

NOTICE: Summary decisions issued by the Appeals Court pursuant to its 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 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

18-P-746

COMMONWEALTH

vs.

VALERIE PERRY.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a jury trial in the Superior Court, the defendant was convicted of aggravated rape of a child in violation of G. L. c. 265, § 23(A).¹ While her appeal was pending, the defendant filed a motion for a new trial alleging ineffective assistance of counsel. The motion was denied without a hearing by the trial judge. We consolidated the defendant's appeal from the order denying her new trial motion with her direct appeal. For the reasons that follow, we conclude that the defendant is not entitled to a new trial, and we affirm the judgment.

Background. a. Facts. The charges in this case stem from a sexual encounter between the defendant, who was forty-two years old, and the victim, who was fifteen years old, at the

¹ The defendant also was charged with one count of indecent assault and battery on a person over fourteen; however, this count was dismissed.

defendant's home in Wareham located in Plymouth County. The defendant was the victim's art teacher in middle school and their unlawful sexual relationship occurred during the summer between the victim's freshman and sophomore years in high school. The two also engaged in sexual acts on occasions in the defendant's automobile in the town of Norton located in Bristol County. The defendant was indicted for this conduct by a grand jury in Bristol County and those charges were pending at the time of her trial in this case.² The defendant testified at trial and did not deny that she and the victim had engaged in sexual intercourse at her home. She claimed, however, that the victim had overpowered her, forcibly removed her clothes, and then raped her.³ Given the defendant's defense of duress, the judge admitted testimony regarding the sexual encounters that had occurred in the defendant's car on the limited issues of voluntariness and intent.

b. Motion for new trial. Represented by new counsel, the defendant filed a new trial motion claiming that she was

² The defendant ultimately pleaded guilty to a reduced charge of rape of a child and dissemination of obscene material to a minor.

³ The defendant testified that she was shocked, afraid, and unable to fight or scream during the incident. She explained that she maintained a relationship with the victim afterwards to "keep up appearances," and that she did not report the incident because she was embarrassed. The defendant also presented testimony from a clinical psychologist who opined that it was not unusual for a sexual assault victim to maintain a relationship with their assailant and not report the crime.

deprived of the effective assistance of counsel because defense counsel failed to aggressively cross-examine the victim to show that he was the aggressor and that the defendant was the victim. According to the defendant, the alleged inadequacy of defense counsel's performance in this regard left the jury with the impression that the defendant voluntarily engaged in sexual acts with the victim.

In a well-reasoned memorandum of decision, the trial judge rejected these arguments. Relying on his own knowledge of the trial, he concluded that defense counsel conducted an effective cross-examination that was purposeful and did not deprive the defendant of her defense of duress. The judge noted that the victim was much larger than the defendant. There was evidence that, at the time of the offense, the victim was approximately six feet tall and weighed two hundred pounds whereas the defendant had a slight build and was only five feet three inches tall. As a result, the judge reasoned, there was a danger in treating the victim overly aggressively by the defense because he "may [then] have appeared more the victim and less the formidable man." In addition, the judge observed that given the prior bad act evidence, defense counsel was forced to tread lightly. As noted, the judge concluded that defense counsel's conduct was not deficient and denied the new trial motion.

Discussion. We review the denial of a motion for new trial for an abuse of discretion.⁴ See Commonwealth v. Sperrazza, 399 Mass. 1001, 1002 (1987). Our review is particularly deferential when the motion judge was also the trial judge. See Commonwealth v. Bowie, 25 Mass. App. Ct. 70, 84 (1987) (judge may make use of "knowledge of what occurred at trial").

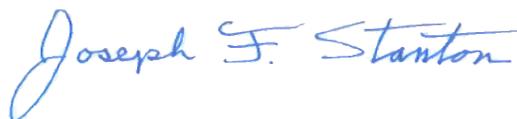
In order to prevail on a motion for a new trial based on a claim of ineffective assistance of counsel, the defendant must demonstrate (1) that defense counsel's conduct fell "measurably below that which might be expected from an ordinary fallible lawyer" (performance prong), and (2) that he was prejudiced by 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 conduct "[a]t issue here is a strategic choice, and the question is whether that strategic choice was . . . 'manifestly unreasonable when made.'" Commonwealth v. Hudson, 446 Mass. 709, 715-716 (2006), quoting Commonwealth v. Martin, 427 Mass. 816, 822 (1998). We agree with the conclusion reached by the trial judge that the defendant did not meet her burden on either prong. Accordingly, there was no abuse of discretion.

⁴ The defendant's only claim on appeal concerns the denial of her motion for a new trial.

First, defense counsel solicited testimony from the victim that he pulled some of the defendant's clothes off during the encounter and that he had put his hands on her and was on top of her. Second, defense counsel exposed numerous inconsistencies in the victim's testimony regarding both the indicted conduct and the defendant's prior bad acts.⁵ In sum, defense counsel solicited testimony which supported the defense of duress and upon which he could argue to the jury that the defendant had not acted voluntarily. We discern nothing unreasonable about this trial strategy which, together with the defendant's expert, provided the defendant with a coherent defense. That it did not succeed was not the fault of defense counsel. Therefore, both the judgment and the order denying the defendant's motion for a new trial are affirmed.

So ordered.

By the Court (Vuono, Hanlon &
Shin, JJ.⁶),



Clerk

Entered: March 21, 2019.

⁵ We note also that defense counsel moved, unsuccessfully, to exclude evidence of the defendant's prior bad acts.

⁶ The panelists are listed in order of seniority.