Commonwealth
v.
Bryan M. Grassie

Appeals Court Docket No. 2015-P-0196

On Appeal from Plymouth Superior Court
Docket No. PLCR2012-00489

APPELLANT'S BRIEF

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ISSUES PRESENTED

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defendant did not testify or make any claims during trial?

STATEMENT OF THE CASE

This case is before this Court on the direct appeal of the defendant, Bryan Grassie, from his conviction of second-degree murder, and assault and battery with a dangerous weapon.

On September 21, 2012, a Plymouth County grand jury returned indictments charging the defendant with first-degree murder of eighteen-year-old Brendan Mahoney, as well as with armed assault with intent to murder and assault and battery with a dangerous weapon resulting from the stabbing of nineteen-year-old Brian Mahoney. (R.A. 1-3).[1] Prior to the trial, the defendant moved to dismiss the indictments due to the integrity of the grand jury being impaired by the Commonwealth's failure to instruct the grand jury of the legal impact of mitigating circumstances. *See Commonwealth* v. *Walczak*, 463 Mass. 808 (2012). (R.A. 45). The

[1] References to the record appendix will be cited as (R.A.__). References to the trial transcript will be cited by volume and page number as (Tr.__:__). References to the trial exhibits will be cited as (Exh.__). The defendant has not included the voluminous minutes of the grand jury proceedings in the Record Appendix, but will promptly provide them at the Court's request.

defendant's motion was denied. (R.A. 79). The defendant thereafter filed a G.L. c. 211, §3 petition to the Supreme Judicial Court appealing this denial. The defendant's G.L. c. 211, §3 petition was denied (R.A. 90).

The defendant was tried by a jury before Justice Frank Gaziano from June 9 to 16, 2014. (R.A. 10-11). On June 16, 2014, the jury convicted the defendant of the second-degree murder of Brendan Mahoney and assault and battery with a dangerous weapon on Brian Mahoney. (R.A. 10). The jury acquitted the defendant on the indictment alleging assault with intent to murder Brian Mahoney. (R.A. 10). The trial judge sentenced the defendant to the mandatory term of life in prison. (R.A. 10-11). The defendant filed a timely notice of appeal on July 3, 2014. (R.A. 109).

STATEMENT OF FACTS

On July 28, 2012, Dylan Burns hosted a high school graduation party at 29 Priscilla Avenue in East Wareham at his grandparents' home while his father was next door at 25 Pricilla Avenue. (Tr. II:96). No adults were present at 29 Priscilla Avenue and a keg of beer as well as two thirty-packs of beer, hard liquor, and marijuana were obtained for this party.

(Tr. II:96, III:52). The majority of people in attendance were under the age of twenty-one. (Tr. III:45). Dylan Burns had recently graduated from Oliver Ames High School in Easton. (Tr. II:98). The party began as a small gathering of Burns' friends on the afternoon of July 28, 2012, and eventually swelled to a party of approximately twenty people by the early morning hours of July 29, 2012. (Tr. I:135). Most of the attendees were not residents of East Wareham, but rather knew Burns from elsewhere. (Tr. II:57).

Brendan and Brian Mahoney were brothers who were invited to Burns' graduation party. (Tr. II:96). The Mahoney brothers had attended Bridgewater-Raynham Regional High School and knew Burns from playing hockey with him. (Tr. V:4-5). Brian Mahoney was nineteen years old at the time and Brendan Mahoney was eighteen years old at the time. (Tr. V:5). Both Mahoney brothers played hockey and "could handle themselves physically." (Tr. V:34). In fact, they were both "tough kids" who "don't take shit from anyone." (Tr. III:62, 64). Dylan Burns had known the Mahoney brothers since the age of seven, and was "best of friends" with them. (Tr. III:43-44). Dylan Burns also knew the defendant, Bryan Grassie, and in the past had

spent time with him, although Burns had not seen the defendant in the months before the party. (Tr. II:98). The defendant, unlike the majority of the partygoers, was a resident of East Wareham, and his family lived less than a mile from Burns' family's summer home. (Tr. IV:104, 107). Burns had not invited the defendant to his graduation party. (Tr. II:98-99). The defendant was eighteen years old in July of 2012, and was "a skinny teenager." (Tr. IV:102, 119).

The party started between approximately 12:00 p.m. and 1:00 p.m. and the Mahoney brothers arrived at approximately 4:30 p.m. (Tr. II:99). The Mahoney brothers began to drink shortly after they arrived, and by the early morning hours of July 29, 2012, Brian Mahoney had consumed approximately nine or ten beers and Brendan Mahoney had probably consumed a similar amount of alcohol. (Tr. V:7). The defendant arrived at the party by himself between approximately 12:30 a.m. and 1:30 a.m. on July 29, 2012. (Tr. II:100). By the time the defendant arrived, Brian and Brendan Mahoney were intoxicated. (Tr. III:178). Dylan Burns had, in his words, drunk "enough, but. . .[not] enough to be belligerent." (Tr. II:97). Other partygoers consumed beer, hard liquor, and marijuana. (Tr. III:52).

As noted above, the defendant was not invited to the party, but Dylan Burns told the defendant that he was welcome to join the festivities. (Tr. II:101). The defendant was visibly intoxicated when he arrived at the party, and in fact appeared to be "very drunk" to the point he was swaying on his feet. (Tr. III:54-56, 155). The defendant had on his person a folding knife that he had purchased for his work as a landscaper. The defendant was taking blood-thinning medication, which caused him to bleed more easily. (Tr. III:55; IV:125). (Tr. IV:122). The defendant and Dylan Burns had a friendly conversation during which the defendant invited Burns to his upcoming graduation party. (Tr. II:101). After this friendly conversation, it is not disputed that the defendant's behavior turned boorish.[2]

Shortly after arriving, the defendant engaged in a conversation with Greg Mahalic, one of the partygoers, in which the defendant told Mahalic that if there was a problem between them, they should

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[2] In his opening statement, defense counsel clearly stated: "Let me get something out of the way right here at the outset. My client acted like a jerk. My client was drunk, okay, and my client engaged in a lot of trash talk, all right. Let's get that out of the way right now." (Tr. I:102-103).

"squash it." (Tr. I:137). The defendant's tone of voice was "agitated but. . .cool, calm." (Tr. II:31). While the defendant was speaking with Mahalic, Matt Ingargiola, and Jimmy Waitz - other partygoers - began to laugh at the defendant, and the defendant responded by asking if he had said something funny. (Tr. II:32). The defendant also asked Jimmy Waitz if Waitz had laughed at him. (Tr. II:32-33). The defendant used an aggressive tone of voice in addressing these individuals, but he never engaged with any of them physically, nor did he suggest that they have a physical altercation. (Tr. I:169-173).

