

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

21-P-260

COMMONWEALTH

vs.

THOMAS F. LUCEY.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

A jury found the defendant, Thomas F. Lucey, guilty of one count of workers' compensation fraud in violation of G. L. c. 152, § 14, two counts of presenting a false insurance claim in violation of G. L. c. 266, § 111A, one count of witness intimidation in violation of G. L. c. 268, § 13B, and one count of perjury in violation of G. L. c. 268, § 1A. On appeal, the defendant argues that the trial judge (1) erred by excusing Commonwealth witness Kevin O'Leary before the defense had a full and fair opportunity to develop its alternative theory of the case; (2) abused his discretion by declining to declare a mistrial after O'Leary was excused; (3) erred in granting the Commonwealth's motion in limine to exclude prior bad act evidence concerning O'Leary; (4) abused his discretion by denying the defendant's motion for a new trial; and (5) erred in

ordering the defendant to make "full restitution." We affirm the convictions and order denying the motion for a new trial; we vacate the order that required payment of "full restitution," and we remand for reconsideration of the question of restitution consistent with this memorandum and order.

Background. 1. The incident. We summarize the evidence at trial, reserving discussion of evidence and procedural history that pertains to the issues on appeal. The defendant was a trolley driver on the Massachusetts Bay Transportation Authority (MBTA) Green Line. Just after midnight on October 30, 2016, the defendant was assaulted by a person in a "Michael Myers" costume carrying a plastic Halloween pumpkin at the Cedar Grove station (station). The attacker punched the defendant, pulled him off the trolley, and continued to beat him as he lay on the platform. The attacker left the pumpkin behind.

Two witnesses to the attack ran to a nearby home. Off-duty Boston police officer Steven McKunes answered their knock and used his radio to call for help. Multiple agencies responded, including the MBTA transit police, Boston police, and Boston Emergency Medical Services.

Emergency medical technician (EMT) Daniel Sheehan arrived at the scene and found the defendant alert and awake on the ground. The defendant told Sheehan that he had been knocked unconscious for fifteen seconds. Sheehan noted that in his

experience as an EMT, people do not usually recall the length of time that they were unconscious. Additionally, the defendant did not exhibit any physical signs that he had previously lost consciousness. The defendant was transported to Carney Hospital where he was treated for minor physical injuries.

Investigators identified fingerprints on the pumpkin as belonging to Kevin O'Leary, a friend and former coworker of the defendant. On November 28, 2017, the police went to O'Leary's home to speak with him. O'Leary confessed that he carried out the assault. The next day, O'Leary went to the MBTA transit police headquarters and spoke in detail in a recorded interview about the planned attack. O'Leary testified at trial that the defendant met O'Leary at a Hooters restaurant in Saugus on October 26, 2016, and paid him \$2,000 in cash to stage an attack on the defendant while he was at work driving a trolley for the MBTA.

Police investigation revealed bank and telephone records corroborating O'Leary's account. On October 25, 2016, the day before the defendant met O'Leary at Hooters, the defendant withdrew \$3,000 from his bank account. The day after the Hooters meeting, October 27, 2016, the defendant deposited the remaining \$1,000 in cash back into his own account. Also on October 27, 2016, O'Leary deposited \$1,900 in cash in his bank account. O'Leary's cellular telephone records also revealed

that O'Leary had been in communication with the defendant on the night of the incident before and after the attack.

AAA records also confirmed where O'Leary had parked and how long he had remained in the area after the attack. When O'Leary left the station, he ran to his car, which was parked near Dorchester Park, and realized he had locked the keys inside. He removed his Michael Myers mask, put it underneath his car, and went into Dorchester Park, where he sat on a bench to take off his coveralls and gloves. Then he searched for a payphone along Dorchester Avenue, hid in a yard to avoid police presence, and eventually went to Carney Hospital where he was allowed to use its phone to call AAA at 2:37 A.M.

2. The claims based on the incident. On October 30, 2016, the defendant filed his first claim for workers' compensation benefits; it was later approved. On December 1, 2016, the defendant filled out an "Industrial Accident Data Form" that he signed under the pains and penalties of perjury in which he recounted details of the incident that left him injured. On January 23, 2017, the defendant's benefits were terminated after he failed to provide the required notes from his doctor. About a week later, the defendant made a claim on two disability insurance policies that he had purchased through Unum Insurance Company. After the termination of the workers' compensation benefits, the defendant successfully appealed and continued to

receive benefits. In total, the defendant collected about \$30,000 from the MBTA, \$7,203.15 from Unum policy 1307720, and \$28,783.33 from Unum policy 3669703.

