because there was no objection, our review is limited to determining whether an error occurred and, if so, whether that error created a substantial risk of a miscarriage of justice. See Commonwealth v. Arias, 84 Mass. App. Ct. 454, 464 (2013).

The limiting instruction at issue was given after the judge permitted the prosecutor to play two short video clips of the SAIN interview to rehabilitate Sally's credibility.<sup>6</sup> During his cross-examination, defense counsel asked Sally whether she had cried or expressed any emotion during the SAIN interview at any time other than when she was asked about the defendant's preference for his biological children.<sup>7</sup> The Commonwealth then

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<sup>6</sup> The defendant also argues that the judge abused his discretion by permitting the Commonwealth to show the video clips to the jury. We disagree. The judge has the discretion to allow the Commonwealth to rehabilitate its witness and properly did so here.

<sup>7</sup> Q: "You didn't cry during that whole interview, did you? . . . I'm sorry. In fact, you cried one time during the interview, that was when you told her you felt that your stepfather preferred his two biological kids to you, that was very upsetting to you?"

A: "What happened?"

Q: You, if you recall, you cried one time during that entire interview and that time that you cried it was when you were talking about how your stepfather preferred [his biological children] over you, and treated them differently?"

presented the video clips that showed Sally was emotional when she was asked about other topics. After the jury saw the video clips, which were not introduced as exhibits, the judge instructed the jury as follows:

"Ladies and gentlemen, we have just seen two short video clips of the interview of [the victim], and during cross-examination it was brought out whether or not she had been emotional during that interview. So you just saw two brief clips of one, I think where she discussed during her cross-examination, and another clip just showing her getting a little emotional. I instruct you that your verdict must not be in any way influenced by the fact that this video may have shown the complainant getting emotional, and your verdict must not produce -- this video must not produce any emotional reaction and cause you to feel sympathy or empathy for the complainant in any way.

"I'll discuss this a little further in my full charge to you, but the testimony of a witness can be impeached with prior inconsistencies, but then the testimony of a witness can be rehabilitated by supporting or showing that he or she had previously made statement that are consistent, or in this case had a reaction that has been suggested that she hadn't made during her testimony.

"But again, that's only -- you can only consider this for establishing the truth, the credibility of her testimony that you saw at the trial, if for no other purpose. It's not to be for eliciting any emotional response or sympathy toward the complainant in this case."

The defendant asserts that the instruction was erroneous because it permitted the jury to "consider [the victim's] SAIN interview statements for both the 'credibility' of [the victim's] testimony and 'for establishing the truth.'"

As an initial matter, we do not agree with the defendant's interpretation of the judge's instruction. The judge clearly informed the jury that it was the victim's reaction, and not her statements, that were being shown for purposes of rehabilitation. In any event, to the extent that the instruction is susceptible to a different interpretation, it did not create a substantial risk of a miscarriage of justice. The obvious import of the instruction was to ensure that the jurors would not be swayed by sympathy or emotion. As such, the instruction was proper and more than adequate to achieve that goal.

Next, the defendant maintains that the judge erred in his final instructions to the jury regarding the use of prior inconsistent statements. Again, there was no objection, but even if the issue had been preserved, we discern no error. The judge instructed the jury as follows:

"You may consider [the first complaint] evidence only for specific limited purposes, and that is to establish the circumstances in which the complainant . . . first reported the alleged offense or offenses, and then to determine whether that first complaint either supports or fails to support the complainant's own testimony about the crime. You may not consider this testimony as evidence that the assault in fact occurred; the purpose of this first complaint evidence is to assist you in your assessment of the credibility and reliability of the complainant's testimony here in court."

The defendant's challenge to the instruction as given stems from the fact that the Commonwealth's first complaint witness was impeached with a prior inconsistent statement made under oath before the grand jury regarding Sally's disclosure.<sup>8</sup> As a result, the defendant argues, the judge should have instructed the jury that Medeiros's prior inconsistent statement could be considered as substantive evidence pursuant to Commonwealth v. Daye, 393 Mass. 55, 74 (1984), where the Supreme Judicial Court held that "inconsistent grand jury testimony may be admitted in limited circumstances for its probative worth" if certain foundational requirements are met.