Approximately twenty minutes thereafter, the defendant was seated in a chair of the living room. (Tr. I:145). The Mahoney brothers were seated on a sofa across the room from the defendant, and several other people were in the same room. (Tr. I:145). Brendan Mahoney asked the defendant why he was staring at him. (Tr. I:146). Words were briefly exchanged between the two, and both Brendan Mahoney and the defendant rose to their feet. (Tr. I:146). Brendan Mahoney approached the defendant until they were just inches apart from each other. (Tr. II:58-59). Brendan Mahoney was "pissed off" and yelling at the defendant.

(Tr. V:13-14). Brian Mahoney joined his brother, and the two Mahoney brothers "got in [the defendant's] face." (Tr. II:58). The Mahoney brothers "had [the defendant] up against a wall" and were "in his face yelling at him." (Tr. II:58). Brendan Mahoney grabbed a cigarette that had been behind the defendant's ear and threw it in the defendant's face. (Tr. III:135). The defendant appeared "shocked" but did nothing in response. (Tr. III:135). Brian Mahoney approached Dylan Burns and told Burns, "get [the defendant] the fuck out of here before I, like, hit him or something." (Tr. III:62).

Soon thereafter, Dylan Burns attempted to escort the defendant outside of the house. (Tr. III:15). On the way out of the house, the defendant exchanged hostile words with Brian Mahoney. (Tr. III:69,70). As the defendant was leaving, Brian Mahoney approached the defendant as they exchanged words, and Dylan Burns had to position himself between the defendant and Brian Mahoney to physically separate them. (Tr. III:77). Brendan Mahoney was a couple of feet away from Brian Mahoney, and both of the Mahoney brothers began to engage in a verbal exchange with the defendant. (Tr. III:77). The defendant was verbally

challenging the Mahoney brothers to fight him, although he made no physical contact whatsoever with either brother. (Tr. V:33). In response to the defendant's blustering, Brendan Mahoney stated to the defendant, "me and [Brian Mahoney] will go outside right now and kick your ass." (Tr. III:75). The defendant began to leave the house, and as the defendant was "backing away," Brian Mahoney reached over Dylan Burns' shoulder and shoved his hand in the defendant's face creating the first physical contact of the evening. (Tr. III:78-79). The defendant did not physically retaliate against Brian Mahoney after he was shoved in the face, but rather left the house with Dylan Burns. (Tr. III:79-81).

Once outside, Burns and the defendant exchanged words amongst themselves. (Tr. III:15). Burns asked the defendant to leave. (Tr. III:15-16). The defendant agreed to leave but asked Burns for a cigarette. (Tr. III:16). Burns went inside and retrieved a cigarette for the defendant. (Tr. III:19). Left alone outside, the defendant did not attempt to re-enter and did not engage with the Mahoney brothers. (Tr. III:86). When Burns gave the defendant the cigarette, the defendant was calm. (Tr. III:19). The defendant then asked for a

lighter, which Burns supplied, after going back inside. (Tr. III:20). The defendant was unable to light the cigarette, so Burns lit it for him. (Tr. III:20).

The defendant became upset again because he was being asked to leave, and as he began to raise his voice, Brian Mahoney came out of the house to the area where the defendant and Burns were. (Tr. III:22). The defendant made several more statements about fighting the Mahoney brothers, and Brian Mahoney went back inside of the house. (Tr. III:22). Soon thereafter, Brian and Brendan Mahoney reemerged together, and the defendant and the Mahoney brothers exchanged more hostile words. (Tr. III:23). Matt Ingargiola, Jimmy Waitz, Mike Winterson, Harrison Stevens, and Nick Lydon were also outside of the house while the Mahoneys and the defendant exchanged words. (Tr. III:24). Excluding the defendant, there were eight people outside of the house as the verbal exchange occurred. (Tr. III:89).

After being told by several people to leave the party, the defendant said, "alright, alright, fine. I see how it is. I'll go home now. I'll leave." (Tr. III:24). After the defendant agreed to leave, he began

to walk down the street, away from the house and towards his home. (Tr. III:24-25, 90). Priscilla Avenue was a quiet dirt road in the woods with minimal lighting and few houses. (Tr. I:120; III:91, 103). There was a small beach near Burns' family home, in the direction of the defendant's family home. (Tr. III:90).

The defendant walked away from the house, past the only streetlight on Priscilla Avenue, and over a small hill. (Tr. III:90-91). As the defendant walked away from the house, he was still visible, and he yelled out several profanity-laced disparaging remarks directed towards the other partygoers, referring to the other partygoers as "pussies" and "faggots" and repeatedly challenging several people to fight him. (Tr. I:155; III:92). As the defendant made these comments and challenged the partygoers to fight him, he continued to walk away from the house and the group of people to whom he was speaking. (Tr. I:155). Brian Mahoney admitted that as of this time, the defendant had not touched him or his brother. (Tr. V:33). He further admitted that "all that [the defendant] had been doing was talking trash, saying nasty, stupid

things." (Tr. V:33). This "trash talking" had "pissed off" both Brian and his brother. (Tr. V:33).

As the defendant walked away, certain members of the group of eight stated, "you shouldn't let [the defendant] talk to you like that. . .he's talking shit. . .we should do something about it." (Tr. III:25). Everyone in the group of eight agreed that they should "go get [the defendant]." (Tr. III:94). Dylan Burns replied, "no. . .he's going home. He's walking home. Let's go back inside. . .." (Tr. III:25-26). As Burns tried to convince the group of eight to go inside the house, the group of eight collectively decided to attack the defendant, and someone said, "let's go beat [the defendant] now." (Tr. III:94-96). The Mahoney brothers said, "fuck it," and "took off" down the road in pursuit of the defendant, and Burns followed approximately ten to twenty feet behind them. (Tr. III:26-27). Jimmy Waitz and Matt Ingargiola followed close behind Burns. (Tr. III:28). Nick Lydon, Harrison Stevens, and Mike Winterson followed behind Jimmy Waitz and Matt Ingargiola. (Tr. III:111-112). As the Mahoney brothers ran after the defendant, the defendant began to run away from the Mahoneys. (Tr. III:104). At the point that the Mahoneys began to

chase the defendant, the only physical interaction between the defendant and the Mahoney brothers had been initiated by the Mahoneys. (Tr. V:33). Brian Mahoney admitted that when they chased the defendant down, the defendant was going in the opposite direction and leaving. (Tr. V:33).

