

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-308

COMMONWEALTH

vs.

JOHN E. DUTCHER.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant appeals from the denial of his latest motion for a new trial.¹ He argues that (1) there was structural error

¹ After a 1989 jury trial, the defendant was found guilty of aggravated rape, G. L. c. 265, § 22 (a), aggravated burglary, G. L. c. 266, § 14, and assault and battery, G. L. c. 265, § 13A. His convictions were affirmed by this court. Commonwealth v. Dutcher, 32 Mass. App. Ct. 1108 (1992). The order denying his first motion for a new trial was affirmed by this court. Commonwealth v. Dutcher, 81 Mass. App. Ct. 1115 (2012). There, he argued that the eyewitness identification at trial was unreliable and also pursued a claim for postconviction discovery of scientific evidence. In his second motion for a new trial, which was also denied, the defendant raised other motions for postconviction relief, including a motion for a corrected mittimus on another case and a motion to vacate and resentence in this case, arguing that the charges were duplicative. This court rejected those arguments. Commonwealth v. Dutcher, 90 Mass. App. Ct. 1115 (2016). The defendant filed another motion for a new trial, which was also denied. On appeal from the denial of that motion, the defendant argued "that he was entitled to a new trial on multiple grounds: a police officer falsely testified before the grand jury, the Commonwealth failed to provide exculpatory evidence at trial, his trial counsel and appellate counsel were constitutionally ineffective, and the trial judge failed to provide the jury with

because he did not attend a pretrial conference; (2) his conviction for aggravated rape should have been dismissed as a lesser included offense of aggravated burglary; (3) the Commonwealth was somehow relieved of its burden to prove every element of the crimes charged because his counsel conceded at trial that the crimes had occurred, and pursued only a defense of misidentification; (4) the government lost key evidence, denying him due process on direct appeal and collateral review; (5) the victim's "one-on-one" identification violated his rights under the Fourteenth Amendment to the United States Constitution; (6) he was unfairly denied an alibi instruction in the trial judge's final instructions to the jury due to his counsel's failure to notify the Commonwealth of his alibi defense; (7) the government failed to investigate the crime scene properly, depriving him of a third-party defense; (8) certain testimony he describes as "bad acts" testimony violated a ruling on a motion in limine and created a miscarriage of justice; (9) the prosecutor improperly vouched for the victim's

instructions on fresh complaint testimony. Discerning no abuse of discretion or other error," we affirmed. Commonwealth v. Dutcher, 92 Mass. App. Ct. 1129 (2018). That appeal was pending in this court when the motion judge entered her findings and the defendant filed his brief in this matter.

In addition, the defendant filed a motion challenging his guilty plea on an unrelated case and his commitment as a sexually dangerous person. The denial of those motions also was affirmed by this court. Commonwealth v. Dutcher, 69 Mass. App Ct. 1104 (2007).

credibility; and (10) he was denied effective assistance of counsel at trial and on appeal. We affirm, essentially for the reasons well explained by the motion judge.

Discussion. Because this appeal originates from the denial of a motion for new trial, "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. Brescia, 471 Mass. 381, 387 (2015), quoting Commonwealth v. Wright, 447 Mass. 447, 461 (2014). We see neither. Each of the claims in the defendant's motion either has been waived for failure to raise it at trial, on direct appeal, or in a prior motion for new trial, or else it is directly estopped as it previously was adjudicated on its merits. See Mass. R. Crim. P. 30 (b) and (c) (2), as appearing in 435 Mass. 1501 (2001); Commonwealth v. Ellis, 475 Mass. 459, 476 (2016); Commonwealth v. Morganti, 467 Mass. 96, 101-102, cert. denied, 135 S. Ct. 356 (2014); Commonwealth v. Chase, 433 Mass. 293, 297 (2001).

"If a motion for a new trial rests on an unpreserved claim of nonconstitutional error, a new trial should be granted only if the defendant demonstrates a 'substantial risk of a miscarriage of justice,' Commonwealth v. Childs, 445 Mass. 529, 530 (2005), namely, 'a serious doubt whether the result of the trial might have been different had the error not been made.'

Commonwealth v. Randolph, 438 Mass. 290, 297 (2012)." Brescia, 471 Mass. at 389.

"The rule of waiver 'applies equally to constitutional claims which could have been raised, but were not raised' on direct appeal or in a prior motion for a new trial."

