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COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 93-0135

COMMONWEALTH

vs.

MICHAEL ELBERY

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR A NEW TRIAL AND REQUEST FOR AN EVIDENTIARY HEARING

On July 2, 1993, after a five-day jury trial, the defendant, Michael Elbery, was convicted of assault and battery (G.L. c. 265, §13A), assault with intent to maim (G.L. c. 265, §15), and being a disorderly person (G.L. c. 272, §53).[1] A fourth count of assault with a dangerous weapon (G.L. c. 265, §15B(b)) was dismissed at trial. The defendant's convictions were affirmed on appeal. 38 Mass. App. Ct. 912. Representing himself *pro se*, the defendant now moves for a new trial pursuant to Mass. R. Crim. P. 30(b)[2]. In addition, the defendant seeks an evidentiary hearing and further discovery as allowed by Mass. R. Crim. P. 30 regarding the

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[1] The defendant was sentenced to ten (10) years' imprisonment at M.C.I., Concord, on the maiming charge. At the sentencing the judge, Toomey, J., expressed his intention that the defendant serve one (1) year. The defendant was also sentenced to concurring one (1) year's probation for the other two convictions to be served after the maiming sentence.

[2] Despite a 60-page limit ordered by Judge Toomey, the defendant submitted a 115-page memorandum of fact and law and an eight-page amendment to the original memorandum in support of his motion for new trial. Specifically, Judge Toomey's February, 28, 1997 order stated that, "Defendant's memorandum shall not exceed 60 pages including items of appendix, addendum and copies of documents as to which Defendant makes reference in the memo."

The defendant filed a petition for relief to the Supreme Judicial Court from the Superior Court order limiting his memorandum in support of his motion for new trial to 60 pages. In a decision dated July 13, 2000, a single justice of the Supreme Judicial Court denied the petition, and the defendant appealed. The Supreme Judicial Court held that the defendant had another available remedy and, thus, was not entitled to extraordinary relief. Elbery v. Commonwealth, 432 Mass. 1007, 1007-1008 (2000).

injuries he allegedly sustained by Thomas King. Following are the grounds upon which the defendant primarily relies: ineffective assistance of trial counsel[3] and appellate counsel[4], judicial misconduct[5], prosecutorial misconduct[6], that the verdict was against the weight of the evidence (insufficient evidence)[7], inadequate jury instructions[8], inadmissible evidence admitted during trial[9], and duplicative sentencing[10]. For the following reasons, it is hereby **ORDERED** that the defendant's motion for a new trial and request for an evidentiary hearing are **DENIED**.

BACKGROUND

The trial transcript indicates that the jury could have reasonably found the following facts:

At the time of the incident at issue, Michael Elbery was 42 years old. He had previously owned a bar in the city of Worcester. On the evening of September 28, 1992, he stopped by the Winner's Circle bar located on Shrewsbury Street in Worcester. Elbery was acquainted with the bartender of that evening, Jeff Schlener. He did not know any of the other 10-15 patrons in the bar at the time. The Winner's Circle is a small establishment and all of the patrons were seated at the semi-circle shaped bar. Elbery was served two beers that evening, finishing approximately one of them before the incident occurred. He was not intoxicated. Among the other patrons in

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3 See Counts I - XV, excluding III.

4 See Count XVIII.

5 See Counts IX and Count I of the amended motion.

6 See Counts II, IV, VI, VIII, X, XII, and XVI.

7 See Counts VI and VIII.

8 See Count XVII.

9 See Count III.

10 See Count XIV.

the bar were two off-duty doormen employed by the bar, two young women who had stopped by after working a waitressing shift at the Ground Round, and Thomas King, an off-duty detective for the Westborough Police Department. King had consumed approximately two cocktails, but was not intoxicated.

An argument ensued between Elbery and Schlener. Schlener was poking fun at the fact that Elbery had lost his bar establishment and was drinking cheap beer. King, a friend of Schlener, came to the bartender's defense and told Elbery to back off. Although voices rose, there was no physical confrontation at this point and everyone returned to their seats. Approximately one half of an hour passed and again an argument ensued. While it is not entirely clear from the record, the jury could have reasonably found at this point that Elbery became quite upset and smashed a beer bottle on the bar or a nearby pole. The bottle shattered and Elbery was left holding the barrel of the bottle. A shard of glass flew and struck Christina Mann, one of the waitresses, under her eye causing her to bleed. Mann was assisted by another patron who happened to be a chiropractor, and was later taken by a friend to a nearby hospital.

