19-P-53 Appeals Court

COMMONWEALTH vs. DANIEL A. WATTERSON.

No. 19-P-53.

Worcester. March 2, 2021. – June 17, 2021.

Present: Green, C.J., Neyman, & Grant, JJ.

Larceny. False Pretenses. Practice, Criminal, Motion for a required finding. Evidence, Photograph, Relevancy and materiality.

Indictments found and returned in the Superior Court Department on December 17, 2010.

The cases were heard by Richard T. Tucker, J.

Joseph N. Schneiderman for the defendant.
Susanne G. Reardon, Assistant Attorney General, for the Commonwealth.

NEYMAN, J. The defendant, Daniel A. Watterson, provided services as an oil burner technician, plumber, and drain specialist. The Commonwealth alleged that he targeted and stole from various elderly and unsuspecting customers. Following a jury-waived trial in the Superior Court, a judge found him

guilty of one count of larceny by false pretenses and one count of larceny from an elderly person.[1] On appeal, he argues that the judge erred in deferring action on his motion for a required finding of not guilty after the Commonwealth rested, the Commonwealth presented insufficient evidence to sustain the larceny convictions, and the admission of a photograph in evidence constituted prejudicial error. We affirm.[2]

Background. Because the defendant challenges the sufficiency of the evidence, we summarize the evidence in the light most favorable to the Commonwealth, reserving certain details for discussion. See Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979).

1. The Thomas incident. In late January of 2009, there was a problem with the heating system at the home of Toufe and Katia Thomas in Worcester. Mr. Thomas, who was seventy-seven

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[1] The judge found the defendant not guilty of three counts of larceny over $250 stemming from similar allegations involving other customers of the defendant.

[2] A grand jury also indicted the defendant on three counts of violating the Massachusetts Clean Air Act, G. L. c. 111, § 142A, and two counts of reckless endangerment of a child, G. L. c. 265, § 13L. Those indictments were severed from the larceny indictments. Following a separate jury trial, the defendant was convicted of three counts of violating the Clean Air Act and one count of reckless endangerment of a child. The Commonwealth entered a nolle prosequi as to the remaining count of reckless endangerment of a child. Issues pertaining to that jury trial are the subject of a separate appeal and are not before us in this case.

years old at the time, contacted "the plumber who usually comes in to work on that furnace, but he was kind of busy." Accordingly, Mr. Thomas looked in the telephone book and called the defendant, who operated "DW Plumbing and Heating."[3] The defendant came to the Thomas home, looked at the furnace, and said he "needed a part" that would cost between $100 and $150. Mr. Thomas provided his credit card number to the defendant to pay for the part. The defendant left and returned the next day with a "credit card slip for $250." Mr. Thomas signed the slip.

The defendant worked for thirty to forty-five minutes and installed the part. He then provided a copy of an updated slip or invoice to Mr. Thomas. The invoice was for the $250 plus what Mr. Thomas thought was an additional $150. Mr. Thomas told the defendant that $400 was more than the job should cost. The defendant replied that "[t]his is not 150, it's 1,500." In response, Mr. Thomas said, "1,500? That's 1,750 total. The furnace [did not] cost me that much." The defendant replied, "Well, flat rate," and began to walk away. At this time, Mr. Thomas told him, "Don't charge this to my credit card. I don't agree to that price." Mrs. Thomas came downstairs and Mr.

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[3] The defendant received his apprentice plumber's license in 1995, and his journeyman plumber's license in 2008. He was also certified as an oil burner technician; "that certification was in effect in January 2009." He also operated a business named "Clog Specialist."

Thomas told her about the minimal work and the charges. She followed the defendant and questioned him about the charges and the work. She stated, "We're not going to pay you the fifteen hundred." The defendant retorted, "Flat rate, flat rate," and "took off" in his truck. Testimonial and physical evidence confirmed that the defendant charged $250 and then an additional $1,500 to the Thomases' credit card. The Thomases' complaints and efforts to dispute the charges with the credit card company were unsuccessful.

After the defendant left, the heat "worked for about ten minutes, then it went off." Mr. Thomas contacted the defendant's business and advised that the furnace was again not working. The defendant's "helper" returned to the Thomas home, worked on the furnace for approximately fifteen minutes, and left. Although the helper was able to start the furnace, it stopped working, yet again, after he departed. Mr. Thomas contacted the defendant's business and spoke to the helper again, who said that "the problem is electrical." As a result, Mr. Thomas contacted an electrician who came to the Thomas home. After approximately forty-five minutes, the electrician reported that there were no electrical problems. Mr. Thomas then called the defendant's business and left a message that there was no electrical problem. He placed five more calls to the defendant's business, but the defendant never responded.

