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COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT
CRIMINAL ACTION NO.
BRCR2013-01141

COMMONWEALTH

vs.

SHAYANNA JENKINS

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S
MOTION TO DISMISS FOR INSUFFICIENT EVIDENCE AND FOR
IMPAIRING THE INTEGRITY OF THE GRAND JURY**

INTRODUCTION

Shayanna Jenkins is charged with one count of perjury in violation of G.L. c. 268, § 1. She moves to dismiss the indictment on the grounds that the grand jury did not hear probable cause for that crime and the integrity of the proceeding was impaired. For the reasons discussed below, the motion to dismiss is **denied**.

BACKGROUND

On June 27, 2013, Jenkins appeared before the Bristol County Grand Jury ("Grand Jury") investigating the homicide of Odin Lloyd and asserted her Fifth Amendment right to remain silent. She was thereafter granted immunity from prosecution. Jenkins testified before the Grand Jury on August 13, 2013 and August 15, 2013. Her testimony for both days is set forth in approximately 217 pages of the grand jury transcript.

On September 26, 2013, Jenkins was charged with a single count of perjury. The indictment states that Jenkins:

On August 13, 2013, and/or August 15, 2013, at Fall River, in the County of Bristol aforesaid, being lawfully required to depose the truth in a judicial proceeding or in a proceeding in a course of justice, did willfully swear or affirm falsely in a matter material to the issue or point in question, or being required by law to take an oath or affirmation did willfully swear or affirm falsely in a manner relative to which such oath or affirmation was required, in violation of G.L. c. 268, section 1.

Jenkins then moved for a bill of particulars. After that motion was allowed, the Commonwealth filed a bill of particulars listing twenty-nine instances of allegedly perjurious statements. In response to a court order that the Commonwealth disclose all direct evidence of perjury in its possession, on July 31, 2014, the Commonwealth stated that it has direct evidence with respect to fourteen of the allegedly perjurious statements.

DISCUSSION

Duplicity

Duplicity is the charging of several separate offenses in a single count. Commonwealth v. Barbosa, 421 Mass. 547, 553 n.10 (1995). Jenkins argues that because the indictment charges a single count of perjury involving numerous separate acts, she may be convicted of a crime without having been indicted for that crime by a grand jury in violation of art. 12 of the Declaration of Rights. In Barbosa, the grand jury heard evidence that the defendant engaged in two entirely separate drug transactions; in each the defendant distributed cocaine to a different purchaser. Yet the grand jury returned only one count of distribution in the indictment. The indictment charged that the defendant did knowingly and intentionally distribute “a certain controlled substance.” Id. at 548 n.2. At trial, the prosecution again presented evidence of the two separate transactions. The Court found that, “on its face, the indictment appears to refer to a single act of distribution of cocaine” Id.

at 551. The Court pointed out that it was not dealing with a continuing offense occurring at several times and places over a period of time. Id. Accordingly the Court reversed the conviction on the grounds that there was a very real possibility that the defendant was convicted of a crime for which he was not indicted by the grand jury. Id. at 554.

Generally, the Commonwealth is free to bring indictments in as many counts as it feels is appropriate in the circumstances, unless the form of the indictment infringes the substantial rights of the defendant. Commonwealth v. Murray, 401 Mass.771, 774 (1988) (successive takings of property actuated by a single, continuing criminal impulse or intent or pursuant to a general larcenous scheme may, but need not, be charged as one crime); Commonwealth v. Gurney, 13 Mass. App. Ct. 391, 399 n.9 (1982). Where there is a continuing criminal episode, the Commonwealth has discretion to charge multiple acts in a single indictment. See Commonwealth v. Crowder, 49 Mass. App. Ct. 720, 721-722 (2000) (proper to charge single indictment for rape based on four separate acts of penetration of the same victim); Commonwealth v. Gurney, 13 Mass. App. Ct. at 403, 405 (suggesting that perjury need not be treated as a continuing offense but may be so viewed). The Court in Gurney noted that it has been the practice in Federal courts to charge perjury committed in the same proceeding as a one-count indictment with each false declaration set forth in a particular specification. Id. at 405 n.13 (citations omitted). As long as the separate specifications set out different falsehoods, proof of any of the specifications is sufficient to support a verdict of guilty. Id. See also United States v. Fernandez, 389 Fed. Appx. 194, 199 (3d Cir. 2010) (citing United States v. Berardi, 629 F.2d 723, 729 (2d Cir. 1980), for the proposition that it is accepted practice to charge perjury before a grand jury committed in the course of the same appearance in a one-count indictment); United States v. Pagan-Santini, 451 F.3d 258, 266 & n.2 (1st Cir. 2006) (noting, in

context of need for specific unanimity instruction, that government sometimes charges multiple perjuries in a single count).

