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-459

COMMONWEALTH

vs.

ROBERT R. GILL, JR.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a jury trial in the Superior Court, the defendant, Robert R. Gill, Jr., was convicted of armed assault with intent to kill, and assault and battery.[1] The defendant's motion for a new trial was denied after a nonevidentiary hearing.[2] The defendant's direct appeal and his appeal from the denial of his motion for a new trial were consolidated.[3] We affirm.

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[1] The defendant was indicted on charges of armed assault with intent to murder and assault and battery by means of a dangerous weapon. The jury convicted him of the lesser included offenses of armed assault with intent to kill and assault and battery.

[2] The motion was supported by affidavits of trial counsel and a medical expert, and various exhibits. The defendant did not submit an affidavit.

[3] On appeal, the defendant challenges only the conviction of armed assault with intent to kill.

Discussion. Motion for new trial.[4] The defendant's motion for a new trial was based on a claim of ineffective assistance of counsel. A judge may allow a motion for a new trial "if it appears that justice may not have been done." Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). It is the defendant's "burden to rebut the presumption that [he] had a fair trial." Commonwealth v. Comita, 441 Mass. 86, 93 (2004). "The judge may rule on the motion for new trial from the face of the affidavits or other supporting material, without an evidentiary hearing, 'if no substantial issue is raised by the motion or affidavits.'"[5] Commonwealth v. Marrero, 459 Mass. 235, 240 (2011), quoting Mass. R. Crim. P. 30 (c) (3), as appearing in 435 Mass. 1501 (2001). "We review the judge's denial of the motion for a new trial for 'a significant error of law or other abuse of discretion.'" Commonwealth v. Forte, 469 Mass. 469, 488 (2014), quoting Commonwealth v. Grace, 397 Mass. 303, 307 (1986). Where, as here, the motion judge was the trial judge, "[r]eversal for abuse of discretion is particularly rare." Commonwealth v. Rice, 441 Mass. 291, 302-303 (2004), quoting Commonwealth v. Schand, 420 Mass. 783, 787 (1995).

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[4] The defendant does not make any separate arguments in connection with his direct appeal.

[5] The defendant does not argue that the judge erred in declining to hold an evidentiary hearing.

Where the defendant contends that his trial counsel was ineffective, we consider "whether 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, if so, "whether it has likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). In assessing the prejudice prong of Saferian, "a defendant is entitled to a new trial 'if we have a serious doubt whether the result of the trial might have been different had the error not been made.'" Commonwealth v. Lacoy, 90 Mass. App. Ct. 427, 439 (2016), quoting Commonwealth v. Millien, 474 Mass. 417, 432 (2016).

The defendant argues that trial counsel was ineffective by failing to (1) argue that the stabbing was an accident; (2) call an expert witness; (3) object to the Commonwealth's closing argument; and (4) failing to object to jury instructions.[6] We address each in turn.

a. Accident. The defendant argues that counsel was ineffective in advancing a theory of self-defense because the defendant testified that he accidentally stabbed that victim in

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[6] As the defendant does not make any arguments on his claim that trial counsel failed to object to the admission of prior consistent statements, that argument is waived. See Mass. R. A. P. 16 (a) (9), as appearing in 481 Mass. 1628 (2019).

the back. "An attorney's tactical decision amounts to ineffective assistance of counsel only if it was manifestly unreasonable when made." Commonwealth v. Hudson, 446 Mass. 709, 716 (2006), quoting Commonwealth v. Martin, 427 Mass. 816, 822 (1998). "Many decisions of defense counsel that are characterized in hindsight as errors may have been reasonable tactical or strategic decisions when made." Commonwealth v. Mosher, 455 Mass. 811, 827 (2010).

Here, as a result of a physical altercation between the defendant, his brother, and the victim, the victim sustained two significant injuries -- a stab wound to the back and another to his hand. Although the defendant twice testified that the stabbing in the back was an accident, he also testified that he went to his car and grabbed the knife after he saw the victim wielding a machete, and then jumped on the victim with the unfolded and unsheathed knife "cock[ed]," "out," and pointed toward the fallen victim. Indeed, the defendant intentionally jumped onto the victim with the knife, and the stab wound to the victim's back occurred as a result. This conduct was not accidental. Cf. Commonwealth v. Palmariello, 392 Mass. 126, 145 (1984). At a minimum, these actions were wanton and reckless and did not occur due to the types of inadvertence, mistake, or negligence required for a defense of accident. See Commonwealth v. Figueroa, 56 Mass. App. Ct. 641, 650-651 (2002). And, the

defense theories of accident and self-defense are typically mutually exclusive, see Commonwealth v. Turner, 24 Mass. App. Ct. 902, 903 (1987), so it was not manifestly unreasonably for counsel to choose to pursue a defense of self-defense. For the same reasons, the defendant's argument that trial counsel undermined his credibility in his closing argument by failing to characterize the stabbing as an accident fares no better.

b. Expert witness. Next, the defendant argues that counsel was ineffective for failing to call an expert witness to testify that the injury to the victim's hand could have been self-inflicted. We disagree. Trial counsel consulted with an expert and ultimately decided not to call her as a trial witness because the expert did not rule out the possibility that the injury occurred as described by the victim. It was not a manifestly unreasonable tactical decision for counsel to decline to call the expert, particularly where the Commonwealth did not present expert testimony that the hand injury could only have been caused by the defendant. See Hudson, 446 Mass. at 716. Cf. Millien, 474 Mass. at 429-430 (ineffective assistance where Commonwealth submitted expert testimony that only medical explanation for victim's injuries was defendant's actions, but defense counsel failed to call viable rebuttal expert). Moreover, even if it was error, the defendant has not shown prejudice. The undisputed evidence was that the defendant

stabbed the victim in the back, which alone was sufficient to support the conviction. See Lacoy, 90 Mass. App. Ct. at 439.

c. Closing argument. The defendant next argues that trial counsel was ineffective for failing to object to a portion of the Commonwealth's closing argument where the prosecutor argued that the victim had "every right to stand his ground . . . on his property. He has every right to defend his family. He has every right to defend himself."