The Mahoney brothers chased the defendant down, and Brian Mahoney attempted to kick the defendant. (Tr. V:21). Brendan Mahoney punched the defendant and knocked him to the ground. (Tr. V:21, 40-41). The defendant fell against a chain link fence. (Tr. V:40-41). The Mahoney brothers intended to continue to kick and beat the defendant. (Tr. V:41). After he was knocked to the ground against the fence, the defendant stabbed both Mahoney brothers multiple times. (Tr. V:21). The entire physical altercation lasted a matter of seconds. (Tr. V:21); (Exh. 1). Brendan Mahoney later died of his stab wounds. (V:191).

The home at 13 Priscilla Avenue had a surveillance camera attached to it that recorded certain events from the evening. (Tr. I:120-124). The video was time-stamped and recorded in real time. (Tr. I:125). The camera recorded audio of the defendant yelling disparaging remarks as he walked away from the

party at 29 Priscilla Avenue. (Exh. 1; Tr. I:120-24). The video also recorded what sounds like the noise of feet running on a dirt road followed by the sound of a chain link fence and what sounds like a brief altercation. (Exh. 1). At the end of the altercation, voices can be heard yelling about "a knife" and then voices can be heard screaming. (Exh. 1). A motion activated light went on and the camera then recorded the image of five figures walking past 13 Priscilla Avenue, two of whom appear to be injured and limping. (Exh. 1).

Brendan Mahoney received five stab wounds and one slash wound. (Tr. IV:173). The slash wound was on his inner left thigh, one stab wound was to the front of his abdomen, and four stab wounds were to the front and back of his legs and buttocks. (Tr. IV:173-174). All five of the stab wounds were inflicted in an upward direction. (Tr. IV:198). The wound to his abdomen was the only wound that could have killed him. (Tr. IV:199). Brian Mahoney received six wounds in total, including one on his elbow, two on his side, one near the top of his buttocks, and two lower on his buttocks. (Tr. V:27).

The defendant returned to his family's home between 2:30 a.m. and 3:30 a.m. and woke up his parents. (Tr. IV:106-107). The defendant was crying, yelling, and "very scared". (Tr. IV:107, 120). He told his father that he had been jumped by a group of people and that he may have stabbed one or two of them. (Tr. IV:107). His father accompanied him on foot to meet his grandmother nearby. (Tr. IV: 114). He was arrested later that morning after his mother led police to his grandparents' home and his grandparents allowed the police into their home. (Tr. IV:65-66). The defendant willingly allowed the police to arrest him. (Tr. IV:65, 74).

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE ABSENCE OF PROVOCATION AND EXCESSIVE FORCE IN SELF-DEFENSE BEYOND A REASONABLE DOUBT, AND THEREFORE INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF MALICE AND A CONVICTION OF MURDER.

Murder, of which the defendant was improperly convicted, is the unlawful killing of a human being with malice aforethought (or in the commission or attempted commission of certain felonies). *See Commonwealth* v. *Fleury*, 64 Mass. App. Ct. 282, 282-283 (2005). Voluntary manslaughter, in contrast, "is unlawful homicide arising not from malice, but 'from

the frailty of human nature,' as in a case of 'sudden passion induced by reasonable provocation, sudden combat, or excessive force in self-defense.'" *Commonwealth* v. *Carrion*, 407 Mass. 263, 267 (1990) (quoting *Commonwealth* v. *Nardone*, 406 Mass. 123, 130-31 (1989)).

In order to prove malice to support a conviction for murder, the Commonwealth must prove the absence of provocation beyond a reasonable doubt. *Commonwealth* v. *Boucher*, 403 Mass. 659, 661 (1989). Indeed, "[m]alice and adequate provocation are mutually exclusive." *Id.* at 661-662. Furthermore, "[t]he provocation that justifies reasonable action in self-defense also negates a finding of malice in any killing that results from the use of excessive force." *Id.* at 664. That is, malice cannot be attributed to a killing where the Commonwealth fails to prove beyond a reasonable doubt that the killer was not provoked and did not use excessive, but otherwise appropriate, self-defense. *Id.* at 661-664. In cases where malice may not be attributed to a killing, the only crime of which the killer may be appropriately convicted is manslaughter. *Commonwealth* v. *Carrion*, 407 Mass. 263, 267 (1990).

A. The Trial Judge Improperly Denied The Defendant's Motion For A Required Finding Of Not Guilty As To So Much Of The Indictment That Alleged Murder.

At the close of the Commonwealth's case, at the close of all of the evidence, and following the jury verdict, the defendant moved for required findings of not guilty as to so much of the indictments that alleged murder. (R.A. 10-11, 92, 100).[3] The motions should have been allowed, as the Commonwealth failed to prove beyond a reasonable doubt the absence of provocation and the absence of excessive force in self-defense.

The standard on a motion for a required finding of not guilty is well-established as a high, but not insurmountable bar for defendants. The Supreme Judicial Court has articulated the standard thusly: "to sustain the denial of a directed verdict, it is not enough for the appellate court to find that there was some record evidence, however slight, to support each essential element of the offense; it must find that there was enough evidence that could have satisfied a rational trier of fact of each such

[3] Prior to trial the defendant had also moved to dismiss so much of the indictment as alleged murder in the first degree pursuant to *Commonwealth* v. *McCarthy*, 385 Mass. 160 (1982). (R.A. 13).

element beyond a reasonable doubt." *Commonwealth* v. *Latimore*, 378 Mass. 671, 677-78 (1979). A rational trier of fact simply could not find evidence in the record to support the finding of absence of provocation and excessive force in self-defense in the instant case.

At trial, the Commonwealth fell woefully short of proving beyond a reasonable doubt the absence of provocation and excessive force in self-defense. In fact, not only did the Commonwealth fail to prove the absence of provocation and excessive force in self-defense beyond a reasonable doubt, it failed to present *any* facts that challenged the uncontroverted evidence that the defendant was attacked, and that he appropriately defended himself, albeit with force that could be said to have been excessive. (Tr. V:40-41). There was no evidence presented that undermined the fact that the victims of the crimes for which the defendant was convicted chased the defendant down the street and struck the first blows in the physical altercation that resulted in the death of Brendan Mahoney. (Tr. V:33). Nor was there evidence presented to call into question the fact that the defendant was set upon by a group of between two and six individuals

who were intent on doing physical harm to the defendant. (Tr. V:41). Likewise, the Commonwealth failed to adduce any evidence to challenge the fact that the defendant was prescribed and taking the blood-thinning medication Coumadin at the time of the incident, (Tr. III:55) something that would make any injury suffered by the defendant in this attack a grave danger. Similarly, the Commonwealth failed to adduce any evidence to contradict the fact that the defendant, immediately prior to the physical altercation, had walked away from the party and the group of individuals who would soon pursue him. (Tr. III:155). Finally, the Commonwealth failed to produce any evidence to contradict the fact that Brendan and Brian Mahoney had punched him, pushed him against a fence, and attempted to kick him before he defended himself by stabbing the Mahoneys. (Tr. V:40-41).

