

2015 WL 2327675 (Mass.App.Ct.) (Appellate Brief)
 Appeals Court Of Massachusetts.

COMMONWEALTH,

v.

Kim ENAGBARE.

No. 2014-P-1960.

May 4, 2015.

Brief and Record Appendix for the Defendant On Appeal from Middlesex County's Ayer District Court

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*iv ISSUES PRESENTED

I. Whether the evidence viewed in the light most favorable to the Commonwealth was insufficient for any rational fact finder to have found that the Commonwealth proved beyond a reasonable doubt that Kim Enagbare committed larceny by false pretenses.

II. Detective Barhight's testimony that Ms. Enagbare was conducting a "scam" as well as her testimony that Ms. Enagbare befriended Guthrie Sr. with the intent of taking his money constituted reversible error because it was Detective Barhight's opinion as to Ms. Enagbare's guilt.

*1 STATEMENT OF THE CASE

On August 27, 2012 in Ayer District Court, Kim Enagbare was arraigned then charged with larceny over \$250 by false pretenses and larceny from a person over 65 on Ed Guthrie Sr. (Docket #1248CR001106). Her jury trial commenced on June 23, 2014. Upon motion for a directed verdict by defense counsel, Judge Elizabeth Cremens allowed it as to larceny from a person over 65. (Tr.II.71-72) ¹. After trial on June 24, 2014, the jury found her guilty of larceny over \$250 by false pretenses. (Tr.II.139). The judge committed Ms. Enagbare to one year in the house of corrections. (Tr.II.152). Counsel timely filed a Notice of Appeal. The case was entered in this Court on December 23, 2014.

STATEMENT OF FACTS

The alleged victim, 92-year old Ed Guthrie Sr. (Guthrie Sr.), died on January 7, 2014, five months before the start of Kim Enagbare's trial. (Tr.I.104). The Commonwealth acknowledged that without Guthrie Sr.'s testimony, it had a "very circumstantial" case and it "may have trouble" *2 proving Ms. Enagbare made statements to Guthrie Sr. (Tr.I.15, 40). On June 23, 2014, Ms. Enagbare's jury trial commenced before Judge Elizabeth Cremens. (Tr.I.94). The Commonwealth presented testimony from four key witnesses to prove that Ms. Enagbare had committed larceny over \$250 by false pretenses on Guthrie Sr. His son Ed Guthrie Jr. (Guthrie Jr.), nephew John Guthrie, nephew David Desmond, and Ayer Police Detective Kelly Barhight testified for the Commonwealth at trial. (Tr.I.102, 149; Tr.II.6, 38).

In the spring of 2010, Guthrie Jr. travelled to his father's home to help him with his taxes. (Tr.I.107). Upon reviewing Guthrie Sr.'s bank records, Guthrie Jr. noticed "an awful lot of checks" written to Ms. Enagbare. (Tr.I.108). Some of the checks had notations on the memo line for oil, school, rent and Christmas. (Tr.I.123-126). He grew concerned with his father's relationship with Ms. Enagbare and the amount of money he gave her. (Tr.I.108). When he spoke to his father regarding the checks, Guthrie Sr. became "very upset and would not speak" to Guthrie Jr. about them. (Tr.I.108). Guthrie Jr. felt as though Ms. Enagbare was siphoning money from his father's bank account. (Tr.I.116).

In 2011, Guthrie Jr. made another visit to Guthrie Sr.'s home. (Tr.I.109). After reviewing *3 his father's bank records again, Guthrie Jr. discovered more checks written to Ms. Enagbare for large amounts of money which caused him further concern. (Tr.I.109). He also observed Ms. Enagbare would call the home up to 15 times a day. (Tr.I.110). The calls would start as early as "5:30 in the morning and not end till like 10:30 at night." (Tr.I.111). Guthrie Sr.'s personality changed whenever Ms. Enagbare called or when he talked about her. (Tr.I.115). He appeared scared. "He didn't want to talk to her." (Tr.I.115).

