COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1229

COMMONWEALTH

vs.

LISA J. GREGOR.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a bench trial, the defendant, Lisa J. Gregor, was convicted of larceny over $250 by false pretenses and uttering a false check. On appeal, the defendant claims the evidence was insufficient, trial counsel was ineffective for failing to raise a defense of authority, the judge abused her discretion in admitting evidence of prior bad acts, and the cumulative effect of trial errors created a substantial risk of a miscarriage of justice. We affirm.

Background. The fact finder could have found the following facts. The defendant and the victim, M.B., met nine years prior to trial. The defendant worked for the victim in his tattoo shop and, over time, the relationship developed into a romantic one. As part of her responsibilities, the defendant answered telephones, made appointments, and handled paperwork. There was

no agreement for M.B. to pay the defendant for her work. At times, when M.B. was busy he would ask the defendant to write out checks and sign his name. This happened many times over the years, always at M.B.'s direction. In November 2015, after the parties' romantic relationship ended, M.B. received a telephone call from his bank inquiring whether he had issued a particular check. When he examined his records, he noted that the check in question was outside of the numerical sequence and was taken from the last book of checks he had received. M.B. went to the bank and discovered several cashed checks that he had not authorized. He completed an "Affidavit of Forgery," in which he stated that he had not authorized a total of nine checks.[1] He also reported that the defendant was the person who forged his signature. M.B. testified that check number 2195 was made payable to the defendant in the amount of $70, and that he recognized the handwriting as that of the defendant.[2]

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[1] The checks were as follows: Check No. 2195 10/19/15 payable to Lisa Gregor $70; Check No. 2196 10/29/15 payable to Trucchi's $37.50; Check No. 2197 10/31/15 payable to Lisa Gregor $80; Check No. 2198 11/05/15 payable to Trucchi's $34.77; Check No. 2199 11/05/15 payable to Lisa Gregor $100; Check No. 2200 11/06/15 payable to Lisa Gregor $70; Check No. 2202 11/09/15 payable to Lisa Gregor $70; Check No. 2203 11/16/15 payable to Lisa Gregor $120; and Check No. 2204 11/17/15 payable to Lisa Gregor $60.

[2] The defendant testified and claimed that she had M.B.'s authority to sign the checks in question and that she never wrote a check without his knowledge and consent. We do not consider this evidence for purposes of the sufficiency of the evidence claim. Commonwealth v. Acosta, 81 Mass. App. Ct. 836,

Sufficiency of the evidence. The defendant claims that M.B. had no basis of knowledge to support his testimony that he recognized the defendant's handwriting on the forged checks and that the fact finder had no samples of the defendant's handwriting to compare with her signature. We disagree.

We review a sufficiency of the evidence claim to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (quotation omitted; emphasis omitted). Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). A witness who is familiar with a person's handwriting, as is the case here, may give an opinion as to whether a signature in question was written by that person. Commonwealth v. O'Connell, 438 Mass. 658, 667 (2003), citing Commonwealth v. Ryan, 355 Mass. 768, 770-771 (1969). M.B.'s testimony was based on his personal knowledge and observations over a nine-year period and thus sufficed to prove his basis of knowledge for his testimony that the defendant wrote out and signed the checks in question.

In addition, the fact finder was presented with samples of the defendant's signature to use as a comparison standard. The evidence included the checks themselves and the endorsement of

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840 (2012), citing Commonwealth v. Kelley, 370 Mass. 147, 150 (1976).

each check. Indeed, check numbered 2195, the first of the checks in question, served as an exemplar for each check that followed. Moreover, the fact finder could compare the handwriting on the checks that M.B. claimed were forged against those that the defendant wrote with permission. Lay persons can examine handwriting similarities and dissimilarities in order to gauge authenticity. O'Connell, 438 Mass. at 667-668. Nothing more was required.[3]

Ineffective assistance of counsel. The defendant raises this claim in her direct appeal, rather than by the preferred method of filing a motion for new trial. Commonwealth v. Zinser, 446 Mass. 807, 811 (2006). We review such a claim under the familiar standards set forth in Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). The crux of the defendant's claim is that counsel was ineffective for failing to comply with Mass. R. Crim. P. 14 (b) (3), as appearing in 442 Mass. 1518 (2004), thereby depriving her of the defense of a claim of authority. While she is correct that counsel did not follow the technical requirements of the rule, the defendant did raise this defense at trial and it was squarely before the fact finder. See Saferian, 366 Mass. at 98; Commonwealth v. Ryan, 93 Mass. App.

[3] The defendant's claim that testimony from a bank employee or video recording was required to prove the defendant cashed the checks is unavailing. M.B.'s testimony and the documentary evidence sufficed to prove that the defendant cashed the checks.

Ct. 486, 494 (2018). Indeed the judge's findings included that he could not reconcile the fact that the defendant had taken checks in September, but cashed them in October and November, calling into question whether the defendant actually had authority to do so. The defendant has not demonstrated how the failure to follow the technical requirement of Mass. R. Crim. P. 14 (b) (3) deprived her of a defense.

Prior bad acts evidence. The defendant claims that it was error to admit evidence of her prior drug use. We disagree. On cross-examination of the defendant, she was unable to explain the gap in time between the dates written on the checks and the dates they were cashed. On redirect examination, the defendant attempted to explain the discrepancy by attributing it to side effects from an aneurism that she had suffered. It was only on recross-examination -- in response to the defendant's explanation -- that she was asked about other things that could have affected her memory, including drug and alcohol use. This evidence was admissible to show a possible motive for the crime, Commonwealth v. Gollman, 436 Mass. 111, 113-114 (2002), citing Commonwealth v. Helfant, 398 Mass. 214, 224 (1986), and to rebut the defendant's contentions made on redirect examination. Commonwealth v. Anestal, 463 Mass. 655, 665 (2012). The evidence was properly admitted and defense counsel's failure to attempt to exclude it did not constitute ineffective assistance

of counsel creating a substantial risk of a miscarriage of justice. The judge's findings do not reference this evidence, suggesting that he did not rely on the evidence. Moreover, because this was a bench trial, the judge is presumed to properly instruct himself on the law as it relates to prior bad act evidence. Commonwealth v. Healy, 452 Mass. 510, 514 (2008).[4]

Judgments affirmed.

By the Court (Agnes, Sullivan & Blake, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: December 6, 2019.

[4] Because we discern no trial errors warranting relief, we need not address the defendant's final claim that cumulative trial errors created a substantial risk of a miscarriage of justice.

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