APPENDIX "A"

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1307

COMMONWEALTH

vs.

GEORGE K. MACKIE.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

On August 12, 2009, following a jury trial in the Superior Court, the defendant, George K. Mackie, was convicted of two counts of rape of a child.[1] He appealed the convictions, contending that he received ineffective assistance of counsel, the prosecutor made several errors in closing argument, and the judge admitted inappropriate first complaint testimony. On March 7, 2014, a panel of this court affirmed the defendant's convictions in an unpublished decision issued pursuant to Rule 1:28. See Commonwealth v. Mackie, 85 Mass. App. Ct. 1104 (2014). On April 2, 2020, the defendant filed a motion for a new trial in the Superior Court, which a Superior Court judge denied in a written memorandum. The defendant now appeals from

[1] The judge dismissed a count of intimidation of a witness at the request of the Commonwealth.

the order denying his motion for a new trial arguing the following: (1) trial and appellate counsel rendered ineffective assistance by failing to object to or raise issues regarding the prosecutor's closing argument; (2) trial and appellate counsel rendered ineffective assistance by failing to object to or raise issues regarding the judge's jury instructions; (3) trial and appellate counsel rendered ineffective assistance with respect to violations of the first complaint rule; and (4) trial counsel rendered ineffective assistance by failing to introduce telephone records to impeach the victim's credibility.[2] We affirm.

Background. The forty-six year old defendant developed a friendship with the thirteen year old victim and the victim's friend. Among other activities, the defendant took the boys fishing, to restaurants, to a bike store, and to a "monster jam" truck event. He also gave the victim an iPod and a cell phone but told the victim that he "could only use it to call [the defendant]." On one of the outings, the defendant drove the victim to a boat ramp by "the lake in Clinton." "[I]t was dark out at this time." There, the defendant unzipped the victim's pants, pulled out the victim's penis, and placed it into his

[2] The arguments relating to the first complaint doctrine and the telephone records were included at the defendant's insistence. See Commonwealth v. Moffett, 383 Mass. 201, 208 (1981).

mouth. A few days later, the defendant drove the victim to the same area and placed the victim's penis into his mouth a second time. After each incident, the defendant told the victim, "what happens in the car stays in the car." The defendant admitted at trial that he took the victim to restaurants and bought him various things. He also admitted that he took the victim to the boat ramp on at least two occasions but testified that he did so to go fishing. He denied any sexual contact with the victim.

Discussion. 1. Legal standards. The defendant claims that the judge abused her discretion in denying the motion for a new trial because both trial and prior appellate counsel rendered ineffective assistance. A court should only grant a motion for a new trial under Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001), where it "appears that justice may not have been done." Mass. R. Crim. P. 30 (b). Accord Commonwealth v. Wheeler, 52 Mass. App. Ct. 631, 635 (2001). Motions for a new trial are committed to the sound discretion of the judge, see Commonwealth v. Moore, 408 Mass. 117, 125 (1990), and "are granted only in extraordinary circumstances," Commonwealth v. Comita, 441 Mass. 86, 93 (2004). "A judge may make the ruling based solely on the affidavits and must hold an evidentiary hearing only if the affidavits or the motion itself raises a 'substantial issue' that is supported by a 'substantial evidentiary showing.'" Commonwealth v. Scott,

467 Mass. 336, 344 (2014), quoting Commonwealth v. Stewart, 383 Mass. 253, 260 (1981).

Where, as here, a motion for a new trial is based on ineffective assistance of counsel, the defendant bears the burden to establish that "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 that, as a result, the defendant was "likely deprived . . . of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). See Commonwealth v. Millien, 474 Mass. 417, 432 (2016) (prejudice standard under second prong of Saferian test met when reviewing court has "serious doubt whether the jury verdict would have been the same had the defense been presented"). Where, as here, the motion judge was not the trial judge, we independently assess the trial record, but we defer to the motion judge's credibility determinations. See Commonwealth v. Masonoff, 70 Mass. App. Ct. 162, 166 (2007). See also Commonwealth v. Wright, 469 Mass. 447, 461 (2014).