This argument is complicated by the fact that first complaint testimony, as the judge properly explained to the jury, is admitted for a limited purpose, namely "to give the jury as complete a picture as possible of how the accusation of sexual assault first arose," and "to assist [the jury] in [its] assessment of the credibility of and reliability of the complainant's testimony . . . in court." Commonwealth v. King, 445 Mass. 217, 246-248 (2005). Thus, as the Commonwealth argues

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<sup>8</sup> On cross-examination, Medeiros acknowledged that when she testified before the grand jury about Sally's disclosure to her, she said: "[S]he (Sally) told me that there was one time when she was younger that her stepfather tried going into her room. . . . [Sally] didn't say that he touched her or did anything." At trial, Medeiros's testimony consisted of the following: "I asked her if she liked her stepdad, and she said no because when I was little, he came into my room to touch me."

in its brief, it is far from clear whether Medeiros's prior testimony could be considered substantively by the jury. In any event, we discern no risk of a miscarriage of justice. The jury was made aware of the inconsistencies in Medeiros's testimony and were free to consider them in assessing her credibility.

Third, the defendant claims that the judge should have instructed the jury on indecent assault and battery as a lesser-included offense of rape and the failure of the judge to do so sua sponte resulted in a substantial risk of a miscarriage of justice. We disagree. "[W]hen the evidence permits a finding of a lesser included offense, a judge must, upon request, instruct the jury on the possibility of conviction of the lesser crime" (quotation and citation omitted). Commonwealth v. Roberts, 407 Mass. 731, 737 (1990). However, where, as here, an instruction on a lesser included offense is inconsistent with the defendant's trial strategy, the judge is not required to give it and it is generally prudent not to do so. See id. at 737-739 (defendant's argument on appeal, that jury might have been reluctant to acquit without option of lesser included offense, "inconsistent" with his "all-or-nothing" trial strategy; "the instructions . . . requested after the fact, might have undermined his tactical decision to seek an acquittal"); Commonwealth v. Mills, 54 Mass. App. Ct. 552, 554 (2002) (concluding that "no error flowed from the judge's

failure to instruct, sua sponte, that simple assault and battery was a lesser included offense of assault and battery by means of a dangerous weapon" where "[d]efense counsel's omission of a request for an instruction on the subject appear[ed] consistent with an all-or-nothing defense strategy").

Fourth, the defendant claims the judge should have tracked the allegations set forth in the bill of particulars when he instructed the jury on the elements of the offenses. The judge was not asked to do so, and, in any event, our review of the instructions reveal no error let alone a miscarriage of justice. As the Commonwealth notes in its brief, the purpose of a bill of particulars "is to give a defendant reasonable knowledge of the nature and character of the crime charged . . . and the effect, when filed, is to bind and restrict the Commonwealth as to the scope of the indictment and to the proof to be offered in support of it" (citation omitted). Commonwealth v Crawford, 429 Mass. 60, 69 (1999). Thus, while a bill of particulars controls the presentation of the Commonwealth's evidence, it has no direct effect on the judge's instructions to the jury. A judge is not required to tailor her instructions to the bill of particulars. Rather, a judge must, as the judge did here, adequately define the elements of each offense. In fulfilling that duty, it is feasible (and perhaps likely) that a judge will refer to facts as alleged in a bill of particulars, but the

primary objective is to inform the jury of the elements the Commonwealth is required to prove beyond a reasonable doubt. Here, the instructions amply accomplished that objective.

