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COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
NO. 1682CR00089

COMMONWEALTH

vs.

ALEXANDER W. JOHNSON

**Memorandum of Decision and Order on
Defendant's "Motion to Dismiss for Grand Jury Impairment"**

On March 23, 2016 a Norfolk County grand jury returned indictments against the defendant, Alexander Johnson, alleging that on October 3, 2015, he committed the crimes of mayhem and assault and battery with a dangerous weapon causing serious bodily injury against Christopher Socha. The grand jury also returned indictments against two codefendants, Jordan Williams, and Michael Leary. The charges grew out of a bar fight at the Waterfront Bar & Grille in Plymouth. The defendants previously challenged the indictments pursuant to *Commonwealth v. McCarthy*, 385 Mass. 160, 162-163 (1982). Their efforts met with substantial success in this court, but the Appeals Court disagreed and ordered the indictments reinstated in full. See *Commonwealth v. Johnson*, 92 Mass. App. Ct. 538 (2017).

The defendant now mounts a new challenge to the indictments, contending that Detective Gregory Smith of the Plymouth Police Department gave false testimony concerning his interviews with Lola Rizzotto, a friend of Socha and a member of his party on the evening in question, who did not herself testify before the grand jury. Specifically, he claims that Detective Smith did not inform the grand jury that Rizzotto told him that the defendant had been present on the night in

question but was “not involved in the fight.” He also claims that the detective “badgered” Rizzotto to create the false impression that she believed the defendant had a glass or bottle in his hand at the time of the attack and that she might not have heard the glass break because of the “accompanying din and hubbub surrounding the alleged assault.” One might well question why, having already had one opportunity to challenge the grand jury’s indictments, the defendant should be afforded a second opportunity to do so. The answer is that he bases his attack on Detective Smith’s notes, recently produced as discovery by the prosecutor, and thus could not have been expected to raise the particular claim as part of his earlier motion.

Detective Smith’s notes also generated an additional claim, not fully raised in the defendant’s written motion, but broached by counsel in her affidavit and orally at the motion hearing. Counsel represented that based on a brief reference in the notes, an investigator had located and spoken with two other witnesses, Sean P. Fitzgerald and Fitzgerald’s girlfriend, Whitney Pumphret. Fitzgerald claimed that Smith had interviewed them both, and that they had provided what counsel characterized as exculpatory information, but they were never asked to give written or recorded statements, and never called before the grand jury. Neither were the substance of their remarks turned over to defense counsel. Counsel represented that this information had so recently come to her attention that she had not had time to incorporate it in her written motion or to secure affidavits from the witnesses.

The court held a hearing on the defendant’s motion on August 28, 2019. One witness testified, Detective Smith. The court sets forth below its findings of fact relative to Smith’s testimony.

Findings of Fact re: Smith's Testimony

Detective Gregory Smith has worked for the Plymouth Police Department since 2008, the last 5 ½ years as a detective. He spoke to Lola Rizzotto on three occasions, the first time over the telephone on October 31, 2015. On the second occasion, November 4, 2015, Smith conducted a photo array identification with her, at which she picked out the defendant's picture. On the third occasion, November 6, 2015, Smith conducted a brief interview with her, which was recorded.

The notes provided the prosecutor and ultimately turned over to defense counsel constitute the entirety of Smith's notes in the case folder. The page apparently pertinent to Ms. Rizzotto contains the following:

“was facing bar talking to Chris
third guy reaches right hand
so unprovoked, it was unbelievable
tall
shouldered Chris
blue shirt
2nd guy navy blue shirt
Black shirt w/ red tie there, but not involved w/ fight”

The second page of Smith's notes lists a number of witnesses, some with telephone numbers, some without. It includes the notation, “Sean Fitzgerald,” without further information attached to that name. Smith recalled that he had spoken to Fitzgerald and his girlfriend, Ms. Pumphret by phone. He spoke to Fitzgerald first on his cell phone. He believes he called Pumphret immediately thereafter, but is not sure-- it is possible that Fitzgerald simply passed her his phone.

