THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case Nos. 2007-0047 & 2007-0813, State of New Hampshire v. Matthew Collanzo, the court on February 23, 2009, issued the following order:

The defendant, Matthew Collanzo, appeals his convictions for aggravated felonious sexual assault, robbery, kidnapping, falsifying physical evidence, and misdemeanor sexual assault. He argues that the trial court erred in: (1) denying his motion for discovery of police reports in an ongoing investigation in which he was a suspect (2003 cases); (2) denying his motion to suppress; (3) admitting evidence of DNA testing through the DNA analyst's supervisor; and (4) denying his motion for a new trial or, in the alternative, discovery. We affirm.

We will affirm the trial court's discovery ruling absent an unsustainable exercise of discretion. State v. Fox, 150 N.H. 623, 624 (2004). To establish that a ruling is unsustainable, the defendant must demonstrate that it was clearly unreasonable or untenable to the prejudice of his case. Id.

The defendant argues that because the reports were cited in the affidavit supporting the State's application for a search warrant, he needed them: (1) to determine whether the affidavit contained material misrepresentations; (2) to assess potential defenses; and (3) to avoid unwittingly opening the door to unknown evidence.

The defendant does not argue that the reports contained exculpatory information. He concedes that the State represented that it did not intend to introduce evidence of the 2003 cases. To the extent that he sought the information to challenge the validity of the search warrant, we note that the evidence obtained was limited to hair samples and a plastic tube. To the extent that he argues that the reports would assist him in assessing the strength of an overly zealous prosecution defense, we note that the affidavit provided information about the continuing investigation of the 2003 cases. We are not persuaded that the State was required to provide its files to a suspect in an ongoing investigation simply because it had charged him with other later occurring offenses. Nevertheless, even if we assume without deciding that the trial court erred in denying the defendant's motion for discovery, we conclude that any error was harmless. See State v. Deschenes, 156 N.H. 71, 80 (2007) (State bears burden of proving that error is harmless beyond reasonable doubt; error may be harmless if inadmissible evidence is merely cumulative or inconsequential in relation to State's evidence of guilt). In this case, the alternative evidence included: (1) the victim's identification of the defendant and

description of his accent and clothing; (2) the odds that DNA evidence obtained matched another Caucasian other than the defendant were estimated at one in 7.1 quadrillion; and (3) the defendant and his girlfriend gave false alibis to the police, see State v. Bean, 153 N.H. 380, 387 (2006) (falsehood uttered to avoid suspicion relevant to show consciousness of guilt).

The defendant next argues that the trial court erred in denying his motion to suppress any evidence obtained as a result of police observations of his girlfriend's vehicle. We will assume without deciding that the observations were made while the vehicle was parked within the curtilage of the defendant's residence. See State v. Johnston, 150 N.H. 448, 452 (2004) (curtilage questions are fact sensitive). The trial court found that: (1) the defendant lived in a multi-unit apartment building with an adjacent parking lot with space for approximately ten vehicles; (2) there were no gates blocking entrance to the lot and no other signs restricting access to it; and (3) the lot was clearly visible to the officers from the street; their view was unobstructed by any trees or shrubbery. That the police made their observations at night and that the windows of the vehicle were tinted do not affect our conclusion that the defendant had no reasonable expectation of privacy in a vehicle parked in the multi-space lot. See State v. Goss, 150 N.H. 46, 48-49 (2003) (adopting reasonable expectation of privacy analysis to review search and seizure issues raised under State Constitution).

The defendant also argues that the trial court erred by admitting evidence of mitochondrial testing through the DNA analyst's supervisor. We will assume without deciding that the issue framed on appeal has been preserved for our review. The challenged testimony was limited to hairs, identified as having the same mDNA as the victim, which were found in the car used by the defendant to commit the charged offenses. Given the previously cited alternative evidence of the defendant's guilt, we conclude that any error was harmless.

The defendant's final argument is that the trial court erred in denying his motion for new trial. Whether newly discovered evidence requires a new trial is a question of fact for the trial court; we will sustain its decision unless it is clearly unreasonable. State v. Cossette, 151 N.H. 355, 361 (2004). To prevail on a motion for a new trial based upon newly discovered evidence, the defendant must prove that: (1) he was not at fault for failing to discover the evidence at the prior trial; (2) the evidence is admissible, material to the merits and not cumulative; and (3) the evidence is of such a character that a different result will probably be reached upon another trial. Id.

In support of his request for a new trial, the defendant cited both newly discovered evidence and exculpatory evidence. The newly discovered evidence concerned the ability of the New Hampshire State Police Laboratory (lab) to

provide a copy of its data in electronic form; the exculpatory evidence concerned the results of a proficiency test taken by a lab employee who later testified at trial.

We turn first to the electronic data. We agree with the trial court's detailed analysis supporting its denial of the motion, which we briefly summarize: (1) the defendant sought the evidence to impeach the credibility of a witness from the lab; (2) the witness did not conduct the relevant DNA analysis; (3) the analyst who conducted the DNA testing was extensively cross-examined; (4) the nature of the raw data was not of such a nature that it would produce a different result upon retrial; and (5) the trial court had previously granted the defendant's motion to preserve the DNA evidence; ninety percent of the sample remained but the defendant never sought to perform independent tests.

The defendant also argues that the State's failure to provide exculpatory evidence also required that his motion for new trial be granted. Generally, a defendant must prove that the State withheld evidence that is both favorable and material to obtain a new trial. State v. Dewitt, 143 N.H. 24, 33 (1998). Favorable evidence includes that which is admissible, likely to lead to the discovery of admissible evidence or otherwise relevant to the preparation or presentation of the defense. Id. The withheld evidence is material only if there is a reasonable probability that the result of the trial would have been different if the evidence had been disclosed to the defendant. Id. If the defendant establishes that the State knowingly withheld favorable evidence, the burden shifts to the State to prove beyond a reasonable doubt that the evidence would not have affected the verdict. Id.; see State v. Lucius, 140 N.H. 60, 63 (1995) (duty to disclose potentially exculpatory evidence in possession of State Police imputed to prosecutor).

In this case, the trial court found that an unsatisfactory, undisclosed proficiency test result received by the lab witness was exculpatory and knowingly withheld. The court further found that: (1) the undisclosed evidence was only minimally probative of the witness's credibility; (2) the witness's testimony was not crucial to the State's case; and (3) the evidence did not "directly call into question the DNA results." These findings are supported by the record. Accordingly, we affirm the ruling of the trial court.

Affirmed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

Eileen Fox,
Clerk