There was simply no evidence adduced at trial that could be construed as undermining the fundamental fact that although the defendant was indeed verbally aggressive and rude, as soon as words escalated to the point of an imminent physical altercation, the defendant disengaged and walked away. (Tr. III:104). Once the defendant was walking away from the house, it

cannot be said that what happened next was anything other than a physically unprovoked attack upon the defendant that caused him to reasonably fear that he was going to be seriously injured, and that left him—as he was pushed against a fence—with no means of escape. (Tr. V:40-41). The facts overwhelmingly support the contentions that the defendant was provoked by the Mahoney brothers' attack, and that after he had been chased down, punched, and knocked to the ground by two people, he was legally entitled to use some level of force to defend himself. *See, e.g.*, *Commonwealth* v. *Harrington*, 379 Mass. 446, 452 (1980). The defendant acknowledges that the jury may have found that he used excessive force in defending himself, but there is no evidence whatsoever to support the finding that he was not entitled to use some measure of self-defense based on the fact that he was chased down and attacked by the Mahoneys.

Indeed, each of the two necessary elements for the right of self-defense were clearly present in the defendant's case. The Supreme Judicial Court has stated repeatedly, "[t]he right of self-defense does not arise unless (1) the defendant took every opportunity to avoid combat, *Commonwealth* v. *Niemic*,

427 Mass. 718, 722 (1998), and (2) the defendant had 'reasonable ground to believe, and actually did believe that he was in imminent danger of death or serious bodily harm.' *Commonwealth* v. *Carrion*, 407 Mass. 263, 268 (1990), quoting *Commonwealth* v. *Harrington*, 379 Mass. 446, 450 (1980)." *Commonwealth* v. *Berry*, 431 Mass. 326, 335 (2000). In specifically addressing when the consideration of excessive force in self-defense as a mitigating factor is appropriate, the SJC has held that the necessary factual predicates are a reasonable belief on the part of the defendant that his physical safety was in immediate danger, and an attempt on the part of the defendant to retreat and avoid the physical confrontation. *See, e.g.*, *Commonwealth* v. *Hinds*, 457 Mass. 83, 91-92 (2010). In *Hinds*, the SJC found that excessive force in self-defense could not be considered as a mitigating factor where the defendant exited his home in order to confront two people, and then shot them based on his unfounded belief that they may have been reaching for weapons. *Id.* at 91-92.

Here, although the defendant may have agitated events prior to the fatal altercation, he had walked away from the party and was a considerable distance

down the roadway when he was chased by the Mahoney brothers with several others closely pursuing, giving the defendant the reasonable belief he was about to be viciously beaten by an angry mob. (Tr. III:24-26, 28, 90). The defendant fled from the Mahoney brothers until they closed in on him, and there was no direct evidence that a knife was drawn until after the defendant was punched, knocked against a chain link fence, and set upon by both of the Mahoney brothers. (Tr. V:33). It is clear that the defendant, having withdrawn from any active confrontation at the party by walking away from the house, unequivocally took every opportunity he had to avoid combat. It is also indisputable that after he was chased, set upon, punched, and knocked against a fence that the defendant was in immediate physical danger, something heightened even more so by his use of blood-thinning medication. Thus, there was not sufficient evidence for the Commonwealth to prove beyond a reasonable doubt that the defendant was not entitled to use some measure of self-defense. Indeed, the prosecutor seemed to admit as much herself, when in her closing argument, she stated, "would [the defendant] have probably gotten punched a few times? Yeah. And you

know what he could have done? He probably could have punched [the Mahoneys] back." (Tr. V:127). The prosecutor's apparent acknowledgement of the obvious fact that the defendant was entitled to use some measure of self-defense underscores the impropriety of the defendant being convicted in disregard of the utter lack of evidence as to the absence of excessive force in self-defense.

It is equally clear that the Commonwealth failed to prove the absence of provocation beyond a reasonable doubt. The law related to provocation in the Commonwealth has been stated in similar fashion for over a century: "[I]f a person kills another in the heat of passion, which is occasioned by adequate and reasonable provocation, or in sudden combat, then even though that person had an intent to kill, the killing is designated manslaughter and not murder because of the mitigating circumstances." *Commonwealth* v. *Acevedo*, 427 Mass. 714, 716 (1998). Reasonable provocation includes something that would "produce in an ordinary person such a state of passion, anger, fear, fright, or nervous excitement as would eclipse his capacity for reflection or restraint." *Commonwealth* v. *Walden*, 380 Mass. 724, 728 (1980),

citing *Commonwealth* v. *Rooney*, 365 Mass. 484, 494-495 (1974). Sudden combat is among those circumstances constituting reasonable provocation, see *Commonwealth* v. *Walden*, *supra* at 727-728, and has been described as "[w]hen two meet, not intending to quarrel, and angry words suddenly arise, and a conflict springs up in which blows are given on both sides, without much regard to who is the assailant. . .." *Commonwealth* v. *Clemente*, 452 Mass. 295, 320 (2008), cert. denied, 555 U.S. 1181 (2009), quoting *Commonwealth* v. *Webster*, 59 Mass. 295, 308 (1850).

Even if this Court were to find that the defendant was not entitled to use any form of self-defense, and therefore finds that the Commonwealth was not obligated to prove beyond a reasonable doubt the absence of excessive force in self-defense, it is abundantly clear that the defendant was provoked by sudden combat with the Mahoney brothers. Not only was the fight, from the defendant's perspective, a sudden occurrence that he did not intend to engage in, the Mahoney brothers literally had to chase the defendant down the road in order to start the fight. The SJC has noted that mere words can cause provocation sufficient to mitigate a finding of malice. *Commonwealth* v.

Hinds, 457 Mass. 83, 90 (2010). Here, where the defendant was provoked by being chased and beaten by at least two people, the factual support for a finding of provocation cannot be disputed. The only proposition that is plainer to see is that the inverse -- the absence of provocation -- could not possibly have been proven beyond a reasonable doubt. Therefore, the judge improperly denied the defendant's motion for a required finding of not guilty as to so much of the indictments that alleged murder.