The defendant's final challenge to the jury instructions is that the judge lessened the Commonwealth's burden of proof by twice using the word "possibly" in connection with his instruction on the elements of indecent assault and battery. This argument requires little discussion. As the judge noted in his memorandum and order denying the new trial motion, the word "possibly" was used in connection with the location of the alleged assaults. The judge explained: "[T]he Commonwealth must prove beyond a reasonable doubt the defendant did in fact engage in a touching, however slight. This means in this particular case you must be satisfied that the Commonwealth proved, as to Count 7, that the defendant possibly, while living on Second Street or June Street, touched the complainant's vaginal area over her clothing." In addition, as the judge further noted, the transcript contains an error. The comma following the word "possibly" is misplaced; the sentence should read, "This means in this particular case you must be satisfied that the Commonwealth proved, as to Count 7, that the defendant, possibly while living on Second Street or June Street, touched the complainant's vaginal area over her clothing."

c. The prosecutor's closing argument. The defendant challenges several aspects of the prosecutor's closing argument. In particular, he contends that the prosecutor improperly 1) attempted to inflame the jury and evoke their sympathy, 2) vouched for Sally's credibility, 3) misstated evidence, and 4) misled the jury regarding the extent to which they could consider first complaint testimony. The defendant did not object,<sup>9</sup> and therefore, we must determine whether there was an error that created a substantial risk of a miscarriage of justice. Commonwealth v. Grandison, 433 Mass. 135, 141-142 (2001).

Upon review of the challenged remarks "in the context of the whole argument, the evidence admitted at trial, and the judge's instructions to the jury,"<sup>10</sup> Commonwealth v. Cole, 473 Mass. 317, 333 (2015), we conclude that any alleged errors did not create a substantial risk of a miscarriage of justice.

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<sup>9</sup> The defendant objected to one of the challenged comments, but he did not renew the objection following the judge's curative instruction. Therefore, we review that claim under the substantial risk of miscarriage of justice standard as well. Commonwealth v. Beaudry, 445 Mass. 577, 587 (2005).

<sup>10</sup> We note that the judge instructed the jury that closing arguments are not evidence on four occasions and that "[e]motion or sympathy, passion or prejudice has no place in [jury] deliberations." See Commonwealth v. Camacho, 472 Mass. 587, 609 (2015) (such instructions usually are adequate to cure any errors in closing arguments).

First, the defendant contends that the prosecutor improperly attempted to arouse jury sympathy when she stated: "I would ask you to consider [the victim's reactions and behavior] through the eyes of a child, because that's what she was, a child." It is true, as the defendant argues, that an "invitation to the jury to put themselves in the position of the victim is usually improper" (citation omitted), Commonwealth v. Grinkley, 75 Mass. App. Ct. 798, 809 (2009), however, we do not view the prosecutor's statement as one that asked the jurors to put themselves in Sally's position. Rather, the remark served to remind the jury that Sally, who was seventeen years old when she testified, experienced the assaults when she was a child and, therefore, the jury should analyze her testimony through the lens of a child and not a teenager.<sup>11</sup> Thus, the remark did not exceed the bounds of proper argument. The defendant also contends that the prosecutor improperly appealed to juror emotion by urging them to consider and hear Sally's "voice."<sup>12</sup>

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<sup>11</sup> The challenged remark was prefaced with the following: "Let's not forget one thing as we're assessing [Sally], remember that she was a child throughout most of this. You saw her at [seventeen], but this was going on from the age of five all the way to [fourteen]. So her reactions, her behavior, I would ask you to consider it through the eyes of a child, because that's what she was, a child."

<sup>12</sup> Specifically, the prosecutor stated, "At the beginning of this case we told you that you were going to hear evidence through [Sally's] voice. . . . I ask that you consider her voice because that's evidence. . . . You're going to have to consider credibility, whether or not you believe [Sally], whether or not

We disagree. The prosecutor was merely drawing the jury's attention to Sally's testimony and asking them to consider it carefully in light of the fact that there was no physical evidence to support her allegations.