Discussion. 1. Limit on cross-examination. On the third day of trial, just prior to the lunch recess, the Commonwealth informed the trial judge and defense counsel that O'Leary could not "testify tomorrow because he has a flight." The judge then stated that O'Leary would take the stand immediately after lunch, suspending another witness to take O'Leary out of order, "because we're going to get [O'Leary] done today."

The Commonwealth's direct examination of O'Leary began at approximately 2:04 P.M., concluded forty minutes later, and spanned thirty pages. Cross-examination commenced and covered numerous topics, highlighting inconsistencies in O'Leary's prior statements, his lies to police in the first interview, and the fact that O'Leary withheld information from the police. Defense counsel also elicited that O'Leary and the defendant spoke by telephone several times a month and it was not unusual that they spoke before and after the date of the incident. O'Leary also admitted that the government did not require O'Leary to forfeit the \$2,000 and did not prosecute him.

Approximately an hour into the cross-examination, at 3:46 P.M., the trial judge said, "we can go until 4:15." Defense counsel stated that he would "be done by ten after

four." Later during the cross-examination, the judge informed defense counsel that he had "one more minute left to go," at which point defense counsel said that he was "just about to begin to examine [O'Leary] about the central piece of our defense in this case. . . I was just about to go in right now to the alternative explanation for all of this." The judge then reminded defense counsel that they "had this conversation more than a half an hour ago" that he had until 4:10 P.M. The prosecutor ceded redirect examination and defense counsel was given until 4:15 P.M. to cross-examine O'Leary. After objecting, defense counsel continued the cross-examination.

Defense counsel asked questions designed to offer an alternate reason why the defendant gave O'Leary the money. Defense counsel asked O'Leary whether he knew the defendant's mother, to which O'Leary responded that he did not. O'Leary testified that he knew that the defendant's mother owned a business that sold food and soft drinks at parades and events. Defense counsel then asked O'Leary whether he had ever worked for the defendant's mother or the defendant, to which O'Leary replied that he had not. Defense counsel's final question on this topic was, "You never went out on the street and worked at any of their sausage carts?" The defendant replied, "I did not." Then defense counsel proceeded to ask questions about a

different topic. Cross-examination spanned sixty-eight pages and one and one-half hours.

After the jury were dismissed for the day, defense counsel made an offer of proof. Defense counsel anticipated that O'Leary would admit that he helped the defendant and his mother with a sausage cart, such as one might see along a parade route. The defense anticipated that O'Leary would admit he was hired to work a cart on Halloween day in Woburn. The defense recognized that O'Leary could have said no to all the questions in this line, as he already had denied ever working a sausage cart with the defendant's mother. Defense counsel also pointed out that the defendant had the right to present affirmative evidence that contradicts those negative answers and the judge responded that the defendant did not have an obligation, but did have that right.

On appeal, the defendant argues that the judge violated his right to confrontation by excusing O'Leary before the defendant had completed cross-examination. As an initial matter, we reiterate what the trial judge acknowledged: the prosecutor should not have kept this important scheduling information about the key witness in the case to herself, arrogantly or foolishly hoping the schedule would unfold without a hitch. The prosecutor essentially disrupted the trial judge's ability to manage the courtroom and trial. This was not consistent with

her obligation to the court or defense counsel. Had everyone understood the issue, everyone could have managed the schedule and, more importantly, the timing and pace of the defendant's examination would have been under defense counsel's control (with appropriate trial management by the judge) -- not by the prosecutor. We turn now to the merits of the argument.

"Both the Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights guarantee a criminal defendant's right to confront the witnesses against him or her through cross-examination." Commonwealth v. Hernandez, 481 Mass. 189, 192, cert. denied, 140 S. Ct. 168 (2019).

"The right is 'not absolute,' however, and 'the scope of cross-examination rests largely in the sound discretion of the trial judge.' In determining whether a limitation on cross-examination was permissible, 'we weigh the materiality of the witness's direct testimony and the degree of the restriction on cross-examination.' We will not overturn the judge's determination unless the defendant can 'demonstrate[] that the judge abused [his] discretion and that the defendant was prejudiced thereby'" (citations omitted).

