COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-724

COMMONWEALTH

vs.

CRAIG DETHERIDGE.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant appeals from his conviction of rape pursuant to G. L. c. 265, § 22 (b), and the order denying his motion for a new trial pursuant to Mass. R. Crim. P. 30, as appearing in 435 Mass. 1501 (2001). The defendant argues that (1) his counsel at trial was constitutionally ineffective and the trial judge erred by not conducting an evidentiary hearing on his motion for a new trial; and (2) the trial judge erred by admitting evidence pertaining to the defendant's acquitted conduct. We affirm.

Procedural background. On April 27, 2017, a grand jury returned indictments charging the defendant with the rape of three different women, Beth, Julie, and Sarah.[1] On March 7,

[1] Pseudonyms are used to protect the victims' identities in compliance with G. L. c. 265, § 24C.

2018, the defendant filed a motion to sever the indictments, which was denied. At trial, a jury convicted the defendant of one count of rape (Beth) and acquitted him of the other two counts (Julie and Sarah). Thereafter, the defendant filed a motion for a new trial. On June 3, 2020, the trial judge denied the defendant's motion without an evidentiary hearing.

Factual background. 1. Commonwealth's case. The jury could have credited the following facts. On December 29, 2015, Beth and a friend, Karen,[2] traveled to Somerville to visit Julie. On December 31, Beth and Karen accompanied Julie and Julie's boyfriend, the defendant, for drinks before Julie went to work. Beth, Karen, and the defendant continued drinking and later returned to Julie's workplace, where the three shared a marijuana cigarette with a stranger while awaiting the end of Julie's shift. All four then spent the rest of the evening drinking at a nearby bar. When the group decided to leave the bar, Beth closed her tab and later realized that she left her wallet on a bar stool. After retrieving her wallet, Beth began to walk toward the train because she forgot that the group was waiting for an Uber ride. However, she was called over to the Uber vehicle, which she shared with the group, including the defendant. Beth was drunk and disoriented and passed out on the

[2] A pseudonym.

ride. Upon returning to the apartment, Beth got into Julie's bed alone and fell asleep.

Beth next remembered waking as a man pulled her leggings and underwear to the bottom of her buttocks. Beth then, while drifting in and out of consciousness, recalled feeling "hands inside of [her] vagina." She then remembered lying face down on her stomach with the assailant's weight on top of her as she felt a "penis penetrate [her] vagina." Beth was "[t]errified" and was unable to get out from under her assailant. She tried to move away but could not until the assailant's weight was no longer on top of her. Sometime later Beth woke up and saw the defendant to her right and Julie lying on the floor, face down, passed out. Beth then recalled asking the defendant, "Why did you do that?" to which the defendant responded, "Do what?" Beth then "[p]ulled [her] pants up and walked out of the room" to sleep in the living room.

The following morning, Beth told Karen that she wanted to leave and, on the way to the train to depart Boston, told Karen that the defendant had raped her. When Beth and Karen returned home, Beth reported the rape and went to the hospital. At the hospital, Beth was examined, and the evidence collected was sent to the Massachusetts State Police crime laboratory, which obtained a deoxyribonucleic acid (DNA) sample. The parties

stipulated that the DNA sample obtained from Beth matched the defendant's DNA.

Karen called Julie later that day and Julie confronted the defendant and asked him if he had had sex with Beth. The defendant said that he was sorry. Julie asked the defendant to leave and their relationship ended.

The events with Beth caused Julie to recall an experience with the defendant in a different light.[3] Julie had gone to her apartment and did not invite the defendant over. At that time, the defendant was not permitted to come and go from Julie's apartment as he pleased. One night in October 2015, the defendant let himself into Julie's apartment with a key he knew she had hidden outside and Julie awoke to a man on top of her with his penis inside of her vagina. Julie "froze" and "didn't know what to do or think" but then pushed the person off her and realized that it was the defendant. The next day, Julie asked the defendant about it and the defendant told her that she was "overreacting" and "should have liked it."

In January 2016, the defendant resumed living full time in his apartment instead of splitting time between his and Julie's apartments. In June 2016, the defendant and one of his

[3] The jury found the defendant not guilty of the charged rapes of Julie and Sarah. We recite the evidence only to the extent necessary to address the defendant's arguments on appeal.

roommates, Sarah, went to a bar with some friends and then to a friend's nearby apartment. Sarah and the defendant were drinking, Sarah felt "strongly inebriated," and she ultimately vomited multiple times at the apartment. Sarah and the defendant then returned to their shared apartment, where Sarah still felt "very ill" and "very groggy" and went to bed alone. Sarah later awoke and realized that the defendant was in the bed with her, recognizing him by "a very distinctive diamond earring" that he was wearing. The defendant then put his hand down the back of Sarah's underwear and tried to penetrate her vagina with his finger. Sarah felt bewilderment and confusion and was paralyzed with fear. The defendant tried again and inserted his finger into her vagina. Sarah turned so the defendant "couldn't keep his hand in that position" and told the defendant to go to his room, whereupon the defendant left.