B. The Trial Judge Improperly Denied The Defendant's Motion To Reduce The Verdict To A Finding Of Manslaughter.

After the jury returned its verdict convicting the defendant of murder in the second degree, the defendant filed a motion to reduce the verdict to a finding of manslaughter, pursuant to Mass.R.Crim.P. 25(b)(2). (R.A. 11, 100). That motion should have been allowed because the weight of the evidence clearly indicates the presence of mitigating factors, and thus the absence of malice, and therefore the interests of justice demanded that the verdict be reduced to a finding of manslaughter. It was error not to do so.

"Pursuant to rule 25(b)(2), a trial judge has the authority to reduce a verdict, despite the presence of

evidence sufficient to support the jury's original verdict." *Commonwealth* v. *Rolon*, 438 Mass. 808, 820 (2003). Trial judges are to reduce verdicts pursuant to rule 25(b)(2) when, "a lesser verdict is more consonant with the interest of justice." *Commonwealth* v. *Millyan*, 399 Mass. 171, 189 (1987). In the context of motions for reduced verdicts, it is well-settled that, "[i]f the weight of the evidence indicates that the defendant did not act with malice, a murder verdict is appropriately reduced to manslaughter." *Commonwealth* v. *Almeida*, 452 Mass. 601, 614 (2008).

In assessing a trial judge's decision to reduce a verdict under Mass.R.Crim.P. 25(b)(2), appellate courts are to "consider only whether the judge abused his discretion or committed an error of law." *Commonwealth* v. *Gaulden*, 383 Mass. 543, 557 (1981).

There are important differences in the manner in which a trial judge is to consider a motion for a reduced verdict and a motion for a required finding of not guilty. Specifically, whereas a motion for a required finding of not guilty requires consideration of all of the evidence in order to determine whether there is sufficient evidence to convince a reasonable trier of fact of each element beyond a reasonable

doubt, in the context of deciding a motion for a reduced verdict, a trial judge is to consider the weight of the evidence, and the interests of justice, even if there is evidence sufficient to support the original verdict. *Rolon*, *supra* at 820; *Millyan*, *supra* at 189; *Almeida*, *supra* at 614.

As noted above, the overwhelming weight of the evidence supports a conviction for manslaughter as opposed to murder, and because of that, the trial judge abused his discretion by refusing to find that the interests of justice demand a reduction of the verdict to a conviction of manslaughter. The significant amount of uncontroverted evidence of mitigation due to either excessive force in self-defense or provocation is laid out above, and it is instructive to compare the facts of the instant case to those of a leading case in which the SJC determined that the interests of justice were served by reducing a jury verdict convicting a defendant of second degree murder to a verdict of manslaughter. Indeed, the facts of the instant case mirror the facts of *Commonwealth* v. *Keough*, 385 Mass. 314 (1982), to a degree that is striking.

In this case, as in *Keough*, both the defendant and the victims were intoxicated at the time of the altercation. *Commonwealth* v. *Keough*, 385 Mass. 314, 320 (1982). (Tr. III:54-56, 178). In this case, as in *Keough*, the defendant and the victims had never had any conflict prior to the deadly altercation. *Commonwealth* v. *Keough*, 385 Mass. 314, 320 (1982). (Tr. V:11-14). In this case, as in *Keough*, the defendant had the knife that was used to stab the victims on his person the entire night -- he did not begin a confrontation, leave to retrieve a weapon, and then re-appear to confront the victims. *Commonwealth* v. *Keough*, 385 Mass. 314, 320 (1982). (Tr. IV:122). In this case, as in *Keough*, it is undisputed that in the moments preceding the stabbing, the victim sought out and began the physical confrontation that unfortunately ended in death. *Commonwealth* v. *Keough*, 385 Mass. 314, 320-321 (1982). (Tr. V:21). In this case, as in *Keough*, the defendant was outnumbered, *Commonwealth* v. *Keough*, 385 Mass. 314, 321 (1982) (Tr. III: 26-28), and in this case, as in *Keough*, the conviction of second degree murder should be reduced to a conviction of manslaughter because the weight of the evidence and the interests of justice demand it.

Further tipping the interests of justice towards a conviction of manslaughter as opposed to murder is the defendant's tender age. This tragic event occurred when the defendant was just a few months past his eighteenth birthday. (Tr. IV:102). It is established that "[a] defendant's personal circumstances may be considered in conjunction with the evidence that points to a lesser degree of guilt." *Commonwealth* v. *Rolon*, 438 Mass. 808, 825 (2003). The fact that the defendant had been an adult in the eyes of the law for just a few months before the stabbing should have been considered by the trial judge in considering whether malice had been proven, and it ought to be considered by this court.

The Supreme Judicial Court and the Supreme Court of the United States have recognized that offenders under the age of eighteen have "diminished culpability" due to their youth and their level of cognitive and emotional development in the context of homicide prosecutions. *Diatchenko* v. *District Attorney for Suffolk District*, 466 Mass. 655, 670 (2013), quoting *Miller* v. *Alabama*, 132 S.Ct. 2455, 2464 (2012). An offender who happens to have turned eighteen twenty weeks before his offense likely

suffers from the same underdeveloped cognitive and emotional functioning that our highest courts have recognized in juveniles. The defendant's youth, along with the other mitigating factors mentioned above, undoubtedly mitigate the malice necessary to sustain a murder conviction, and thus demand that the verdict be reduced to a conviction of manslaughter.

The final factor weighing in favor of reducing the verdict to manslaughter is the fact that the jury returned verdicts of guilty on the charge of second degree murder of Brendan Mahoney, not guilty on the charge of armed assault with intent to murder of Brian Mahoney, and guilty on the lesser charge of assault and battery with a dangerous weapon of Brian Mahoney. (R.A. 10). Although the defendant recognizes that a verdict is not invalid simply because it is internally inconsistent, *Commonwealth* v. *Scott*, 355 Mass. 471, 475 (1969), there is no explanation that is consonant with justice for the inconsistency in these verdicts. Clearly, the jury believed that the defendant attacked the two victims with a knife or some other weapon. (R.A. 10). Equally clear is the fact that the jury believed there were mitigating factors that vitiated the intent -- i.e., the malice -- in the armed assault

with intent to murder charge as to Brian Mahoney. The same mitigating factors that were equally present in the stabbing of Brian Mahoney were present in the killing of Brendan Mahoney, and in fact, the uncontroverted evidence showed that the stabbing of Brendan was even more mitigated than the stabbing of Brian, as it was Brendan who first punched the defendant. (Tr. V:21, 40-41). Therefore, there is no explanation consistent with justice and fairness for how the jury could have found that the defendant acted with malice in stabbing Brendan Mahoney, but that he did not act with malice in stabbing Brian Mahoney. As such, the conviction of murder cannot stand and ought to be reduced to manslaughter.