Within about a minute of the bottle breaking, Elbery left the bar. King yelled at him to stop and wait for the Worcester Police to arrive as someone had been injured inside. Elbery testified that he intended to get into his car and leave. However, King testified that he did not see keys in Elbery's hands and did not see Elbery reach for his pocket. Once outside the bar, King pursued Elbery down the street. In addition to King, the two off-duty doormen and between one and three other patrons of the bar also followed Elbery. It appears that King was in the front of the group since he testified that he did not realize others had followed him out of the bar. Although it is unclear exactly what happened at this point, the jury reasonably could have found that King caught up to Elbery and an altercation ensued. King testified that Elbery threw

multiple punches at him and then, in response, King tackled him. As both of them were on the ground, Elbery stuck his finger in King's eye doing serious damage. The group assisted the injured King by holding Elbery on the ground thereby allowing King to free himself from the altercation. Prior to the police arriving, King was brought to a nearby hospital by two men in a passing car. The Worcester Police arrived shortly thereafter and arrested Elbery.

Following his July 2, 1993 jury trial, the defendant received a sentence of one (1) year's imprisonment on the maiming charge and concurrent sentences of one (1) year's probation for the other two convictions to be served after the maiming sentence. The defendant's sentence was stayed on July 15, 1993, pending an appeal of his convictions. With new counsel Robert C. Sheketoff, Esq. representing him, the defendant appealed his convictions based on a prejudicial statement made by the prosecutor during closing arguments and on improper and incomplete jury instructions.[11] On January 26, 1995, the Appeals Court affirmed the convictions in a written decision.[12] Commonwealth v. Elberry (sic), 38 Mass. App. Ct. 912 (1995), rev. denied, 419 Mass. 1107 (1995).

DISCUSSION

I. Motion for a New Trial Standard

"The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done." Mass. R. Crim. P. 30(b). The standard is purposely broad as the disposition of a "motion for new trial is addressed to the sound discretion of the judge." Commonwealth v. Moore, 408 Mass. 117, 125 (1990). "[O]nce the regular procedures have run their course the presumption tilts heavily toward finality." Commonwealth v. Amirault, 424

[11] The defendant was represented by Louis P. Aloise, Esq. at trial.

[12] The Appeals Court found that the prosecutor's statement was prejudicial but the corrective instruction used by the trial judge was adequate. The Appeals Court also determined that the trial judge's instructions concerning the elements of the crimes were sufficient.

Mass. 618, 637 (1997). "New trials should not be granted except for substantial reasons." Id., quoting Commonwealth v. Tucceri, 412 Mass. 401, 406 (1992). "The mere fact that, if the process were redone, there might be a different outcome, or that some lingering doubt about the first outcome may remain, cannot be a sufficient reason to reopen what society has a right to consider closed." Id.

II. Waiver of Claims

As mentioned previously, this motion for a new trial comes after the conviction has already been affirmed on direct appeal. Consequently, "[t]he concern for finality demands that a defendant present every claim and argument he might fairly have had available to him the first time around." Amirault, 424 Mass. at 639. Therefore, "absent extraordinary circumstances ... the defendant who had a fair opportunity to raise [an issue] may not belatedly invoke that right to reopen a proceeding that has already run its course." Id. (citations omitted). Furthermore, "if [the defendant] had an opportunity to invoke the right and failed to avail himself of it, the claim is waived and may not be raised for the first time on collateral attack." Id. "The test for waiver is whether the 'theory on which his argument is premised has been sufficiently developed to put him on notice that the issue is a live issue.'" Id. (citations omitted). In addition, the doctrine of waiver "'applies equally to constitutional claims which could have been raised, but were not raised' on direct appeal or in a prior motion for a new trial." Commonwealth v. Watson, 409 Mass. 110, 112 (1991), quoting Commonwealth v. Deeran, 397 Mass. 136, 139 (1986).

