

NOTICE: Summary decisions issued by the Appeals Court pursuant to its 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 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 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-187

COMMONWEALTH

vs.

SEQUOIA BROWN.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Sequoia Brown was convicted by a jury of larceny over \$250 (count 1), possession of a counterfeit note (count 2), and uttering a false check (count 3), all in connection with her cashing a fraudulent check at a bank in South Hadley. On appeal, Brown argues that the judge's denial of her motion for a required finding of not guilty was error, that the judge improperly admitted evidence of prior bad acts, and that the prosecutor made improper remarks during closing argument. We reverse in part and affirm in part.

Background. A fraudulent check made payable to Sequoia Brown was presented and cashed at the South Hadley branch of TD Bank on February 27, 2013. The check was indorsed with the name Sequoia Brown. The person presenting the check provided the bank teller with a Massachusetts identification card for Sequoia

Brown. Bank surveillance video captured the person as she was entering the bank and also at the teller's window. A second fraudulent check payable to Sequoia Brown was presented and cashed at the West Springfield branch of TD Bank approximately twenty-six minutes before the transaction in South Hadley.<sup>1</sup> The West Springfield branch's surveillance video also showed the person entering the bank and at the teller's window.<sup>2</sup> The person on the surveillance video from the West Springfield branch appears to be the same person as the person on the video from the South Hadley branch.

Discussion. 1. Counterfeit note. The Commonwealth points out that the evidence was insufficient to sustain the conviction of possession of a counterfeit note because the forged check that formed the basis for the conviction does not constitute a note or bill under the statute. See G. L. c. 267, § 12. Brown joins in the Commonwealth's argument. We have conducted an independent review and conclude that the Commonwealth is correct in its observation that a check is not within the definition of a note under G. L. c. 267, § 12. Accordingly, we shall reverse

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<sup>1</sup> The criminal complaint did not charge the defendant for her actions in West Springfield.

<sup>2</sup> Trial exhibits 6 through 9 depict still images of the person cashing the two checks at the two bank locations.

the judgment on count 2, charging possession of a counterfeit note.

2. Motion for a required finding of not guilty. Brown argues that her motion for a required finding of not guilty should have been allowed because the evidence failed to identify her as the person who presented the check at the bank. Brown contends that absent corroboration, the use of the name and Massachusetts identification card of Sequoia Brown were insufficient to establish her identity as the person cashing the check at the South Hadley branch of TD Bank.

Brown moved for a required finding of not guilty at the close of the Commonwealth's case and again at the close of all the evidence. We therefore first "consider the state of the evidence at the close of the Commonwealth's case to determine whether [Brown's] motion should have been granted at that time. We also consider the state of the evidence at the close of all the evidence, to determine whether the Commonwealth's position as to proof deteriorated after it closed its case."

Commonwealth v. Sheline, 391 Mass. 279, 283 (1984).

a. Sufficiency of the evidence at the close of the Commonwealth's case. "[W]e review the evidence introduced up to the time the Commonwealth rested its case to determine whether the evidence, viewed in the light most favorable to the Commonwealth, was sufficient for a reasonable jury to infer the

existence of each essential element of the crime charged, beyond a reasonable doubt." Commonwealth v. Rivera, 460 Mass. 139, 141 (2011). At the close of its case, the Commonwealth's evidence included a copy of the check payable to Sequoia Brown, testimony that a Massachusetts driver's license in the name of Sequoia Brown was presented to the teller, and still photographs of the woman who cashed the fraudulent check.

Brown argues that the Commonwealth's evidence failed to establish the identity of the person who cashed the check. See Commonwealth v. Koney, 421 Mass. 295, 302 (1995) (identity is essential element that Commonwealth must prove). Brown's argument concentrates on the fact that the teller did not identify her and that the evidence of the name, Sequoia Brown, without corroboration is insufficient to identify her as the person who cashed the check. However, the evidence included more than a name or identification; the Commonwealth also introduced photographs of the person who presented the check. The photographs depicting the person who cashed the check provided the jury with sufficient evidence to establish that Brown was the person who cashed the check at the South Hadley branch of TD Bank. Brown's motion for a required finding at the close of the Commonwealth's evidence was properly denied.

b. Sufficiency of the evidence at the close of all the evidence. We next consider Brown's motion at the close of all

the evidence, "to determine whether the Commonwealth's position as to proof deteriorated after it closed its case." Sheline, 391 Mass. at 283. Viewing the evidence in the light most favorable to the Commonwealth, deterioration occurs only where the defendant's "contrary evidence is so overwhelming that no rational jury could conclude that the defendant was guilty." Commonwealth v. O'Laughlin, 446 Mass. 188, 204 (2006).

We conclude that the judge properly denied Brown's renewed motion for a required finding of not guilty because the Commonwealth's case did not deteriorate after the Commonwealth rested. Brown presented evidence that she never possessed a Massachusetts driver's license but instead had a Massachusetts identification card. Since the identification card and driver's license look alike, this merely "created a conflict in the evidence which was for the jury to sort out and was not material to the required finding issue." Commonwealth v. Valentin, 420 Mass. 263, 267 n.4 (1995).

