COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1152

COMMONWEALTH

vs.

DAVID HOMEN.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A jury convicted the defendant, David Homen, on two indictments charging rape of a child under the age of sixteen by force and two indictments charging indecent assault and battery on a child under fourteen. The defendant subsequently filed a motion for a new trial in which he alleged ineffective assistance of trial counsel. In this consolidated appeal from the judgments and from the denial of his new trial motion, the defendant presses only his ineffective assistance claim. We affirm.

Discussion. We review the denial of the defendant's new trial motion for "a significant error of law or other abuse of discretion." Commonwealth v. Bonnett, 472 Mass. 827, 833 (2015), quoting Commonwealth v. Forte, 469 Mass. 469, 488 (2014). "A judge's findings of fact after an evidentiary

hearing on a motion for a new trial will be accepted if supported by the record." Commonwealth v. Walker, 443 Mass. 213, 224 (2005). We extend "special deference" to the motion judge's ultimate decision on an ineffective assistance of counsel claim where, as here, she was also the trial judge. See Commonwealth v. Lane, 462 Mass. 591, 597 (2012).

1. Failure to argue for suppression under New Hampshire law. The defendant contends that trial counsel was ineffective because he argued the motion to suppress the defendant's statements made to Pelham, New Hampshire, police officers under Federal and Massachusetts law instead of New Hampshire law. To prevail on a claim of ineffective assistance of counsel, the defendant must show that "(1) the conduct of his counsel fell 'measurably below that which might be expected from an ordinary fallible lawyer' [performance prong], and (2) this conduct 'likely deprived the defendant of an otherwise available, substantial ground of defence' [prejudice prong]." Commonwealth v. Henry, 88 Mass. App. Ct. 446, 452 (2015), quoting Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). For claims based on failing to raise an argument in a motion to suppress, the defendant must first demonstrate a likelihood that the motion would have been successful. See Commonwealth v. Comita, 441 Mass. 86, 91 (2004). If the motion would have been successful, we then consider whether "we have a serious doubt

whether the jury verdict would have been the same." Commonwealth v. Millien, 474 Mass. 417, 432 (2016).

The question whether New Hampshire or Massachusetts law applied to the defendant's motion to suppress is not straightforward. For example, considering whether Massachusetts law, which was more favorable to the defendant, would apply to a motion to suppress based on the deprivation of a postarrest telephone call by South Carolina police, the court stated broadly, "The legality of the procedures employed by the police forces of other States operating in their own jurisdiction is governed by the law of that jurisdiction." Commonwealth v. Scoggins, 439 Mass. 571, 578 (2003). See Commonwealth v. Williams, 475 Mass. 705, 717 (2016) (declining to apply Massachusetts wiretap statute to suppress recordings made by Connecticut police officers). Yet in seeming contradiction, in a case concerning whether evidence seized pursuant to a warrant in another State was admissible, the court stated that Massachusetts law concerning conflict of law issues in this area "is by no means clear or settled." Commonwealth v. Banville, 457 Mass. 530, 536 n.1 (2010). In dicta, the court discussed four methods other States employ to resolve conflict of law

issues, but ultimately did not decide which one applied. Id. at 536-538 & n.1.[1]

In this case, it is by no means certain that New Hampshire law would apply, or that the defendant would prevail on the performance prong based on counsel's failure to argue New Hampshire law. For the purposes of this appeal, however, we will assume without deciding that New Hampshire law would apply, that a motion to suppress made under New Hampshire law would have been successful, and that an ordinary, fallible lawyer would not have failed to argue New Hampshire law. Nonetheless, we conclude that the defendant failed to establish that he suffered prejudice from counsel's error. See Strickland v. Washington, 466 U.S. 668, 697 (1984) ("a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies").

The audio recordings of the defendant's statements to the New Hampshire police officers did not provide direct evidence of his guilt. One of the statements introduced at trial included

[1] In addition, the Supreme Judicial Court recently granted further appellate review to consider an appeal that raises the question whether Massachusetts or Connecticut law applied to determine whether a suspect was in custody, and therefore entitled to Miranda warnings, when questioned by Connecticut police. See Commonwealth v. Medina, 95 Mass. App. Ct. 1118 (2019), further appellate review granted, 483 Mass. 1102 (2019).

the defendant's admission that he had a drinking problem. These statements merely corroborated the victim's testimony that the defendant frequently smelled like alcohol, including when he sexually assaulted her in her bedroom. In addition, the jury heard that when the police asked the defendant about an incident when he might have gotten into bed with the victim, he volunteered that he knew what they were talking about: an incident when he came into the house drunk and woke the victim sleeping on the couch because he mistook her for her mother. This evidence corroborated the victim's testimony that she had been sleeping on the couch when one of the sexual assaults occurred. The prosecutor also made use of this evidence during closing argument. While the defendant denied at trial that the victim and her mother ever confronted him about the couch incident, the prosecutor suggested it was indicative of the defendant's guilt that he gave the same "quick response" to the police that the victim testified he had made to her and her mother.