2. Ineffective assistance regarding Commonwealth's closing. The defendant contends that trial counsel was ineffective for failing to object to what he claims were multiple errors in the prosecutor's closing argument, and that prior appellate counsel was ineffective for failing to argue in

the first appeal that the prosecutor improperly vouched for witnesses and argued facts not in evidence. As the defendant did not object at trial, our review is limited "to determine if the statements were error, and, if so, whether they created a substantial risk of a miscarriage of justice." Commonwealth v. Sanchez, 96 Mass. App. Ct. 1, 9 (2019).

In closing argument, counsel "may argue from the evidence and may argue fair inferences that might be drawn from the evidence" (citation omitted). Commonwealth v. Ridge, 455 Mass. 307, 330 (2009). We consider the challenged comments in light of the entire argument, the judge's instructions, and the evidence at trial. See Commonwealth v. Pearce, 427 Mass. 642, 643-644 (1998). "Counsel also may call on the experience and common knowledge of the jury." Ridge, supra. With these principles in mind, we turn to the conduct at issue in the present case.

a. Analogy to "typical" case. First, the defendant contends that the prosecutor erred in stating that the rapes occurred "in the woods," and in describing the typical child rape case and attempting to fit the facts of the present case into such "typical" cases. Specifically, he claims error in the prosecutor's statements to the effect that such cases do not occur in public or on camera, but occur "in the woods, alone in

a car, with a man and a boy or a man and a girl, while nobody is around."

The prosecutor's statements regarding the "typical case" were not appropriate because at trial there was no expert testimony or other evidence explaining what evidence or facts would or may exist in a "typical" child rape or child sexual assault case. Despite this error, the challenged statements, viewed in context of the entire closing argument and the evidence adduced at trial, were not of the scope or tenor that created a substantial risk of a miscarriage of justice. See Ridge, 455 Mass. at 331 (holding that judge properly concluded that prosecutor's remarks "referencing United States involvement in foreign conflicts and how criminal cases are portrayed on television, 'were brief utterances that were within the common knowledge of the jury'"). The comments were made in response to defense counsel's closing argument to the effect that the victim's claims lacked corroboration and credibility. See Commonwealth v. Mason, 485 Mass. 520, 539 (2020) ("A prosecutor is entitled to respond to an argument made by the defense at closing"). There was no dispute that the defendant and the victim were alone together at the time of the incidents; that their time together by the boat ramp was not caught on camera; that the victim did not immediately disclose the incidents; and that there was no DNA or other scientific or medical evidence

introduced at trial. In response to defense counsel's argument, the prosecutor permissibly highlighted evidence regarding the private nature and circumstance of the incident and appealed to the jury's common knowledge that it is not uncommon for such a crime to occur away from the public eye. See Commonwealth v. Kozec, 399 Mass. 514, 521 (1987) ("It is not improper to make a factually based argument that, due to the . . . disclosed circumstances . . . a particular witness should be believed or disbelieved").

As to the prosecutor's references to "the woods,"[3] even assuming that they constituted error, they, too, did not create a substantial risk of a miscarriage of justice.[4] We attribute a certain measure of sophistication to a jury. "The jury are presumed to understand that a prosecutor is an advocate, and statements that are '[e]nthusiastic rhetoric, strong advocacy, and excusable hyperbole' will not require reversal" (citation omitted). Commonwealth v. Martinez, 476 Mass. 186, 199 (2017).

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[3] We note that the prosecutor asked the investigating officer, Paul Silvester, "And how far into the woods does the boat ramp go?" The detective responded, "It's adjacent to the road." We need not decide whether this question and answer sufficed to establish that the crimes may have occurred in the woods, as we discern no substantial risk of a miscarriage of justice emanating therefrom.

[4] We note that the defendant testified at trial. He denied sexual contact with the victim. However, his testimony corroborated many details recounted by the victim, including the trips together to the boat ramp. Thus, the precise location of the incidents was not in dispute at trial.

See Kozec, 399 Mass. at 517. Moreover, as discussed below, the judge's repeated instructions further negated any risk of a miscarriage of justice.

b. Prosecutor's reference to experience with his own son. The defendant next challenges the prosecutor's statement to the effect that he had a thirteen year old son, and he knew that "they all tell stories." The defendant suggests that the statement constituted comments on facts not in evidence and vouching for witness credibility.[5] Viewed in isolation, the prosecutor's statement may appear troubling. Viewed in context, however, the statement is not. In defense counsel's closing argument, he repeatedly referenced a friend's son, "Dean," to illustrate, by analogy, why the victim was lying. He described how Dean is a "nice kid," but "[e]very now and then . . . he'll say something that we both know is just totally a lie." He then described how Dean told a "fish story," for no apparent reason, "but we know kids do things."

