State of New York
Court of Appeals

MEMORANDUM

No. 25
The People &c.,
Respondent,
v.
Nicholas Brooks,
Appellant.

Susan C. Wolfe, for appellant.
David M. Cohn, for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed.

Following a jury trial, defendant was convicted of second-degree murder (Penal Law § 125.25 [1]) for killing his girlfriend in a Manhattan hotel room. The victim, partially clothed, was found fully submerged in an overflowing bathtub. Forensic testing showed defendant's DNA on a bathtub fixture. The autopsy revealed signs of strangulation and

fluid in the victim's lungs, indicating that she had been trying to breathe while under water. The Chief Medical Examiner ultimately concluded that the cause of death was "compression of [the] neck and drowning," opining that this was "not a close case." Video surveillance footage confirmed that, during the short period of time between check in and discovery of the body, only defendant and two hotel employees – one assisting the victim to the room and the other bringing ice to the minibar – had entered and exited the room.

Defendant appealed, contending, among other things, that the trial court erred in granting the People's motion for a Frye hearing and in issuing various evidentiary rulings. The Appellate Division unanimously affirmed defendant's conviction (People v Brooks, 134 AD3d 574 [1st Dept 2015]).

Under the Frye standard, expert testimony is admissible only if a scientific "principle or procedure has 'gained general acceptance' in its specified field" (People v Wesley, 83 NY2d 417, 422 [1994], quoting Frye v United States, 293 F 1013, 1014 [DC Cir 1923]). The process is meant to assess "whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally" (Wesley, 83 NY2d at 422). Absent a novel or experimental scientific theory, a Frye hearing is generally unwarranted.

"The Frye inquiry is separate and distinct from the admissibility question applied to all evidence – whether there is a proper foundation – to determine whether the accepted methods were appropriately employed in a particular case" (Parker v Mobil Oil Corp., 7 NY3d 434, 447 [2006]). The proper procedure for addressing concerns about foundation can include an *in limine* hearing where the trial court determines whether "'there is simply

too great an analytical gap between the data and the opinion proffered'" (Cornell v 360 West 51st Street Realty, LLC, 22 NY3d 762, 781 [2014], quoting General Electric Co. v Joiner, 522 US 136, 146 [1997]). The question is whether the expert's opinion sufficiently relates to existing data or "is connected to existing data only by the *ipse dixit* of the expert" (Joiner, 522 US at 146).

To the extent that the trial court improperly employed the Frye procedure to rule on the foundation of the defense expert's testimony, any such error was harmless.

We also reject defendant's challenges to the trial court's evidentiary rulings. Defendant primarily contends that character testimony from eleven witnesses was impermissibly prejudicial and cumulative. The trial court repeatedly instructed the jury that such evidence could be used only for the limited purpose of establishing the nature of the relationship between defendant and the victim, not to show defendant's propensity to engage in illicit conduct. In any event, the testimony about defendant's prior bad acts largely reflected his own admissions to police, and defendant's present objection to the cumulative nature of this testimony is unpreserved.

The trial court erred, however, in admitting testimony about an argument – occurring more than a month before the murder – in which defendant threatened to kill the victim. The witness's testimony as to the victim's statement that defendant had previously threatened her constituted double hearsay and was not properly admitted pursuant to any exceptions to the hearsay rule. The People's contention that the threat was not offered for its truth is belied by the record. "It may be true that evidence that defendant . . . threatened to kill the victim is admissible under a Molineux theory, but such evidence must still be in

admissible form" (People v Meadow, 140 AD3d 1596, 1599-1600 [4th Dept 2016]). Nor is there any blanket hearsay exception providing for use of such statements as "background" in domestic violence prosecutions (see People v Maher, 89 NY2d 456, 460-461 [1997]). Considering the overwhelming evidence against defendant, we nonetheless conclude that the error was harmless.

Defendant's remaining contentions are without merit.

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Order affirmed, in a memorandum. Chief Judge DiFiore and Judges Rivera, Stein, Fahey, Garcia, Wilson and Feinman concur.

Decided March 22, 2018