Second, the defendant asserts that the prosecutor improperly pointed to certain sexual "details" in Sally's description of the defendant's conduct and at the same time asserted that Sally never had consensual sex with a boy, thereby implying that Sally's knowledge of sexual conduct could only have stemmed from the abuse she described. See Commonwealth v. Beaudry, 445 Mass. 577, 580-581 (2005) (improper in certain circumstances to argue that victim's knowledge of sexual matters was derived from abuse charged). We are not persuaded. To the contrary, the prosecutor properly argued that Sally was credible because she provided details of what had happened to her.<sup>13</sup> We discern nothing improper with this argument. A prosecutor is permitted to give the jury reasons why a victim's testimony

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you're going to hear her voice. I would ask you to consider her voice."

<sup>13</sup> The prosecutor pointed to Sally's testimony that the defendant "put a second finger inside her vagina," and then said, "Why would [the victim] add a second finger? That's a detail. And detail from a young girl who tells you that she has -- never has had consensual intercourse with a boy." The prosecutor went on to say, "What else [did the victim] tell you? . . . [The defendant] takes his hand and he puts one hand on her head and one hand holding his penis. Detail. Does that sound like something that's going to be made up?"

should be believed and providing details is a legitimate basis on which a jury could find a witness credible.

Third, the defendant claims the prosecutor misstated the evidence when she argued, "So, what happens after [the victim] tells [Medeiros]? Now it's about 2010, 2011 -- 2010, 2009/2010, she tells somebody, finally. Nothing happens. Things only get worse. The sexual abuse increases in terms of its severity, that's when [the defendant] starts penetrating [the victim] with his penis and his mouth and tongue and his penis." Defense counsel objected to this comment and questioned the prosecutor's claim that the sexual abuse increased in severity after Sally's disclosure to Medeiros.<sup>14</sup> The judge responded to the objection and indicated that he would remind the jurors that closing arguments are not evidence and the jurors' memory regarding the testimony controls. The judge then instructed the jury to disregard any argument that is not consistent with the juror's memory of the evidence. Even if we were to assume that the prosecutor's comment was slightly inaccurate, these instructions were sufficient to mitigate any potential prejudice. See Commonwealth v. Dagley, 442 Mass. 713, 725 (2004) ("That the judge's final instruction did not include any express correction

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<sup>14</sup> The defendant also claims that this argument relied on facts that were inconsistent with those set forth in the bill of particulars, but makes no separate argument on this basis.

of the prosecutor's mischaracterization does not mean that the instruction was inadequate to cure any confusion caused by that mischaracterization").

Fourth, the defendant contends that the prosecutor impermissibly urged the jury to consider first complaint testimony for its truth. At one point, the prosecutor stated: "[The victim] told [Medeiros] that her stepfather touched her." "A prosecutor may not present to the jury evidence admitted for a limited purpose as if it were substantive evidence." Commonwealth v. Rosa, 412 Mass. 147, 156 (1992). In this case, however, the prosecutor merely restated Sally's testimony,<sup>15</sup> which was admitted substantively. Again, there was no error.

2. Motion for a new trial. Represented by new counsel, the defendant filed a motion for a new trial alleging that his trial counsel provided ineffective assistance. The judge considered the defendant's numerous arguments in support of his claim and rejected them as either unsubstantiated or insufficient to show that the alleged misconduct deprived him of an otherwise available substantial ground of defense. We review the denial of a motion for a new trial for "a significant error of law or other abuse of discretion." Commonwealth v. Millien, 474 Mass. 417, 429 (2016), quoting Commonwealth v. Grace, 397

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<sup>15</sup> Specifically, the victim stated, "So I just told [Medeiros] that my step-dad had been touching me."

Mass. 303, 307 (1986). Here, we discern no error or abuse of discretion and, consequently, we affirm the order denying the new trial motion.

As the judge correctly observed, to prevail on a motion for a new trial based on a claim of ineffective assistance of counsel, the defendant must demonstrate that (1) trial counsel's conduct fell "measurably below that which might be expected from an ordinary fallible lawyer" (performance prong) and (2) he was prejudiced by trial counsel's conduct in that it "likely deprived the defendant of an otherwise available, substantial ground of defence" (prejudice prong)." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). The burden of proving ineffectiveness rests with the defendant. See Commonwealth v. Kolenovic, 471 Mass. 664, 673 (2015).