Commonwealth v. Gallett, 481 Mass. 662, 682 (2019).

We cannot say on this record that the judge abused his discretion. At the outset of O'Leary's testimony, the judge stated that O'Leary's testimony would conclude that afternoon; nobody raised a concern. An hour into the cross-examination, the judge noted the time and informed defense counsel that

O'Leary's testimony would have to be completed by 4:15 P.M.. Understanding this, defense counsel stated that he could finish his cross-examination of O'Leary by 4:10 P.M.. When defense counsel expressed concern that he needed additional time to finish with O'Leary, the Commonwealth agreed to forgo redirect examination and the judge provided defense counsel with another five minutes, extending the examination until 4:15 P.M.. Where the judge afforded defense counsel ample time for cross-examination, gave him time warnings to allow him to budget his time, and extended the day, we cannot say that the judge abused his discretion. In addition, we note that defense counsel was aiming to end his cross-examination on a high point -- that there was an alternate explanation for the defendant giving O'Leary \$2,000. O'Leary did not give the desired answer and the defendant still had the right to bring forth additional evidence on the point (but did not).

2. Motion for a mistrial. The next morning, the defendant moved for a mistrial. The defendant argues that the trial judge abused his discretion in denying the defendant's request for a mistrial. Defense counsel reiterated that he would have asked additional questions about O'Leary working the sausage cart. But the witness had already denied performing such work or even knowing the defendant's mother. Counsel did not provide a further explanation at that juncture about the substance of any

additional lines of inquiry. Based on the proposed questions and predicted answers read by defense counsel the previous day, and the judge's assessment of the strength of the cross-examination already conducted, the judge denied the motion.

We review the judge's decision to deny a motion for a mistrial for an abuse of discretion. See Commonwealth v. Bryant, 482 Mass. 731, 739 (2019). The defendant has a heavy burden in arguing that the judge abused his discretion in denying the motion for a mistrial, because "[t]he trial judge is in the best position to assess any potential prejudice and, where possible, to tailor an appropriate remedy short of declaring a mistrial." Commonwealth v. Martinez, 476 Mass. 186, 197 (2017). Again, we cannot say that the trial judge abused his discretion.<sup>1</sup>

3. Motions in limine. The defendant argues that the trial judge erred in granting the Commonwealth's motions in limine to exclude (a) evidence that O'Leary had been discharged from the MBTA transit police after he lied about drug use on a job application with the Quincy police department, and (b) evidence of the temporary food service application filed with the city of

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<sup>1</sup> At oral argument, the defendant conceded that the appellate argument related to the trial judge's decision to excuse O'Leary and the appellate argument regarding the denial of the motion for a mistrial "rise and fall together" because the judge had the same information at both times.

Woburn on the grounds that it was hearsay and irrelevant. The judge allowed both motions provisionally pending any offer of proof from the defendant. We review a ruling on a motion in limine for abuse of discretion. Commonwealth v. Spencer, 465 Mass. 32, 48 (2013). 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). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

The first order prohibited impeachment of O'Leary with bad act evidence, including his use of drugs or alcohol. Commonwealth v. Lopes, 478 Mass. 593, 606 (2018), quoting Mass. G. Evid. § 608(b) (2017) ("specific instances of misconduct showing the witness to be untruthful are not admissible for the purpose of attacking . . . the witness's credibility"); Commonwealth v. Alcantara, 471 Mass. 550, 565 (2015) (witness's use of alcohol or drugs in past not admissible unless evidence "show[s] a connection between the drug use and the witness's ability to perceive, remember, or testify to the event in question"); Commonwealth v. Bui, 419 Mass. 392, 401, cert. denied, 516 U.S. 861 (1995) ("A defendant who seeks to pursue a subject in an attempt to demonstrate bias must make a plausible showing that the circumstances existed on which the alleged bias

is based"). As indicated, the challenged order was provisional only and the trial judge invited offers of proof, which the defendant did not make. We cannot conclude that this general order was an abuse of discretion. Certainly, nothing prohibited defense counsel from simply asking O'Leary if he harbored ill will toward the MBTA.

