COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-418

COMMONWEALTH

vs.

MARIA E. MONTEIRO.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a jury trial, the defendant, Maria E. Monteiro, was found guilty of assault, pursuant to G. L. c. 265, § 13A (a); assault and battery, pursuant to G. L. c. 265, § 13A (b); and trespass, pursuant to G. L. c. 266, § 120. On appeal, she argues that the judgment on her assault conviction should be vacated as duplicative of her assault and battery conviction; her trial counsel was ineffective; and the Commonwealth presented insufficient evidence for the trespass conviction. For the following reasons, we vacate the judgment on the defendant's assault conviction and affirm the judgments on the remaining convictions.

Background. The defendant's charges stem from an incident that occurred at Brockton High School on October 27, 2015, around lunchtime. During the lunch period, students were

allowed outside the building in a courtyard area. The courtyard is located underneath two walkways that connect the gymnasium with the school's main building; the buildings form a courtyard, with grass in the middle. While the area is open to the public during the day, during lunch each entrance has a "Do Not Enter" sign posted on a sawhorse. When students are at lunch, the courtyard is monitored by teachers and other school staff on lunch duty. Further, at the school, students are required to wear an identification badge at all times; visitors are required to check in at the administration building, as indicated by a sign in front of the administration building; and, once checked in, visitors are required to wear an orange "visitor" sticker.

On October 27, 2015, at about 11:30 A.M., the defendant, her daughter, and an adult male entered the courtyard. No one in the group wore the proper identification.[1] Deborah McNulty, a teacher on lunch duty, noticed the defendant's party and the fact that none of them were wearing identification; she brought this to the attention of two other teachers, Jeff Driscoll and Chris Sullivan.

Before the teachers were able to reach the defendant, the school bell rang and the victim, a student who was approximately fourteen or fifteen years old, came out of the school. The

[1] The defendant's daughter was a student at the school, but she had not gone to school that day.

defendant immediately confronted her. With other students standing around, words were exchanged, and when the defendant got close enough the victim, the defendant began to punch the victim and to pull her hair. The defendant eventually pulled the victim to the ground and slammed her head on the ground. At one point, the defendant's daughter was holding a Taser and attempted to fire it at the victim. The teachers intervened and, eventually, police officers arrived and placed the defendant under arrest.

The next day, the defendant was arraigned and counsel was provided. At a pretrial conference, the judge offered the defendant a continuance without a finding (CWOF) on the charges, if she was willing to admit to facts sufficient to support a finding of guilty. At the time, the defendant was a legal permanent resident with a prior conviction in Federal court of felony conspiracy, and trial counsel informed the court that he was concerned that a CWOF, which is the functional equivalent of a guilty finding in immigration court, could have an impact on the defendant's immigration status. With the defendant present, trial counsel then refused the judge's offer, opting instead for trial.

On September 5, 2017, after a one-day trial, the jury found the defendant guilty on all counts. On November 28, 2018,[2] the defendant filed a motion for a new trial, arguing that trial counsel provided ineffective assistance. In the same motion, the defendant also moved for entry of a finding of not guilty on the trespass conviction and for dismissal of the assault charge as duplicative of her assault and battery conviction.[3] On December 27, 2018, the motion was denied.

Discussion. 1. Duplicative convictions. The defendant first argues that her convictions of assault and of assault and battery were based on the same act. For that reason, and because assault is a lesser included offense of assault and battery, the assault charge, she argues, should be dismissed. The Commonwealth concedes that both charges were based on the same incident and that the judge did not instruct the jury specifically that each charge must be based on a separate and distinct act. For that reason, the Commonwealth agrees that the lesser included offense of assault must be vacated as duplicative. See Commonwealth v. Kelly, 470 Mass. 682, 699

[2] The defendant filed a timely notice of appeal on September 18, 2017; on April 6, 2018, the Appeals Court granted the defendant's request for a stay of her appeal in order to pursue a motion for a new trial in the Brockton District Court.

[3] The defendant's arguments regarding the duplicative convictions and the sufficiency of the evidence on the trespass charge were also raised at trial.

(2015). We agree and, accordingly, we vacate the judgment on the conviction of and the sentence on the lesser included offense of assault, leaving intact the conviction of the greater offense, assault and battery. See Commonwealth v. Pires, 97 Mass. App. Ct. 480, 483-484 (2020), citing Commonwealth v. Beal, 474 Mass. 341, 348 (2016), and Commonwealth v. Mello, 420 Mass. 375, 398 (1995).