Because it was so cold outside, Mr. Thomas purchased two electric heaters to put near the furnace to prevent the pipes from freezing. He then called his usual plumber who "came up," worked for approximately forty-five minutes on the furnace, "[a]nd after that, everything was okay." That plumber charged $296 for the work.

On February 6, 2009, Mr. Thomas "made a complaint to the Worcester plumbing department about" the defendant. The Worcester plumbing and gas inspector visited the Thomas home in response to the complaint. He reviewed the invoice from the defendant and opined that the charge was unreasonable, "very high," and "excessive." He testified that for that repair, "we're talking maybe an hour's worth of labor and a part that should have cost about $110, $120."

2. The DeOliveira incident. On January 21, 2009, the oil burner heating system at the home of Francisco and Denise DeOliveira in Leominster "stopped working." Through a "colleague," Mrs. DeOliveira "received the name and phone number of [the defendant]." She contacted him and he agreed to fix the heating system. The defendant, accompanied by his assistant,[4] arrived at the home and Mr. DeOliveira walked them to the

[4] The evidence tended to suggest that his assistant was the same "helper" involved in the Thomas incident. However, that determination is not material to the outcome of this case.

basement and showed them the oil burner. Mr. DeOliveira went upstairs for about fifteen minutes, returned downstairs, and observed the defendant and the assistant cleaning. Mr. DeOliveira asked, "How's everything?" The defendant responded, "We are done." Mr. DeOliveira returned upstairs and approximately ten minutes later, the defendant came upstairs and provided an invoice in the amount of $500. In response, Mr. DeOliveira said, "Are you kidding?" The defendant replied, "That's the flat rate charge that I always do." Mr. DeOliveira asked what work had been performed. The defendant said that he had replaced or fixed the "[f]iring assembly." Mr. DeOliveira had never heard that term.

At 5 P.M., while the defendant was still at his home, Mr. DeOliveira called Mrs. DeOliveira to discuss which credit card to use for payment. Mrs. DeOliveira then spoke to the defendant and "asked him to explain to [her] what exactly he had done with the oil burner." His response "really didn't make any sense to [her]." She asked some questions, but she "really didn't understand anything he had said they had done that afternoon." However, insofar as the heating system appeared to be working, she and her husband "paid in good faith."

When Mrs. DeOliveira awoke the next morning, she noticed that the heat was not working again. She called the defendant, who said that he could not respond until the afternoon. Mrs.

DeOliveira then called her oil company, which referred her to another licensed oil burner technician, Dwight Wheeler. Wheeler came to the DeOliveira home and "restored the heat within a minute." Mrs. DeOliveira showed Wheeler the invoice that the defendant had provided to the DeOliveiras. Upon seeing the invoice, Wheeler "laugh[ed] about it." Despite being a licensed oil burner technician since approximately 1974, with ninety to ninety-five percent of his business involving work on oil burners, he did not use the term "firing assembly" and "wanted to see what a firing assembly was, so [he] went back down in the basement and inspected the burner to see what was changed" by the defendant. Upon inspecting the system, Wheeler observed that the only new part was the nozzle to the drawer assembly, which cost $3.25. Wheeler concluded that no other part appeared to have been newly replaced. Wheeler did not charge the DeOliveiras for this visit.[5]

Following her conversation with Wheeler, Mrs. DeOliveira contacted the defendant and asked for an itemized bill with a listing of parts he had replaced. The defendant agreed to do

[5] Because the furnace was dirty, Wheeler recommended a cleaning be performed. He subsequently returned to the DeOliveira home and performed the cleaning. He returned a third time after the heat went out again and replaced the ignition transformer. He charged $94 for the part, but did not charge for the labor because he felt that he may have overlooked something when he cleaned the furnace.

so, but did not follow up. Mrs. DeOliveira contacted the defendant again several days later and asked again for the information. The defendant said, "no problem," but neither followed up nor provided the requested information. The DeOliveiras both testified that had they known that the defendant had only replaced a $3.25 nozzle, they would not have agreed to pay $500 for the "repair."

3. Additional evidence. William Hackett, called by the Commonwealth, testified that he worked with the defendant on "[h]undreds" of jobs on "most days of the week for several years." He also testified that the defendant had told him, when pricing jobs for "older customers," that "[t]hey had more time to save up money for him." The defendant also told Hackett that when he commenced a new job, "he looked at people's possessions" in order "to see how they were living." Finally, when customers "would start questioning the [defendant's] pricing," he had a practice of saying "that he would have to call his boss and find out the final price." The defendant had no boss.