During Guthrie Jr.'s visit, he met Ms. Enagbare when she stopped by the house. (Tr.I.111). He recalled that she stated to him, "She was getting a loan from dad and when she got her tax return she was going to return the money." (Tr.I.112). During that summer, Guthrie Sr.'s nephew John Guthrie also met Ms. Enagbare when he visited his uncle. (Tr.I.152). At that time, he observed Guthrie Sr. give Ms. Enagbare a check. (Tr.I.154).

Mr. Desmond, another nephew and also a former state trooper, had visited Guthrie Sr. in "February or March of 2012." (Tr.II.12). He observed a red car that he did not recognize in his uncle's driveway and pulled his car in behind it. (Tr.II.12). Mr. Desmond noticed two *4 individuals in the vehicle who upon seeing him became "really nervous" like they were "up to something." (Tr.II.12,13). Mr. Desmond "went over and up to the door to try and open the door to go in his house and it was locked." (Tr.II.14). A moment later, Ms. Enagbare exited the house and drove off with the individuals in the red car. (Tr.II.15). After they left, Mr. Desmond asked Guthrie Sr. about Ms. Enagbare. (Tr.II.15). His uncle became irritated with him for questioning his relationship with her. (Tr.II.16). On two occasions thereafter, Mr. Desmond observed the same red car about to pull into Guthrie Sr.'s driveway, but when the driver spotted Mr. Desmond, the car drove off instead. (Tr.II.16-17).

Between 2010 and 2012, Guthrie Sr. wrote checks to Ms. Enagbare totaling \$85,000. (Tr.II.46-47). At one point in 2012, Guthrie Sr.'s bank account went into the negative. (Tr.I.116). Guthrie Jr. gave him \$7000, and paid his father's taxes at Guthrie Sr.'s request. (Tr.I.116). In the spring of 2012, Guthrie Jr. put his name on all of his father's bank accounts and withdrew money from them. (Tr.I.116).

Guthrie Jr. went to the police in 2012 because he suspected that Guthrie Sr. was being taken advantage of and feared for his father's life. (Tr.I.117). Ayer Police Detective Kelly *5 Barhight began an investigation in July of 2012. (Tr.II.42). On July 25, 2012, Detective Barhight received a call from North Middlesex Savings Bank that Guthrie Sr. requested to withdraw a substantial amount of money. (Tr.II.43). Detective Barhight went to the bank and confronted Guthrie Sr. regarding his withdrawal and told him that Ms. Enagbare was conducting "a scam" on him. (Tr.II.45). Detective Barhight observed that he acted "very nervous." (Tr.II.45). She also testified that his demeanor was in line with observations she had made in past **elder abuse** investigations. (Tr.II.48). She concluded that Ms. Enagbare "appeared friendly to an **elderly** man who was lonely" in order to take money from him. (Tr.II.59).

On July 26, 2012, John Guthrie was at Guthrie Sr.'s house when Ms. Enagbare called. (Tr.I.155). John Guthrie overheard the conversation between his uncle and Ms. Enagbare due to an amplifier on the home phone. (Tr.I.156). He recalled that "Kim asked my uncle, 'Would you please meet me. I'd like to meet you at nine o'clock today.' And my uncle goes, 'No, I can't do it.' And she says, 'What do you mean you can't do it? I need some money. I need a check... I need to meet you. I have someone coming in... Flying in down to the Cape, I need some money to get there. You *6 want the money I owe you, I need this money to get down there... I need this money to go down and get your big bunch of money.'" (Tr.I.157-158). After the phone call, Guthrie Sr. seemed "rattled," "upset," and "nervous," like "someone was just pushing him." (Tr.I.158). No checks were written to Ms. Enagbare after April of 2012. (Tr.II.47). The Commonwealth conceded that no money was given to Ms. Enagbare after this phone call. (Tr.II.67). None of the witnesses had any knowledge that she paid anything back to Guthrie Sr. (Tr.I.112, Tr.II.6, 17, 47).

At trial, the Commonwealth's witnesses testified they knew Guthrie Sr. as a social but private person. (Tr.II.13). During his relationship with Ms. Enagbare, he lacked his usual "happy go lucky" demeanor. (Tr.I.118). He "didn't want to answer the phone... Was very scared... a completely different person like he was in prison and couldn't go anywhere." (Tr.I.118). After the investigation and Guthrie Sr.'s relationship with Ms. Enagbare ended, he appeared relieved and jovial. (Tr.II.47).