Commonwealth v. Roberts, 472 Mass. 355, 359 (2015), quoting Commonwealth v. Watson, 409 Mass. 110, 112 (1991). "A defendant generally may not raise any ground in a motion for a new trial that could have been, but was not, raised at trial or on direct appeal. Commonwealth v. Pisa, 384 Mass. 362, 366 (1981), and cases cited. This requirement ensures the finality of convictions by eliminating piecemeal litigation, which would 'unfairly consume public resources without any corresponding benefit to the administration of justice.' Id. It is neither unreasonable nor unduly burdensome to require a defendant to advance his contentions, even those with constitutional ramifications, at the first opportune time. Murch v. Mottram, 409 U.S. 41, 45 (1972). 'We cannot retry every criminal [case] on the basis of what might have been.' Commonwealth v. Stout, 356 Mass. 237, 243 (1969). Thus, even when a claim is one of constitutional dimension, a defendant who has had a fair opportunity to raise it may not 'belatedly invoke that right to reopen a proceeding that has already run its course.'
Commonwealth v. Amirault, 424 Mass. 618, 639 (1997)." Chase,

433 Mass. at 297. See Morganti, 467 Mass. at 101-102 ("structural error is subject to the doctrine of waiver" [quotation omitted]).

Further, under the principle of direct estoppel, arguments that previously were raised, and adjudicated, cannot be reheard. See Ellis, 475 Mass. at 475, quoting Commonwealth v. Rodriguez, 443 Mass. 707, 709-710 (2005) ("where a defendant 'raises no new factual or legal issue' in a motion under Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 [2001], and simply seeks to relitigate a motion that was previously denied by the motion judge and rejected on appeal, 'principles of direct estoppel operate as a bar to the defendant's attempt in [the] rule 30 [b] motion to relitigate issues'").

A. Waived claims. 1. Failure to attend pretrial conference. The defendant contends his failure to attend a pretrial conference on July 6, 1987, was structural error that violated his due process rights and automatically requires a new trial. He argues also that his counsel was ineffective because the defendant was not made aware of the conference. Neither claim was raised on direct appeal nor in prior motions for new trial. As a result, those claims are waived. Further, we see no risk of a miscarriage of justice from the defendant's absence at the pretrial conference. There is no offer of proof to substantiate his claim that he was "excluded" from the

conference. Nor are we persuaded that his presence at the conference would have altered the outcome of the trial.

2. Concession by counsel at trial that the crimes occurred. The defendant argues that defense counsel was ineffective when he conceded that the burglary and rape had occurred. This argument also is waived. Moreover, the motion judge determined that defense counsel "vigorously argued" misidentification, the defendant's theory at trial. We cannot say that that strategy was unreasonable at the time, or that the concession reduced the Commonwealth's burden to prove that the defendant in fact committed the crimes. Further, the trial judge specifically instructed the jury that the Commonwealth must prove, beyond a reasonable doubt, that the defendant committed the crimes charged. The defendant has given us no reason to believe that, had trial counsel not conceded that the crimes occurred, the outcome would have been different.

3. Deoxyribonucleic acid (DNA) testing. The defendant also claims that his due process rights were violated because the Commonwealth lost key evidence -- DNA on the victim's clothes -- which he asserts could have exonerated him. Because this is the first time this issue has been raised, it too is waived. In addition, a laboratory report from 1987 stated that no seminal fluid was detected on the victim's shirt or underwear. Therefore, we see no reason to conclude that "the

result of the trial might have been different had the [alleged] error not been made." Brescia, 471 Mass. at 389.

4. Alibi instruction. The defendant's contention at trial was that he was at his brother's house during the burglary and rape. He now argues, for the first time, that trial counsel was ineffective for failing to request an alibi instruction. Again, this claim is waived. See Commonwealth v. Phinney, 446 Mass. 155, 167-168 (2006) ("defendant's claim of ineffective assistance of counsel [concerning failure to object to jury instructions] was not raised in his direct appeal and therefore was waived, subjecting it to review solely for a substantial risk of a miscarriage of justice on appeal"). See also Commonwealth v. Robinson, 480 Mass. 146, 152 (2018) ("Cases noting that a defendant also failed to raise the claim in his or her first motion for a new trial or on direct appeal only serve to emphasize the egregiousness of the defendant's delay in raising the claim").

Further, "it cannot be counted a mistake to omit the [alibi] charge, if it is otherwise made clear that the burden of showing that the defendant was present at the time and place, and thus capable of committing the crime, remains on the Commonwealth." Commonwealth v. Knight, 437 Mass. 487, 499 (2002), quoting Commonwealth v. Medina, 380 Mass. 565, 579 (1980), S.C., 430 Mass. 800 (2000).

5. Prior bad act testimony. The defendant argues for the first time that he was prejudiced by the admission of what he describes as prior bad act testimony, from a witness (other than the victim), who testified that she had "good reason" to hate him. The argument is waived. Further, we see no risk of a miscarriage of justice because the witness's admitted bias was used by trial counsel on cross-examination to undermine her credibility. Arguably, the statement resulted in a tactical trial advantage for the defendant, and we are not persuaded that the statement's omission would have changed the trial's outcome.

