COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-112

COMMONWEALTH

vs.

KIMBERLY S. WELLS.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a jury trial in the District Court, the defendant was convicted of witness intimidation in violation of G. L. c. 268, § 13B. On appeal, the defendant contends that (1) the evidence was insufficient to support her conviction; (2) the judge erred in admitting certain testimony of a police witness; and (3) her counsel gave her ineffective assistance. We affirm.

Background. On November 11, 2014, the victim called the Plymouth Police Department to report that her husband had raped her. The police obtained a warrant for the husband and located him on November 18, 2014, at a home where the defendant was the primary resident.[1]

[1] The husband was the father of the defendant's children. Upon his arrest, the husband was incarcerated; at the jail, he listed the defendant as his girlfriend.

Two days later, on November 20, 2014, the victim received a call from a woman identifying herself as Lisa who "worked for the judge." Lisa indicated that she was compiling reports and calling "to make sure [that] all the facts were correct." Shortly after that call ended, the victim received another call from Lisa. This time, Lisa said she was calling because she didn't want to see the victim get into trouble, but that the husband said he had six or eight witnesses he was with at the time of the alleged crime. Lisa indicated that the victim would go to jail in Framingham for two years, and that she had seen similar cases where people were taken right out of the court room in handcuffs and hauled off to jail. Lisa painted a picture of prison life in Framingham, filled with women in tattoos and with shaved heads. She said that the victim "would never make it [in] there." The victim later received a third call from Lisa, who wanted to know whether the victim had gone to the court house to tell the judge that she did not want to pursue the charges.[2] The victim "thought she had heard that

[2] Also in November 2014, a victim witness advocate within the district attorney's office received a call from someone identifying herself as the defendant. The caller stated that her boyfriend (the husband) had been falsely accused of a crime by the victim and that there were eight witnesses who could say that he was with them at the time of the alleged crime. The caller also indicated that Lisa from the court had called the victim and told her that she was going to jail in Framingham for two and one-half years for filing a false police report.

voice before, . . . but couldn't say exactly when." Subsequent investigation revealed that the calls to the victim on November 20, 2014, originated from a telephone number assigned to the defendant.[3]

Discussion. 1. Sufficiency of the evidence. The defendant contends that the judge erred in denying her motion for a required finding of not guilty at the close of the Commonwealth's case. In reviewing the denial of a motion for a required finding, we examine "whether the Commonwealth produced enough evidence, taken in the light most favorable to the Commonwealth, to satisfy any rational trier of fact beyond a reasonable doubt that each element of the crime was present." Commonwealth v. Hilton, 398 Mass. 63, 64 (1986). See Commonwealth v. Latimore, 378 Mass. 671, 677-678 (1979). We bear in mind that guilt may be established by circumstantial evidence and that "the inferences a [fact finder] may draw from the evidence need only be reasonable and possible and need not be necessary or inescapable" (quotation and citation omitted). Commonwealth v. Linton, 456 Mass. 534, 544 (2010).

[3] The victim testified that she was familiar with the defendant's voice from a few telephone calls in the past. Although the caller's voice sounded familiar, she did not recognize it as the defendant's until the police told her that the calls originated from the defendant's telephone number.

"In order to prove the defendant guilty of intimidation of a witness in violation of G. L. c. 268, § 13B, the Commonwealth was required to show that the defendant, either directly or indirectly, made a wilful effort to intimidate or harass another person who was a witness or potential witness at any stage of a criminal investigation or proceeding." Commonwealth v. Carvalho, 88 Mass. App. Ct. 840, 845 (2016). See Hrycenko v. Commonwealth, 459 Mass. 503, 507 (2011). Proof may be in the form of "fair inferences drawn from circumstantial evidence." Commonwealth v. Pagels, 69 Mass. App. Ct. 607, 613 (2007).

The defendant's claim on appeal is that the evidence was insufficient to establish her identity as the perpetrator. Specifically, the defendant argues that the victim never identified her as the person who made the intimidating calls, and that the evidence was otherwise insufficient to allow the jury to infer that she made them. Contrary to the defendant's claim, there was ample evidence from which the jury could have inferred that the defendant was the perpetrator.