The "motion judge's discretion under Rule 30(c)(2) to grant relief from such a waiver is limited if the conviction has already received appellate review." Commonwealth v. LeFave, 430 Mass. 169, 174 n.5 (1999). If the issue has been waived, the judge may not consider it, unless in the exercise of discretion the judge determines there is a substantial risk of a miscarriage of

justice. See id. at 173-174. The judge's discretion in granting relief from waiver should not be exercised lightly, and should only be exercised if "upon sober reflection, it appears that a miscarriage of justice might otherwise result." Commonwealth v. Gagliardi, 418 Mass. 562, 565 (1994), cert. denied, 513 U.S. 1091 (1995). Here, the defendant's claims of judicial misconduct, prosecutorial misconduct, that the verdict was against the weight of the evidence (insufficient evidence), inadequate jury instructions, inadmissible evidence admitted during trial, and duplicative sentencing were all areas of the law that were sufficiently developed at the time of his appeal to put the defendant on notice that these issues were live issues. Consequently, all of the above claims could have been raised on direct appeal but were not. Therefore, the above issues are waived.

III. Ineffective Assistance of Appellate Counsel

The defendant's ineffective assistance of counsel claims are also subject to the waiver rule. See Lefave, 430 Mass. at 171-173; see also Commonwealth v. Egardo, 426 Mass. 48, 49-50 (1997). In situations where the defendant has been represented by the same attorney at trial and on direct appeal, that defendant may seek review of the trial counsel's performance, even though no ineffective assistance of counsel claim was asserted on direct appeal. See Egardo, 426 Mass. at 49. The reasoning behind this exception to the waiver rule is "that it would be 'unrealistic to expect [the defendant's] first attorney to have raised a claim calling his own competence into question.'" Id., quoting Commonwealth v. Lanoue, 409 Mass. 1, 3-4 (1990). In situations where the defendant has had new appellate counsel, the defendant's "first opportunity" to raise the issue of trial counsel's ineffectiveness would be on direct appeal. See Egardo, 426 Mass. at 49-50 ("[b]ecause trial and appellate counsel were associates in the practice of criminal law, the second attorney thus furnished the defendant his 'first opportunity' to raise the issue of

trial counsel's effectiveness"); see also Breese v. Commonwealth, 415 Mass. 249, 250 n.1 (1993).

In this case, the defendant's first opportunity to raise an ineffective assistance of trial counsel was on direct appeal since the defendant had different representation at that time. Therefore, the defendant's ineffective assistance of trial counsel claim is waived. However, the defendant also claims that his appellate counsel was ineffective because he failed to argue on appeal that his trial counsel rendered ineffective assistance. This is the defendant's first opportunity to raise an ineffective assistance of appellate counsel. Therefore, the question of whether the defendant's appellate counsel was ineffective necessarily depends on whether he actually received ineffective assistance at his trial. See Breese, 415 Mass. at 252; Commonwealth v. Van Zant, 1999 WL 823745 n.6 (Super. Ct. 1999) (Neel, J.). Consequently, this Court has reviewed the trial transcript to determine whether the defendant received ineffective assistance of counsel at trial which, in turn, would also answer whether or not the defendant's appellate counsel was ineffective by failing to bring an ineffective assistance of trial counsel claim on direct appeal.

The defendant bears a heavy burden in establishing ineffective assistance of counsel such that a new trial is required. See Commonwealth v. Brookins, 33 Mass. App. Ct. 626, 631 (1992), rev'd on other grounds, 416 Mass. 97 (1993). In order to support a claim of ineffective assistance of counsel, the defendant must show serious incompetency, inefficiency, or inattention of counsel falling "measurably below that which might be expected from an ordinary fallible lawyer" and that such inadequacies "likely deprived [the defendant] of an otherwise available, substantial ground of defense." Commonwealth v. Clark, 44 Mass. App. Ct. 502, 512 (1998), quoting Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). To succeed on a claim of

ineffective assistance of counsel, the defendant must show that better work by trial counsel might have accomplished something material for the defense. See Commonwealth v. Satterfield, 373 Mass. 109, 115 (1977). Counsel's tactical judgments must be "manifestly unreasonable" to constitute ineffective assistance. See Commonwealth v. White, 409 Mass. 266, 273 (1991). "Judicial scrutiny of counsel's performance must be highly deferential, 'indulg[ing] a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Commonwealth v. Florentino, 396 Mass. 689, 690 (1986) (citation omitted).

