COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-741

COMMONWEALTH

vs.

HENRY E. HOUGHTON.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Convicted in 1982 of five counts of forcible rape of a child, G. L. c. 265, § 22A, and related crimes,[1] the defendant appeals from the denial of his motion for a new trial, arguing that the judge abused his discretion by failing to hold an evidentiary hearing before ruling, and that the results of DNA testing on certain trial exhibits cast doubt on the justice of his convictions. We affirm the denial of the motion for a new trial.

Background. In 2015, a Superior Court judge allowed the defendant's motion, pursuant to G. L. c. 278A, § 3, for

[1] The defendant was also convicted of one count of kidnapping, G. L. c. 265, § 26; two counts of assault and battery by means of a dangerous weapon, G. L. c. 275, § 15A (b); four counts of assault with intent to commit rape, G. L. c. 265, § 24; and one count of assault and battery, G. L. c. 265, § 13A.

postconviction forensic testing on certain trial exhibits: a quilt[2] (trial exhibit 14) and four beer bottles (trial exhibits 12a-12d). Based on the results of the testing, the defendant moved for a new trial, his fifth such motion. Another Superior Court judge (motion judge) denied the defendant's motion without an evidentiary hearing. The defendant now appeals.

The facts of the crimes are set forth in Commonwealth v. Houghton, 39 Mass. App. Ct. 94, 95-97 (1995), and need not be repeated here. The jury heard evidence that the defendant ejaculated in the victim's mouth, and she spat out his ejaculate. They also heard evidence that chemical analysis on the quilt revealed seminal fluid residue and sperm cells. The beer bottles were recovered from the outdoor scene the day after the crimes.

Results of forensic testing in 2017 by Bode Cellmark Forensics (Bode) on the quilt revealed a mixture of deoxyribonucleic acid (DNA), of which the portion from the major contributor matched the defendant's DNA, and the portion from the minor contributor was so small that no conclusion could be reached as to its source. As to the beer bottles, three of them bore a mixture of at least two individuals' DNA, but in such a

[2] At trial the item was referred to as a "quilt" or a "blanket"; the 2017 forensic report calls it a "blanket."

small amount that "no conclusions can be made." On the fourth beer bottle, no DNA was detected.

Discussion. The defendant argues that the results of the DNA testing on the quilt and beer bottles are newly discovered evidence, and the motion judge erred in denying the motion for a new trial without first holding an evidentiary hearing at which the defendant's expert would have testified to his interpretation of Bode's test results.

"In reviewing the denial or grant of a new trial motion, we 'examine the motion judge's conclusion only to determine whether there has been a significant error of law or other abuse of discretion.'" Commonwealth v. Weichell, 446 Mass. 785, 799 (2006), quoting Commonwealth v. Grace, 397 Mass. 303, 307 (1986). A judge may decide a motion for a new trial without an evidentiary hearing "if no substantial issue is raised by the motion or affidavits." Mass. R. Crim. P. 30 (c) (3), as appearing in 435 Mass. 1501 (2001). See Commonwealth v. DiBenedetto, 458 Mass. 657, 664 (2011). Rule 30 (c) (3) "encourages the denial of a motion for a new trial on the papers, without hearing, where no substantial issue is raised." Commonwealth v. Gordon, 82 Mass. App. C. 389, 394 (2012). "'Although the motions and supporting materials filed by a defendant need not prove the issue raised therein, they must at least contain sufficient credible information to cast doubt on

the issue' in order to create a substantial issue." Commonwealth v. Barry, 481 Mass. 388, 401 (2019), quoting Commonwealth v. Denis, 442 Mass. 617, 628 (2004).

The motion judge weighed the credibility of competing affidavits from the defendant's expert and from the Commonwealth's expert, a forensic scientist at the State police crime laboratory. In considering the credibility of competing affidavits from experts, a judge has discretion to "consider whether holding a hearing will add anything to the information that has been presented in the motion or affidavits." Commonwealth v. Goodreau, 442 Mass. 341, 348 (2004). "If the theory of the motion, as presented by the papers, is not credible or not persuasive, holding an evidentiary hearing to have the witnesses repeat the same evidence (and be subject to the prosecutor's cross-examination further highlighting the weaknesses in that evidence) will accomplish nothing." Id. at 348-349.

To succeed on his motion for a new trial, the defendant was required to establish "both that the evidence is newly discovered . . . and that it casts real doubt on the justice of the conviction" (citation omitted). Commonwealth v. Bonnett, 482 Mass. 838, 844 (2019). As to the first prong, the Commonwealth argues that the evidence is not newly discovered because, although DNA testing was not available at the time of

trial in 1982, it was available when he filed prior motions for new trials in 1998 and 2002. See Mass. R. Crim. P. 30 (c) (2), as appearing in 435 Mass. 1501 (2001). See also Commonwealth v. Ellis, 475 Mass. 459, 472 (2016). We need not pause to consider that argument because we conclude, as the motion judge did, that even if the DNA test results were newly discovered evidence, they did not cast real doubt on the justice of the conviction. See Barry, 481 Mass. at 405-406 (newly discovered evidence was "inconsequential to the outcome of the trial").