"Where defense counsel is claimed to be ineffective because he failed timely to object during the course of trial, we determine whether there was error and, if so, whether the error was 'likely to have influenced the jury's conclusion.'" Commonwealth v. Walker, 460 Mass. 590, 598 (2011), quoting Commonwealth v. Gonzalez, 443 Mass. 799, 808 (2005). "[W]e examine the remarks 'in the context of the entire argument, and in light of the judge's instructions to the jury and the evidence at trial.'" Commonwealth v. Kolenovic, 478 Mass. 189, 199 (2017), quoting Commonwealth v. Gaynor, 443 Mass. 245, 273 (2005).

Here, the challenged statements were in direct response to the defendant's claim that the victim was the primary aggressor. Cf. Commonwealth v. Simpson, 434 Mass. 570, 585-586 (2001). Furthermore, the judge correctly instructed the jury that because the defendant sufficiently raised the issue of self-

defense, it was the Commonwealth's burden moving forward to prove beyond a reasonable doubt that the defendant had not acted in self-defense. Commonwealth v. McGann, 484 Mass. 312, 324 (2020). Even if the prosecutor's statement was improper, it was sufficiently offset by the jury instructions and was not likely to influence the jury's conclusion. See Commonwealth v. Brewer, 472 Mass. 307, 315 (2015).

d. Jury instructions. Lastly, the defendant argues that the judge erred in instructing the jury regarding the lesser included offense of armed assault with intent to kill by lowering the Commonwealth's burden of proof.[7] Because there was no objection to the instructions, we review to determine if error, whether it created a substantial risk of a miscarriage of justice. Commonwealth v. Sherman, 481 Mass. 464, 471 (2019).

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[7] The challenged instruction was as follows:

> "Now, if . . . you determine that the Commonwealth has proven, beyond a reasonable doubt, that the defendant, either personally or as part of a joint venture, assaulted [the victim], with a dangerous weapon, that the defendant possessed the specific or actual intent to kill [the victim], but that the Commonwealth has failed to prove the absence of mitigating circumstances, then you shall find the defendant guilty of the lesser-included offense of armed assault with intent to kill. If you find that the Commonwealth has proven, beyond a reasonable doubt, that the defendant assaulted [the victim], but has failed to prove beyond a reasonable doubt he was armed with a dangerous weapon, you shall find him guilty of the lesser-included offense of assault. If on the evidence, however[,] the Commonwealth has failed to prove beyond a reasonable doubt that the defendant . . . assaulted [the victim] then you must find the defendant not guilty."

The defendant claims that the instruction conveyed to the jury that they could only acquit the defendant of armed assault with intent to kill -- and convict the defendant of assault -- if they found that the defendant did not have the intent to kill, but still found that he was armed and assaulted the victim. "An error is not ascertained by scrutinizing bits and pieces of the charge, removed from their appropriate context." Commonwealth v. Redmond, 53 Mass. App. Ct. 1, 9 (2001). "In considering whether a [jury] charge lowers the criminal standard of proof, we consider the charge, taken as a whole, and assess the possible impact of [an] alleged error on the deliberations of a reasonable juror, i.e., whether a reasonable juror could have used the instruction incorrectly." Commonwealth v. Silva, 482 Mass. 275, 288 (2019), quoting Commonwealth v. Rosa, 422 Mass. 18, 27 (1996).

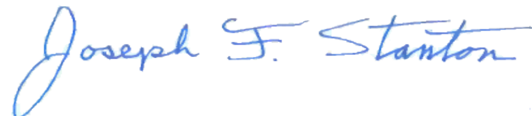
Taken as a whole, the judge properly instructed the jury, including instructions on lesser included offenses. As an example, the judge explained how the jury could move from an armed assault with intent to kill indictment to simple assault if they found that the defendant was not armed. The judge appropriately instructed the jury that no matter what they chose to convict the defendant of, however, the Commonwealth had to prove each element beyond a reasonable doubt. Thus, it was implicit in the instructions that the jury could also convict

the defendant of the lesser included offense of simple assault if they found that the Commonwealth did not prove that the defendant had the specific intent to kill, but he still assaulted the victim. There was no error, let alone one creating a substantial risk of a miscarriage of justice.[8]

Judgments affirmed.

Order denying motion for new trial affirmed.

By the Court (Vuono, Blake & Singh, JJ.[9]),



Clerk

Entered: May 4, 2020.

[8] Because we discern no errors warranting relief, we conclude that the defendant's claim that cumulative trial errors created a substantial risk of a miscarriage of justice also fails.
[9] The panelists are listed in order of seniority.