2. Ineffective assistance of counsel. The defendant next argues that her trial counsel was ineffective. In so doing, she contends, first, that trial counsel was ineffective for advising her incorrectly that a CWOF is the equivalent of a conviction for the purposes of her immigration status. Her second complaint challenges counsel's handling of the evidence of the use of the Taser.

"[W]e review the denial of a motion for a new trial for 'a significant error of law or other abuse of discretion.'" Commonwealth v. Duart, 477 Mass. 630, 634 (2017), quoting Commonwealth v. Forte, 469 Mass. 469, 488 (2014). An abuse of discretion occurs "where we conclude the judge made 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). When the basis for the motion for a new trial is a claim of ineffective

assistance of counsel, "the defendant must show that the behavior of counsel fell measurably 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. Prado, 94 Mass. App. Ct. 253, 255 (2018), quoting Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). "We afford particular deference to a decision on a motion for a new trial based on claims of ineffective assistance where the motion judge was, as here, the trial judge." Commonwealth v. Diaz Perez, 484 Mass. 69, 73 (2020), quoting Commonwealth v. Martin, 467 Mass. 291, 316 (2014).

a. Immigration consequences. The defendant argues that trial counsel informed her that she "would" be deported if she accepted the judge's offer of a CWOF and, because of that advice, she proceeded to trial. She contends now that a CWOF on the charges at issue would not necessarily have resulted in her deportation and that, had she known that, she would have accepted the judge's offer and admitted to sufficient facts.

On the limited record before us, we reject this claim. See Commonwealth v. McCormick, 48 Mass. App. Ct. 106, 108 (1999) (ineffective assistance claim must be rejected on direct appeal unless factual basis of claim appears indisputably on trial record). The Commonwealth argues, and we agree, that the affidavits of the defendant and trial counsel submitted with the

defendant's motion for a new trial clearly indicate that trial counsel informed the defendant that she could get deported; not, as the defendant argues, that she would get deported. Further, the defendant's argument, and cases cited therein, concern the Federal immigration classification of particular charges that differ from those at issue.[4] The record is clear that trial counsel's immigration concern was about the effect that the disposition of this case would have on the defendant's situation, given an already existing Federal conviction of felony conspiracy. Further, the defendant's argument that, for immigration purposes, a CWOF on the present case was fundamentally different from a guilty finding is incorrect. See De Vega v. Gonzales, 503 F.3d 45, 49 (1st Cir. 2007) ("Under Massachusetts law, therefore, a continuation, based on an admission of facts sufficient for a finding of guilt and conditioned on payment of restitution, is treated as the legal equivalent of a guilty plea and probationary sentence"). Finally, the defendant has not explained how she is harmed by the guilty verdicts in this case -- that is, what significant

[4] See Zivkovic v. Holder, 724 F.3d 894, 906 (7th Cir. 2013) (offense of residential trespass in violation of Illinois law is not categorically crime of violence for purposes of aggravated felony provision of 8 U.S.C. § 1227[a][2][A][iii]); Matter of Sejas, 24 I. & N. Dec. 236, 238 (B.I.A. 2007) (offense of assault and battery against family or household member in violation of Virginia law is not categorically crime involving moral turpitude for purposes of 8 U.S.C. § 1182[a][2][A][i][I]).

collateral consequences result from the fact that she has been found guilty rather than receiving a continuance without a finding. For these reasons, the defendant's argument that trial counsel's conduct was manifestly unreasonable is unavailing. See Commonwealth v. Adams, 374 Mass. 722, 728 (1978).

b. Taser evidence. The defendant's next argument is that trial counsel's handling of the evidence concerning the use of the Taser was manifestly unreasonable. As an initial matter, the defendant bases her argument entirely on the trial record, as she failed to raise this argument in her motion for a new trial. See Commonwealth v. Gorham, 472 Mass. 112, 116 n.4 (2015), quoting Commonwealth v. Peloquin, 437 Mass. 204, 210 n.5 (2002) ("Relief on a claim of ineffective assistance based on the trial record is the weakest form of such a claim because it is 'bereft of any explanation by trial counsel for his actions and suggestive of strategy contrived by a defendant viewing the case with hindsight'"). "Relief may be afforded on such a claim 'when the factual basis of the claim appears indisputably on the trial record.'" Gorham, supra, quoting Commonwealth v. Zinser, 446 Mass. 807, 810 (2006).