From the quilt, two stains were tested for DNA. In the first stain, the defendant's DNA partially matched the DNA in epithelial cells. The second stain contained a mixture, in which the defendant's DNA partially matched the DNA of the major contributor in both sperm and epithelial cells. As to the minor contributor to that second stain, the testing reached no conclusion due to the small size of the sample. The defendant argues that the absence of female DNA in that second stain contradicts the victim's testimony that she spat the defendant's ejaculate onto the quilt. However, the motion judge concluded that "the far more important evidence was the presence of the defendant's semen on the [quilt]."[3] See Commonwealth v. Laguer,

[3] At trial, the defendant testified that the quilt belonged to the mother of the victim's friend, and any seminal fluid or sperm on it was not his.

89 Mass. App. Ct. 32, 36-37 (2016) (inculpatory postconviction DNA evidence did not cast doubt on conviction). Cf. Commonwealth v. Ferreira, 481 Mass. 641, 651-652 (2019) (crime laboratory's posttrial revision of protocol for calculating probability that defendant contributed DNA to mixture made test results "less damaging, but not exculpatory").

In considering the defendant's argument that the lack of female DNA on the quilt cast doubt on the credibility of the victim's trial testimony that she spat the defendant's ejaculate onto the quilt,[4] the motion judge credited the affidavit of the State police crime laboratory forensic scientist, which averred that if what the victim spit onto the quilt "consisted mostly of the ejaculate, it is possible to not detect the female contribution to that mixture," and that incomplete data should not be used for comparison, especially as to samples containing a mixture. The motion judge also concluded that the jury would

[4] The victim's testimony is arguably ambiguous as to whether she meant that she spat the ejaculate on the quilt, or merely that she was on the quilt when she spat the ejaculate:

Defense counsel: "So you were [l]ying on the quilt?"

Victim: "Uh-huh."

Defense counsel: "And did you spit up on the quilt?"

Victim: "Yuh."

Defense counsel: "That's what you were on?"

Victim: "Yuh."

have been warranted in finding that the victim's statement to police within hours of the rapes that she spat the ejaculate out of the car window was "more accurate" than her trial testimony that she spat the ejaculate onto the quilt.[5] Of course, the victim's spitting in one place would not preclude her from spitting in another. The motion judge did not abuse his discretion in finding that the DNA test results on the quilt would not have made a difference in the case.

On three of the beer bottles, there was so little DNA that the Bode report made "no conclusions."[6] The defendant argues that the motion judge should have credited his expert's opinion, based on DNA test results that fell below the threshold

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[5] To the extent that the defendant argues that the motion judge improperly considered for its truth the victim's written statement that she spat out the car window because it was admitted at trial only as fresh complaint evidence, that argument is unavailing. The defendant introduced that document into evidence on cross-examination of the victim, and did not object to its admission. He did object when the prosecutor later asked a police detective to read it aloud, but the judge overruled the objection, as it was in his discretion to determine how and when an exhibit admitted in evidence would be placed before the jury. See Commonwealth v. Flynn, 362 Mass. 455, 468 (1972). The judge did not give any limiting instruction as to that exhibit, nor did the defendant request one. Thus, it was admitted for its truth. See Commonwealth v. Jones, 439 Mass. 249, 261 (2003). Cf. Commonwealth v. Lester, 486 Mass. 239, 253-254 (2020) (requiring counsel to request limiting instruction at time of admission of prior inconsistent statement).

[6] On the fourth beer bottle, there was not enough DNA even to obtain a profile. The affidavit of the defendant's expert did not contradict that finding.

considered reliable by laboratories, that DNA on those three beer bottles did not match the defendant's DNA at "multiple loci." The affidavit of the State police crime laboratory forensic scientist explained that the DNA test results from the three beer bottles fell below those threshold levels and were not reliable. The motion judge found that the analysis of the defendant's expert was "fundamentally flawed" because he "deviated from standard scientific practice by lowering the laboratory-set threshold for interpreting DNA testing results." See Commonwealth v. DiCicco, 470 Mass. 720, 721 (2015) (motion judge did not abuse discretion in excluding below-threshold analysis of defendant's expert). Although the affidavit of the defendant's expert averred that recommendations for using below-threshold DNA have "changed over time" and "there are still laboratories where this [analysis] is done," it did not provide the judge with support for those claims. See id. at 732 (motion judge properly discredited affidavit of DNA expert who did not "supply the judge with written guidelines" from DNA laboratories that relied on below-threshold DNA). Therefore, the motion judge did not abuse his discretion by discrediting the opinion of the defendant's expert based on below-threshold results of DNA testing on the beer bottles. Moreover, because the jury heard testimony at trial that no forensic evidence linked the defendant to the beer bottles, the expert's opinion that the

defendant's DNA did not match the DNA on the bottles would not add anything to impeach the credibility of the victim's testimony that the defendant drank from the beer bottles.

We conclude that the motion judge did not abuse his discretion in denying the defendant's fifth motion for a new trial without an evidentiary hearing.[7] The results of DNA testing on the quilt and beer bottles would not have made a difference in the case.

Order denying motion for new trial affirmed.

By the Court (Desmond, Sacks & Grant, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: October 19, 2021.

[7] Because we conclude that the judge properly declined to conduct an evidentiary hearing, we need not consider the defendant's claim that his expert would have been qualified to testify as an expert in DNA analysis at such a hearing.

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