COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-765

COMMONWEALTH

vs.

MICHAEL EMERALD.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant was convicted of operating a motor vehicle under the influence of alcohol, third offense, in violation of G. L. c. 90, § 24 (1) (a) (1); operating a motor vehicle with a revoked license in violation of G. L. c. 90, § 23; negligent operation of a motor vehicle in violation of G. L. c. 90, § 24 (2) (a); and possession of a class C drug, subsequent offense, in violation of G. L. c. 94C, § 34.

At trial, the Commonwealth was required to prove that the defendant was operating the vehicle in question. The prosecutor asked a testifying police officer, "Now, do you know what kind of vehicle Mr. Emerald typically drives?" There was an objection by defense counsel who argued that the question was prejudicial because it assumed that the defendant was "driving around regularly," when his license was revoked. The prosecutor

acknowledged that that was a fair point and said, "I would withdraw the question and ask a different one." The judge appears to have overruled the objection nonetheless. In any event, at the end of the sidebar the prosecutor asked instead a rephrased question. After establishing that the officer knew the vehicle to belong to the defendant's grandmother, the prosecutor asked, "And have you known this [d]efendant to operate that vehicle in the past?" The officer testified, "Yes." On appeal, the defendant argues that this testimony was irrelevant to the issue whether the defendant was driving the car at the time of the accident.

We disagree. This evidence, if believed by the jury, demonstrated that in the past the defendant had access to this very vehicle to the point of being able to drive it. That is quite obviously relevant to, though also obviously not dispositive of, the question whether he was driving it on the night in question. To the extent the defendant argues that the risk of undue prejudice from this evidence substantially outweighed its probative value, we see no abuse of discretion in the judge's conclusion to the contrary. See Commonwealth v. Scesny, 472 Mass 185, 199 (2015).

Finally, to the extent, if any, that the defendant argues that this was impermissible propensity evidence, an argument not raised below, we disagree. This evidence was admissible for the

purpose of showing the defendant's access to the vehicle in question. It was not admitted for the purpose of demonstrating action in conformity with his propensity to drive the car.

Although the defendant did not bring a motion for a new trial, in this direct appeal the defendant also raises an ineffective assistance of counsel claim. The presentation in this posture of such a claim is strongly disfavored by our appellate courts. In order to succeed, the defendant must show that the factual basis for the claim must appear indisputably on the trial record. See Commonwealth v. Davis, 481 Mass. 210, 222-223 (2019).

The defendant's first argument is that he believes that his trial counsel has photographs in his possession that demonstrate that he was ejected from the passenger side of the car and therefore could not have been its driver. There is no support in the record, however, for the defendant's stated belief that his trial counsel has such photographs.

The defendant also argues that if the head injuries he suffered in the automobile accident that brought him to the attention of the police on the night in question had been brought to the attention of the jury, it would have "recontextualized his accident site admissions." This argument lacks both factual and legal support. There was testimony from the police officers concerning the head injury that the

defendant suffered in the accident. At the scene, according to testimony at trial, the defendant repeatedly denied having driven the car. He did, however, state that he had taken valium and drunk alcohol, but that he did know the quantities of either.

The defendant was acquitted of operating under the influence of drugs, but was convicted of operating under the influence of alcohol. Given that direct evidence of his blood alcohol level of .16 was also introduced, we conclude that no amount of emphasis on his head injury as it might have affected the accuracy of his statements at the scene (something of which there was no evidence) would have affected the jury's conclusion on the OUI count of which he was convicted. Put another way, any failure of counsel to emphasize his head injury could not have "deprived the defendant of an otherwise available, substantial ground of defence," Commonwealth v. Saferian, 366 Mass. 89, 96 (1974), and therefore could not have amounted to ineffective assistance of counsel.

Finally, the defendant argues that pills found on his person should not have been introduced into evidence as there was no proof of chain of custody. The pills, however, were admitted through the testimony of Officer Regan of the West Bridgewater Police Department who identified the bottle as the one given to him by a firefighter who testified to finding them

on the defendant's person. The officer testified that he had shown the bottle of the pills to the defendant who said they were his, and that they were valium. He testified to markings placed on the exhibit indicating that they were evidence in the case and to markings indicating that they had been sent to the State laboratory for analysis. The officer's testimony adequately authenticated them without the need for any evidence of chain of custody. Although the defendant does not raise any argument about the chemical analyst's description of the pills as those she tested that were found to contain valium, her testimony in regard to the previously admitted evidence concerning the markings and identification number found on the exhibit, as well as the way she received it from her supervisor, are sufficient evidence of chain of custody to support a finding that the pills she tested were indeed the same pills seized from the defendant's person on the night in question.

Judgments affirmed.

By the Court (Rubin, Blake & Wendlandt, JJ.[1]),

Joseph F. Stanton

Clerk

Entered: May 15, 2020.

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