At bar, there is no evidence that trial counsel's performance was ineffective nor that it deprived the defendant of an otherwise available substantial ground of defense. The trial counsel's performance fell well within the realm of what may be expected from an ordinary fallible attorney. In his 115-page memorandum of fact and law in support of his motion for new trial, Elbery claims multiple instances of ineffective assistance of counsel on the part of his attorney at trial, Louis P. Aloise. The defendant makes a series of allegations which either are not grounded in the record or do not amount to ineffective assistance of counsel. Generally, Elbery claims that Aloise conspired with the prosecution to withhold the truth about the evidence upon which he was convicted. However, there is no evidence of any conspiracy. Most of Elbery's contentions arise from strategic decisions on the part of his trial counsel that did not impact the strong case the Commonwealth had against him. Commonwealth v. Rondeau, 378 Mass. 408, 413 (1979) (strategic trial decisions do not constitute ineffective assistance of counsel unless they are "manifestly unreasonable"). See also Commonwealth v. Finstein, 426 Mass. 200, 203 (1997); Commonwealth v. Roberts, 423 Mass. 17, 20 (1996). The following issues are being raised solely for the purpose of determining whether a new trial is warranted based upon

ineffective assistance of trial counsel.

A. Failure to Introduce Evidence

There is no evidence that Aloise conspired to withhold pertinent information from the jury. Elbery alleges that Aloise conspired with the prosecution to withhold from the jury the true cause of King's eye injuries. There is no evidence that this occurred. Aloise described King's eye injury in a manner advantageous to Elbery by noting that the injury was a "superficial abrasion" (Tr. Vol. V/1225[13]) and that if the facts occurred as King described them, "Mr. King would not have his eye in the head today." Tr. Vol. V/1224. Elbery also alleges that his trial counsel failed to highlight to the jury the fact that there was no police investigation, and that he was attacked by a "gang of six." Contrary to this contention, in his opening statement, Aloise questioned whether an adequate investigation had been conducted because it essentially consisted of a dispatch. Tr. Vol. I/127. In addition, in his closing statement, Aloise stated that Elbery was being chased by six or seven individuals. Tr. Vol. V/1218.

Elbery also claims that Aloise was ineffective because he failed to call certain witnesses which would have assisted his case. However, there is no merit to this contention. There is no evidence that calling Dr. Stephen Sawyer as a witness would have provided Elbery with a substantial ground of defense because he would not lie on the stand and thus upset the alleged conspiracy between Aloise and the prosecution. There is also no evidence that calling Alice Arsenault (a friend of Mann), Don Wynne, or Assistant District Attorney Michael Alloum as witnesses would have provided a material defense for Elbery. See Commonwealth v. Epsom, 422 Mass. 1002, 1003 (1996) (at hearing on motion for new trial based on ineffective assistance of counsel where lawyer failed to call witness providing evidence of self-defense, court required

[13] Citations to the Trial Transcript references are indicated as "Tr. Vol.," followed by the volume and page number.

defendant to show: (1) witness was available at time of trial; (2) the testimony would have been sufficient to raise the issue of self-defense; and (3) that testimony would likely have made a material difference in the trial).

Elbery alleges that King testified at the probable cause hearing at the Worcester District Court on January 20, 1993, that there was no assault with a beer bottle and that Aloise failed to introduce this evidence to the jury. However, King did in fact testify during the proceedings that there was an assault with a beer bottle. In response to Assistant District Attorney Todd Mathieson's direct examination of King, King stated that "Mr. Elbery was holding the neck of the bottle in a threatening gesture, yelling."[14] Moreover, Aloise did raise doubt during the trial as to whether there was a breaking of a beer bottle at all ("Mr. Taraskiewicz didn't see the bottle break. Nobody saw the bottle break" (Tr. Vol. V/1217); "Mr. Schlener said that he didn't see the bottle break, he heard it...he said he lied to the police in that he was assaulted with that beer bottle" (Tr. Vol. V/1219)).

