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

19-P-755

COMMONWEALTH

vs.

MICHAEL A. MENDES.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A District Court jury convicted the defendant of assault and battery, G. L. c. 265, § 13A (a), and violation of an abuse prevention order, G. L. c. 209A, § 7. The convictions were based on evidence that the defendant struck his girlfriend in her eye following an argument in a motel room. On appeal, the defendant claims that the judge abused her discretion in admitting evidence of prior bad acts, inadmissible hearsay statements, and improper expert opinion. The defendant also claims that the judge abused her discretion when she denied the defendant's motion for a new trial based on a claim of ineffective assistance of counsel. We affirm.

Discussion. 1. Prior bad acts. The Commonwealth filed a motion in limine seeking to admit evidence of the defendant's prior physical abuse of the victim as proof of the hostile

relationship between them and to explain why the victim feared the defendant. After a hearing, the judge found that the prior bad act evidence was probative and allowed the motion in limine on the condition that the police officer who investigated the prior assault was available for the defendant to call as a witness at trial. Before trial, the parties learned that the officer was unavailable and so informed the judge. Based on the judge's conditional ruling, the Commonwealth did not ask the victim about prior assaults by the defendant.

On cross-examination, in an effort to impeach the victim, defense counsel elicited testimony from the victim that she stayed with the defendant after the assault and did not try to leave the motel room for two days. During redirect examination, the prosecutor asked the victim, "why wouldn't you try and leave while he was still there?" The victim responded, "because of the past." On appeal, the defendant argues that the victim's answer was inadmissible evidence of prior bad acts. See Commonwealth v. Helfant, 398 Mass. 214, 224-225 (1986) (defendant's prior bad acts not admissible to show bad character or propensity to commit crime charged). The defendant's argument fails because there was no reference to any specific prior conduct, lawful or unlawful. We cannot reasonably conclude that the vague reference to "the past" would have caused the jury to draw an inference of prior bad acts. See

Commonwealth v. Lacey, 2 Mass. App. Ct. 889, 889 (1974) (testimony regarding defendant's association with medical center which provides drug rehabilitation programs too vague to allow jury to draw negative inference).

Later in the trial, the prosecutor attempted to elicit testimony regarding the active restraining order prohibiting contact between the defendant and the victim. The prosecutor asked the investigating police officer, "did you learn any other information in the course of your investigation with respect to this case about [the victim] and [the defendant]?" The officer responded, "that they were involved in other domestics." The defendant's objection was sustained and the judge immediately ordered the testimony struck. We agree with the defendant that this testimony violated the judge's conditional order and should not have come before the jury. However, we discern no prejudice where the testimony was inadvertent and brief, the prosecutor did not repeat the testimony or refer to it in closing argument, and the judge immediately struck the testimony and had instructed the jury to disregard struck evidence.[1] See Commonwealth v. Jackson, 384 Mass. 572, 579 (1981).

[1] We also note that the judge did not conclude that the prejudicial impact of the other bad act evidence outweighed its probative value. Rather, at the hearing on the motion in limine, the judge determined that evidence of a prior assault on the victim by the defendant was relevant and admissible. See Commonwealth v. Julien, 59 Mass. App. Ct. 679, 686 (2003)

2. Hearsay. The victim testified that while she and the defendant were in the motel room she overheard a telephone conversation between the defendant and a "gentleman" from whom the defendant intended to purchase crack cocaine. She overheard the gentleman say, "I know [the room number]. I was there the other night." On appeal, the defendant claims this testimony, which drew no objection at trial, was "inadmissible [hearsay], irrelevant and extremely damaging." We are not persuaded by the defendant's argument. When considered in context, these statements appear to have been offered to explain why the victim was angry with the defendant rather than to prove the truth of their content. Therefore, they were not hearsay. See Mass. G. Evid. § 801 (c) (2019). Even were we to conclude that the testimony was inadmissible hearsay, the statement that the "gentleman" had visited the defendant's motel room before, without more, did not create a substantial risk of a miscarriage of justice.