Smith now possesses, charitably speaking, a less than comprehensive recollection of his conversations with Fitzgerald and Pumphret. He does recall that Fitzgerald told him that he was standing at the bar and that during the incident his girlfriend got pushed against a stool. He saw a man, shorter built and tanned, pointing at Williams. Fitzgerald said that the defendant was standing at the bar, 10 feet away, off in the distance while the fight was going on. Smith remembers nothing of what Pumphret told him, although presumably she corroborated Fitzgerald.

Smith did not believe Fitzgerald, primarily because other witnesses, including the defendant himself, had placed him, or at least a person dressed as the defendant had been dressed, right at the scene rather than off in the distance. Smith believed that Fitzgerald was simply trying to cover for his friend. He discredited Fitzgerald's entire account, and took no steps to memorialize it. Smith never told the assistant district attorney about the interview. He does not recall whether either Fitzgerald or Pumphret supplied to him the names of any other witnesses. He had no other conversations with them.

Smith believes that he accurately summarized what Ms. Rizzotto had told him when he testified before the grand jury. He does not recall whether anyone else was present when Ms. Rizzotto was shown the array from which she selected defendant's picture.

Further Findings of Fact, Discussion, and Conclusions of Law

The familiar and long-standing rule in this Commonwealth is that "a court will not review the competency or sufficiency of the evidence before a grand jury." *Commonwealth v. O'Dell*, 392 Mass. 445, 450 (1984). There are two notable exceptions to this rule. First, the Supreme Judicial Court has held that a court may consider whether the grand jury received "sufficient evidence to establish the identity of the accused . . . and [whether there was] probable cause to

arrest him.” *Commonwealth v. McCarthy*, 385 Mass. 160, 163 (1982) (internal citation omitted). That issue has been settled by the decision of the Appeals Court, although arguably the present motion reopens at least the issue of identification. The defendant here primarily relies on the second exception to the general rule, that an indictment may be dismissed where “the integrity of the grand jury proceeding was impaired.” *O'Dell*, 392 Mass. at 446-447. It is the defendant’s burden to show impairment of the grand jury proceeding, and that burden is a heavy one. *Commonwealth v. LaVelle*, 414 Mass. 146, 150 (1993), citing *Commonwealth v. Shea*, 401 Mass. 731, 734 (1988).

As the Supreme Judicial Court has explained,

“[d]ismissal of an indictment based on impairment of the grand jury proceedings requires proof of three elements: (1) the Commonwealth knowingly or recklessly presented false or deceptive evidence to the grand jury; (2) the evidence was presented for the purpose of obtaining an indictment; and (3) the evidence probably influenced the grand jury's decision to indict. *Commonwealth v. Mayfield*, 398 Mass. 615, 620-622 (1986). Inaccurate testimony made in good faith does not require dismissal of an indictment. *Id.* at 620, citing *Commonwealth v. Reddington*, 395 Mass. 315, 320 (1985). Failure to present known information also may impair grand jury proceedings in circumstances that warrant dismissal. See *Commonwealth v. Connor*, 392 Mass. 838, 854 (1984) (failure to disclose known information that would greatly undermine credibility of important witness); *Commonwealth v. O'Dell*, 392 Mass. 445, 446-447 (1984) (unfair and misleading to withhold exculpatory portion of defendant's statement).”

Commonwealth v. Silva, 455 Mass. 503, 509 (2009). The test requires that the defendant demonstrate “that the prosecutor knowingly distorted . . . evidence or withheld exculpatory information, which, if revealed, would have influenced the grand jury not to indict.” *Commonwealth v. Petras*, 26 Mass. App. Ct. 483, 490 (1988).

The defendant's first set of arguments concerns Smith's testimony about his interview with Ms. Rizzotto. In pertinent part, Smith told the grand jury that he had spoken with Ms. Rizzotto over the telephone and that:

she stated she was at the Waterfront Bar and Grill on October 3rd when Chris Socha was injured. She stated she was speaking with Chris Socha just before the incident occurred and she stated she saw the incident that occurred and stated that she saw a third man and it wasn't Michael Leary or Jordan Williams because she knows they were pulled out and detained by the police. She saw this third man put his right hand up in the air and come down in a manner consistent with striking someone over the head with an object just before Chris Socha hunched over. Lola described the third man as tall and wearing a black shirt with a red tie.