The substance of the intimidating calls allowed the jury to infer that the caller was attempting to get the victim to drop the rape charge against the husband. The defendant had the motive to do so as she was the girlfriend of the husband, who was also the father of her children. The calls came only two days after the husband's arrest, which took place at the home

where the defendant was the primary resident and in the defendant's presence. The substance of the intimidating calls were subsequently repeated to a victim witness advocate by a caller identifying herself as the defendant.[4] Also, the intimidating calls were traced back to a telephone number assigned to the defendant. In the light most favorable to the Commonwealth, the evidence was sufficient to establish that the defendant made the intimidating calls. No explicit identification of the defendant by the victim was required. The judge properly denied the motion for a required finding of not guilty.

2. Police witness testimony. The defendant next argues that the judge erred in permitting a police detective to testify about how telephone calls are terminated, without first making a preliminary ruling that the detective was an expert in that area. She maintains that the detective's testimony constituted an expert opinion based on scientific, technical, or other specialized knowledge, which was inadmissible unless the judge made a preliminary determination regarding the detective's qualifications.

[4] Although not relevant to the sufficiency of the evidence at the close of the Commonwealth's case, the defendant subsequently testified and admitted to making the call to the victim witness advocate.

The manner in which telephone calls are terminated "may well be within the general knowledge" of a police detective with twenty years of experience as a law enforcement officer. Commonwealth v. Lodge, 431 Mass. 461, 469 (2000). Defense counsel elicited testimony that the detective had done "an awful lot of investigative work on telephones," that he was "familiar on reading the reports that phone companies would give," and that he would "be able to interpret all the information on there or at least most of it." Given that this foundation, of the detective's experience with investigations involving telephone and telephone records, had been laid out prior to any opinion concerning how calls are terminated, it was within the judge's discretion to admit the testimony. See id. By allowing the detective to give his opinion, it may be inferred that the judge determined that the detective was qualified to give it. See Leibovich v. Antonellis, 410 Mass. 568, 571-572 (1991) (where police witness's qualifications in accident reconstruction had been established, judge's allowance of witness's expert opinion implied prior finding of qualification to testify as expert on subject).[5]

[5] The defendant also asserts, without any supporting authority, that the detective's testimony concerning how telephone calls are terminated was "patently false." We decline to address the defendant's unsubstantiated argument as it does not rise to the level of acceptable appellate argument. See Cameron v. Carelli, 39 Mass. App. Ct. 81, 86 (1995).

The defendant additionally claims that the detective impermissibly opined on the ultimate issue of the defendant's guilt by testifying that he believed the telephone records were accurate. First, a statement regarding the accuracy of telephone records indicating that calls originated from a telephone number assigned to the defendant in no way equates with an opinion regarding the defendant's guilt. See Commonwealth v. Canty, 466 Mass. 535, 543 (2013) (provided that witness does not directly opine as to defendant's guilt, no rule prohibits testimony that touches on ultimate issue).

Second, if there were such error, it was invited. Through cross-examination of the detective, defense counsel sought to emphasize that the telephone records were accurate in order to discredit the victim, whose testimony regarding the calls did not precisely align with the records. The prosecutor objected to defense counsel's line of questioning, asserting that "[t]he records are what they are. They speak for themselves." Defense counsel responded, "We're saying they're accurate." In an apparent attempt to move the case along, the judge asked the detective whether he agreed with defense counsel, and the detective agreed. The defendant did not object. To the contrary, having obtained what he set out to achieve, defense counsel concluded his questioning. Here, there was no risk of a miscarriage of justice. See Commonwealth v. Leary, 92 Mass.

App. Ct. 332, 342 (2017) (invited error reviewed only to extent necessary to prevent substantial risk of miscarriage of justice).

3. Ineffective assistance of counsel. Lastly, the defendant contends that he received ineffective assistance of counsel when his counsel failed to: (1) present an expert witness on technical data contained in telephone records; (2) object to a "suggestive in-court identification"; (3) object to the admission of "propensity testimony"; and (4) object to the admission of "opinion testimony on the issue of guilt."

The defendant raises his claims of ineffective assistance for the first time in this direct appeal. "[T]he preferred method for raising a claim of ineffective assistance of counsel is through a motion for a new trial." Commonwealth v. Zinser, 446 Mass. 807, 810 (2006). An ineffective assistance of counsel claim raised on the "trial record alone is the weakest form of such a challenge," Commonwealth v. Peloquin, 437 Mass. 204, 210 n.5 (2002), and "[f]or such a claim to be successful, counsel's inadequate performance 'must appear[] indisputably on the trial record.'" Commonwealth v. Morales, 461 Mass. 765, 785 (2012), quoting Zinser, supra at 811.