Elbery claims that Aloise was also ineffective because he failed to admit Elbery's medical records regarding his injuries and evidence regarding the clothing he wore during the incident. However, Aloise did admit Elbery's medical records from Hahnemann Hospital as Exhibit 23. Tr. Vol. V/1196. Further, Aloise introduced photographs B, C, D, and E for identification which pictured Elbery's alleged injuries on the event in question. Tr. Vol. IV/812-816. Elbery also claims Aloise was ineffective because there was an illegal citizen's arrest by King which Aloise failed to make clear to the jury. However, there was not an illegal citizen's arrest. Aloise did, in his cross-examination of King, elucidate the fact that King was off-duty and acting in the capacity of a private citizen that night.[15] For these reasons, it was also

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[14] Worcester District Court Proceedings, January 20, 1993, page 9.

[15] Worcester District Court Proceedings, January 20, 1993, page 39.

unnecessary for Aloise to file a motion to suppress evidence from the alleged illegal citizen's arrest of Elbery.

Elbery claims that Aloise failed to subpoena Mann's medical records which Elbery believes would show the true nature of her injuries. However, the extent of Mann's injuries were not at issue in this case since Elbery's convictions related to the injuries inflicted on King. Elbery alleges that Aloise also failed to subpoena evidence from the Westborough Police Department regarding King's demotion and drinking on duty which he believes created a motive for King to lie. There is no evidence that this created a motive to lie nor that it deprived Elbery of a substantial ground of defense. Compare Commonwealth v. Juzba, 46 Mass. App. Ct. 319, 322-323 (1999) (although counsel's failure to obtain police chemist's report and/or police chemist's testimony regarding the absence of sperm or seminal fluid in a rape case did fall below what was expected from an ordinary fallible lawyer, it did not deprive the defendant of a substantial, available defense where it corroborated the defendant's testimony).

B. Failure to Object

Elbery alleges that Aloise failed to object to certain evidence which was prejudicial. However, there is no evidence that Aloise's alleged failures to object deprived Elbery of a material ground of defense. Elbery contends that Aloise failed to object to the admission of King's medical report which he asserts was inadmissible due to its references to liability as well as illegible and hyper-technical content. See G.L. c. 233, §79. However, there is no evidence that the medical report suffered from this condition. Any references to liability in the medical report do not necessitate retrial because they do not add anything to the testimonies at trial. See Commonwealth v. Brattman, 10 Mass. App. Ct. 579, 586 (1980).

Elbery claims that Aloise failed to object to Assistant District Attorney Ball expressing

his own opinion and misstating facts and testimony in his opening and closing arguments. There is no evidence that Assistant District Attorney Ball's opening and closing arguments contained such errors. The prosecutor may comment on evidence developed at trial and draw inferences from such evidence. See Commonwealth v. Bradshaw, 385 Mass. 244, 275 (1982); Commonwealth v. Chavis, 415 Mass. 703, 713 (1993). The prosecutor may also make a fair response to an attack on the credibility of a government witness. Chavis, 415 Mass. at 713, citing Commonwealth v. Simmons, 20 Mass. App. Ct. 366, 371 (1985); see Commonwealth v. Smith, 404 Mass. 1, 7 (1989). The judge also provided curative instructions in stating that "[t]he opening statements and the closing statements that we just heard from counsel are not a substitute for evidence. They are only intended to assist you in understanding the evidence and the contentions of the parties." Tr. Vol. V/1257-58.

Elbery also states that Aloise failed to object to various inappropriate instructions or to the fact that certain instructions were absent. Again, there is no evidence that the instructions were improper or deficient. Among other things, the trial judge instructed the jurors on their role as fact-finders and the importance of focusing solely on the evidence, the difference between direct and circumstantial evidence, inferences, the Commonwealth's burden of proof beyond a reasonable doubt, consciousness of guilt, disorderly conduct, assault and battery, assault with intent to maim, intoxication, and self-defense. (Tr. Vol. V/1251-1294). There was nothing improper about the instructions to the jury. See Commonwealth v. Melton, 47 Mass. App. Ct. 904, 905 (1999) (counsel's failure to request a more forceful curative instruction concerning opinion testimony did not amount to error). Since there was no reason to object, Aloise's failure to object was justified. Compare Commonwealth v. Nunes, 430 Mass. 1, 7 (1999) (failure to object to three infractions by the Commonwealth on cross of defendant, although improper,

would not have affected jury verdict and, therefore, there was no ineffective assistance of counsel).