She explained the third man was there with the group but was not involved with the argument. She stated it was so unprovoked that it was unbelievable and she stated that the third man's actions were a cowardly act, especially because Mr. Socha had turned to walk away.

The defendant suggests that Smith's notes fully exculpate him, in that they indicate that he, "who was dressed in a black shirt and a red tie, was 'there but not involved in *the fight*.'" (emphasis supplied). He further suggests that Smith's testimony to the grand jury that Rizzotto said defendant "was not involved with *the argument*," (emphasis supplied), significantly departed from Rizzotto's word choice, thereby misleading the grand jury. Finally, the defendant argues the prosecutor should have introduced Smith's actual notes for the grand jury's consideration. All of these arguments fail.

Putting aside for the moment that the prosecutor had not seen Smith's notes, and therefore could not possibly have withheld them from the grand jury for the purpose of improperly procuring indictments, see *Petras, supra*, the defendant's interpretation of those notes, at least in the absence of an affidavit from Rizzotto, amounts to nothing more than self-serving wishful thinking. Compare *Commonwealth v. Salman*, 387 Mass. 160, 162-163 (1982)(detectives testified to the

grand jury that victims had, after viewing photographs, identified the defendants as the persons who robbed them, but affidavit of defense investigator asserted that the victims had never been shown any photographs). Smith, who had the benefit of having the conversation with the witness that the notes perfunctorily memorialize, gave an account of the conversation that fully harmonizes with the notes, i.e., the witness observed Socha in an argument (or “fight,” the defendant’s preferred word) with another party, and that she saw a third person in a black shirt with a red tie, whom she later identified as the defendant, standing there, but not involved in the initial argument. That third person raised his hand up and brought it down on Socha’s head. Because the third person, the defendant, had not been involved with the fight, the witness considered the attack “so unprovoked, it was unbelievable.”

The court declines attach to Smith’s grand jury testimony use of the word “argument,” in place of the word in his notes, “fight,” the significance which the defendant labors to ascribe to it. In any event, the notes on their face appear to be a shorthand summary of the conversation, an impression confirmed by Smith’s testimony at the evidentiary hearing. The word “fight,” is not enclosed in quotation marks. Whether the witness used “fight,” “argument,” “dispute,” “altercation,” or some other word cannot be established simply on the basis of the notes.

Had the prosecutor been in possession of the notes, there is no guarantee that his review of them would have called to his mind the interpretation now proffered by the defendant. (Indeed, his post-indictment examination of the notes has apparently done nothing to persuade him of the plausibility of the defendant’s suggestion). Even if the notes may be considered ambiguous, the defendant points to no case in which any appellate court has ever held that a prosecutor had an

obligation to introduce a police officer's notes in evidence at a grand jury proceeding on the possibility that the grand jury might construe them in a manner favorable to the defendant.

Having reviewed the video recording of Smith's third interview with Ms. Rizzotto, the court cannot agree that Smith "badgered" Rizzotto to create the false impression that she believed the defendant had a glass or bottle in his hand at the time of the attack and that she might not have heard the glass break because of the ambient noise in the bar. While there is no doubt that Smith's questions to Rizzotto are leading, apparently intended not to elicit new information but to memorialize the content of the previous unrecorded interviews, there is nothing coercive about the questions and answers. There is no reason to doubt, given the entire sequence of events and Rizzotto's knowledge of them, that she would have any reason to question that there was a glass in the defendant's hand. Even if she were agnostic on the subject, any number of witnesses who testified before the grand jury heard the sound of the glass breaking. Several nearby witnesses were sprayed with broken glass. And, of course, the wound to the victim's head was consistent with a glass cut. Nothing in the entire testimony and evidence suggests that the victim was not struck with a glass object. The importance of Rizzotto's testimony is not whether she believed the assailant held a glass or heard or did not hear it break, but that she identified the person bringing his arm down—other witnesses supply the rest. Notably, the Commonwealth introduced the video of Rizzotto's interview into evidence. The grand jurors thus had the opportunity to view it, and draw their own conclusions as to whether Rizzotto was badgered or coerced. Had they wished, they could have requested that the prosecutor summons her before them so that they could question her themselves.