Just as the Commonwealth failed to prove beyond a reasonable doubt the absence of excessive force in self-defense and the absence of provocation, it failed to marshal the weight of the evidence behind the proposition that the interests of justice were served by the defendant being convicted of murder. For that reason, the defendant's motion for a reduction of the verdict should have been allowed.

II. THE JUDGE IMPROPERLY DENIED THE DEFENDANT'S MOTION TO DISMISS INDICTMENTS FOR FAILURE TO PRESENT INSTRUCTIONS TO THE GRAND JURY ON DEFENSES AND MITIGATING CIRCUMSTANCES AND FAILURE TO INSTRUCT GRAND JURY ON ELEMENTS OF FIRST DEGREE MURDER, SECOND DEGREE MURDER AND MANSLAUGHTER.

After the Grand Jury returned indictments charging the defendant with, among other things, murder in the first degree, the defendant filed a motion to dismiss the indictments against him based on the fact that the jury was not instructed on the legal significance of the obvious mitigating factors in the case. (R.A. 45). The defendant filed said motion in heavy reliance on *Commonwealth* v. *Walczak*, 463 Mass. 808 (2012), a landmark decision that the SJC issued less than three months after the indictments were returned against the defendant in the instant case. (R.A. 1-3); *Commonwealth* v. *Walczak*, 463 Mass. 808 (2012). The *Walczak* decision expanded the protections that defendants enjoy in the grand jury process by plainly stating that in situations where the Commonwealth seeks to indict a juvenile for murder, and where there is evidence of mitigation, the grand jury must be instructed on the elements of the various degrees of murder as well as manslaughter, and it must receive instruction on the legal significance of

mitigating factors. *Id.* at 833-837. The facts in *Walczak* were strikingly similar to the facts in the instant case, except for the fact that the defendant in *Walczak*, unlike the defendant in the instant case, threw the first blow in the physical altercation that led to the death of the victim, and the defendant in *Walczak* was a juvenile. *Id.* at 813-814.

In the present case, the defendant is alleged to have stabbed two individuals in a fight after said two individuals had chased the defendant down the street, one of these individuals had punched the defendant knocking him into a chain link fence, and then the defendant was set upon and assaulted by both individuals. (Tr. V:40-41). Although the defendant had been drunk and obnoxious prior to this altercation, and although the defendant had earlier challenged these two individuals to a fight, he had left the vicinity where these two individuals had been and indeed attempted to run away from these individuals before stopping to defend himself. (Tr. III:104). After being punched, kicked at, knocked to the ground, and pressed against the chain link fence, the defendant had no reasonable avenue of escape. Throughout the lengthy grand jury presentation, strong

evidence was presented to the grand jury of reasonable provocation, sudden combat, self-defense and intoxication, all of which mitigated against and provide defenses to indictment for first degree murder and second degree murder. (R.A. 45).

The Commonwealth acknowledged that "the Grand Jury was not provided with instructions on murder or with instructions regarding defenses and mitigation." (R.A. 12). As such, with no instructions on the difference between first degree murder and second degree murder and manslaughter, and with no instructions on defenses or mitigation, the integrity of the grand jury was impaired, and the instant indictment must be dismissed. *Walczak* at 837.

In *Walczak,* three judges of the divided Supreme Judicial Court held that "where, as here, the prosecutor seeks an indictment for murder despite evidence of mitigating circumstances that is so substantial that concealing it would impair the integrity of the grand jury, the prosecutor is required to give the grand jury legal instructions on the elements of murder in the second degree and on the legal significance of the mitigating circumstances." *Id.* at 837. Although the ultimate decision in *Walczak*

was premised on the fact that *Walczak* was a juvenile and the case presented "the unique instance of juvenile defendants whom the prosecutor seeks to charge with murder," *id.* at 824, three of the four judges concluded that "such instruction was required in the circumstances regardless of whether the person accused is a juvenile or an adult." *Id.* at 837 (Gants, J. concurring, with whom Botsford and Duffly, J.J., join, emphasis added). Given that the *Walczak* court was dealing only with a juvenile charged with murder, Justice Lenk, concurring in the decision, did "not address the merits of Justice Gants' proposal, which would apply in all murder cases." *Id.* at 833. Therefore, three of the justices of the Supreme Judicial Court would require instructions in the instant case, and a fourth justice, Justice Lenk, may well side with those three other justices. *Id.* at 833-837. Justice Lenk wrote at length about the significance of such instructions in *Walczak*, and she may well side with Justice Gants' position when confronted with this issue. *Id.* at 833.

Although the instant case was presented to the grand jury before the *Walczak* decision was rendered, and the defendant made no argument that the

prosecution withheld any evidence before the grand jury, it could not be denied that, after six days of testimony from a total of twenty-seven witnesses before the grand jury, the vast majority of whom testified to voluntary intoxication, self-defense, reasonable provocation and sudden combat, that legal instructions should have been presented to the grand jury on not only first degree murder, but also on second degree murder and manslaughter. *Walczak* at 837. Even more significantly, legal instructions should have been given regarding the significance of mitigating circumstances and defenses. *Id.* at 837. For the grand jurors to be presented with this overwhelming testimony regarding self-defense, sudden combat, reasonable provocation, and intoxication, but not be instructed on their significance, impaired the integrity of the grand jury proceedings. *Id.* at 837. Such instructions would not only have been beneficial to the grand jury in serving their vital role in protecting "against unfound criminal prosecutions," *Commonwealth* v. *McCarthy*, 385 Mass. 160, 163 (1982) quoting *Lataille* v. *District Court of E. Hampden*, 366 Mass. 525, 532 (1974), but such instructions were crucial and essential.

The fact that the petit jury at trial found that there was sufficient evidence to support a conviction is immaterial to the question of the propriety of the proceedings in the grand jury, and the potential for subsequent prejudice to the defendant. *Commonwealth* v. *Mayfield*, 398 Mass. 615, 622 (1986). The Supreme Judicial Court in *Mayfield* made the point that the outcome at trial has little to no bearing on the analysis of potential impropriety in the grand jury when it stated, "the issue of the impairment of the grand jury proceedings does not become irrelevant simply because sufficient evidence was presented at trial to submit the case to the jury. Preservation of the integrity of the grand jury process requires an independent analysis of the propriety of the grand jury proceedings"). *Id.* at 622, n.3. Here, as in *Walczak*, the grand jury process was irreparably sullied by the lack of instruction on the legal significance of mitigating factors as they relate to various degrees of homicide, and that being the case, the defendant's motion to dismiss based on that failing should have been allowed.