To prevail on her ineffective assistance of counsel claims, the defendant bears the burden of establishing that "(1) defense counsel's conduct fell 'measurably below that which might be

expected from an ordinary fallible lawyer' (performance prong), and (2) [s]he was prejudiced by counsel's conduct in that it 'likely deprived the defendant of an otherwise available, substantial ground of defence' (prejudice prong)." Commonwealth v. Lys, 91 Mass. App. Ct. 718, 720 (2017), quoting Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). "Thus, a defendant must prove both deficient performance and prejudice." Commonwealth v. Chleikh, 82 Mass. App. Ct. 718, 722 (2012).

Moreover, "[t]actical judgments do not lead to a finding of ineffective assistance of counsel unless they are 'manifestly unreasonable'" (citation omitted). Commonwealth v. Jones, 42 Mass. App. Ct. 378, 380 (1997). "Only 'strategy and tactics which lawyers of ordinary training and skill in the criminal law would not consider competent' are manifestly unreasonable" (citation omitted). Commonwealth v. Burgos, 462 Mass. 53, 69 (2012). The manifestly unreasonable test is "essentially a search for rationality in counsel's strategic decisions, taking into account all the circumstances known or that should have been known to counsel in the exercise of his duty to provide effective representation to the client and not whether counsel could have made alternative choices." Commonwealth v. Kolenovic, 471 Mass. 664, 674-675 (2015). See Commonwealth v. Johnson, 435 Mass. 113, 133-134 (2001) ("Trial tactics which may appear questionable from the vantage point of hindsight, do not

amount to ineffective assistance unless 'manifestly unreasonable' when undertaken" [citation omitted]).

a. Failure to present expert witness. On this record, we cannot say that defense counsel's decision to cross-examine the detective, rather than obtain an expert witness, was not a tactical decision, or was one that was "manifestly unreasonable" when made.[6] While the defendant claims that an expert on technical data contained in telephone records would have aided defense counsel in cross-examining the detective, this claim is entirely speculative. See Commonwealth v. Horton, 434 Mass. 823, 834 (2001). The defendant has the burden to show that defense counsel's inaction actually deprived her of an available basis for a defense, and "[u]nsupported speculation about possible expert evidence fails to sustain this burden." Id.

b. Failure to object to in-court identification. There is likewise no merit to the defendant's assertion that defense counsel's failure to object to an "unfair and unnecessarily suggestive" in-court identification reflected his incompetence. This is not a case where the victim's ability to identify the defendant by her physical appearance was at issue. The crime took place over the telephone. It would have been clear to the

[6] The record shows that defense counsel requested and was provided with funds to hire an expert regarding the telephone records, and ultimately did not put an expert on the stand.

jury that the identification issue was not whether the victim could identify the defendant by her physical appearance, but rather whether there was sufficient other circumstantial evidence to link the defendant to the telephone calls.

c. Failure to object to propensity testimony. The defendant further claims that defense counsel was ineffective by failing to object to the victim's statement that, after the detective told the victim that the calls originated from a telephone number assigned to the defendant, she was not surprised because of past incidents that the defendant had put her and the husband through. While propensity testimony is generally inadmissible, see Commonwealth v. Howard, 479 Mass. 52, 67 (2018), defense counsel may well have refrained from objecting on the belief that the victim's testimony exposed her bias against the defendant. See Commonwealth v. Washington, 28 Mass. App. Ct. 271, 274-275 (1990) (reasonable tactical decision not to object where victim's testimony might have made her appear less credible to jury).

d. Failure to object to opinion testimony. Finally, the defendant contends that it was error for defense counsel not to object to the detective's testimony that "no victim witness advocate would ever call a victim and make a statement like that, threatening a victim with imprisonment." Contrary to the defendant's contention, this was not a prejudicial statement in

which the detective was improperly opining that this particular defendant was guilty of the crime charged. Rather, this was a general statement about something that would have been obvious to the jurors given the nature of the victim witness advocate's role.

The defendant having failed to establish that the actions of her counsel fell measurably below that of an ordinary fallible lawyer, we need not pursue the analysis further.

Judgment affirmed.

By the Court (Green, C.J., Meade & Singh, JJ.[7]),

Joseph F. Stanton

Clerk

Entered: September 10, 2019.

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