2. Defendant's case. The defendant testified and admitted to having intercourse with Beth, claiming that she consented. Specifically, the defendant testified that he was sleeping on the bedroom floor with Julie. After he woke up to use the bathroom, Beth said, "You don't have to sleep down there." When the defendant informed Beth that he did not have a condom, she stated, "It's okay. I'm on birth control."[4] The defendant also

[4] The defendant's testimony about the content of this conversation was admitted only for impeachment purposes.

admitted that the group, including Beth, was drinking heavily the night of the incident and that Beth went to bed because she was feeling unwell. The defendant further testified that Beth was helped upstairs to Julie's apartment because she thought she was going to vomit, and when he checked on her after she went to bed, Beth reported feeling "[n]ot so good."

The defendant also testified that he had no recollection of the incident described by Julie, and he denied having sexual contact with Sarah.

Discussion. 1. Ineffective assistance of counsel. To establish that counsel has been constitutionally ineffective, a defendant must show first that the attorney's conduct fell "measurably below that which might be expected from an ordinary fallible lawyer" and that counsel's shortcoming "likely deprived the defendant of an otherwise available, substantial ground of defence," Commonwealth v. Saferian, 366 Mass. 89, 96 (1974), or otherwise caused the defendant prejudice. Commonwealth v. Mahar, 442 Mass. 11, 15 (2004).

The defendant argues that his counsel at trial rendered ineffective assistance by not suggesting the use of an expert regarding alcohol related memory blackouts. We conclude that the failure to engage such an expert witness did not result in the loss of a substantial ground of defense. See Commonwealth v. Millien, 474 Mass. 417, 432 (2016) ("where counsel was

ineffective for failing to present an available ground of defense, that defense is 'substantial' for Saferian purposes where we have a serious doubt whether the jury verdict would have been the same had the defense been presented").

The defendant pursued a sound strategy at trial: he argued that Beth consented to sex and subsequently fabricated the rape allegations out of regret or remorse. The mere lack of success of this strategy is not grounds for an ineffective assistance of counsel claim. See Commonwealth v. Facella, 478 Mass. 393, 412 (2017). In addition, the strategy the defendant did pursue resulted in acquittal of two of the three rape charges and also allowed him to use Beth's alcohol consumption in defense of the charge related to Julie.

The defendant now contends that the stronger course was to pursue a defense that Beth was experiencing an alcoholic blackout at the time of the incident, but that she still reasonably appeared and acted capable of consent. As an initial matter, the proffered expert affidavit provided no opinion whether the testimony concerning Beth's condition that night was consistent with an alcoholic blackout. See Commonwealth v. Canty, 466 Mass. 535, 541 (2013) ("An expert's opinion is admissible only where an expert possesses scientific, technical, or other specialized knowledge that will assist the jury in understanding a fact in issue, and where the expert has applied

reliable principles and methods to the facts of the case"); Commonwealth v. Barbosa, 457 Mass. 773, 783 (2010), cert. denied, 563 U.S. 990 (2011) (one of foundational requirements for admission of expert testimony is "that the process or theory is applied to the particular facts of the case in a reliable manner"); Masters v. Khuri, 62 Mass. App. Ct. 467, 473 (2004) ("Whether an expert has sufficient knowledge of the particular facts of the dispute to be qualified to render an opinion is in the discretion of the trial court, which will seldom be reversed" [quotation omitted]). See generally Mass. G. Evid. § 702 (2021).

Rather, the expert explained that people experiencing alcoholic blackouts may be able to carry on elaborate conversations and engage in complex goal-directed behavior; however, such persons fail to form memories of their own behavior or events that occurred, either in part (i.e., fragmentary blackouts) or at all (i.e., en bloc blackouts). The expert further explained that should a person repeatedly attempt to recall memories that were never formed as a result of an alcoholic blackout, "it sharply increases the probability of creating a false or distorted memory for the event. Each time this distorted memory is revisited, it is experienced as increasingly real, and this can lead the individual to draw incorrect conclusions about what transpired during the period of

alcoholic blackout." The expert also opined that "[i]t is common for individuals to believe that they had been unconscious, or falling in and out of consciousness, when there is good documentation that they were fully awake during the interval in question, but simply not consolidating their experiences into long-term memory." While this type of generalized expert testimony about the effects of alcohol on memory is permissible, see Commonwealth v. Fernandes, 487 Mass. 770, 782-783 (2021), we discern no prejudice in trial counsel's failure to pursue this defense.

The notion that Beth was experiencing an alcoholic blackout was undercut by her detailed and specific testimony, much of which was corroborated by other witnesses. As the trial judge found, "aside from the conflicting testimony regarding the circumstances to which they had sex, the defendant's testimony closely tracked with the testimony provided by [Beth, Karen, and Julie]." Had the expert testified, he could have been meaningfully challenged based on Beth's detailed testimony about the specifics of the incident at issue as well as the circumstances leading up to and following it. See Commonwealth v. Candelario, 446 Mass. 847, 856 (2006) (no ineffective assistance where proposed expert testimony on effect of defendant's intoxication "could have been rebutted by evidence from the witnesses to the crime and from the defendant's own

statement . . . recounting the crime in detail"). Notably, while the defendant maintained that Beth was awake and invited him to join her in the bed, Beth's testimony that she awoke as a man pulled down her leggings and underwear was consistent with Karen's account that she observed the defendant awake in bed with Beth while she was asleep, after which Karen heard "sexual noises . . . like a lot of rustling around in the sheets."