6. Prosecutor's vouching for victim's credibility. In closing argument, the prosecutor argued that the victim should be believed because she never wavered in her identification of the defendant and she was not shaken on cross-examination. The defendant contends, again for the first time, that these statements constituted improper vouching. This claim is waived.

In addition, we see no error. "A prosecutor engages in improper vouching if he or she 'expresses a personal belief in the credibility of a witness, or indicates that he or she has knowledge independent of the evidence before the jury.'"

Commonwealth v. Martinez, 476 Mass. 186, 199 (2017), quoting Commonwealth v. Wilson, 427 Mass. 336, 350 (1998). Here, however, the prosecutor's statements reasonably represented the evidence at trial. See Martinez, supra ("A prosecutor properly

may comment on and urge the jury to draw inferences from the trial evidence, Commonwealth v. Chavis, 415 Mass. 703, 713 [1993], and may state logical reasons based on inferences from the evidence why a witness's testimony should be believed").

7. Reasonable doubt instruction. The defendant argues that the reasonable doubt instruction was erroneous because it included the term "moral certainty." This argument, too, is waived. In addition, "the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof." Commonwealth v. Veiovis, 477 Mass. 472, 489 (2017). We agree with the motion judge that, in 1989, when the defendant was tried, the Webster charge was the "gold standard" for instructions on reasonable doubt. Commonwealth v. Webster, 5 Cush. 295, 320 (1850). See Commonwealth v. Russell, 470 Mass. 464, 477 (2015) (setting out for use "going forward" "uniform instruction on proof beyond a reasonable doubt that uses more modern language, but preserves the power, efficacy, and essence of the Webster charge"). We see no error.

B. Directly estopped claims. 1. Lesser included offenses. The defendant argues again that aggravated rape is a lesser included offense of aggravated burglary, and that therefore he could not be sentenced on both charges. This

argument already has been rejected by this court. Commonwealth v. Dutcher, 90 Mass. App. Ct. 1115 (2016). See note 1, supra.

2. Unnecessarily suggestive photographic array. The defendant also argues that the victim's identification of him as her attacker was unnecessarily suggestive and should have been suppressed, and that trial counsel "was ineffective for failing to move the court for a suppression hearing before trial." As a preliminary matter, we note that defense counsel apparently did, in fact, move to suppress the identification and that an evidentiary hearing was conducted.

In addition, in an earlier motion for a new trial, the defendant argued that the victim's identification was unreliable because she initially selected a different individual from a photographic array. Commonwealth v. Dutcher, 81 Mass. App. Ct. 1115 (2012). For this reason, the motion judge concluded the defendant was precluded from making this argument. We agree and, even if he were not so precluded, there was no error.

It appears that the defendant's present argument is that "[t]here were only two persons present at this 'identification event.'" That is, because only one police officer was present to show the victim the array, the array was "one-on-one" and therefore unnecessarily suggestive. This is not what the cases mean by a "one-on-one" identification process. Compare Commonwealth v. Crayton, 470 Mass. 228, 235 (2014) ("We have

applied the 'unnecessarily suggestive' standard to showup identifications, where the police show a suspect to an eyewitness individually rather than as part of a lineup or photographic array"). See Commonwealth v. Silva-Santiago, 453 Mass. 782, 797 (2009). Furthermore, before the victim was provided with the eight-picture array, she had examined over 1,000 pictures of white males. Even having in mind recent case law on eyewitness identification, which, for the most part would not apply to the defendant, we see no error and certainly no risk of a miscarriage of justice.

3. Bowden instruction. The defendant now argues that the trial judge failed to give a requested Bowden instruction.² Commonwealth v. Bowden, 379 Mass. 472, 485-486 (1980). This issue, too, was addressed and rejected previously. Dutcher, 81 Mass. App. Ct. 1115. The defendant is precluded from raising the issue again. In any event, whether to provide a Bowden instruction is discretionary with the trial judge, so long as the trial judge does not foreclose the jury from considering the details of the police investigation. See Commonwealth v. Issa, 466 Mass. 1, 21 n.26 (2013), quoting Commonwealth v. Perez, 460 Mass. 683, 692 (2011) ("We have often stated that, so long as the judge does not 'remove issues of inadequacy of a police


² We note that there was no objection at trial.

investigation or lack of evidence from the jury's consideration . . . a judge is not required to instruct on the claimed inadequacy of a police investigation").

We see no error or abuse of discretion in the motion judge's thorough findings and conclusions.³

Order dated February 17, 2018, denying defendant's motion for new trial affirmed.

By the Court (Vuono, Hanlon & Shin, JJ.⁴),


Clerk

Entered: August 30, 2019.

³ "To the extent we have not explicitly discussed them, we have carefully considered the defendant's remaining arguments, and we find them to be without merit." Commonwealth v. Silva, 93 Mass. App. Ct. 609, 619 n.8 (2018).

⁴ The panelists are listed in order of seniority.