After the Commonwealth rested, defense counsel moved for a required finding of not guilty on the charge of larceny of property over \$250 by false pretenses. (Tr.II.67). The Commonwealth argued that even though there was no direct *7 evidence of a false statement made by Ms. Enagbare to Guthrie Sr., all of the evidence taken together allowed the jury to infer one was made. (Tr.II.67). The Court focused on the statement overheard by John Guthrie "where she said... I need to get money to the guy in the Cape... coming from New Jersey." (Tr.II.68). The Commonwealth argued that this statement, while Guthrie Sr. did not

rely on it, allowed the inference that she was “getting monies based on false statements to him.” (Tr.II.69). The judge denied the motion based on the Commonwealth's contention that all of the other circumstances, such as his demeanor, her admission of a loan, and the amount of checks written before the statement, the jury may draw the inference that “she was getting all of these monies based on false statements to him.” (Tr.II.69).

During the Commonwealth's closing statement, it argued that Guthrie Sr.'s age, lonely state and demeanor aided in allowing the inference that Ms. Enagbare made false statements. (Tr.II.121-122). The Commonwealth also emphasized in its closing the frequency of phone calls from Ms. Enagbare, the police investigation by Detective Barhight, Guthrie Sr.'s bank statements, the checks for hundreds of dollars each and totaling over \$85,000.00 given to Ms. Enagbare, and the red car *8 that Ms. Enagbare left from Guthrie Sr.'s house in, which also drove away upon seeing Guthrie Sr.'s nephew on multiple occasions as factors for the jury to consider in determining that Ms. Enagbare lied to Guthrie Sr. (Tr. 11.115-117, 120, 121, 122). The jury then found Ms. Enagbare guilty of larceny over \$250 by false pretenses. (Tr.II.139). At sentencing, the judge committed Ms. Enagbare to one year in the house of corrections. (Tr.II.152).

ARGUMENTS

I. KIM ENAGBARE'S MOTION FOR A REQUIRED FINDING OF NOT GUILTY SHOULD HAVE BEEN ALLOWED BECAUSE THE EVIDENCE VIEWED IN THE LIGHT MOST FAVORABLE TO THE COMMONWEALTH WAS INSUFFICIENT FOR ANY RATIONAL FACT FINDER TO HAVE FOUND THAT THE COMMONWEALTH PROVED BEYOND A REASONABLE DOUBT THAT SHE COMMITTED LARCENY BY FALSE PRETENSES.

A motion for a required finding of not guilty shall be allowed when the evidence, taken in the light most favorable to the Commonwealth is insufficient to permit a rational trier of fact “to infer the existence of the essential elements of the crime charged.” *Commonwealth v. Latimore*, 378 Mass 671, 677 (1979). The Commonwealth's evidence in Ms. Enagbare's case was insufficient to establish the following elements of larceny by false pretenses: that Ms. Enagbare knowingly made *9 a false statement, that she intended for Guthrie Sr. to rely on the truth of a false statement, and that he did in fact rely upon a false statement made by Ms. Enagbare. See *Commonwealth v. Gall*, 58 Mass. App. Ct. 278, 285-286 (2003); See also M.G.L. c. 266 § 30.

The Commonwealth presented evidence of at most two statements made by Ms. Enagbare to Guthrie Sr. (Tr.I.112, 158). It entered no direct evidence that either statement was made knowingly false to Guthrie Sr. or that he relied on its truth when he gave Ms. Enagbare money. (Tr.I.40). Instead, the Commonwealth relied entirely on circumstantial evidence. The judge incorrectly denied her motion for a required finding of not guilty because that circumstantial evidence lacked sufficiency to establish all of the elements of the crime charged. (Tr.II.72).

