2018 IL App (1st) 151347-U

No. 1-15-1347

Order filed March 22, 2018

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 16552
	)	
MARSHAUN BOYKIN,	)	Honorable
	)	Michael B. McHale,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Burke and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Where a single nine-loci DNA analysis was not the primary identification evidence against defendant, the trial court did not abuse its discretion in denying defendant's motion for a search to determine the number of nine-loci matches that exist in the Illinois DNA database.

¶ 2 Following a jury trial, defendant Marshaun Boykin was found guilty of two counts of predatory criminal sexual assault of a child. The trial court sentenced defendant to two consecutive terms of 35 years in prison, for a total of 70 years. On appeal, defendant contends

that the trial court abused its discretion when it denied his pretrial *pro se* request to order the Illinois State Police to determine the number of nine-loci DNA matches in the Illinois DNA database. Defendant asserts that a new trial is warranted because he was denied his constitutional right to properly and fully confront the scientific evidence presented by the State, as well as his right to present a complete defense.

¶ 3 For the reasons that follow, we affirm.

¶ 4 Defendant's conviction arose from the events of May 11, 2011. Following his arrest, defendant was charged with four counts of predatory criminal sexual assault of a child and six counts of criminal sexual assault. As part of the investigation, DNA testing was performed on specimens collected from the victim and from defendant. Defendant was initially represented by the Cook County Public Defender, but ultimately opted to represent himself.

¶ 5 On July 3, 2014, defendant filed a *pro se* "Motion for Discovery." The motion included the following paragraphs:

> "15) Defendant need and request a search of the codis DNA database to verify and determine who this specimen belongs too and how many people it matches at 9-Loci by an independent source outside the Police Crime Lab due to possible biased. (#I10-012723. I need the name and addresses of the individuals who fit this profile.
>
> ***
>
> 21) Defendant need and request a search of the Illinois State Police convicted database to determine the number of 9-Loci DNA matches it has in it's offender database in conjunction with 725 ILCS 5/166-5 (West 2006).

***

26) Defendant is also requesting a 9-Loci search of the offender database to determine how many individuals and pairs match his DNA profile at 9-Loci? And what are their names addresses and date of birth?

27) In the alternative if the court rules and decides to admitt the 9-Loci ICI-F2 Evidence, then it should order the State to determine how many 9-Loci matches there are in the States convicted database. (Defendant need & request this.)

'A recent examination of Arizona's convicted offender database revealed 120 nine location matches between two inmates in a database of 65,493 offenders. In other word's 9-Loci matches are not real matches! People v. Juan Luna, No. 02 CR 15430.' People v. McKown, 226 Ill. 2d 245, 258-59, 875 N.E. 2d 1029, 314 Ill. Dec. 742 (2007).

28) Defendant declares that in order to have 'a match' the samples had to match at 13 loci, and anything less is not a match. (Defendant need and request the court to determine if this is true via an independent forensic scientist outside the Illinois State Police Station."

¶ 6 The trial court denied defendant's motion on August 15, 2014. With regard to the request in paragraph 15 for a search of the Combined DNA Index System (CODIS) database, the trial court stated, "Again that has 10 million profiles. Defendant has asked me for matches at 9 loci. That would be millions of profiles presumably and he does not have a good-faith basis for asking the entire CODIS DNA database to be searched for 9 loci matches, so that's denied." The trial

court noted that paragraphs 21, 26, 27, and 28 also involved the issue of the number of loci, and denied the requests included in those paragraphs because there was no good-faith basis for the requests and because "[t]he court doesn't make match determinations. That's a trial issue."

¶ 7 At trial, M.W. testified that on May 11, 2011, when she was 12 years old, she "got raped" by defendant, whom she identified in court. M.W. explained that she knew defendant before the date in question because she "just saw him around" and he "was at Javon's house once." M.W. testified that around 9 or 9:30 p.m. on the evening in question, she was outside when she saw defendant. Defendant grabbed her hand and walked her to the playground behind her elementary school. He lifted M.W. up onto a step on the playground equipment, pulled down her shorts, unbuttoned his pants, and put his penis in her vagina. Defendant then put his penis into her anus. When he was finished, defendant walked away.