III. THE PROSECUTOR IMPROPERLY SHIFTED THE BURDEN OF PROOF DURING HER CLOSING ARGUMENT BY REPEATEDLY MAKING REFERENCES TO THE DEFENDANT "CLAIMING" SELF-DEFENSE AND THE IMPROPRIETY OF HIM DOING SO.

It is axiomatic that "a prosecutor 'cannot make statements that shift the burden of proof from the Commonwealth to the defendant.'" *Commonwealth* v. *Amirault*, 404 Mass. 221, 240 (1989). This general statement applies to cases in which self-defense is an issue, and proscribes prosecutors from making comments that create the impression that the defendant in a case which involves self-defense is under an obligation to assert or claim that he acted in self-defense. *See, e.g.*, *Commonwealth* v. *Rodriguez*, 370 Mass. 684, 687-688 (1976).

In the instant case, the prosecutor, in her closing argument, made repeated references to her belief that the defendant was trying to "claim" self-defense, which were followed by her stated belief that he could not do so in the circumstances of the case. (Tr. V:128, 132). The prosecutor made reference to the fact that, in her opinion, the defendant was "claiming" self-defense at least four times in her closing argument. (Tr. V:128-132). The defendant, through counsel, objected to these comments at the

first available opportunity. (Tr. V:139-140). These statements were clearly inappropriate, and clearly constitute the type of prejudicial error that has compelled courts to set aside guilty verdicts for similar improprieties for decades. *See, e.g., Commonwealth* v. *Domanski, et al.*, 332 Mass. 66, 71 (1954).

In fact, the defendant, who did not testify at trial, did not claim anything during the course of the trial, and he was certainly under no obligation whatsoever to claim or assert self-defense, or any other defense or mitigating factor. U.S. Const. amend. V; MA Const. Part I, art. XII. Instead, the prosecutor bore the burden throughout the trial of disproving self-defense and the existence of any mitigating factors beyond a reasonable doubt. *Connolly* v. *Commonwealth*, 377 Mass. 527, 530 (1979). The prosecutor's comments during closing argument that the defendant was somehow not entitled to "claim" self-defense reversed the appropriate placement of the burden of persuasion, and in so doing prejudiced the defendant by likely leading the jury to believe that the defendant had an affirmative obligation to "claim" self-defense and demonstrate that his actions were

excused or mitigated by self-defense. *See Id.* at 534 (finding reversible error because of burden-shifting that results from repeated suggestion and implication that jury must "find self-defense" in order to acquit). The prosecutor's statements were improper and not only flew in the face of the reality that the Commonwealth had the heavy burden of proving the absence of self-defense beyond a reasonable doubt, the comments in fact reversed the burden, and could well have led a reasonable juror to the belief that the defendant was under the obligation to claim self-defense and then prove that his actions fell under the umbrella of self-defense. *Id.* at 534.

CONCLUSION

For the foregoing reasons, the defendant respectfully requests that this Honorable Court overturn the defendant's convictions and order a verdict of not guilty as to so much of the indictment against him that alleges murder, or, in the alternative, order a new trial.

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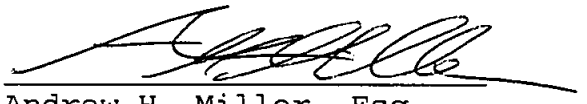
Mass.R.A.P. 16(k) Certificate of Compliance

I, Andrew H. Miller, Esq. Hereby certify that I have complied with the Massachusetts Rules of Appellate Procedure which pertain to the filing of this Brief.



Andrew H. Miller, Esq.

Commonwealth
v.
Bryan M. Grassie

Appeals Court Docket No. 2015-P-0196

On Appeal from Plymouth Superior Court
Docket No. PLCR2012-00489

ADDENDUM TO APPELLANT'S BRIEF

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ADDENDUM

Verdict-Offense 1.....Add. 1

Verdict-Offense 3.....Add. 2

Statutes and Other Legal Authorities

G.L. c. 211, §3.....Add. 3

Mass.R.Crim.P. 25(b)(2)..... Add. 4

MA Const. Part I, art. XII..... Add. 7

U.S. Const. amend. V.....Add. 8

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Commonwealth v Grassie, Bryan M

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No.	Docket Entry:
1	RE Offense 1:Guilty verdict (lesser offense) Murder 2nd degree

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No.	Docket Entry:
1	RE Offense 3:Guilty verdict

Docket Details: Parties Attorneys Docket Entries Calendar Events Charges
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Add. 2

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title I. Courts and Judicial Officers (Ch. 211-222)
Chapter 211. The Supreme Judicial Court (Refs & Annos)

M.G.L.A. 211 § 3

§ 3. Superintendence of inferior courts; power to issue writs and process

Effective: July 1, 2012

Currentness

The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section 3C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration; provided, however, that general superintendence shall not include the authority to supersede any general or special law unless the supreme judicial court, acting under its original or appellate jurisdiction finds such law to be unconstitutional in any case or controversy. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

Credits

Amended by St.1956, c. 707, § 1; St.1973, c. 1114, § 44; St.1992, c. 379, § 61; St.2011, c. 93, § 46, eff. July 1, 2012.

Notes of Decisions (807)

M.G.L.A. 211 § 3, MA ST 211 § 3
Current through Chapter 25 of the 2015 1st Annual Session

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Massachusetts General Laws Annotated
Massachusetts Rules of Criminal Procedure (Refs & Annos)

Massachusetts Rules of Criminal Procedure (Mass.R.Crim.P.), Rule 25

Rule 25. Motion for Required Finding of Not Guilty

Currentness

(Applicable to District Court and Superior Court)

(a) Entry by Court. The judge on motion of a defendant or on his own motion shall enter a finding of not guilty of the offense charged in an indictment or complaint or any part thereof after the evidence on either side is closed if the evidence is insufficient as a matter of law to sustain a conviction on the charge. If a defendant's motion for a required finding of not guilty is made at the close of the Commonwealth's evidence, it shall be ruled upon at that time. If the motion is denied or allowed only in part by the judge, the defendant may offer evidence in his defense without having reserved that right.

(b) Jury Trials.

(1) *Reservation of Decision on Motion.* If a motion for a required finding of not guilty is made at the close of all the evidence, the judge may reserve decision on the motion, submit the case to the jury, and decide the motion before the jury returns a verdict, after the jury returns a verdict of guilty, or after the jury is discharged without having returned a verdict.

(2) *Motion After Discharge of Jury.* If the motion is denied and the case is submitted to the jury, the motion may be renewed within five days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned, the judge may on motion set aside the verdict and order a new trial, or order the entry of a finding of not guilty, or order the entry of a finding of guilty of any offense included in the offense charged in the indictment or complaint.