The judge concluded, and we do not disagree, that even if the audio recordings had been suppressed, the Commonwealth likely would have been able to use them for impeachment purposes. See Commonwealth v. Mulgrave, 472 Mass. 170, 181-182 (2015); Mass. G. Evid. § 511(d) (2019). The judge rejected the defendant's claim that he would not have testified if the

statements had been suppressed, and we have no basis to disturb this conclusion. After an evidentiary hearing at which trial counsel testified, the judge found that the defendant would have taken the stand regardless of the outcome of the motion because he wanted to assert his innocence and deny the allegations against him. The record supports this finding.

At trial, the defendant contended that he drank only occasionally when he lived with the victim and her mother. The Commonwealth could have used the defendant's statements, albeit only to impeach him, on this point. The defendant also testified that he once woke the victim on the couch, mistaking her for her mother. Although the Commonwealth may not have been able to use the audio recording on this point, the defendant's in-court admission had the same corroborative effect and could have been used to make the same point as the "quick response" argument.

Furthermore, the defendant has not created a serious doubt that the outcome would have been different even if he did not testify and the audio recordings or their equivalent were not admitted. The Commonwealth's case relied on the strength and credibility of the victim's testimony. The victim knew the defendant well: he lived with her, was her mother's boyfriend, and the father of her sister. She testified that the defendant sexually assaulted her while playing "the squishy game," in the

second-floor hallway, and while she was sleeping on the couch. She could see the defendant during these incidents. Although it was dark when the defendant assaulted her in her bedroom, she recognized his voice when he said her name, and she smelled alcohol on his breath. As the judge concluded, "[G]iven the strength of the victim's testimony, the verdict would not have been different if the defendant's statements were excluded."

2. Failure to investigate. The defendant also claims ineffective assistance of counsel based on trial counsel's failure to investigate. Again, we assume without deciding that counsel's failure to investigate was conduct falling measurably below that of an ordinary, fallible lawyer. The judge concluded that while counsel should have conducted an investigation of the two other men the defendant identified as living in the victim's home at the time of the assaults -- Jeremy Jalbert and Ray, Jalbert's mother's boyfriend -- this failure did not deprive the defendant of an otherwise available, substantial ground of defense. We agree.

In assessing the prejudice prong for failure to investigate, we consider whether evidence developed by an investigation would have had a significant impact on the jury's assessment of the evidence and likely would have influenced the jury's decision. See Commonwealth v. Alvarez, 433 Mass. 93, 103 (2000); Commonwealth v. Hampton, 88 Mass. App. Ct. 162, 166

(2015). The defendant argues that he was prejudiced because an investigation would have produced evidence, in addition to his testimony, contradicting the victim's testimony that the defendant was the only adult male present in her home at the time of the assaults and forming the basis for a third-party culprit defense.

At the evidentiary hearing, Jalbert testified that he and his mother resided with the victim's family when he was a child. He could not recall exactly when they lived with the victim, and it may have been after the sexual assaults occurred. He testified that Ray was often present at the house and that Ray had a drinking problem and physically beat Jalbert. Jalbert also stated that Ray would "cat call" young girls, make inappropriate comments, and whistle at them, although Jalbert never observed any unusual interactions between Ray and the victim. Jalbert did once see Ray alone with the victim's much younger sister in a bedroom.

The judge found that Jalbert's testimony would not have been admissible as third-party culprit evidence because it was speculative, of limited probative value, and would have tended to confuse the jury. See Mass. G. Evid. § 403 (2019); Commonwealth v. Silva-Santiago, 453 Mass. 782, 800-801 (2009). The judge also found that even if the evidence had been admitted, it would not have influenced the jury's decision.

Jalbert was uncertain that he and his mother lived with the victim at the relevant time. Moreover, even if Ray, an adult male of questionable character, may have been around the house, the jury were very unlikely to conclude that the victim could not tell the difference between the defendant and Ray. Accordingly, counsel's failure to investigate does not raise "a serious doubt whether the result of the trial might have been different had the error not been made" (citations omitted). Millien, 474 Mass. at 432. The motion judge did not err or abuse her discretion in denying the defendant's motion for a new trial.

The judgments and the order denying the motion for a new trial are affirmed.

So ordered.

By the Court (Massing, Sacks & Hand, JJ.[2]),

Joseph F. Stanton

Clerk

Entered: November 25, 2019.

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