¶ 8 Later, after M.W. went home, she told her mother about some of what had happened to her. An ambulance came to M.W.'s house. After M.W. talked with the paramedics, they took her to the hospital. There, M.W. spoke with a nurse about what defendant had done, and "samples" were taken from her vagina, anus, and back. Personnel also gave her a pill and took hair combings from her body, scrapings from under her fingernails, and a sample of her blood. A few days later, M.W. went to a children's advocacy center, where she spoke with an interviewer and saw a doctor. Then, a few months later, M.W. went to the police station and identified defendant in a lineup.

¶ 9 Sirkethia Haywood, M.W.'s mother, testified that she had previously met defendant through "a friend of my [other] daughter's baby's father's mother." She stated that earlier in the afternoon of the day in question, M.W.'s demeanor was normal, but that when she saw M.W.

again closer to 10 p.m., M.W. was afraid and unhappy and was crying. After speaking with M.W., Haywood called the police.

¶ 10 Chicago fire department paramedic Jeffrey Thrun testified that he and his partner arrived at M.W.'s residence in an ambulance around 2:30 a.m. on May 12, 2011. M.W., who was shaky and afraid, told Thrun that around 10 p.m., she was going to the candy store when she was pulled around the corner by a person she knew and was sexually assaulted. Thrun and his partner transported M.W. to the hospital.

¶ 11 Capri Reese testified that on May 12, 2011, while she was working as a staff nurse in the emergency room, she met with M.W., who was crying and shaking. M.W. reported that she had been on her way to a candy store when she encountered a "known male" who became aggressive, pushed her off to the side, and sexually assaulted her by penetrating her vaginally and anally. M.W. also provided a physical description of the "known male." In light of M.W.'s statements, Reese and a doctor conducted a criminal sexual assault evidence collection kit, which included collecting a blood sample, pubic hair combings, fingernail scrapings, vaginal swabs, anal swabs, and a swab of the right upper portion of M.W.'s back, as M.W. had indicated her assailant had some type of salivary contact with her in that location. Reese sealed the specimens in envelopes provided in the kit, along with the blood-stained underwear and shorts M.W. had been wearing at the time of the incident. M.W. was given antibiotics and an emergency contraceptive medication.

¶ 12 Dr. Antonio Navarrete, who treated M.W. in the emergency room, testified that M.W. reported she was on the way to a store when a man she knew accosted her, brought her to an isolated place, and sexually assaulted her vaginally and rectally. In addition to conducting the

criminal sexual assault evidence collection kit with Reese, Navarrete conducted a pelvic examination. During the examination, Navarrete observed a recent hymenal tear that was bleeding. He explained in court that the fresh blood indicated that the wound could have happened less than a day prior to the examination.

¶ 13 A Chicago police evidence technician picked up M.W.'s criminal sexual assault evidence collection kit from the hospital, transported it to the police station, and inventoried it. A forensic scientist with the Illinois State Police tested the vaginal and anal swabs contained in the kit and determined semen was present on both.

¶ 14 Chicago police detective Joseph Leyendecker testified that on May 18, 2011, he monitored an interview between an investigator and M.W. at the Children's Advocacy Center through a two-way mirror. During the interview, M.W. identified her attacker as "Ty" or "Marshaun." A few months later, Leyendecker learned that the crime lab had analyzed samples from M.W.'s criminal sexual assault evidence collection kit and had associated the results with one State identification (SID) number in the State database. The SID number was associated with two names: Tyrone Williams and Marshaun Boykin. Leyendecker explained that when one SID number is associated with two names, it indicates that the SID number "involve[s] one individual." Finally, Leyendecker testified that on September 16, 2011, M.W. identified defendant in a lineup at the police station.

¶ 15 Lauren Schubert, a forensic scientist with the Illinois State Police Forensic Sciences Command, was found by the trial court to be an expert in the area of forensic biology specializing in DNA analysis. Schubert testified that she analyzed the vaginal swabs, anal swabs,

and blood standard collected from M.W. From the blood standard, Schubert was able to identify a DNA profile for M.W. that was suitable for comparison.

¶ 16 Schubert testified that when she tested the vaginal swabs, she identified a female DNA profile in the non-sperm fraction, and that M.W. could not be excluded from having contributed to that profile.