The first of the two statements that the Commonwealth relied on came from Guthrie Jr.'s testimony that Ms. Enagbare stated to him “she was getting a loan from [Guthrie Sr.] and when she got her tax return she was going to return the money.” (Tr.I.112). The Commonwealth did not present a signed agreement between the parties, a date when the loan would be considered past due, any *10 evidence that Ms. Enagbare had already received her tax return, or any other direct evidence to prove the falsity of this statement. Some witnesses testified they had no knowledge that she paid any monies back to Guthrie Sr. (Tr.I.112, Tr.II.6, 17, 47). Even if this testimony in conjunction with the statement constituted sufficient evidence that she received a loan from Guthrie Sr. and did not pay him back, it was insufficient to find that she committed larceny by false pretenses. “Deception cannot be inferred from the mere nonperformance of the promise.” *Commonwealth v. True*, 16 Mass. App. Ct. 709, 711 (1983).

John Guthrie testified to the second of the statements that Ms. Enagbare allegedly made to Ed Guthrie Sr. He claimed that during a phone conversation that he overheard, she told Guthrie Sr. that she needed money to meet someone in Cape Cod so she could get him his “big bunch of money.” (Tr.I.157-158). The Commonwealth's evidence that this second statement was made knowingly false pales in comparison to what was presented in *Commonwealth v. Lewis*, 48 Mass. App. Ct. 343 (1999)

where the Appeals Court upheld the denial of a motion for a required finding of not guilty. *11 In Lewis, the Commonwealth offered evidence that the defendant made false statements to a lender that four prominent attorneys were part of his new business venture. *Id.* at 345-346. Based on the statement, the lender gave the defendant a loan in the amount of \$66,000. *Id.* at 351. At trial, the named lawyers testified that they never heard of the business venture thus providing direct evidence sufficient for a rational factfinder to infer that the defendant knowingly made a false statement which the lender relied on as true. *Id.* at 350-351.

In Ms. Enagbare's case, the Commonwealth lacked direct evidence that she knew this second statement was false. It did not enter evidence that she had enough money to travel to Cape Cod without financial help from Guthrie Sr. Nor did it enter any evidence pertaining to whether or not she had plans to meet someone in Cape Cod. Instead, the Commonwealth argued that Ms. Enagbare's statement was false on its face contending that the notion someone needs to borrow money to make money is clearly false. (Tr.II.123). The Commonwealth's argument fails logically. People often borrow money with the intent to invest it so they can hopefully make *12 more money. See *Commonwealth v. McCauliff*, 461 Mass. 635 (2012), *Commonwealth v. North*, 52 Mass. App. Ct. 603 (2001).

With absolutely no direct evidence supporting its case, the Commonwealth asserted that all of the circumstantial evidence allowed for inferences that one of Ms. Enagbare's statements was knowingly false. (Tr.II.67). "Knowledge or intent often cannot be proved by direct evidence, but instead must be proved by inferences drawn from evidence of relevant circumstances." *Commonwealth v. Casale*, 381 Mass. 167, 173 (1980). "However, the result may not be a product of conjecture or speculation, or the piling of inference upon inference." *Commonwealth v. Mandile*, 403 Mass. 93, 94 (1988). In order to establish that one of Ms. Enagbare's statements was knowingly false, the Commonwealth needed to produce circumstantial evidence "tending to show" that Ms. Enagbare made a false statement, and that she knew she made a false statement at the time Guthrie Sr. "actually parted with the funds." *Commonwealth v. McCauliff*, 461 Mass. at 642.

The Commonwealth argued that Guthrie Sr.'s demeanor aided the jury in concluding that Ms. Enagbare made false statements to him. *13 (Tr.II.121). The Commonwealth pointed to testimony that he acted nervous, fearful and anxious when he spoke to or about Ms. Enagbare. *Id.* Such demeanor, however, is contrary to that of a person in the process of being victimized through larceny by false pretenses. People who loan money without knowing that the person receiving the loan has no intention to repay, act as they usually do and not in any abnormal way. They would not act "nervous," "fearful" or "anxious". These traits are most likely inconsistent with the conclusion that Guthrie Sr. was in the midst of being duped by Ms. Enagbare.

The Commonwealth also offered Guthrie Sr.'s age and lonely state as reasons to believe Ms. Enagbare obtained his money by lying to him. (Tr.II.122). At best, this evidence allowed for the conclusion that Guthrie Sr. was vulnerable to being victimized in some way. It did not sufficiently support the conclusion that Ms. Enagbare made a false statement to him.