Turning to the defendant's second set of arguments, Smith's failure to memorialize and turn over a report of Fitzgerald's statement raises serious concerns. All of the accounts of the assault place the person holding the glass within arm's reach of the victim. If, as Fitzgerald claimed, the defendant was standing some ten feet away at the time, he could not have been the assailant. Whether Smith believed him or not, there is no question that Fitzgerald's account is exculpatory, and should have been turned over to the defendant. *See Commonwealth v. Gregory*, 401 Mass. 437, 442 (1988) (in case involving delayed disclosure of witness and his oral exculpatory statement, court noted, *inter alia*, that exculpatory evidence includes that which "calls into question a material, although not indispensable, element of the prosecution's version of events"); *Commonwealth v. Ellison*, 376 Mass. 1, 22 (1978) (same). The fault cannot be laid at the feet of the prosecutor, who was wholly unaware of the interview, but the Commonwealth is a unitary entity, and ultimately responsible for Smith's failing. The failure to pursue this information may ultimately suggest a *Bowden* trial defense and raise an argument that the police early on decided that the defendant was culpable and simply ignored any evidence to the contrary. The question presently before the court, however, is whether the failure to present Fitzgerald's account to the grand jury tainted the proceedings so as to require dismissal.

The prosecutor cannot be said to have withheld the evidence in an attempt to procure an indictment; he was, after all, wholly unaware of it. Smith was aware of it, but more insouciant than malevolent. Having discounted the witnesses' account himself, it seems not to have occurred to him that if credited, it was exculpatory. But a prosecutor is by no means required to present to a grand jury all evidence that may be exculpatory; rather, he is required only to present exculpatory evidence "that would greatly undermine either the credibility of an important witness or evidence

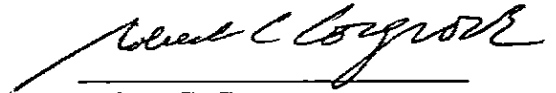
likely to affect the grand jury's decision." *Commonwealth v. Clemmey*, 447 Mass. 121, 130 (2006), quoting *Commonwealth v. Wilcox*, 437 Mass. 33, 37 (2002). The remaining question, then, is whether the failure to present the information, whether purposeful or negligent, probably influenced the grand jury to indict where it otherwise would not have. The answer is no.

First, Smith was correct in noting that the defendant himself did not claim he was ten feet away from the scene. He told Smith that he was standing at the bar when he heard a glass break and turned; there was no one between him and those fighting. Second, the defendant's girlfriend, Erica Piccirilli, testified that Williams, Leary, and the defendant were all standing at the bar when she felt someone, inferably the victim, brush by. Words were exchanged between Williams and the defendant, who head-butted Leary. The defendant then said, "Oh, shit, they're fighting" and tried to block her, protect her from the fight. The inference is that they were standing quite close. Third, both Williams and Piccirilli confirmed Johnson's distinctive black garb with red tie, the same outfit Lola Rizzotto attributed to the man who she saw put his hand up in the air and bring it down on the victim in a chopping motion. Given the totality of the evidence before them, it is unlikely that the jury would have concluded that there was not probable cause to believe that Johnson was the man who struck the defendant with the glass.

The defendant argues that Fitzgerald's testimony was also significant in that it suggests the defendant instigated the altercation. Even if that were so, he did nothing against Johnson. He was also unarmed. Johnson, if he was indeed the third man, chose to enter the fray, and chose to escalate the conflict by striking the victim from behind with a dangerous weapon. Whether the victim went looking for trouble and found more than he bargained for is, so far as the defendant is concerned, legally irrelevant.

Order

The Defendant's "Motion to Dismiss for Grand Jury Impairment" is **denied**.



Robert C. Cosgrove,
Justice of the Superior Court

September 3, 2019