¶ 17 Schubert identified a human male DNA profile in the sperm fraction of the vaginal swabs. When asked whether that was a "full" male DNA profile, Schubert answered:

> "There are two DNA kits that I use for amplification. One contains information on nine DNA locations, and the other kit contains an additional four locations. If there is enough DNA I will use both kits. In this case for the sperm fraction there was only enough DNA to use one of the kits, so I had a full complete information for those nine locations in that kit."

Schubert reiterated that she had "full information" for nine locations, and agreed that "that is why you refer to it as a full profile."

¶ 18 Schubert testified that she identified a mixture of two individuals' DNA in the mixed fraction derived from the vaginal swabs. The DNA profile of the major donor was female and matched M.W.'s profile. The minor donor's profile was male and was a full profile at 13 locations. Schubert agreed that this profile was "the same male from the sperm fraction of the same swabs."

¶ 19 Schubert identified a mixture of two human DNA profiles in the non-sperm fraction derived from the anal swabs. She determined that M.W. was the female contributor and that the male contributor was the same male contributor she had identified through the vaginal swabs.

When asked whether the male profile from the non-sperm fraction from the anal swabs was a complete profile, Schubert answered, "I do have information at all 13 locations. However, at two of the locations the information is incomplete, meaning I know one of the two DNA types at each but was not able to determine what the second type was." In response to further questioning, Schubert explained that she "got 13 locations," but because two locations only had partial information, the profile was incomplete at those locations.

¶ 20 With regard to the sperm fraction derived from the anal swabs, Schubert testified that she identified a "complete" human male DNA profile. She agreed that this profile was "the same male as all the others from this case."

¶ 21 Schubert testified that she did not analyze the mixed fraction from the anal swabs. She explained that there was no need to do so, since she had been able to get a complete male profile from the sperm fraction.

¶ 22 Finally, Schubert testified that she entered the male DNA profile into a database. That database search detected an association to Tyrone Williams, also known as Marshaun Boykin. Schubert indicated that there were no other "candidates" in the search. As a result of the search, Schubert requested a confirmatory forensic analysis standard from defendant.

¶ 23 An investigator for the office of the Cook County State's Attorney testified that he obtained a buccal swab from defendant on November 15, 2011. That evidence was sealed and transported to a Chicago police evidence lab.

¶ 24 Christine Prejean, a forensic scientist with the Illinois State Police Crime Lab, was found by the court to be qualified to testify as an expert in DNA analysis. She testified that on January 18, 2012, she conducted DNA analysis on a buccal standard collected from defendant. She

identified a 13-loci DNA profile from defendant's buccal standard that was suitable for comparison, and then compared this DNA profile to the previously-generated profiles that had been derived from the vaginal and anal swabs collected from M.W.

¶ 25 Prejean testified that the male DNA profile derived from the sperm fraction of the vaginal swabs matched defendant's DNA profile at nine locations. Prejean explained that the DNA profile derived from the sperm fraction of the vaginal swabs was not a complete profile, but rather, had 9 out of a possible 13 locations. She explained:

> "[T]here are two sets of chemistries that we use to produce what we call a full DNA profile. And a full DNA profile has DNA types at 13 locations. So one set of chemistries will give us DNA markers at nine of these 13. And the other will give us the DNA profile of an additional four. And in this case for the sperm fraction which is the DNA from the male donor and the sample of the - - from the vaginal swabs, there was only a DNA profile generated at the nine possible locations not the full 13."

According to Prejean, the profile she identified would be expected to occur in approximately one in 70 billion black, 1 in 100 billion white, or 1 in 85 billion Hispanic unrelated individuals.

¶ 26 Prejean compared defendant's DNA profile to the male DNA profile from the mixed fraction derived from the vaginal swabs, and determined that they matched at 13 loci. She stated that the DNA profile derived from the mixed fraction of the vaginal swabs was a full 13-loci profile, and that it would be expected to occur in approximately 1 in 39 quadrillion black, 1 in 170 quadrillion white, or one in 27 quadrillion Hispanic unrelated individuals.