The same was true for the other evidence that the Commonwealth pointed to in its argument: the frequency of phone calls from Ms. Enagbare (up to 15 phone calls a day), the police investigation, Guthrie Sr.'s bank statements, the checks for *14 hundreds of dollars each and totaling over \$85,000 given to Ms. Enagbare, and a red car that Ms. Enagbare arrived in at Guthrie Sr.'s house which drove away upon seeing Guthrie Sr.'s nephew on a multiple occasions. (Tr. 11.115-117, 120, 121, 122). Taken in the light most favorable to the Commonwealth, this evidence might have indicated that Guthrie Sr. made a loan to Ms. Enagbare or that she even pressured him to do so. *Commonwealth v. Latimore*, 378 Mass. 671, 677 (1979). The Commonwealth offered no evidence "tending to show" that Ms. Enagbare intentionally lied to Guthrie Sr. *Commonwealth v. McCauliff*, 461 Mass. 635, 642 (2012).

In addition to the above evidence, the Commonwealth also presented expert testimony from Police Detective Kelly Barhight who made a statement that Ms. Enagbare was conducting "a scam." (Tr.II.45). While the Commonwealth did not rely on this testimony in its argument during the motion for a required finding, it is important to note that Detective Barhight's testimony did not suggest or establish that Ms. Enagbare knowingly made a false statement that induced Guthrie Sr. to give her money. "A verdict may not be based on conjecture or surmise, and expert *15 opinion does not help if it is demonstrated that it rests on speculation." *Id.* See also *Commonwealth v. Pikul*, 400 Mass. 550, 554 ("An expert's opinion, however, cannot be mere

conjecture or surmise.”). Detective Barhight had no direct knowledge of any statements made to Guthrie Sr. Her testimony merely showed that he gave Ms. Enagbare money. In *LaClair v. Silberline Mfg. Co.* (379 Mass. 21, 32 (1979)), the Supreme Judicial Court held that in order to establish the necessary “causal link” to a knowingly false statement, expert testimony “must be based on either the expert's direct personal knowledge, on evidence already in the record or which the parties represent will be presented during the course of the trial, or on a combination of these sources. The evidence did not establish “causal link” to Detective Barhight's conclusion that Ms. Enagbare was conducting “a scam”. *Id.*; (Tr.II.45). Therefore, Detective Barhight's testimony was based on mere speculation.

When circumstantial evidence has allowed for inferences to satisfy the elements of larceny by false pretenses, evidence in such cases included prior conduct. See *Commonwealth v. Edgerly*, 6 Mass. App. Ct. 241, 251-252 (1978), citing *16 *Commonwealth v. Farmer*, 218 Mass. 507, 512-513 (1914) (In a prosecution for larceny by false pretenses, intent as to one act may be inferred from the defendant's having accomplished similar results in other, factually similar instances). Also, evidence of a modus operandi allowed the inference to establish elements of the crime. See *Commonwealth v. Price*, 72 Mass. App. Ct. 280, (2008). In Ms. Enagbare's case, the Commonwealth's evidence did not contain prior conduct or modus operandi. The evidence lacked sufficiency to show that Ms. Enagbare knowingly made a false statement to Guthrie Sr. and such a statement induced him to loan her money.

Even if this Court determines that there was sufficient evidence that Ms. Enagbare's statements were false, the Commonwealth failed to show that the statements induced Guthrie Sr. to give her money. “Larceny by false pretenses requires the permanent taking of property caused by the reliance on the defendant's false statement.” *Commonwealth v. Crocker*, 384 Mass. 353, 356 (1981).