The defendant testified at trial, and claimed, inter alia, that he performed the work for which he was paid; that he believed that he had installed the correct parts; that he charged for travel time to get to the DeOliveiras' house as he did not customarily make service calls to Leominster; and that he traveled to the Thomas home in Worcester during a blizzard.

On cross-examination, the Commonwealth introduced a printout from the National Climactic Data Center showing weather data in Worcester in January of 2009. The exhibit showed that there had been no precipitation in Worcester on the dates the defendant traveled to the Thomas residence.

Discussion. 1. Deferring rule 25 (a) decision. At the close of the Commonwealth's case, the defendant moved under Mass. R. Crim. P. 25 (a), as amended, 420 Mass. 1502 (1995), for a required finding of not guilty as to all counts. Following argument, the judge stated that he would need to take some time because he could not decide the motion "without reviewing all [of his] notes and maybe the transcript." In response, counsel for the defendant stated:

> "I am asking you to defer a decision until you have that opportunity. Because as a jury-waived fact finder, you can rule, once you've reviewed everything, what the state of the evidence was right now, and then you can rule appropriately, and then you can rule on the case itself. That's all I'm asking the Court to do."

The judge agreed to the defendant's explicit request, and deferred ruling on the motion.

The defendant renewed his motion for a required finding of not guilty at the close of the evidence. Prior to commencing closing arguments, the defendant stated that he had "no objection to continuing to" defer the decision on the motions for a required finding, and "then to independently rule with

regard to the motion." The defendant also stated that he was not seeking further argument on the motions. The judge responded that in his final rulings, he would "make a written final ruling on" the motions and "would submit a written notation in the file on [the defendant's] motion for required findings." The judge asked if that was satisfactory, and defense counsel replied, "Yes, it is." The judge ultimately denied the motions for a required finding of not guilty.

The defendant now claims, for the first time on appeal, that the judge erred by deferring action on the defendant's motions. The argument is unavailing.

We agree that "[w]hen a defendant files a motion for a required finding at the close of the Commonwealth's case, the plain language of Mass. R. Crim. P. 25 (a) requires that the motion 'shall be ruled upon at that time.'" Commonwealth v. Yasin, 483 Mass. 343, 350 (2019), quoting Mass. R. Crim. P. 25 (a). Seizing on this premise, and citing Yasin, supra, the defendant contends that he "had a vested right to insist that [the judge] resolve his motion for a required finding of not guilty at the end of the Commonwealth's case without presenting any evidence." In the present case, however, the defendant did not "insist" that the judge resolve the motion at the end of the Commonwealth's case. To the contrary, he asked the judge to defer action on the motion. It is well settled that where the

defendant invited the error now claimed on appeal, appellate review is limited to whether a substantial risk of a miscarriage of justice occurred. See Commonwealth v. Kirwan, 448 Mass. 304, 315 (2007); Commonwealth v. DiBenedetto, 427 Mass. 414, 422 (1998); Commonwealth v. Leary, 92 Mass. App. Ct. 332, 342 (2017); Commonwealth v. Knight, 37 Mass. App. Ct. 92, 99-100 & n.2 (1994). Here we discern no such risk.

First, the defendant's reliance on Yasin is misplaced. There, defense counsel objected to the judge reserving her decision on the rule 25 (a) motion. Yasin, 483 Mass. at 350. Furthermore, the judge indicated at the time she reserved the decision that she favored allowing the motion. Id. at 351. Defense counsel averred in an affidavit that the defendant was prepared to testify, but counsel advised him not to do so because of counsel's expectation that the judge would allow the required finding motion. See id. at 352. The defendant in Yasin thus suffered obvious prejudice:

> "When the judge reserved decision on the defendant's motion for a directed verdict at the close of the Commonwealth's case, she deprived the defendant of his right to insist that the Commonwealth prove each element of murder beyond a reasonable doubt before he decided whether to rest or to present a defense. Such prejudice is manifest where, as here, the judge indicates at the time of the reservation that she strongly favors allowing the motion. . . . In effect, the judge told the parties that the Commonwealth had presented insufficient evidence to convict the defendant of murder. After the judge made these statements, however, the trial proceeded, and the defendant

> was put to the choice of deciding whether to rest or to present a defense."

Id. at 351. In Yasin, the Commonwealth did not dispute the above-referenced assertions of prejudice. Id. at 352.