¶ 27 Prejean further testified that she compared defendant's DNA profile to the DNA data from the sperm fraction derived from M.W.'s anal swabs, and that they matched. She stated that the DNA profile derived from the sperm fraction of M.W.'s anal swabs was a full profile. It would be expected to occur in approximately 1 in 39 quadrillion black, 1 in 170 quadrillion white, or 1 in 27 quadrillion Hispanic unrelated individuals, which is the occurrence rate for 13-loci matches.

¶ 28 When Prejean compared defendant's DNA profile to the male DNA profile from the non-sperm fraction derived from M.W.'s anal swabs, she determined that defendant could not be excluded as having been a contributor. She stated that the wording "cannot be excluded" was used for this comparison because all 13 locations were tested, but "it was an incomplete profile at that 13."

¶ 29 Lynette Wilson, a forensic scientist with the Illinois State Police, was found by the trial court to be an expert in forensic DNA analysis. Wilson testified that she analyzed a swab that was collected from M.W.'s back and identified a mixture of two DNA profiles from the sample. She stated that she was able to obtain nine locations for the "full profile" of the major contributor, which was male and matched defendant's DNA profile. Wilson explained that this profile would be expected to occur in approximately 1 in 70 billion black, 1 in 100 billion white, or 1 in 85 billion Hispanic unrelated individuals. With regard to the minor contributor, Wilson stated that M.W. could not be excluded as having contributed to that profile.

¶ 30 At the close of the State's case, defendant made a motion for a directed verdict, which the trial court denied.

¶ 31 Defendant called four witnesses. Javon Gardner, who knew defendant through a friend, testified that on the night in question, he and others were at M.W.'s house, and then "on the benches" at 10 p.m. M.W.'s sister, Andrea Haywood, testified that she did not know defendant personally, but "saw [him] around" and knew him as "Ty." On the night in question, Andrea Haywood, M.W., and some other people were "rapping" on a bench when defendant walked up to them. At some point, Andrea Haywood went to check on another sister and left M.W. on the bench by herself. When Andrea Haywood returned, M.W. was gone. Andrea Haywood also stated that when M.W. came home, she was crying and had blood on her shorts. Another of M.W.'s sisters, Javonda Haywood, testified that she remembered pointing defendant out in a lineup as the person who "committed this crime." Finally, Jamie Jett, a forensic scientist with the Illinois State Police, testified that no hairs suitable for comparison were recovered from M.W.'s underwear or pubic hair combings. Jett stated that hairs suitable for comparison were recovered from M.W.'s shorts, and were microscopically dissimilar to hairs collected from defendant.

¶ 32 In closing arguments, the prosecutor noted four times that M.W. reported to adults that she was assaulted by someone she knew. The prosecutor reviewed the DNA evidence and how often the DNA profiles generated would be expected to occur in various populations, and concluded three times, "It's him." The prosecutor also summarized M.W.'s testimony, stating, "She told you that [defendant] raped her," and observing that M.W.'s testimony was corroborated by others' testimony regarding her demeanor after the assault, her torn hymen, and the DNA evidence. The prosecutor then reviewed the jury instructions, during which she again referenced the DNA evidence and said that it indicated "It was him" and "it's him." Finally, the

prosecutor argued that defendant's "DNA was all over [M.W.'s] twelve-year-old body" and urged the jury to find defendant guilty on all counts.

¶ 33 Defendant argued to the jury that the State had failed to prove him guilty, that the witnesses against him lied, and that he was being framed so as to "take the fall for the young lady and her lover" and to prevent the Department of Children and Family Services from taking M.W. and her sisters from their mother. Defendant noted that the hairs collected from M.W. did not match him, and that some of the DNA collected from M.W. did not match his profile. With regard to the non-matching DNA, defendant stated, "DNA don't lie," and "Remember, the lady took the stand and said the DNA did not match me. If it did not match me, that exonerates me." Defendant also argued that his trial was unfair because the court repeatedly sustained the State's objections and thus prevented him from presenting the jury with the truth.

¶ 34 In rebuttal, the prosecutor emphasized that when M.W. testified, she identified defendant in court as her attacker. The prosecutor also stated, "The heart of the proof in this case lies in the DNA and that is where the defendant is identified"; that the DNA showed "It's him"; that "It's him. The DNA matched"; and that "This case is about DNA matches, and you heard the numbers, and the numbers are astronomical, and the numbers only point to one person, to the defendant."