At trial, the Commonwealth offered testimony that the defendant's daughter possessed a Taser and attempted to Tase the victim during the altercation; a video depicting the defendant's daughter holding the Taser was admitted in evidence. The

defendant now argues that trial counsel should have challenged the admission of the evidence regarding the Taser. This argument fails. In the first place, the daughter's use of the Taser while the defendant was holding the victim by the hair was linked inextricably to the assault at issue. Further, the defendant claimed at trial that she was acting in self-defense and, also, in defense of another, her daughter; at the defendant's request, the judge instructed the jury on both defenses. For that reason, evidence of the use of the Taser clearly was relevant to rebut those arguments. See Commonwealth v. Keita, 429 Mass. 843, 852 n.9 (1999), quoting Commonwealth v. Rodriguez, 370 Mass. 684, 687-688 (1976) ("[W]hen the issue of self-defense is properly before the trier of fact, the Commonwealth must, as matter of due process, prove beyond a reasonable doubt that the defendant did not act in self-defense"). Where, as here, the evidence was properly admitted, we cannot say that the fact that trial counsel did not move to exclude it rendered his performance ineffective. See Commonwealth v. Conceicao, 388 Mass. 255, 264 (1983) (failing to pursue motion with minimal chance of success is not ineffective assistance of counsel).

The defendant also challenges trial counsel's direct examination of herself, arguing that inquiring about the Taser was error and permitted the jury to hear evidence that the

defendant had brought the Taser with her to the altercation. In fact, it appears that trial counsel's questions were framed to enable his client to distance herself from the use of the Taser; instead, the defendant volunteered that she had brought the Taser to the school.[5] In addition, there was evidence regarding the Taser from the first Commonwealth witness and counsel had carefully cross examined to illustrate that the defendant did not use the Taser, although her daughter did.[6]

Without an affidavit from trial counsel, we have no basis on which to conclude that trial counsel's thinking was manifestly unreasonable at the time that he asked the questions the defendant now challenges. See Commonwealth v. Hoyle, 67 Mass. App. Ct. 10, 11 (2006) (noting "[c]onspicuous[] absen[ce]" of affidavit from trial counsel).

3. Sufficiency of the evidence. The defendant's final argument is that the Commonwealth presented insufficient evidence of trespass. Specifically, she argues, there was no indication that she did not have a right to be in the school

[5] For example, counsel asked, "You never had any Taser on you that day, is that correct? The defendant answered, "Yes, I did. My daughter did have the Taser." Counsel asked, "Did you ever pull the Taser out? Answer: "I dropped it and my daughter picked it up."

[6] For example, in cross-examining one of the teachers, trial counsel asked, "So you never saw Miss Monteiro waving any -- wielding any Taser?" The witness responded, "No, no."

courtyard and that there was insufficient evidence that she actually saw a posted sign.

In considering claims of insufficient evidence, this court reviews the evidence in the light most favorable to the Commonwealth to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (quotation and citation omitted). Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). General Laws c. 266, § 120, defines the crime of trespass as "[w]hoever, without right enters or remains in or upon the . . . buildings . . . improved or enclosed land . . . of another . . . after having been forbidden so to do by the person who has lawful control of said premises, whether directly or by notice posted thereon."

The Commonwealth presented sufficient evidence for the jury to find the defendant guilty of trespass. Testimony at trial established the presence of a sign in front of the administration building notifying visitors that they had to check in at the main office and, further, the presence of "Do not enter" signs posted at the entrances to the courtyard. In addition, the evidence established that Brockton High School required students and visitors to wear identification badges at all times -- a policy that reasonably should have been known by a parent with a child attending the school. In the light most

favorable to the Commonwealth, see Latimore, 378 Mass. at 677, this evidence was sufficient to permit a rational jury to find beyond a reasonable doubt that the defendant had adequate notice that she was not to be in the courtyard at the time of her arrest, and therefore was guilty of trespass, pursuant to G. L. c. 266, § 120. See Commonwealth v. Hood, 389 Mass. 581, 590 (1983), quoting Commonwealth v. Richardson, 313 Mass. 632, 638 (1943) ("[General laws] c. 266, § 120, 'protect[s] the rights of those in lawful control of property to forbid entrance by those whom they are unwilling to receive, and to exclude them if, having entered, those in control see fit to command them to leave'"). See also Fitzgerald v. Lewis, 164 Mass. 495, 500 (1895).

Conclusion. On the count of the complaint alleging assault (count 1), the judgment is vacated, the verdict is set aside, and that count of the complaint is to be dismissed. On the remaining convictions, the judgments are affirmed. So much of the order on the defendant's posttrial motion that denies the

request for dismissal of count 1 is reversed, but the order is otherwise affirmed.

So ordered.

By the Court (Hanlon, Wendlandt & Englander, JJ.[7]),

Joseph F. Stanton

Clerk

Entered: August 14, 2020.

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