Commonwealth v. Johnavon St.-Vil

Appeals Court of Massachusetts
January 18, 2022, Entered
19-P-1511

Reporter

2022 Mass. App. Unpub. LEXIS 34 *; 100 Mass. App. Ct. 1120; 180 N.E.3d 1032; 2022 WL 151582

COMMONWEALTH vs. JOHNAVON SAINT-VIL.1

Notice: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as 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 23.0 or 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, 881 N.E.2d 792 (2008).

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Disposition: Judgments affirmed. Orders denying first and second motions for new trial affirmed.

Judges: Neyman, Singh & Grant, JJ. [*1]

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

¹ As is our custom, we spell the defendant's name as it appears in the indictments.

The defendant was indicted for multiple charges stemming from allegations that he had abused his girlfriend's two children. After a jury-waived trial in the Superior Court, the defendant was convicted of two counts of mayhem, G. L. c. 265, § 14, five counts of assault and battery by means of a dangerous weapon on a child, G. L. c. 265, § 15A (*c*) (iv), and three counts of indecent assault and battery by means of a dangerous weapon on a child, G. L. c. 265, § 13B 1/2.² On appeal, the defendant claims that his trial counsel provided ineffective assistance, and that his first and second motions for a new trial were therefore wrongly denied.³ We affirm.

Background. 1. The Commonwealth's case. The children, whom we shall call Marco and Andrea,⁴ lived with their mother in their maternal grandparents' home. The mother began dating the defendant and, in 2012, the mother and the children moved into an apartment with the defendant. In the late summer of 2013, ten year old Marco told his grandfather that the defendant had whipped him and his seven year old sister, Andrea, with a belt. The grandfather confronted the defendant, who said that Marco was "being fresh." Shortly thereafter, when the children were [*2] staying at the grandfather's house, the grandfather noticed that Marco was bleeding from an injury to his penis. The grandfather did not report the child's injury to authorities, but on October 4, 2013, the mother and the grandfather agreed that the children would move back to the maternal grandparents' home.⁵

More extensive injuries were discovered after the children were seen by a pediatrician, including multiple burns apparently inflicted by lit cigarettes. On November 7, 2013, a sexual assault nurse examiner (SANE) performed an examination of the children and took photographs of the injuries. Both children had "numerous healed burn marks" on their bodies, as well as other marks that appeared to be cuts or puncture wounds. At trial, the Commonwealth's medical expert testified that the injuries would leave the children with permanent, lifelong scars.

2. The defense theory. The defense proceeded on the theory that a third party, rather than the defendant, had abused the children. Trial counsel consulted with a medical expert prior to trial in an attempt to determine, from the stage of healing

² A required finding of not guilty entered on an indictment charging assault and battery by means of a dangerous weapon (shovel) on a child, and a finding of not guilty entered as to two additional counts of assault and battery by means of a dangerous weapon (belt) on a child. Two of the convictions involved assaults with knives, while the remaining eight convictions involved burns caused by a spoon dipped in hot oil and lighted cigarettes.

³ The defendant's direct appeal was consolidated with his appeals from the denials of his first and second motions for a new trial.

⁴ The children's names are pseudonyms.

⁵ The children's mother's sister also lived with the grandparents, and was given "care giver authorization" over the children, with the assent of their mother.

represented in the photographs, when the burns had been inflicted. Because the expert "was not [*3] able to offer a helpful opinion that would have excluded [the defendant] as the potential source of the injuries," trial counsel did not retain the expert for trial. Instead, trial counsel cross-examined the Commonwealth's expert, eliciting from her, in part, an opinion that the November 7, 2013 SANE photographs "depicted wounds that had been healed — had been healing at least for five to seven days." Trial counsel argued that this expert testimony established that the children had been injured after they moved in with their grandparents on October 4, 2013, and they no longer had any contact with the defendant. He highlighted the close relationship between the grandparents and the children, arguing that the family was "scapegoat[ing]" the defendant because he was "expendable."

Discussion. The defendant contends that trial counsel's failure to consult with additional experts, in order to identify one who could provide an opinion favorable to the defense, constituted ineffective assistance.⁶ The defendant rests this argument on an affidavit from a nurse and manager of the Brigham and Women's Hospital's burn program (burn expert), which accompanied the defendant's second motion for a new [*4] trial.⁷ The burn expert, after reviewing the photographs, opined that the burn injuries "were less than one month old at the time the photos were taken."