Jenkins has not demonstrated that the form of the indictment infringes upon her substantial rights. The falsehoods all relate to the testimony given by Jenkins before the same grand jury in connection with its inquiry into who might be responsible for Lloyd's death and/or be accessories after the fact. By viewing her testimony to the Grand Jury as a continuing course of perjurious conduct, the Commonwealth has avoided problems with multiplicity and limited Jenkins's criminal exposure. The bill of particulars gives Jenkins notice of the factual predicate underlying the Commonwealth's case and restricts the Commonwealth's proof at trial to the allegedly false statements specified therein. See Commonwealth v. Crawford, 429 Mass. 60, 69 (1999); Rogan v. Commonwealth, 415 Mass. 376, 378 (1993). At trial, the defendant will be entitled to a specific unanimity instruction indicating to the jury that they must be unanimous as to which specific statement constitutes the offense charged. See Commonwealth v. Shea, 467 Mass. 788, 798 (2014) (specific unanimity instruction warranted when, on a single charged offense, Commonwealth presents evidence of discrete acts, any one of which would suffice by itself to make out the crime charged). Accordingly, Jenkins's concerns with respect to duplicity do not require dismissal of the indictment.

Probable Cause

In most cases, a court should not inquire into the adequacy or competency of the evidence upon which an indictment is based. Commonwealth v. Moran, 453 Mass. 880, 883 (2009); Commonwealth v. Coonan, 428 Mass. 823, 825 (1999). Nonetheless, fundamental fairness requires that a court dismiss an indictment where the grand jury receives no evidence of criminality on the

part of the accused. Commonwealth v. Moran, 453 Mass. at 884. In order for indictments to fulfil their traditional function as protection against unfounded criminal prosecutions, they must be supported by at least enough evidence to establish both the identity of the accused and probable cause to arrest her for the crime charged. Commonwealth v. Hanright, 466 Mass. 303, 311 (2013); Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982).

Probable cause to arrest means reasonably trustworthy information sufficient to warrant a prudent person in believing that the defendant committed the charged offense. Commonwealth v. Hanright, 466 Mass. at 312; Commonwealth v. McCarthy, 385 Mass. at 163. It requires more than mere suspicion but considerably less than the evidence required to warrant a conviction beyond a reasonable doubt. Commonwealth v. Humberto H., 466 Mass. 562, 565 (2013). Evidence that is insufficient to support a guilty verdict may be more than sufficient to establish probable cause. Id. Probable cause to sustain an indictment is a decidedly low standard, but the grand jury must be presented with evidence on each element of the crime charged. Commonwealth v. Hanright, 466 Mass. at 311-312.

Chapter 268, section 1 provides:

Whoever, being lawfully required to depose the truth in a judicial proceeding or in a proceeding in a course of justice, willfully swears or affirms falsely in a matter material to the issue or point in question, or whoever, being required by law to take an oath or affirmation, willfully swears or affirms falsely in a matter relative to which such oath or affirmation is required, shall be guilty of perjury.

This Court is not persuaded by the defendant's argument that, in order to sustain the indictment against a McCarthy challenge, the Court must separately analyze whether the Grand Jury had probable cause for each instance of alleged perjury set forth in the bill of particulars. The defense

and the Commonwealth agree that no case stands for that proposition. The issue presented by the McCarthy motion is whether the evidence before the Grand Jury was adequate to establish the level of probable cause required to support an arrest. A single false statement that meets the elements of perjury is a sufficient basis on which to predicate an arrest. No more need be shown for the indictment to survive.

The Grand Jury heard probable cause to believe that Jenkins committed perjury. The elements of perjury are that the defendant made a statement under oath in a judicial proceeding, the statement was false, the defendant made the statement willfully and knew the statement was false when she made it, and the statement was material to the issue or point in question. Commonwealth v. Geromini, 357 Mass. 61, 63-64 (1970); Commonwealth v. White, 70 Mass. App. Ct. 71, 76 (2007). In assessing the sufficiency of the indictment, this Court must view the evidence in the light most favorable to the Commonwealth. Commonwealth v. Hanright, 466 Mass. at 305. Jenkins was asked, while testifying under oath before a grand jury, whether, after Lloyd's death, she had talked to Ernest Wallace. The grand jury was investigating Wallace as a potential co-venturer in Lloyd's murder and as a potential accessory after the fact. In response, she testified, "Not from my knowledge, no." However, the Grand Jury was presented with telephone records from Jenkins's phone and Wallace's phone which indicate that, on June 18th, there were eleven calls between them, starting around the time that Jenkins dropped Aaron Hernandez off at the North Attleboro Police Station. The grand jury had evidence that Jenkins had a motive to lie and that, at Hernandez's request, she had disposed of a heavy box. Viewed in the light most favorable to the Commonwealth, the evidence supports an inference that Jenkins probably made the statement wilfully and knew it was false when she testified. Knowledge may be inferred from the circumstantial evidence that

reasonably tends to show that knowledge existed. “In perjury cases, such knowledge may be inferred from the falsity of the statement itself, as least if considered in relation to the facts relating to the defendant’s opportunity to have knowledge.” Commonwealth v. Giles, 350 Mass. 102, 112 (1966), overruled on other grounds, Commonwealth v. McDuffee, 379 Mass. 353 (1979). The questions posed to Jenkins regarding her communications with Wallace were directly within the scope of the grand jury inquiry. The test of relevancy and materiality for perjury is not whether the false testimony did in fact impede or otherwise influence the grand jury’s investigation; rather, it is whether, viewed objectively, the testimony directly or circumstantially had a reasonable and natural tendency to do so. Commonwealth v. Borans, 379 Mass. 117, 136 (1979); Commonwealth v. White, 70 Mass. App. Ct. at 76. Jenkins’s false statement that she did not communicate with Wallace following Lloyd’s death was relevant to the investigation into Hernandez’s and Wallace’s involvement in the murder and had a reasonable tendency to influence the grand jury investigation.