C. Conflicts of Interest

Although Elbery alleges that there are various conflicts of interest which deprived him of a fair trial, there is no substantiation on the record for his allegations. For instance, he alleges that Aloise's secretary is "best friends" with bartender Schlener's wife and that Aloise was ineffective because he failed to stop Aloise's secretary from passing along confidential information to her friend's husband, Schlener. However, there is no evidence on the record that any such conflict of interest existed nor that any such acts occurred. Elbery also alleges that because Aloise asked Elbery to take a lie detector test it shows that Aloise had a conflict of interest because he was repeatedly reinforcing the prosecution's arguments. Again, there is no such evidence. Aloise represented Elbery effectively and countered the prosecution's version of the facts in terms of describing the events as a mere "barroom fight" (Tr. Vol. V/1229), downplaying King's injuries as a "superficial abrasion" (Tr. Vol. V/1225), and arguing that Elbery was acting in self-defense (Tr. Vol. V/1221-22). There is also no conflict of interest merely because the prosecuting Assistant District Attorney Ball may have been a former police officer.

D. Misleading Use of Terms

Elbery contends that Aloise used certain incorrect terms and failed to object to certain terms that allegedly confused the jury. Elbery claims that Aloise adopted the prosecution's facts and theory of the case by using terms such as "right, "am I right," and other expressions during cross-examination of the Commonwealth's witnesses which misrepresented Elbery and made the jury put Elbery in a bad light. These allegations are not valid since phrases such as "right" and

"am I right," especially with leading questions during cross-examination, are typical trial practice techniques.

Elbery also claims that the judge's use of the phrase "moral certainty" in his jury instructions obscured for the jurors the defendant's standard for proving his case beyond a reasonable doubt. However, case law has determined that use of the phrase does not render the instructions improper. In Victor v. Nebraska, 511 U.S. 1, 14 (1994), cert. denied, Calderon v. Sandoval, 122 S.Ct. 322 (2001), the Supreme Court decided that although "'moral certainty,' standing alone, might not be recognized by modern jurors as a synonym for 'proof beyond a reasonable doubt'...it does not necessarily follow that the...instruction is unconstitutional." Id. The Supreme Court reasoned that the "moral certainty language [could] not be sequestered from its surroundings." Id. at 16. Thus, Aloise was not ineffective for failing to object to the judge's use of the term "moral certainty." He was also not ineffective for failing to object to the judge's use of the phrases "whether or not" and "basic fact" in the jury instructions, because those terms are also proper.

E. Miscellaneous

Elbery also alleges various other instances of ineffective assistance of counsel which are unfounded. For instance, Elbery claims that Aloise failed to impeach witnesses with perjurious prior inconsistent statements and aided the prosecution with false testimony. However, Aloise did point to discrepancies in the testimonies of the Commonwealth's witnesses and repeatedly called the Commonwealth's rendition of the facts of the case "patently absurd." (Tr. Vol. V/1221-24).

In addition, Elbery alleges that Aloise failed to argue double jeopardy with Elbery's convictions of assault and battery and assault with intent to maim. Elbery believes that assault and assault and battery are the lesser included offenses of assault with intent to maim. There is no double jeopardy with regard to Elbery's convictions. Double jeopardy refers to the Fifth Amendment prohibition against a "being prosecuted twice for substantially the same offense. Black's Law Dictionary 506 (7th ed. 1999); see Breed v. Jones, 421 U.S. 519. In the instant case, Elbery was convicted of three distinct charges with distinct elements: assault and battery (G.L. c. 265, §13A)[16], assault with intent to maim (G.L. c. 265, §15)[17], and being a disorderly person (G.L. c. 272, §53)[18]. Contrary to Elbery's allegations, assault and assault and battery are not the lesser included offenses of assault with intent to maim. Elbery also claims that he was sentenced

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[16] G.L. c. 265, §13A states:

> Whoever commits an assault or an assault and battery upon another shall be punished by imprisonment for not more than two and one half years in a house of correction or by a fine of not more than five hundred dollars.