"We review a judge's decision to deny a motion for a new trial without holding an evidentiary hearing for a significant error of law or other abuse of discretion" (quotation and citation omitted). *Commonwealth* v. *Upton*, 484 Mass. 155, 162, 139 N.E.3d 1159 (2020). "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" (citation omitted). *Commonwealth* v. *Diaz Perez*, 484 Mass. 69, 73, 138 N.E.3d 1028 (2020). To establish ineffective assistance of counsel, a defendant must show that the "behavior of counsel [fell] measurably below that which might be expected from an ordinary fallible lawyer," depriving the defendant of a "substantial ground of defence." *Commonwealth* v. *Saferian*, 366 Mass. 89, 96, 315 N.E.2d 878 (1974). "A strategic or tactical decision by counsel will not be considered ineffective assistance unless that decision was 'manifestly

⁶ The defendant also argues that the judge denied his second motion for a new trial based on the "clearly erroneous finding" that the children were "removed from [the defendant's] home as a direct result of his abuse." This argument is unavailing. The reason for the children's move to the grandparents' home has no bearing on the issue of trial counsel's performance. Cf. *Care & Protection of Olga*, 57 Mass. App. Ct. 821, 825, 786 N.E.2d 1233 (2003) (clearly erroneous findings are immaterial when they are "not central to the ultimate conclusion").

⁷ The defendant was appointed new appellate counsel after filing pro se a second motion for a new trial.

unreasonable' when made" (citation omitted). *Commonwealth* v. *Acevedo*, 446 Mass. 435, 442, 845 N.E.2d 274 (2006).

The defendant has not shown that trial counsel's conduct fell below that of an ordinary fallible lawyer. Trial counsel's affidavit demonstrates that he was aware, after consulting with a medical expert, that the photographs of the [*5] burn injuries could not be used to definitively determine that the injuries were inflicted after October 4. Even had trial counsel identified a different expert, who had an opinion as to the age of the injuries that was favorable to the defense, the initial consultation made it reasonable to anticipate that calling such an expert would result in the Commonwealth presenting competing expert testimony. See Commonwealth v. Montez, 450 Mass. 736, 758-759, 881 N.E.2d 753 (2008) (counsel's failure to call expert witness not unreasonable where admission of expert testimony would have highlighted unfavorable evidence). Trial counsel instead advanced his defense theory by cross-examining the Commonwealth's witnesses and emphasizing discrepancies in Marco's testimony. Indeed, he did this with some success: trial counsel elicited testimony from the Commonwealth's expert that disclaimed her ability to identify, precisely, how long the wounds had been healing. Contrast Commonwealth v. Epps, 474 Mass. 743, 762, 53 N.E.3d 1247 (2016) (impossible to advance defense theory without expert testimony). A tactical decision is not manifestly unreasonable simply because it ultimately proves unsuccessful; here, the record shows that trial counsel was competent in his duty to provide effective representation.8 Commonwealth v. Kolenovic, 471 Mass. 664, 674-675, 32 N.E.3d 302 (2015).

Nor has the defendant demonstrated [*6] a viable claim of prejudice. The defendant's reliance on *Commonwealth* v. *Millien*, 474 Mass. 417, 50 N.E.3d 808 (2016), which he claims is "outcome determinative," does not persuade us otherwise. *Millien*, contrary to the defendant's claim, does not stand for the proposition that a defense attorney must consult expert after expert, until finding one who is able to "substantiate the sole theory of defense." Rather, defense counsel in *Millien* was ineffective for failing to consult with *any* experts, an omission that was particularly prejudicial in a case that hinged on proving the cause of the child's injuries and where the alleged cause — shaken baby syndrome — was an "ongoing medical controversy," subject to "vigorous debate." *Id.* at 441. Because the child victim in *Millien* was only six months old and nonverbal, and there were no percipient witnesses aside from the defendant, the

⁸ Trial counsel's affidavit provided sufficient information about his strategic choices. Although a claim of ineffective assistance qualifies as a serious issue, see *Commonwealth* v. *Welch*, 487 Mass. 425, 445, 167 N.E.3d 1201 (2021), the new affidavit did not make an adequate showing of ineffective assistance such that an evidentiary hearing was required.

Commonwealth relied heavily on expert opinion to prove its case that the child's head injuries were intentionally inflicted. *Id.* at 418, 420, 429.

Here, in contrast, the Commonwealth proved its case largely through the testimony of the children, who were twelve and nine at the time of trial. The children provided ample, detailed testimony regarding the multiple instances of abuse and identified the defendant as the [*7] perpetrator. Andrea testified that the defendant burned her with cigarettes on multiple occasions. She testified that he had hit her with a belt and a brush, tried to stab her, and, on one occasion, burned her with a metal spoon that had been heated in boiling oil. Marco testified to much of the same. The Commonwealth's expert, in the context of a case dependent on the victims' credibility, did little to pinpoint the defendant as the perpetrator of the abuse. Contrast Commonwealth v. Jacobs, 488 Mass. 597, 606, 174 N.E.3d 1200 (2021) ("The absence of expert testimony constitutes ineffective assistance where such testimony could provide a substantial ground of defense or is necessary to rebut critical expert testimony relied upon by the Commonwealth"). Rather than depriving the defendant of a substantial ground of defense, the lack of expert testimony on the healing time of a burn injury allowed trial counsel to focus the defense on undermining the credibility of the children and their grandfather, and to highlight the family's motive to falsely identify the defendant as the perpetrator.

Judgments affirmed.

Orders denying first and second motions for new trial affirmed.

By the Court (Neyman, Singh & Grant, JJ.9),

Entered: January 18, 2022.

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⁹ The panelists are listed in order of seniority.