3. Expert opinion. During direct examination, the investigating police officer described a bruise he observed on

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(evidence of defendant's prior assaultive behavior relevant to show hostile nature of relationship with victim). The judge disallowed the testimony only because the investigating officer involved in the prior assault was not available for the defendant to call as a witness in an effort to impeach the victim.

the victim's face as "a little yellow, a little red" and "semi-healing," and testified that "it may have occurred a couple of days before." On appeal, the defendant claims that such testimony amounted to an expert opinion that the officer was not qualified to give. Because there was no objection, we review only for a substantial risk of a miscarriage of justice. Commonwealth v. Fowler, 431 Mass. 30, 41 & n.20 (2000). "While an expert opinion is admissible only where it will 'help jurors interpret evidence that lies outside of common experience,' a lay opinion is admissible only where it lies within the realm of common experience" (citation omitted). Commonwealth v. Canty, 466 Mass. 535, 541-542 (2013). Bruising is a matter that lies within the realm of common experience. See Commonwealth v. Junta, 62 Mass. App. Ct. 120, 127-128 (2004). Accordingly, there was no error, much less a substantial risk of a miscarriage of justice.[2]

4. Motion for new trial. In a motion for new trial, the defendant claimed that his trial counsel was constitutionally

[2] Because we conclude that the officer's testimony regarding the victim's bruising was admissible evidence, the prosecutor's unobjected to reference to that testimony in closing argument did not create a substantial risk of a miscarriage of justice. Nor do we discern such a risk from the prosecutor's argument that the victim "answered candidly" and "didn't hold back." See Commonwealth v. Pearce, 427 Mass. 642, 644 (1998) ("Counsel may argue from the evidence, including a witness's demeanor and motive for testifying, that the witness should be believed").

ineffective. Specifically, he claimed counsel failed to investigate the defendant's attendance at work and introduce the defendant's employment records which, he contends, would have impeached the victim's testimony that the defendant remained with her for three days.[3] We review the judge's decision to deny the motion for a new trial "to determine whether there has been a significant error of law or other abuse of discretion." Commonwealth v. Grace, 397 Mass. 303, 307 (1986). We extend special deference to the motion judge where, as in this case, she was also the trial judge. See id.

"Where a motion for a new trial is based on ineffective assistance of counsel, the defendant . . . [must prove] that the behavior of counsel fell below that of an ordinary, fallible lawyer and that such failing 'likely deprived the defendant of an otherwise available, substantial ground of defence.'" Commonwealth v. Comita, 441 Mass. 86, 90 (2004), quoting Commonwealth v. Saferian, 366 Mass. 89, 96-97 (1974). Where defense counsel made a strategic or tactical decision, the defendant must demonstrate that the decision was manifestly

[3] The defendant argued that the employment records would have established that the defendant was at work on the two days following the assault, evidence which is inconsistent with the victim's testimony that she did not call the police until three days after the assault because that is when the defendant first returned to work.

unreasonable when made. Commonwealth v. Walker, 460 Mass. 590, 598 (2011). The defendant has failed to meet that burden here.

"Impeachment of a witness is, by its very nature, fraught with a host of strategic considerations" and, as a general proposition, "[f]ailure to use a particular method of impeachment does not constitute ineffective assistance of counsel" (citation omitted). Commonwealth v. Lally, 473 Mass. 693, 709 (2016). Here, the victim was effectively impeached with evidence of her consumption of alcohol, her blackouts during the two days following the assault, and her general lack of memory regarding that time period. The victim admitted that she could not remember whether she left the motel room at any time between the assault and the day she contacted the police, and could not remember how she sustained scratches on her nose and mouth. Ultimately, she acknowledged that she had no idea whether the defendant was present in the motel room during the two days following the assault. The defendant's employment records would have added little to this impeachment evidence, which defense counsel used effectively during closing argument. In short, we cannot reasonably conclude that defense counsel's behavior fell below that of an ordinary fallible lawyer, and the records demonstrating that the defendant went to work on the days following the assault would not have provided a substantial

ground of defense. Accordingly, we discern no abuse of discretion in the judge's denial of the motion for new trial.

Judgments affirmed.

Order denying motion for new trial affirmed.

By the Court (Sullivan, Kinder & Singh, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: May 21, 2020.

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