[17] G.L. c. 265, §15 states:

> Whoever assaults another with intent to commit murder, or to maim or disfigure his person in any way described in the preceding section, shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than one thousand dollars and imprisonment in jail for not more than two and one half years.

[18] G.L. c. 272, §53 states:

> Common night walkers, common street walkers, both male and female, common railers and brawlers, persons who with offensive and disorderly acts or language accost or annoy persons of the opposite sex, lewd, wanton and lascivious persons in speech or behavior, idle and disorderly persons, disturbers of the peace, keepers of noisy and disorderly houses, and persons guilty of indecent exposure may be punished by imprisonment in jail or house of correction for not more than six months, or by a fine of not more than two hundred dollars, or by both such fine and imprisonment.

to one year for being a disorderly person when the maximum sentence is only six months. However, Elbery was sentenced to serve one year for the assault with intent to maim charge and one year probation for the assault and battery and disorderly conduct convictions which were to run concurrently. His probation was to begin after his release from jail. Thus, Elbery was not sentenced for longer than his convictions mandated.

Also, contrary to Elbery's contentions, there is no evidence that Aloise sponsored Assistant District Attorney Ball to lie about the bottle assault, nor that Perma (a fellow cop), De Pasquale (an acquaintance of King) or Mann lied on the stand as witnesses. There is also no evidence that the pictures admitted at trial were falsified or duplicative. Nor did Aloise have the responsibility, nor the capacity, to file criminal charges against King for the injuries he allegedly caused Elbery. There is also no evidence that Aloise abandoned his client.

For the aforementioned reasons, the defendant has failed to show that trial counsel's representation was seriously deficient and that he was deprived of an otherwise available material ground of defense. Since there was competent representation by the trial attorney, appellate counsel was not ineffective for failing to argue on appeal that the defendant's trial counsel rendered ineffective assistance. See Breese, 415 Mass. at 252.

IV. Evidentiary Hearing Not Warranted

In addition to his request for a new trial, the defendant requests an evidentiary hearing and further discovery. A judge has broad discretion to deny a motion for new trial upon review of the motion and affidavits without conducting an evidentiary hearing. Commonwealth v. Rice, 427 Mass. 203, 207 (1998); see also Commonwealth v. Lopez, 426 Mass. 657, 663 (1998).

"[T]he judge may decide a rule 30(b) motion based solely on affidavits; may discredit untrustworthy affidavits; and need only proceed to evidentiary hearing 'where a substantial issue is raised [by the motion or affidavits] and is supported by a substantial evidentiary showing.'" Lopez, 426 Mass. at 663, citing Commonwealth v. Stewart, 383 Mass. 253, 260 (1981); Mass. R. Crim. P. 30(c)(3) ("[t]he judge may rule on the issue or issues presented by such motion on the basis of the facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits"). The court need only hold an evidentiary hearing if a substantial issue is raised by the motion and affidavits and is supported by a substantial evidentiary showing. Id. In determining whether the defendant has raised a 'substantial issue' meriting an evidentiary hearing under Rule 30, the court looks at the seriousness of the issue asserted and to the adequacy of the defendant's showing on the issue raised. Commonwealth v. DeVincent, 421 Mass. 64, 67 (1995). Further, the defendant must show that an evidentiary hearing is necessary to provide the judge with additional information not already contained in affidavits. See id. at 68. Here, the defendant has not demonstrated that substantial issue exists which would require additional information not already contained in the defendant's submission or the record. Consequently, the defendant's request for an evidentiary hearing is denied.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Defendant's Motion for a New Trial and Request for an Evidentiary Hearing are **DENIED**.

Timothy S. Hillman
Justice of the Superior Court

DATED: December 21, 2001

FILED
DEC 26 2001
ATTEST: Lorraine P. Lamoureux CLERK