The second order provisionally excluded the temporary food service application filed with the city of Woburn for October 30, 2016, purportedly signed by the defendant. To the extent that the application would be used to demonstrate that the defendant intended to be capable of work on October 30, 2016, it was hearsay not falling within an exception. It was not a business record, see Beal Bank, SSB v. Eurich, 444 Mass. 813, 815 (2005), and even if a keeper of the records from the city had testified, the record does not demonstrate that that person could have authenticated the defendant's signature or provide a nonhearsay foundation for the document's admission. Again, the defendant did not make an offer of proof.

4. Motion for a new trial. The defendant argues that the trial judge erred in denying his motion for a new trial, arguing that trial counsel had been ineffective when counsel failed to: (a) give an adequate offer of proof of additional topics that would have been covered had counsel been permitted to continue O'Leary's cross-examination; (b) offer the temporary food

service application; and (c) offer evidence of O'Leary's termination from the MBTA. We address each in turn.

We review a judge's decision on a motion for new trial claiming ineffective assistance of counsel for abuse of discretion or other error of law. See Commonwealth v. Alvarez, 433 Mass. 93, 100-101 (2000).

"Where, as here, the motion judge was also the trial judge, the decision of the motion judge is entitled to special deference. Moreover, where a claim of ineffective assistance of counsel is the basis for the defendant's motion for new trial, appellate courts accord substantial deference to the trial judge's favorable evaluation of a trial counsel's performance" (citations omitted).

Commonwealth v. Barnette, 45 Mass. App. Ct. 486, 493 (1998). In order to establish ineffective assistance of counsel, the defendant must show that, under the circumstances of his case, (1) "there has been serious incompetency, inefficiency, or inattention of counsel -- behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer," and (2) that behavior "has likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).

a. Offer of proof. At trial at the end of the day after O'Leary had been excused, counsel did not hesitate in making the offer of proof. He provided a line of questioning that bore on the alternative sausage cart theory. The judge asked defense counsel, Michael Natola, if "there was any avenue [of] cross-

examination you forwent after" O'Leary denied working on the sausage cart. Natola did not identify any issue but rather said he would have asked additional questions on the same topic and later "present affirmative evidence that contradicts those negative answers."

Natola testified at the hearing on the motion for a new trial. The court credited his testimony but noted its limitations -- Natola had not reread the trial transcript, he had destroyed his outline for the cross-examination, and he had to have his memory refreshed repeatedly with his affidavit. Natola testified that he did not keep track of the topics he had not addressed during the cross-examination. The motion for new trial identified several further areas of cross-examination, including inconsistent statements on motives, questions about purchase of the costume and related inconsistencies, inconsistencies about the presence of witnesses, inconsistencies with telephone records, and O'Leary's past employment with and termination by the MBTA.

As to prong one of the Saferian test, the defendant has failed to show that there was serious incompetency of counsel. The judge asked for and counsel provided an offer of proof while the examination was still fresh in counsel's mind at a time when the examination could have been extended, including by bringing O'Leary back the following Monday. The judge was entitled to

credit that defense counsel "hoped to go out with a bang" with the alternate theory for the payment and the witness gave an unexpected "no" answer to the question requiring a "yes" to provide a foundation for the sausage cart theory. The question of counsel's performance was not what further examination defense counsel could have conducted with the benefit of months of reflection; the judge could discredit the defendant's hindsight criticism of the offer of proof. Commonwealth v. Drew, 447 Mass. 635, 641 (2006), cert. denied, 550 U.S. 943 (2007) ("Counsel's performance must be measured against that of an 'ordinary fallible lawyer' at the time of the alleged professional negligence, and not with the advantage of hindsight" [citation omitted]).

Even assuming prong one has been met, the defendant has failed to show that he likely was deprived of an otherwise available, substantial ground of defense. The case against the defendant was strong because, on key points, O'Leary's testimony was corroborated by documentary bank and telephone records. Many of the additional topics identified in the motion for a new trial were designed to emphasize ways in which O'Leary was inconsistent in his testimony. However, the judge found that the cross-examination Natola conducted was "proficient and extensive and fully in line with the defense strategy." Indeed, the record demonstrates that the cross-examination highlighted

that O'Leary had lied to the police, withheld information from the police, admitted that the telephone records may not be as significant as the Commonwealth contended, and received favorable treatment for testifying against the defendant.<sup>2</sup>

b. Termination from the MBTA. To the extent that the defendant contends counsel was ineffective because he did not impeach O'Leary with his termination from the MBTA, the defendant is correct that counsel could have directly asked O'Leary whether he harbored ill will toward the MBTA and why.<sup>3</sup>