The defendant argues that trial counsel was ineffective for opening the door to the introduction of portions of Sally's SAIN interview. According to the defendant, this was an egregious mistake that severely prejudiced him. The trial judge rejected this argument, as do we. To begin with, we agree with the judge that trial counsel was engaging in a competent trial strategy to impeach Sally's testimony when he opened the door to the jury seeing video clips of Sally's SAIN interview. When a defendant challenges trial counsel's strategy, he bears the burden of establishing that the strategy was manifestly unreasonable. See

Commonwealth v. Shanley, 455 Mass. 752, 768 (2010). Sally's credibility was a critical factor in determining the defendant's guilt. That trial counsel would seek to undermine her testimony -- as much as and in every way possible -- was not an unreasonable tactic. "We are cautious on review 'to avoid characterizing as unreasonable a defense that was merely unsuccessful.'" Id., quoting Commonwealth v. White, 409 Mass. 266, 272 (1991). While, in hindsight, this strategy might not have been the best one, it was not manifestly unreasonable. See Commonwealth v. Britto, 433 Mass. 596, 603 (2001) ("[T]he decision to impeach a witness remains a tactical one in which a great amount of discretion is vested in the attorney").

We likewise conclude that trial counsel was not ineffective because he solicited testimony that Sally told multiple persons about the defendant's conduct. That too was a sound tactical decision given that Sally had earlier testified that she was embarrassed to tell anyone about the abuse. Furthermore, as the judge noted, trial counsel emphasized in his opening statement that while Sally told several people about the abuse, she failed to report it to her doctors, DCF, or a teacher.

Next, the defendant faults trial counsel for having drafted "a false, inaccurate affidavit" for Sally's mother and then having her sign it. At trial, the prosecutor cross-examined the mother about the affidavit in which the mother falsely averred

that Sally had recanted the allegations against the defendant. The mother acknowledged that the affidavit was not accurate and said that she had not read it carefully before signing it. In reviewing this ground for a new trial, the judge concluded "[trial] counsel's actions -- while careless -- do not amount to ineffective assistance of counsel." Relying on Commonwealth v. Berry, 68 Mass. App. Ct. 78, 86 (2007), the judge reasoned that the problem was not that counsel had erred in drafting the affidavit, but that the mother had been willing to sign the affidavit despite the misstatements. And, more importantly, the judge observed that the affidavit provided only one basis of impeachment and, therefore, did not deprive the defendant of a substantial ground of defense.

We agree with the judge's reasoning in all respects and conclude that the defendant is not entitled to a new trial on the basis of trial counsel's error in drafting the affidavit. Although the mother was impeached with the false statement in the affidavit, in the absence of any substantiated claim that trial counsel intentionally misled the mother, the defendant's claim fails. As the judge observed, the mother had the obligation to be truthful and while a "careless" error on trial counsel's part could be viewed as conduct falling below that which might be expected from an ordinary, fallible lawyer, the

defendant has not demonstrated that he was deprived of an otherwise substantial ground of defense.

Also unavailing is the defendant's claim that counsel was ineffective for failing to call certain witnesses. As the judge correctly noted, "[t]he defendant has not shown how that hypothetical testimony would have contributed materially to his defense or that the failure to call additional witnesses was otherwise manifestly unreasonable."

The defendant further claims that his attorney failed to properly advise him; failed to engage in plea negotiations; prohibited him from testifying or aiding in preparing his defense; failed to challenge a juror whom he did not want seated for cause; failed to cross-examine police officers regarding the investigation; and failed to adequately prepare by not using investigatory funds and not reviewing evidence and jury instructions prior to the commencement of trial. The only support for these claims consists of the defendant's own assertions set forth in his affidavit.<sup>16</sup>

The judge could, as he did, dismiss these averments as unsupported allegations. "A judge is not required to credit assertions in affidavits submitted in support of a motion for a