Even if the jury credited the defendant's testimony that Beth appeared to consent to sexual intercourse and extrapolated from the proposed generalized expert testimony that Beth simply did not remember doing so because of an alcoholic blackout, the expert testimony would have highlighted the issue of Beth's capacity to consent and the defendant's knowledge thereof. Indeed, to the extent the jury accepted that Beth appeared to consent to sex but did not remember because of an alcoholic blackout, that would be strong evidence that Beth was so impaired as to be incapable of consenting to intercourse (and, relatedly, would have undermined the defense of consent actually presented). The jury then would be left to consider whether the Commonwealth proved that "the defendant knew or reasonably should have known that [Beth's] condition rendered her incapable of consenting to the sexual act." Commonwealth v. Blache, 450 Mass. 583, 594 (2008). See Commonwealth v. Jansen, 459 Mass. 21, 30 (2011) ("If a complainant is 'wholly insensible so as to

be incapable of consenting,' and the defendant is aware of the complainant's incapacitated state, the element of lack of consent is satisfied" [citations omitted]). Here, the defendant testified that Beth "didn't feel well," and that "[Julie] and [Karen] helped [Beth] upstairs because she thought that she was going to vomit and was kind of hurled over." While the defendant testified that his consensual sexual encounter with Beth occurred "many hours later," that contention was belied by his own testimony that Beth invited him into bed and initiated sex with him between two hours and fifteen minutes and three hours and fifteen minutes after she was escorted to bed by her friends.[5] The defendant also testified that during that time span, he checked on Beth who reported feeling "[n]ot so good," that he had "some basic medical training," and that he checked on Beth because he understood "that sometimes when people fall asleep drunk, they can asphyxiate on their own vomit."

Given that any contention Beth was suffering from an alcoholic blackout at the time of the incident was vulnerable to challenge based on Beth's and the other witnesses' detailed and consistent testimony and the evidence that even if Beth was

[5] Specifically, the defendant testified that: Beth went to bed at 1:45 A.M.; the defendant went to sleep on the floor of Julie's bedroom around 3:30 or 3:45 A.M.; and the defendant woke up to use the bathroom at 4 or 5 A.M., at which point Beth invited him into the bed and initiated sex.

suffering from an alcoholic blackout, the defendant either knew or reasonably should have known that Beth lacked capacity to consent, we are not left with serious doubt whether the jury verdict would have been the same had the proposed defense been presented. There was no abuse of discretion in the denial of the defendant's motion for a new trial on this ground.

We also conclude that the trial judge committed no error of law or abuse of discretion by denying the defendant's motion for a new trial without holding an evidentiary hearing. The judge accepted the content of the expert affidavit, as do we. While the defendant argues that an evidentiary hearing would have provided information that the trial judge lacked from merely reading the proposed expert's affidavit, he points to no concrete evidence or information that the judge lacked. The defendant therefore has not shown that "holding a hearing [would] add anything to the information . . . presented in the motion and affidavits." Commonwealth v. Goodreau, 442 Mass. 341, 348 (2004). To the extent that the defendant's argument about his motion for a new trial relies on the alleged deficient performance of counsel, we have addressed that issue above.

2. Other bad acts evidence. The defendant argues that the trial judge erred in allowing evidence concerning the defendant's acquitted conduct and that we should extend the rule from Commonwealth v. Dorazio, 472 Mass. 535 (2015), that

"collateral estoppel protections necessarily embraced by art. 12 warrant the exclusion of . . . acquittal evidence in . . . subsequent criminal proceeding[s] involving alleged unlawful sexual conduct with minors." Id. at 547. We decline to do so.

The defendant was charged with raping three women whom he knew to be incapacitated by sleep, intoxication, or both. Here, unlike in Dorazio, all three charges against the defendant were tried together, thus the evidence concerning the two acquitted counts of rape was not used in a "subsequent" criminal proceeding. Id., 472 Mass. at 547. We therefore conclude that the trial judge committed no error of law or abuse of discretion in allowing the jury to consider evidence relating to the defendant's (ultimately) acquitted conduct and decline to extend Dorazio. Furthermore, the trial judge provided a limiting instruction that the jury "may not consider evidence of the other two alleged offenses to prove that the defendant has a reputation or propensity to commit the indicted offense" and we presume that the jury followed that instruction. See

Commonwealth v. Cheremond, 461 Mass. 397, 414 (2012).

Judgment affirmed.

Order denying motion for new trial affirmed.

By the Court (Henry, Sacks & Singh, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: September 7, 2021.

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