Guthrie Jr's testimony of Ms. Enagbare's statement referencing her income tax returns only showed that it was made to Guthrie Jr. Without *17 evidence that the statement was actually made to Guthrie Sr., the Commonwealth did not establish that he relied on the statement. See *Commonwealth v. Cheromcka*, 66 Mass. App. Ct. 771, 776 (2006) (“The gravamen of [larceny by false pretenses] is that the victim's reliance on the swindler's misrepresentation causes the victim to part with his property.”). See also *Commonwealth v. McCauliff*, 461 Mass. 635, 642 (2012) (“What must be shown is that the false statement caused... the loan, or at least was material to his decision to [give the loan].”). With regard to the statement about a Cape Cod meeting as testified to by John Guthrie, the Commonwealth admitted that Guthrie Sr. never gave Ms. Enagbare any money after she stated such to him. (Tr.II.67). It actually conceded that Guthrie Sr. absolutely did not rely on this statement. *Id.*

Finally, a comparison of the facts in *McCauliff* to Ms. Enagbare's case reveals the Commonwealth's evidentiary deficiencies. The defendant in *McCauliff* was charged with larceny by false pretenses as it related to a loan that he obtained from a colleague. *Id.* at 636. The defendant had stated to the lender that he needed money to clean up a property he owned and prepare *18 it for an imminent sale. *Id.* at 637. Once the lender made a demand for payment, the defendant gave a check to the lender purporting to repay the loan, but the check came from a bank account that had been closed for several months. *Id.* When the check bounced, the defendant could not be found and he did not return the lender's calls. *Id.* at 638.

The Supreme Judicial Court reversed the conviction because “the evidence, considered individually or together, does not furnish a sufficient basis for concluding beyond a reasonable doubt that the defendant knowingly made a false statement.” *Id.* at 639. The Commonwealth did not show a false statement made “at the time [the lender] agreed to make the loan or at the time he actually disbursed the loan funds.” *Id.* at 642. The Court noted that no evidence existed that “the defendant had failed to take any of the steps that often accompany a plan to sell property... No evidence even hinting at the possibility that there was no buyer waiting in the wings... Nor was there any evidence that the defendant did not perform or cause to be performed any cleanup work on the property.” *Id.* at 639-640. The fact that the property never sold and the “seemingly *19 deceptive statements and evasive actions” by the defendant constituted “extremely little evidence to support the inference” that the defendant's statements at the time of the loan were false. *Id.* at 639.

Similar to *McCauliffe*, no evidence existed that supported the Commonwealth's assertion that any statement by Ms. Enagbare was false. As mentioned above, the evidence did not show that Ms. Enagbare had already received her tax return nor did the Commonwealth present evidence that Ms. Enagbare did not have a meeting in Cape Cod. Also, the evidence lacked anything akin to McCauliff's "seemingly deceptive statements" or "evasive actions." *Id* at 639. Even in light of the property not having sold and the defendants assurances of an imminent sale, the McCauliff Court further stated it had "found no case of larceny by false pretenses decided by this court or the Appeals Court in which the verdict of guilt was upheld where the evidence was even close to as slim as it was in this case." *Id* at 643. Given that the Commonwealth presented even slimmer evidence than what was in *McCauliff*, this Court must find that the judge erred by denying Ms. *20 Enagbare's motion for a required finding of not guilty.

II. DETECTIVE BARHIGHT'S TESTIMONY THAT MS. ENAGBARE WAS CONDUCTING A "SCAM" AS WELL AS HER TESTIMONY THAT MS. ENAGBARE BEFRIENDED GUTHRIE SR. WITH THE INTENT OF TAKING HIS MONEY CONSTITUTED REVERSIBLE ERROR BECAUSE IT WAS DETECTIVE BARHIGHT'S OPINION AS TO MS. ENAGBARE'S GUILT.

"Expert testimony is generally admissible whenever it will aid the jury in reaching a decision." *Commonwealth v. Woods*, 419 Mass. 366, 374 (1995). "An opinion within the domain of the expert's professional knowledge may be admissible even if the expert's testimony touched on the ultimate issues before the jury." *Id* at 374-375. "An expert may not, however, offer an opinion as to the defendant's innocence or guilt." *Id*. See also *Commonwealth v. Hesketh*, 386 Mass. 153, 161 (1982); *Commonwealth v. Tanner*, 45 Mass. App. Ct. 576, 579 (1998) ("The only limitation is that the subject matter discussed be within the witness's field of expertise and that the witness not directly express his views on the defendant's guilt.") (emphasis added). An expert witness's testimony should "explain" the evidence to the jury. *Commonwealth v. Tanner*, 45 Mass. App. Ct. at 582. "It is for the jury to reach the ultimate *21 conclusions." *Id*. A police officer's testimony may not cross "the line between touching on an ultimate issue and commenting on the defendant's guilt." *Commonwealth v. Woods*, 419 Mass. at 374.