¶ 35 The jury found defendant guilty of two counts of predatory criminal sexual assault of a child, and the trial court entered judgment on the verdict. Defendant presented an oral motion for a new trial, wherein he argued, as relevant to this appeal, that he was "denied a DNA database search to see how many people were in the database with the 9 locus association to the DNA

uploaded to the system." The trial court denied the motion for a new trial. Subsequently, the court sentenced defendant to two consecutive terms of 35 years in prison, for a total of 70 years.

¶ 36 This appeal followed.

¶ 37 On appeal, defendant contends that the trial court abused its discretion when it denied his pretrial *pro se* request to order the Illinois State Police to determine the number of nine-loci DNA matches in the Illinois DNA database. Defendant asserts that a new trial is warranted because he was denied his constitutional right to properly and fully confront the scientific evidence presented by the State, as well as his right to present a complete defense. Relying on *People v. Wright*, 2012 IL App (1st) 073106, defendant argues that under section 116-5 of the Illinois Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/116-5 (West 2014)), a criminal defendant should be allowed to have the DNA database searched pretrial to determine how many nine-loci matches exist in the database whenever a search of and access to the DNA database is material to the defense investigation or is relevant at trial. Defendant maintains that he has met this threshold of materiality and relevance, as Prejean testified that the DNA from the sperm fraction of M.W.'s vaginal swab matched defendant's profile at nine loci, and Wilson testified that the DNA from the swab of M.W.'s back matched defendant's at nine loci. Finally, defendant asserts that he was prejudiced by the trial court's denial of his motion, because "[w]hile M.W. identified [defendant] as the person who assaulted her, there was no other evidence, aside from the DNA, that implicated [him]," and because the State argued in closing that the DNA evidence revealed "it's him" and told the jury that defendant's DNA was all over M.W.'s body.

¶ 38 The statute at issue in this case is section 116-5 of the Code. 725 ILCS 5/116-5 (West 2014). Section 116-5 provides, in relevant part, that "[u]pon motion by a defendant charged with

any offense where DNA evidence may be material to the defense investigation or relevant at trial, a court may order a DNA database search by the Department of State Police." 725 ILCS 5/116-5(a) (West 2014). A trial court's denial of a section 116-5 motion is reviewed for an abuse of discretion. *Wright*, 2012 IL App (1st) 073106, ¶ 66.

¶ 39 This court first confronted the issue of the denial of a defendant's pretrial motion for a DNA database search in *Wright*, 2012 IL App (1st) 073106, ¶ 1. In that case, the defendant was prosecuted almost entirely on the basis of a cold-case DNA match, as the victim could not identify the defendant and there was no other physical evidence linking him to the aggravated criminal sexual assault with which he was charged. *Id.* ¶ 2. Two DNA samples were recovered in *Wright*: one from the victim's underwear and one from the victim's rectal swabs. *Id.* ¶ 3. Prior to trial, the defendant filed a motion to exclude DNA evidence obtained from the rectal swabs, stating that analysis of this sample was done on the basis of only 9 loci and that DNA analysis is "typically" done on the basis of 13 loci. *Id.* ¶ 8. In the alternative, the defendant asked that, if the trial court admitted the nine-loci evidence, then it should order the State to determine how many nine-loci "matches there are in [the State's] convicted database." *Id.* ¶ 11. In support of his argument, the defendant cited an Arizona study for the proposition that "in Arizona there is a 1 in 700 chance that two individuals will match up at nine locations," and asserted that in order to have "a match," a DNA sample must match at nothing less than 13 loci. *Id.* The trial court denied the defendant's motion. *Id.* ¶ 18.

¶ 40 At trial in *Wright*, the State's forensic expert testified that the DNA sample derived from the victim's rectal swabs, which was done on the basis of nine loci, yielded a "match" to the defendant's DNA. *Id.* ¶ 3. The expert further testified that he analyzed the sample taken from the

victim's underwear on the basis of 13 loci, and could not find a "match." *Id.* Rather, he could conclude only that the defendant could not be excluded as a contributor. *Id.* The jury found the defendant guilty of aggravated criminal sexual assault. *Id.* ¶ 47.