Here, by contrast, the defendant not only failed to object to the reservation of decision on the motion, but, as discussed supra, the defendant asked the judge to do so. In addition, the judge in the present case made no comments implying that the evidence was likely insufficient. To the contrary, and for the reasons delineated infra, the evidence of larceny from the Thomases and DeOliveiras was not only sufficient to survive a required finding of not guilty motion, but was clear and strong. Moreover, the defendant did testify in the present case, and there is no indication in the record -- either at trial or in any posttrial filing or affidavit -- that the judge's deferral of the decision on the required finding motion impacted any strategic decisions made by the defense. Contrast Yasin, 483 Mass. at 352 (based on judge's statements prior to reserving decision on rule 25 [a] motion, defense counsel "formed the opinion that the trial judge agreed that the evidence was legally insufficient" and therefore "concluded that it would be imprudent to put the defendant on the stand").

Finally, Yasin was a jury trial, whereas the present case was jury-waived. Defense counsel viewed it as a benefit to

defer the rule 25 (a) ruling in the context of a jury-waived trial and stated as much when he asked the judge to do just that. See generally Commonwealth v. Colon, 33 Mass. App. Ct. 304, 308 (1992) (discussing judicial rulings in context of jury-waived trials). For these reasons, the present case is factually and legally distinct from Yasin, and the defendant has not demonstrated any prejudice. Thus, the deferral of the decision on the rule 25 (a) motion did not create a substantial risk of a miscarriage of justice.

2. Sufficiency of the evidence. The defendant argues that the Commonwealth failed to prove the elements of larceny as to the Thomases and the DeOliveiras. We apply the familiar test to determine "whether, after viewing the evidence in the light most favorable to the [Commonwealth], any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (emphasis omitted). Latimore, 378 Mass. at 677, quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979). "If, from the evidence, conflicting inferences are possible, it is for the [fact finder] to determine where the truth lies, for the weight and credibility of the evidence is wholly within [his] province." Commonwealth v. Lao, 443 Mass. 770, 779 (2005), S.C., 450 Mass. 215 (2007). See E.B. Cypher, Criminal Practice and Procedure § 37:10 (4th ed. 2014).

As to the Thomases, the defendant was convicted of larceny from an elderly person, which required proof of "unlawful taking and carrying away of the personal property of another with the specific intent to deprive the person of the property permanently" (quotation and citation omitted), Commonwealth v. Mills, 436 Mass. 387, 394 (2002), and that the victim was at least sixty years of age. See G. L. c. 266, § 30 (5). The defendant contends that the evidence was too conjectural to prove his intent to steal, the evidence tended to equally support a finding that he had made an honest mistake, and the Thomases consented to the transaction.[6] The claim has no merit.

The evidence, detailed in the background section, supra, showed that the defendant represented that he needed a part that would cost between $100 and $150; that Mr. Thomas signed a "credit card slip for $250"; that the defendant worked for only thirty to forty-five minutes and installed a part; that the defendant then charged the Thomases a total of $1,750; that Mr. Thomas objected to the price, said that the entire furnace did not cost that much, and told the defendant that he did not approve or authorize that charge; that Mrs. Thomas likewise told the defendant that they did not approve that charge; that the defendant responded, "flat rate," and "took off" in his truck,

[6] There is no dispute that the Thomases were over sixty years of age at the time of the larceny.

even though he had neither contracted for nor represented that the work involved a flat rate; that the heat "worked for about ten minutes, then it went off"; and that the Worcester plumbing and gas inspector opined that the charge was unreasonable, "very high," and "excessive," and that the repair involved "maybe an hour's worth of labor and a part that should have cost about $110, $120." In addition, the Commonwealth introduced evidence of the defendant's practice of excessive pricing for "older customers," who had "more time to save up money for him," along with evidence that when assessing a new job, the defendant "looked at people's possessions" in order "to see how they were living." This evidence was more than sufficient to prove that the defendant charged unreasonable and excessive fees from what he viewed as elderly, vulnerable targets, charged disproportionately beyond the legitimate price of the work, and acted with intent to permanently deprive the Thomases of their funds. The evidence was also sufficient to show that the defendant did so without their consent, as evidenced by the Thomases' admonition not to charge their credit card as well as their direct expression of disapproval and explicit nonagreement to pay the excessive and outrageous charge. See Commonwealth v. St. Hilaire, 470 Mass. 338, 345 (2015) ("although lack of consent is not an element of the offense, it is the sine qua non of the crime of larceny"). Contrary to the defendant's

argument, this is not a case involving an honest mistake or a "failure to make good on a commercial transaction." Commonwealth v. Moreton, 48 Mass. App. Ct. 215, 219 (1999). Cf. Commonwealth v. Reske, 43 Mass. App. Ct. 522, 524-526 (1997). The victims did not agree to the amount that the defendant charged to their credit card, and a rational fact finder could have found that the defendant intentionally absconded with their property with intent to deprive permanently. A rational fact finder could also have viewed the defendant's flight from the scene as evidence of consciousness of guilt. See Commonwealth v. Carrion, 407 Mass. 263, 277 (1990) ("Flight is perhaps the classic evidence of consciousness of guilt").