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<sup>2</sup> Specifically, Natola highlighted inconsistencies in O'Leary's trial testimony about the night in question with O'Leary's prior statements. O'Leary also admitted on cross-examination that he lied to police in his first interview and that he had withheld information from the police, including that he and the defendant had scouted out the station before the attack. O'Leary admitted that they did not disguise themselves even though there are cameras in the area. O'Leary also agreed that he estimated that he spoke with the defendant four to five times a month, that the telephone calls could be lengthy, and that it was not unusual for O'Leary to have spoken with the defendant before and after the incident. O'Leary admitted that he was not prosecuted and the government had not demanded that he forfeit the \$2,000. O'Leary said that he was unclear whether leaving the plastic pumpkin was part of the plan, even though O'Leary's fingerprints might have been on it.

<sup>3</sup> The trial judge was incorrect in concluding that the defendant had failed to provide an offer of proof to support that O'Leary was biased against the MBTA. Defense counsel had advised the court that O'Leary was fired by the MBTA for lying on his job application. The Commonwealth did not dispute this. The fact that O'Leary had denied bias in a pretrial interview does not mean he was not biased. That was for the jury to weigh, had the evidence been presented. The fact that O'Leary was now testifying on behalf of the Commonwealth and the MBTA transit police also did not mean he was incapable of bias against the MBTA. O'Leary own self-interest to avoid prosecution may have motivated that shift.

Nonetheless, the defendant cannot meet prong two of Saferian. Defense counsel elicited and the jury heard testimony from an MBTA transit police detective establishing that the detective believed that O'Leary may have harbored ill will toward the MBTA. By introducing the topic through the detective, the defendant avoided having O'Leary explain that he did not have ill will toward the MBTA and why, which O'Leary had explained in an interview before trial. We cannot conclude on this record that counsel's approach was manifestly unreasonable, Commonwealth v. Holland, 476 Mass. 801, 812 (2017) (where claimed ineffectiveness of counsel is result of tactical decision, defendant only prevails if tactical choice was "manifestly unreasonable"), or deprived the defendant of a substantial defense.

c. Sausage cart application. The defendant also argues that he received ineffective assistance of counsel when his trial attorneys failed to offer the temporary food service application that the defendant allegedly filed with the city of Woburn. The defendant cannot meet prong one of Saferian. The trial judge found, and the record supports, that defense counsel had completed his cross-examination on the alternate theory. Given that O'Leary flatly denied that he had worked for the defendant's mother on the sausage cart, any further questions were repetitive and futile. The application itself had nothing

to do with O'Leary and could not have been admitted through him. In addition, as we have already explained, on this record, the defendant has not established that the application was admissible. The application was relevant only for the truth of the matter asserted -- that the defendant intended to work that day and sell sausages.<sup>4</sup>

5. Restitution. The defendant argues that the trial judge erred by ordering the defendant to make "full" restitution without holding an evidentiary hearing to determine the amount of restitution and to consider the defendant's ability to pay. We agree.

In cases involving consideration of restitution as a condition of probation, "in determining whether to impose restitution and the amount of any such restitution, a judge must consider a defendant's ability to pay, and may not impose a longer period of probation or extend the length of probation because of a defendant's limited ability to pay restitution." Commonwealth v. Henry, 475 Mass. 117, 118 (2016). Here, defense counsel represented that the defendant "ha[d] no means of making restitution." The trial judge did not consider the defendant's ability to pay. While defense counsel discussed the family's possible ability to pay, that is not the question. We remand

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<sup>4</sup> We likewise reject the defendant's suggestion that a combination of errors warrants a new trial.

for a consideration of the amount of money to be paid, the payee(s), the timing of the payment, and defendant's ability to pay.

Conclusion. For the reasons set forth above, the judgments of conviction and the order denying the motion for a new trial are affirmed. The order of restitution is vacated, and the matter is remanded for further proceedings consistent with this memorandum and order.

So ordered.

By the Court (Green, C.J.,  
Wolohojian & Henry, JJ.<sup>5</sup>),



Clerk

Entered: September 12, 2022.

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<sup>5</sup> The panelists are listed in order of seniority.