In Ms. Enagbare's case, Detective Barhight's testimony that Ms. Enagbare was conducting "a scam" and that she "appeared friendly to an elderly man who was lonely, and used that in her advantage to take... over \$100,000" amounted to impermissible expert opinion. (Tr.II.45, 59). It allowed Detective Barhight to "directly express" her view on the "ultimate conclusion" that Ms. Enagbare was guilty. *Commonwealth v. Tanner*, 45 Mass. App. Ct. at 579. *Id* at 582. Both pieces of testimony not only "touched upon the ultimate issue before the jury," it offered the improper opinion that Ms. Enagbare was guilty. *Id* at 374.

At trial, the judge overruled defense counsel's objection to Detective Barhight's improper opinion that Ms. Enagbare "appeared friendly" to Guthrie Sr. with the intent of taking his money. The judge erred in overruling the objection because the detective's opinion substantially influenced the judgment. "Where it cannot be said with assurance that improper [evidence] could not have influenced the jury to *22 convict, the judgment of conviction cannot be preserved." *Commonwealth v. Kelly*, 417 Mass. 266, 272 (1994). See also *Commonwealth v. Peruzzi*, 15 Mass. App. Ct. 437, 445-446 (1983) (If the error substantially influenced or swayed the judgment, the conviction must be reversed); *Commonwealth v. Woods* 419 Mass. 366, 375 (Erroneous officer testimony was harmless error "in light of the strength of the Commonwealth's case."). Allowing Detective Barhight's testimony, however, was not harmless error because it provided the jury with a police officer's ultimate conclusion of guilt and no stronger evidence existed. Thus, it substantially swayed the judgment and improperly prejudiced Ms. Enagbare.

Further, Detective Barhight's characterization that Ms. Enagbare conducted a "scam" created a substantial risk of miscarriage of justice. Even if defense counsel did not preserve the error, the court may reverse the conviction if the error caused "a substantial risk of a miscarriage of justice." *Commonwealth v. Freeman*, 352 Mass. 556, 563-564 (1967). Detective Barhight's conclusory testimony essentially vouched for the Commonwealth's theory of the case that Ms. Enagbare had committed larceny by false *23 pretenses. Thus, there existed a substantial risk of a miscarriage of justice because without such testimony, the Commonwealth lacked sufficient evidence.

Since defense counsel objected to Detective Barhight's testimony that Ms. Enagbare befriended Guthrie Sr. to take his money, the error warranted a harmless error analysis. *Commonwealth v. Woods*, 419 Mass. at 375; (Tr.II.59). Defense counsel did not object, however, to the term "scam."² Thus, a substantial risk of a miscarriage of justice analysis was required. *Commonwealth v. Freeman*, 352 Mass. at 563-564. Regardless, both standards can be met in favor of Ms. Enagbare. As detailed in the argument above, the Commonwealth's case was, at best, substantially less than "strong." See *Commonwealth v. Woods*, 419 Mass. at 375. The elimination of Detective Barhight's erroneous testimony would have made the Commonwealth's unacceptably weak case even weaker. Consequently, the conviction should be reversed.

***24 CONCLUSION**

For the reasons set forth above, the conviction of larceny by false pretenses must be reversed.

Footnotes

- 1 The following references are used throughout: "(R.)" to designate the record appendix which is reproduced in the defendant's brief and "(Tr.)" for the trial transcript, with each reference being followed by the appropriate volume, then page number(s).
- 2 Detective Barhight testified that Ms. Enagbare was conducting "a scheme to steal a substantial amount of money." (Tr.II.59). The word "scheme" was struck upon defense counsel's objection. "Scheme" and "scam" are synonymous. Therefore, "scam" likely would have been stricken had it been objected to.