¶ 41 On appeal in *Wright*, the defendant contended, *inter alia*, that the trial court erred by failing to order the Illinois State Police to determine the number of nine-loci matches in its offender database. *Id.* ¶ 56. This court agreed with the defendant and reversed and remanded for a new trial. *Id.* ¶ 132. We observed that section 116-5 requires a defendant to show only that DNA evidence may be material to the defense investigation or relevant at trial. *Id.* ¶ 80. We then found materiality because the Arizona study showed that the database search requested by the defendant would have had "a good chance of leading to 'reasonable doubt' evidence," and noted that as a result of prior searches for nine-loci matches in Arizona, Maryland, and Illinois, "some legal scholars and scientists have questioned whether the extraordinarily large figures used in court to estimate the probability of a nine-loci 'match' are 'no better than alchemy.' " *Id.* ¶¶ 82, 84 (internal citations omitted). With regard to the *Wright* defendant in particular, we concluded, "Considering that a nine-loci analysis was the primary identification evidence against defendant, the trial court abused its discretion by denying defendant's motion [for a database search]." *Id.* ¶ 86.

¶ 42 *Wright* is readily distinguishable from the instant case. First, unlike in *Wright*, in the instant case, DNA was not the sole evidence against defendant. *Wright* involved a cold-case DNA match made more than five years after the crime occurred. The victim did not know her assailant and could not identify the defendant at trial. Here, in contrast, M.W. knew defendant prior to the assault; told a paramedic, a nurse, and a doctor that she knew her attacker; reported to

a Children's Advocacy Center investigator that she knew her attacker as "Ty" or "Marshaun"; and identified defendant in a lineup and in court as the person who raped her.

¶ 43 Second, the DNA evidence in the instant case was significantly stronger than in *Wright*. There, one of the two DNA samples taken from the victim did not result in a match, and the second DNA sample taken from the victim yielded a match to the defendant's DNA at nine loci. In contrast, here, the male DNA profile derived from the mixed fraction of the vaginal swabs matched defendant's profile at 13 loci, the DNA profile derived from the sperm fraction of the anal swabs matched defendant's profile at 13 loci, the DNA profile derived from the sperm fraction of the vaginal swabs matched defendant's profile at 9 loci, and the male DNA profile derived from the swab of M.W.'s back matched defendant's profile at 9 loci.

¶ 44 Given the facts of the instant case, *Wright* is an inappropriate case for comparison. See *People v. Fountain*, 2016 IL App (1st) 131474, ¶ 49 (in a case which did not rely solely on DNA evidence to identify an otherwise unknown offender, the defendant's reliance on *Wright* was misplaced); *People v. Smith*, 2012 IL App (1st) 102354, ¶ 82 (where the State did not rely on DNA evidence to identify an otherwise unknown offender, "[t]he facts and analysis in *Wright* are not pertinent"). In *Wright*, we found that the trial court abused its discretion in denying the defendant's motion for a database search because a nine-loci analysis was the only identification evidence against him. *Wright*, 2012 IL App (1st) 073106, ¶ 86. But in the instant case, the identification evidence consisted of much more: M.W.'s prompt, unequivocal, and consistent identification of a known offender, two 13-loci matches, and two 9-loci matches.

¶ 45 While the State did emphasize the DNA evidence in closing arguments, it also repeatedly noted that M.W. reported to adults that she was assaulted by someone she knew, and observed

twice that M.W. identified defendant as her attacker in court. We reject defendant's argument that "given the 'mystical aura' in which juries often view DNA evidence *** it was critical for [him] to be able to counter the significance of the DNA frequencies or contextualize the DNA evidence against him by illustrating the probability of finding a partial match in a given population." This argument may have been persuasive had the only identification evidence in this case been a single nine-loci match. However, here, where defendant was not an otherwise unknown offender, where M.W. repeatedly and consistently identified defendant, and where the DNA evidence consisted of two 13-loci matches and two 9-loci matches, we find no abuse of discretion in the trial court's decision to deny defendant's request for a database search to determine the number of 9-loci matches in the Illinois DNA database.

¶ 46 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 47 Affirmed.