In response, the prosecutor addressed this portion of defense counsel's argument, stated that he, too, had a thirteen year old son, and agreed with defense counsel's argument that "they all tell stories." The prosecutor then contrasted the

[5] We note that the defendant argued in his prior appeal that the prosecutor improperly vouched for the victim's credibility. As noted, supra, a panel of this court rejected that argument. See Mackie, 85 Mass. App. Ct. at 1104.

distinction between kids telling stories and the victim suddenly concocting an allegation of rape in the present case. Viewed in context, the prosecutor's comments constituted a reasoned, brief rejoinder to defense counsel's analogy and attack on the victim's credibility, explained that the victim did not have any motive to lie, and "did not state or imply that he had knowledge independent of the jury, or assert any personal beliefs about the victim's credibility." Sanchez, 96 Mass. App. Ct. at 10. See Mason, 485 Mass. at 539. See also Commonwealth v. Cooper, 100 Mass. App. Ct. 345, 356 (2021), quoting Commonwealth v. Dirgo, 474 Mass. 1012, 1014 (2016) ("Where, as here, defense counsel in closing argument challenges the credibility of the complainant, it is proper for the prosecutor to invite the jury to consider whether the complainant had a motive to lie and to identify evidence that demonstrates that the complainant's testimony is reliable"); Mass. G. Evid. § 1113(b)(3)(B) note, at 459-460 (2021).

c. Vouching for Officer Silvester's credibility. The defendant claims that the prosecutor erred in vouching for Officer Silvester's credibility. Here again, the argument must be viewed in context. Specifically, defense counsel argued at least four times in his closing that Officer Silvester did not believe the victim. In response, the prosecutor stated, in part, "Do you think for one minute we would be here if Officer

Silvester didn't think it happened?" It is well established that a prosecutor may respond to defense counsel's closing argument to the extent necessary to correct an erroneous impression created by opposing counsel. See Kozec, 399 Mass. at 519 n.9 ("The Commonwealth's right to fight fire with fire is aimed at answering prejudicial irrelevancy argued by opposing counsel . . . [and] is limited to correct[ing] the erroneous impression for which the defendant himself was responsible" [quotations and citation]); Commonwealth v. Bradshaw, 385 Mass. 244, 277 (1982) (same).[6]

d. The "aha" moment. Finally, the defendant argues that the prosecutor erred by stating, "I hope at some point you all said, 'aha', and figured out what was really going on here." Yet again, we revert to context. Defense counsel used the term "aha" eight times throughout his closing. In particular, he used the refrain to mimic the prosecutor in a manner designed to suggest that the prosecutor was attempting to create unwarranted inferences from the evidence at trial.[7] In response, the

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[6] Although we conclude that the prosecutor's response to defense counsel's arguments did not create a substantial risk of a miscarriage of justice, the better practice in the present case would have been to object to defense counsel's improper arguments and seek curative instructions. See Kozec, 399 Mass. at 519.

[7] Defense counsel argued in his closing, in part, "[Y]ou heard the [prosecutor], and again I'm assuming he's just doing his job -- 'So you have been to the boat ramp?' 'Yes.' 'Aha.' To take

prosecutor responded, "I don't think I ever said the words 'aha', as counsel quotes me . . . . But collectively, I think you can all say 'aha'. I mean, you can figure that out yourself. You don't need me to say 'aha'." The prosecutor later returned to defense counsel's theme, and stated, "I hope that without me saying it to you, you all said at some point, 'aha'. I know I said it under my breath." He then continued, "I never say [aha] out loud; but I hope at some point you all said 'aha', and figured out what was really going on here." On the whole, rather than offering personal opinion, "[t]he prosecutor in this case permissibly used the words as a rhetorical device to urge the jury to draw inferences from the evidence favorable to his case." Commonwealth v. Silva, 401 Mass. 318, 329 (1987).[8] In any event, the challenged statements did not create a substantial risk of a miscarriage of justice. This is a case where "most of the prosecutor's remarks were grounded in the evidence and the few extravagant remarks were responsive to equally extravagant defense tactics in final argument. The jury could be expected to take both arguments with a grain of salt." Bradshaw, 385 Mass. at 277.