3. Prior bad act evidence. Brown claims that the judge abused his discretion by admitting prior bad act evidence.<sup>3</sup> Here, the judge allowed the Commonwealth to present evidence of a person presenting and cashing a fraudulent check made payable

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<sup>3</sup> The Commonwealth agrees that this issue was preserved and should be reviewed under the prejudicial error standard. See Commonwealth v. Grady, 474 Mass. 715, 719 (2016) (motion in limine will preserve objection).

to Sequoia Brown at the West Springfield branch of TD Bank approximately twenty-six minutes prior to the South Hadley transaction. The judge admitted the evidence for the limited purpose of showing a "common scheme or course of conduct, a pattern of operation, absence of accident, mistake, intent, or motive."

Generally, "the prosecution may not introduce evidence that a defendant previously has misbehaved, indictably or not, for the purposes of showing his bad character or propensity to commit the crime charged." Commonwealth v. Helfant, 398 Mass. 214, 224 (1986). However, prior bad act evidence may be introduced to show "a common scheme, pattern of operation, absence of accident or mistake, identity, intent, or motive." Id. In ruling on the admissibility of the prior misconduct, the trial judge is given great latitude and discretion in weighing its probative value versus its prejudicial effect and we uphold a judge's decision unless it is palpably wrong. See Commonwealth v. Rosa, 468 Mass. 231, 242 (2014).

On appeal, Brown concedes that the West Springfield incident demonstrated a common scheme or plan, but argues that its prejudicial effect outweighed its probative value. "By design, all evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided." Commonwealth v. Kindell, 84 Mass. App. Ct. 183, 188 (2013), quoting United

States v. Rodriguez-Estrada, 877 F.2d 153, 156 (1st Cir. 1989). "[T]he question is not whether admission of the [evidence] was prejudicial; it is . . . whether it was . . . more prejudicial than probative." Rosa, 468 Mass. at 241. In conducting the balancing test, the judge found that the West Springfield incident had a sufficient nexus with the South Hadley check cashing to render it relevant and probative and admissible. We discern no abuse of discretion here, especially where the judge gave proper limiting instructions before the jury's deliberations began.

4. Prosecutor's closing argument. Brown raises both preserved and unpreserved claims of error relating to the prosecutor's closing argument. At trial, defense counsel objected to the prosecutor's closing argument about how a person attempting to forge Brown's signature would sign the check. We review this claim for prejudicial error. See Commonwealth v. Garcia, 75 Mass. App. Ct. 901, 901 (2009). Brown contends that the prosecutor's reference regarding how a forger would sign the check constituted vouching for the authenticity of Brown's signature without expert testimony.

"Remarks made during closing arguments are considered in the context of the whole argument, the evidence admitted at trial, and the judge's instructions to the jury." Commonwealth v. Felder, 455 Mass. 359, 368 (2009). Although prosecutors are

not permitted to misstate the evidence or refer to facts not in evidence during closing arguments, Commonwealth v. Kozec, 399 Mass. 514, 516 (1987), they are "entitled to marshal the evidence and suggest inferences that the jury may draw from it." Commonwealth v. Roy, 464 Mass. 818, 829 (2013), quoting Commonwealth v. Drayton, 386 Mass. 39, 52 (1982). Here, the prosecutor did just that. Evidence admitted at trial included two checks indorsed with the name Sequoia Brown, and three other exhibits that contained the genuine signature of Brown. There was no vouching. The comment suggesting how a forger would act was a fair inference from the evidence. See Commonwealth v. Grimshaw, 412 Mass. 505, 510 (1992) (proper for counsel to "assist the jury in their task of analyzing, evaluating, and applying evidence [by offering] suggestions . . . as to what conclusion[s] the jury should draw from the evidence" [citation omitted]). The prosecutor made it clear that the jury did not have to accept his suggestion of how a forger would probably act. The jury were able to review all of the signatures and determine whether there were similarities between the signature on the fraudulent check from the South Hadley TD Bank and known signatures of Brown. See Commonwealth v. O'Connell, 438 Mass. 658, 662 (2003) (jury may use genuine signature "as a standard against which [they] may compare the disputed signatures and decide the question of authorship without the need for expert

testimony"). Taking the signature evidence together with the judge's instruction to the jury that closing arguments are not evidence, we conclude that there was no error, let alone prejudicial error.

Likewise, we find no merit in Brown's argument that the prosecutor vouched for or misstated the type of identification the teller received. Brown maintains that the prosecutor's comments about the similarities between a driver's license and a Massachusetts identification card "invad[ed] the jury's province" by vouching for what identification the bank received and misstating what identification Brown possessed. Since this argument was not raised at trial, we review under the substantial risk of a miscarriage of justice standard. See Commonwealth v. Renderos, 440 Mass. 422, 425 (2003).

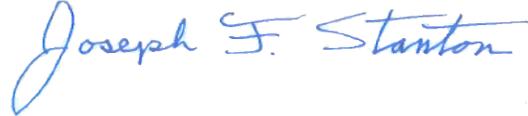
Here, taken in context, the prosecutor's closing consisted of permissible comments about the form of identification in response to defense counsel's closing, and permissible inferences from the evidence presented. See Commonwealth v. Grandison, 433 Mass. 135, 143 (2001) (prosecutor may fairly respond to defendant's closing argument). We discern no error.

Conclusion. On count 2 of the complaint, charging possession of a counterfeit note, the judgment is reversed, the

verdict is set aside, and judgment shall enter for the defendant. The remaining judgments are affirmed.

So ordered.

By the Court (Green, C.J.,  
Vuono & Lemire, JJ.<sup>4</sup>),



Clerk

Entered: November 8, 2019.

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<sup>4</sup> The panelists are listed in order of seniority.