To secure a conviction for perjury with the direct testimony of a live witness, the Commonwealth must offer clear or compelling corroborating evidence; without direct evidence, the Commonwealth must offer clear and compelling circumstantial evidence of perjury objectively inconsistent with the defendant’s innocence. Commonwealth v. Silva, 401 Mass. 318, 323-324 (1987). Clear and compelling corroborating evidence of perjury may be circumstantial and may include inferences. Commonwealth v. Knowlton, 50 Mass. App. Ct. 266, 270 (2000). Assuming that a heightened evidence standard applies in the context of a McCarthy motion,¹ that standard was met with respect to Jenkins’s response about whether she was in communication with Wallace. See Commonwealth v. Brown, 55 Mass. App. Ct. at 447 (telephone records, internal contradictions and

¹See Commonwealth v. Brown, 55 Mass. App. Ct. 440, 447 (2002).

strong implausibilities of witness's testimony, along with readily inferred motive to lie to cover up boyfriend's role in a crime, furnished sufficient corroboration for perjury charge). Accordingly, the Grand Jury heard probable cause to arrest Jenkins for the crime of perjury.

Grand Jury Impairment

Jenkins asks this Court to dismiss the indictment based on impairment of the integrity of the grand jury. The Supreme Judicial Court has stated: "It is unlikely that we could devise a satisfactory, comprehensive statement of what conduct does, and what conduct does not, impair the integrity of the grand jury process." Commonwealth v. Mayfield, 398 Mass. 615, 620 (1986).² Jenkins contends that the Commonwealth deliberately impaired the integrity of the grand jury by attempting to entrap her on perjury charges through questioning intended to create inconsistencies and by not always trying to refresh her recollection with documents in its possession. See United States v. McKenna, 327 F.3d 830, 837 (9th Cir.), cert. den., 540 U.S. 941 (2003) (noting that some jurisdictions hold that the government violates due process when it calls a witness before a grand jury with the primary purpose of obtaining testimony in order to prosecute her later for perjury on matters not material to a legitimate ongoing investigation). Even assuming that the Supreme Judicial Court would recognize the perjury trap doctrine as a basis to dismiss an indictment, Jenkins has failed to establish that the prosecutor questioned her for the primary purpose of securing a perjury indictment or that the perjury charged involves matters not germane to the legitimate investigation into Lloyd's death.


²The most common scenario is that of a defendant who proves that the Commonwealth knowingly or recklessly presented false or deceptive evidence for the purpose of obtaining an indictment and that the evidence probably influenced the grand jury's decision to indict. See Commonwealth v. Carr, 464 Mass. 855, 866-867 (2013); Commonwealth v. Hunt, 84 Mass. App. Ct. 643, 651 (2013), rev. den., 467 Mass. 1104 (2014).

Cf. Commonwealth v. Borans, 379 Mass. at 139 (rejecting as specious the argument that defendant was trapped into perjury, where prosecutor's questions were aimed at flushing out the truth).

Jenkins also contends that the prosecutor's failure to instruct the Grand Jury on the elements of perjury impaired the grand jury proceedings. The general rule is that the Commonwealth "is not required to inform a grand jury of the elements of the offense for which it seeks an indictment or of any lesser included offenses." Commonwealth v. Noble, 429 Mass. 44, 48 (1999). See also Commonwealth v. Riley, 73 Mass. App. Ct. 721, 727, rev. den., 453 Mass. 1111 (2009). The Supreme Judicial Court has established only two exceptions to this rule. Commonwealth v. Rex, 469 Mass. 36, 41 n.10 (2014). First, if the Commonwealth seeks to indict a juvenile for murder and there is substantial evidence of mitigating circumstances or defenses, other than lack of criminal responsibility, presented to the grand jury, the prosecutor must instruct the grand jury on the elements of murder and on the significance of the mitigating circumstances and defenses. Commonwealth v. Walczak, 463 Mass. 808, 810 (2012). Second, where the grand jurors ask for instructions, the prosecutor should provide the appropriate information. Commonwealth v. Noble, 429 Mass. at 48. Neither exception applies to this case. Accordingly, Jenkins has not established that the integrity of the grand jury proceeding was impaired so as to require dismissal of the indictment.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Motion to Dismiss For Insufficient Evidence and for Impairing the Integrity of the Grand Jury be **DENIED**.



E. Susan Garsh
Justice of the Superior Court

DATED: October 10, 2014