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him fishing was his answer. 'Aha'? 'Yeah; you have been to the boat ramp, haven't you?' 'Yeah, we went fishing.' And that's supposed to be the case -- you know, 'Aha, I got you.'"

[8] The prosecutor's statement, "I know I said it under my breath," was better left unsaid, as it could be construed as an expression of personal belief.

e. The jury instructions. The judge instructed the jury, both before and after trial, that the Commonwealth had the burden of proof, that closing statements were not evidence, and that the jury is the exclusive judge of the facts and the credibility of witnesses. Moreover, this is not a case where the judge merely instructed the jury in his final charge that closing arguments are not evidence. Here, the judge instructed the jury before trial that closing arguments are not evidence. He repeated this instruction immediately prior to opening statements. Immediately prior to closing arguments, the judge reiterated to the jury, "if you recall, I said closing arguments . . . are not evidence." In his final jury charge, the judge repeated, for the fourth time, that closing arguments are not evidence. The judge's repeated instructions were clear and "[t]he jury are presumed to have followed [them]." Commonwealth v. Fernandes, 478 Mass. 725, 743 (2018). See Commonwealth v. Alemany, 488 Mass. 499, 513-517 (2021).

3. Ineffective assistance regarding jury instructions. The defendant contends that trial counsel was ineffective for failing to object to the judge's instructions on reasonable doubt, and prior appellate counsel was ineffective for failing to argue in the first appeal that the judge's instructions constituted reversible error. We disagree. The judge made clear that the Commonwealth had the burden to prove all the

elements of the offenses beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 364 (1970). He further instructed the jury on reasonable doubt in accordance with the Massachusetts Superior Court Criminal Practice Jury Instructions § 1.1.2 (2d ed. 2013). See Commonwealth v. Russell, 470 Mass. 464, 477-478

APPENDIX "B"

(2015).[9] There was no error, and thus neither trial counsel nor first appellate counsel rendered ineffective assistance.[10]

Order denying motion for new trial affirmed.

By the Court (Rubin, Neyman & Englander, JJ.[11]),

Joseph F. Stanton

Clerk

Entered: November 30, 2021.

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[9] A panel of this court previously rejected the defendant's claim regarding alleged violations of the first complaint doctrine, and we decline to consider the issue anew. See Mackie, 85 Mass. App. Ct. at 1104. Likewise, we decline to consider the defendant's claim of ineffective assistance for failing to impeach the victim with cell phone records. This claim was not raised in his motion for new trial and cannot be raised and argued for the first time on appeal. See, e.g., Commonwealth v. LaBriola, 430 Mass. 569, 570 n.1 (2000) (only issue before court was issue referred by single justice). Even assuming the issue was properly raised, we cannot conclude, on the record before us, that trial counsel's failure to use the cell phone records was not a reasonable tactical decision. Moreover, in general, the failure to impeach a witness does not constitute ineffective assistance. See, e.g., Commonwealth v. Roberts, 423 Mass. 17, 21-22 (1996); Commonwealth v. Moran 388 Mass. 655, 661 (1983).

[10] To the extent that we have not specifically addressed subsidiary arguments in the defendant's brief, they have not been overlooked. "We find nothing in them that requires discussion." Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).

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

vB

Gmail Ed Gaffney <edgaffneywriter@gmail.com>

FAR-28615 - Notice: FAR denied

1 message

SJC Full Court Clerk <SJCCommClerk@sjc.state.ma.us> Fri, Jan 14, 2022 at 4:00 PM
To: edgaffneywriter@gmail.com

Supreme Judicial Court for the Commonwealth of Massachusetts

RE: Docket No. FAR-28615

COMMONWEALTH
vs.
GEORGE MACKIE

Worcester Superior Court No. 0885CR01449
A.C. No. 2020-P-1307

NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW

Please take note that on January 14, 2022, the application for further appellate review was denied.

Francis V. Kenneally Clerk

Dated: January 14, 2022

To: Donna-Marie Haran, A.D.A.
Ellyn H. Lazar, A.D.A.
Edward B. Gaffney, Esquire