(c) Appeal.

(1) *Right of Appeal Where Motion for Relief Under Subdivision (b) Is Allowed After a Jury Verdict of Guilty.* The Commonwealth shall have the right to appeal to the appropriate appellate court a decision of a judge granting relief under the provisions of subdivisions (b)(1) and (2) of this rule on a motion for required finding of not guilty after the jury has returned a verdict of guilty or on an order for the entry of a finding of guilt of any offense included in the offense charged in the indictment or complaint.

(2) *Costs Upon Appeal.* If an appeal or application therefor is taken by the Commonwealth, the appellate court, upon the

PrevNext

written motion of the defendant supported by affidavit, may determine and approve the payment to the defendant of his costs of appeal together with reasonable attorney's fees, if any, to be paid on the order of the trial court upon the entry of the rescript or the denial of the application.

Credits

Amended April 6, 1983, effective July 1, 1983; amended effective April 14, 1995.

Editors' Notes

REPORTER'S NOTES

Rule 25 is derived with a minimum of change from former G.L. c. 278, § 11 (St.1964, c. 108, §§ 1, 2) and conforms in substance to Fed.R.Crim.P. 29. *See* ABA *Standards Relating to Trial by Jury* § 4.5 (Approved Draft, 1968); Rules of Criminal Procedure (U.L.A.) rule 522 (1974); Vt.R.Crim.P. 29; Me.R.Crim.P. 29.

The practical effect of this rule is to abolish the common law motion for a directed verdict and to substitute therefor a motion for a required finding of not guilty. This is essentially a change in terminology and does not presume to alter practice as it has developed relative to the directed verdict. The new term is not unknown in Massachusetts practice. *See* e.g., Commonwealth v. Coyne, 372 Mass. 599, 363 N.E.2d 256 (1977).

Motion for findings of not guilty are a part of Massachusetts practice in the context of nonjury cases, *see* e.g., Commonwealth v. Pursley, 2 Mass.App. 910, 321 N.E.2d 830 (1975) (Rescript), and are extended by this rule to include jury trials in recognition of the fact that juries have no proper function in this area. *See* ABA *Standards Relating to Trial by Jury* § 4.5(a), comment at 106-08 (Approved Draft, 1968).

Subdivision (a). The requirement that the court rule on a defendant's motion made at the close of the Commonwealth's case at the time such motion is made has recently been added to Massachusetts procedure. *See* Commonwealth v. Kelley, 370 Mass. 147, 149-50, 346 N.E.2d 368 (1976). This rule adopts this approach because of the difference between such a motion and a motion made at the close of all the evidence: in either case a defendant is requesting a judgment on the basis of evidence then before the court, but that evidence is very different at each of the two stages of trial. See ABA *Standards Relating to Trial by Jury* § 4.5(b), comment at 108 (Approved Draft, 1968).

On a defendant's motion for a directed verdict at the close of the Commonwealth's case, the defendant's rights become "fixed." If this motion is improperly denied on the basis of the condition of the case when the motion was made, the defendant is entitled to a reversal of the judgment, notwithstanding the introduction of further evidence. Of course, the Commonwealth's proof might deteriorate between the time the Commonwealth rests and the close of all the evidence. In such a case, on renewal of his motion, the defendant's rights would be reappraised in consideration of all the evidence. *Commonwealth v. Kelley,* supra, at n. 1; Commonwealth v. Blow, 370 Mass. 401, 407 n. 4, 348 N.E.2d 794 (1976); Commonwealth v. Aguiar, 370 Mass. 490, 498, 350 N.E.2d 436 (1976).

Under this rule the defendant may offer evidence in his defense without having reserved that right. Fairness requires this result. As the court stated in Jackson v. United States, 250 F.2d 897 (5th Cir.1958), the motion "would be a futile thing if the court could reserve its ruling and force the defendant to an election between resting and being deprived of the benefit of his motion," Id. at 901, because the defendant would be compelled to forfeit either his right to move for acquittal or his right to present evidence in his defense.

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Subdivision (b)(1). This subdivision permits the court to reserve a decision on a motion made at the close of all the evidence. The objection stated in the *Jackson* case, supra, is not present in this situation, and G.L. c. 278, § 11 in fact expressly condoned the propriety of what often is referred to as a judgment notwithstanding the verdict.

Subdivision (b)(2). By giving the court the power to enter a finding of guilty of any lesser included offense or, in the language of G.L. c. 278, § 33E, a lesser degree of guilt, after a verdict of guilty, this rule deviates sharply from prior criminal practice under G.L. c. 278, § 11. Commonwealth v. Jones, 366 Mass. 805, 323 N.E.2d 726 (1975). This has the practical effect of extending to the trial courts, post-verdict, a power in all cases much like that which had previously been reserved to the Supreme Judicial Court in capital cases under G.L. c. 278, § 33E (as amended). This increases the options available to the trial judge after verdict. It is anticipated that through this extension greater judicial economy will result where the evidence will not support the charge, but where the weight of the evidence clearly requires the conviction of a lesser included offense. *See Jones,* supra.

It should be noted that the motion for a new trial which may be made under this subdivision is in addition to those rights which a defendant has under Rule 30(b). Obviously the court should order a new trial pursuant to this rule only upon motion of a defendant since otherwise the subsequent proceeding would be subject to constitutional attack on double jeopardy grounds.

Notes of Decisions (296)

Rules Crim. Proc., Rule 25, MA ST RCRP Rule 25
Current with amendments received through January 15, 2015.

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Massachusetts General Laws Annotated
Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]
Part the First a Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts

M.G.L.A. Const. Pt. 1, Art. 12

Art. XII. Regulation of prosecutions; right of trial by jury in criminal cases

Currentness

ART. XII. No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his council, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Notes of Decisions (7691)

M.G.L.A. Const. Pt. 1, Art. 12, MA CONST Pt. 1, Art. 12
Current through amendments approved May 1, 2015

End of Document

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Add. 7

United States Code Annotated
Constitution of the United States
Annotated
Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

U.S.C.A. Const. Amend. V full text

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation

Currentness

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const. Amend. V--Grand Jury clause>

<USCA Const. Amend. V--Double Jeopardy clause>

<USCA Const. Amend. V--Self-Incrimination clause>

<USCA Const. Amend. V-- Due Process clause>

<USCA Const. Amend. V--Takings clause>

U.S.C.A. Const. Amend. V full text, USCA CONST Amend. V full text
Current through P.L. 114-9 approved 4-7-2015

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