As to the DeOliveiras, the defendant was convicted of larceny by false pretenses, G. L. c. 266, § 30, which required proof that:

> "(1) a false statement of fact was made; (2) the defendant knew or believed that the statement was false when he made it; (3) the defendant intended that the person to whom he made the false statement would rely on it; and (4) the person to whom the false statement was made did rely on it and, consequently, parted with property."

Mills, 436 Mass. at 396-397. The defendant's appeal centers on the second element -- that the Commonwealth failed to prove that he knew his statement about replacing the firing assembly was false at the time he made it. He contends that the evidence only showed a disputed commercial transaction, and that

incomplete or shoddy work does not equate to larceny. The claim is unpersuasive.

As detailed supra, the jury could have found that the defendant knowingly lied when he told Mr. DeOliveira that he had replaced the "firing assembly." The evidence showed that the defendant had only worked for fifteen minutes; that he only replaced a $3.25 nozzle, which was not a "firing assembly" as he had represented to the DeOliveiras; that he overcharged in an amount that was manifestly unrealistic, as he did with the Thomases; and that the heat ceased working again the following day. In addition, the defendant refused to provide an itemized invoice and refused to provide any detailed description of the work allegedly performed. This evidence was more than sufficient to satisfy the knowledge element of the statute and to prove the existence of more than a mere business dispute. See Reske, 43 Mass. App. Ct. at 524-526; Commonwealth v. Kenneally, 10 Mass. App. Ct. 162, 168-172 (1980), S.C., 383 Mass. 269, cert. denied, 454 U.S. 849 (1981).

3. Admission of photograph. Over the defendant's objection, the judge admitted in evidence a photograph depicting the defendant "bare chested," while standing by a motorcycle. We agree that the judge erred in admitting the photograph, as

the Commonwealth did not establish its relevance.[7] That notwithstanding, we discern no resulting prejudice. The photograph was far from inflammatory, did not show the defendant in a negative light, and did not involve or suggest prior bad conduct or criminal activity. Contrast Commonwealth v. Valentin, 474 Mass. 301, 307-308 (2016). Furthermore, the judge found the defendant not guilty on various counts, which provides some indication that the photograph did not unduly sway the fact finder. See, e.g., Commonwealth v. Eddington, 71 Mass. App. Ct. 138, 146 (2008). In addition, this was a jury-waived case, and thus "[w]e assume that the judge is familiar with the law and did not permit himself to be influenced by such objectionable

[7] On a related line of questioning, the prosecutor represented to the judge that the relevance of the issues relating to the photograph would be "tied in." The prosecutor did not subsequently do so. Although we conclude that the error here was not prejudicial, we note that the judge should have explicitly stated that he was admitting the evidence de bene. In the alternative, the judge could have had the objected-to exhibit marked for identification, and not admitted it in evidence until its relevance and basis for admission had been established. Nonetheless, viewed in full context, we think that the defendant was on notice that the evidence was admitted "on the condition that the proof be introduced later." Mass. G. Evid. § 104(b) (2021). We also note that the defendant never moved to strike the testimony or exhibit. See Commonwealth v. Suarez, 95 Mass. App. Ct. 562, 568 n.8 (2019), quoting Mass. G. Evid. § 104(b) (2019) (judge may admit proposed evidence, de bene, on condition that proof be introduced later, and that "[e]vidence so admitted is subject to a motion to strike if that proof is not forthcoming. . . . If the proof is not introduced, but no such motion is made, the judge is not required to strike the evidence sua sponte, and it may be considered for its full probative value").

testimony." Commonwealth v. Montanez, 439 Mass. 441, 449 (2003). See Commonwealth v. Seesangrit, 99 Mass. App. Ct. 83, 91-92 (2021) (holding no prejudicial error in admission of evidence in bench trial because, inter alia, "we recognize that judges are less likely [than jurors] to be unduly swayed by potentially inflammatory evidence"). We also note that the evidence against the defendant was strong, and that the judge did not ascribe any probative value to the photograph. Contrast Commonwealth v. Darby, 37 Mass. App. Ct. 650, 654-656 (1994) (reversing judgment in jury-waived trial where judge admitted in evidence photograph of defendant that was "grossly offensive and inflammatory," attributed probative value to photograph, and evidence of guilt was not overwhelming).

Judgments affirmed.