

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

14-P-504

COMMONWEALTH

vs.

WILLIAM J. FARIA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A District Court jury convicted the defendant of violating an abuse prevention order under G. L. c. 209A, § 7. On appeal, the defendant contends that (1) defense counsel was ineffective for failing to request a mistrial after the victim made numerous nonresponsive and prejudicial statements while testifying, and (2) the prosecutor improperly shifted the burden of proof in his closing argument. We affirm.

Background. The jury could have found the following facts. The defendant and the victim, Diana Natale, were in a dating relationship for approximately sixteen years. The relationship ended in late May or early June of 2013. On June 24, 2013, Natale obtained a 209A order against the defendant. The order required that the defendant not have any contact with Natale and that he stay at least 100 yards away from her at all times. On

July 25, 2013, Natale was driving down Route 28 in Middleborough when she noticed the defendant driving on the opposite side of the road.<sup>1</sup> The defendant swerved his vehicle in her direction and yelled out his open window that she was "going to fucking pay." The defendant then followed Natale as she visited different businesses, and each time she saw him, he yelled at her and called her a "bitch." Natale testified that she saw the defendant four times that day.<sup>2</sup> After her last encounter with the defendant, Natale went to the East Bridgewater police department and reported the incident to Sergeant William Patterson.<sup>3</sup>

Discussion. 1. Ineffective assistance of counsel. The defendant contends, for the first time on direct appeal, that defense counsel was ineffective for failing to move for a mistrial after Natale made numerous improper and prejudicial statements during her testimony. At various points, the victim impugned the defendant's character and offered information about prior incidents unrelated to the case, including making a statement which implied that the defendant had been

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<sup>1</sup> Because of their prior relationship, the defendant was familiar with Natale's motor vehicle, which she had owned for at least five years.

<sup>2</sup> After the initial encounter on Route 28, Natale saw the defendant at Paul Wolfe Motors on Route 18 and twice in the parking lot of the Harborone Credit Union ATM, also on Route 18.

<sup>3</sup> Defense counsel focused on the inconsistencies in Natale's story, including that in her initial statement to police, she only reported seeing the defendant twice on July 25, 2013.

incarcerated. Counsel objected to the majority of these statements, and for the most part, the objections were sustained and the victim's nonresponsive remarks were struck from the record. In fact, the judge admonished the victim several times. Counsel, however, did not object to the following statements: (1) Natale's passing reference to her son who was killed by a drunk driver, (2) her statement that she would need to refer to her notes, which may have implied that there had been additional violations of the 209A order, and (3) her fleeting mention of a prior 209A order she had against the defendant.

To prevail on a claim of ineffective assistance, "the defendant must show that 'behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer . . . deprived [him] of an otherwise available, substantial ground of defence.'" Commonwealth v. Casey (No. 1), 442 Mass. 1, 6 (2004), quoting from Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). Where the claim involves counsel's strategic decisions, the defendant must show that counsel's tactical decision "was manifestly unreasonable when made." Commonwealth v. Martin, 427 Mass. 816, 822 (1998). See Commonwealth v. Stone, 70 Mass. App. Ct. 800, 809 (2007).

To begin with, we note that "an ineffective assistance of counsel challenge made on the trial record alone is the weakest form of such a challenge 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." Commonwealth v. Peloquin, 437 Mass. 204, 210 n.5 (2002). Such claims can only be resolved on direct appeal "when the factual basis of a claim appears indisputably on the trial record." Commonwealth v. Anderson, 58 Mass. App. Ct. 117, 124 (2003) (quotation omitted). Although we agree with the defendant that Natale's testimony was nonresponsive and at times improper, we cannot determine whether counsel's failure to move for a mistrial constituted "serious incompetency, inefficiency, or inattention of counsel." Saferian, supra. On the record before us, we recognize the plausibility of the Commonwealth's argument that because the defendant's trial strategy was to portray Natale as "a woman scorned," defense counsel could have easily concluded that it was more helpful to have Natale appear defensive and biased, than to have a new trial without the improper testimony and the judge's repeated admonishments. See Commonwealth v. Delarosa, 50 Mass. App. Ct. 623, 631-632 (2000). If this is the case, it may very well be that the strategy was not manifestly unreasonable.<sup>4</sup> Nonetheless, without

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<sup>4</sup> We note that it is not apparent from the record that counsel had a tactical reason for failing to move for a mistrial after Natale improperly alluded to the defendant's prior incarceration.

an affidavit from trial counsel and an assessment by the trial judge, we are not in a position to decide.

2. Prosecutor's closing argument. The defendant next asserts that the prosecutor impermissibly shifted the burden of proof to him when the prosecutor said, in his closing argument, that "[t]he Defense has failed to establish that [Natale] was lying at any point during her testimony." We agree with the defendant that this statement went beyond responding to an attack on Natale's credibility and "cross[ed] over into burden shifting," but conclude that it did not give rise to a substantial risk of a miscarriage of justice. Commonwealth v. Tu Trinh, 458 Mass. 776, 788 (2011). See Commonwealth v. Miranda, 458 Mass. 100, 116-117 (2010). In evaluating whether statements made during closing argument created a substantial risk of a miscarriage of justice, "[w]e analyze the remarks in light of the entire argument, as well as in light of the judge's instruction to the jury and the evidence at trial." Commonwealth v. Reid, 73 Mass. App. Ct. 423, 432 (2008) (quotation omitted). Here, the judge instructed the jury in both her preliminary instructions and her final charge that the defendant is presumed innocent, the Commonwealth must prove each element of the crime beyond a reasonable doubt, and the defendant is not required to call any witnesses or produce any evidence. These forceful and proper instructions cured any

potential prejudice. See Commonwealth v. Montez, 450 Mass. 736, 748 (2008); Tu Trinh, supra at 788.

Judgment affirmed.

By the Court (Berry, Vuono & Rubin, JJ.<sup>5</sup>),

Clerk

Entered: August 28, 2015.

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