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<sup>16</sup> Appellant counsel submitted an affidavit in which he averred that he communicated with trial counsel, but trial counsel ultimately did not submit an affidavit.

new trial, and may evaluate them in light of factors pertinent to credibility, including bias, self-interest, and delay." Commonwealth v. Torres, 469 Mass. 398, 403 (2014). See Commonwealth v. Pingaro, 44 Mass. App. Ct. 41, 48 (1997) ("The credibility, weight, and impact of the affidavits in support of the motion are entirely within the judge's discretion. He is not required to believe them even if they are undisputed" [citation omitted]). In light of the judge's disbelief of the defendant's affidavit and his finding that trial counsel "performed well during the trial," we cannot say that the judge abused his discretion in denying the new trial motion on any of these grounds.

Lastly, the defendant alleges that trial counsel was ineffective by failing to object to certain jury instructions and to certain comments in the prosecutor's closing argument. Because we have already determined that there was no substantial risk of a miscarriage of justice, it follows that counsel's failure to object did not amount to ineffective assistance of counsel. See generally, Commonwealth v. Randolph, 438 Mass. 290, 295-297 (2002).

We further conclude that, in the circumstances presented, the judge, who heard and evaluated the testimony, did not abuse his discretion in deciding the new trial motion without conducting an evidentiary hearing. "When the motion judge is

also the trial judge, as in this case, she may use her 'knowledge and evaluation of the evidence at trial in determining whether to decide the motion for a new trial without an evidentiary hearing.'" Commonwealth v. Morgan, 453 Mass. 54, 64 (2009), quoting Commonwealth v. Wallis, 440 Mass. 589, 596 (2003).

3. GPS monitoring. In his motion for a new trial, the defendant challenged the condition of his probation requiring him to wear a GPS monitoring device. He alleged that the condition constitutes an unreasonable search and must be vacated in light of Commonwealth v. Feliz, 481 Mass. 689, 690-691 (2019), in which the Supreme Judicial Court ruled that when a judge imposes GPS monitoring as a condition of probation, the judge must first "conduct a balancing test that weighs the Commonwealth's need to impose GPS monitoring against the privacy invasion occasioned by such monitoring." The judge was unpersuaded. He noted that Feliz was decided after the sentence in this case was imposed; and that, assuming, without deciding, that Feliz applied retroactively, the defendant, at a minimum, was required to show that failure to make the individualized determinations required under Feliz gave rise to a substantial risk of a miscarriage of justice. The judge concluded that the defendant had not made a sufficient showing and denied the request to vacate the condition of GPS monitoring.

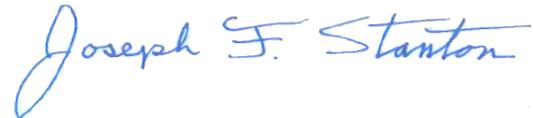
Not only do we agree with the judge that there was no substantial risk of a miscarriage of justice, but we additionally conclude that it is not necessary to vacate the condition and remand the case because, despite not having the benefit of the court's decision in Feliz, the judge here considered the appropriate "constellation of factors" specified in Feliz. A review of the sentencing hearing makes clear that the judge considered and balanced the various factors of the Feliz framework. Specifically, the judge considered the fact that the defendant had been convicted of several counts of raping a child and had a history of violating the terms of his probation. In addition, the judge considered the defendant's history of violating abuse protection orders. Given these circumstances, the judge concluded that GPS monitoring -- with a curfew of 10 P.M. to 6 A.M. and an exclusion zone for the victim and minor children (other than his own children) -- was necessary to assure compliance with the requirement that the defendant have no contact with the victim or children under

sixteen years old. Accordingly, the defendant's request for a new sentencing hearing was properly denied.

Judgments affirmed.

Order denying motion for new trial affirmed.

By the Court (Green, C.J.,  
Vuono & Sacks, JJ.<sup>17</sup>),



Clerk

Entered: August 15, 2022.

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<sup>17</sup> The panelists are listed in order of seniority.