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COMMONWEALTH OF MASSACHUSETTS

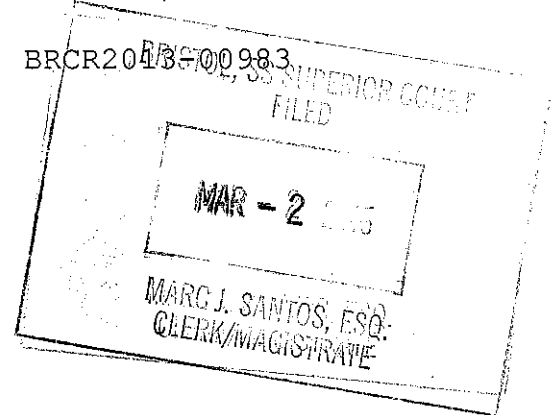
BRISTOL, ss.

BRCR2013-00983
SUPERIOR COURT
FILED

COMMONWEALTH

vs.

AARON HERNANDEZ



COMMONWEALTH'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE
REGARDING GLOCK .45 CALIBER HANDGUN DEMONSTRATION

Introduction. The defendant, Aaron Hernandez, has filed a motion to preclude admission or display of a Glock .45 caliber pistol before the jury. The Commonwealth respectfully opposes the defendant's motion and asks this Honorable Court to DENY the motion.

The Commonwealth gave notice to the defendant that it intends to call Kyle Aspinwall, the Northeast District Sales Manager for Glock, Inc. well in advance of trial. This witness will testify about specific features and the operation of a .45 caliber Glock semi-automatic firearm as well as a description (size, shape, color and weight) of the Glock .45 which is consistent with the firearm observed by the defendant's housekeepers and possessed by the defendant in the home surveillance video. This witness

will also testify about his review of video sequences at 22 Ronald C. Meyer Drive showing the defendant outside of the house upon his return from South Street Café, inside of the house--in the great room before the murder and at the top of the basement stairs--after the murder. The witness will opine that the pistol in the video surveillance is consistent with a Glock pistol based on the size, color and shape of the curve of the backstrap. Further, he would describe an item recovered from the Nissan Altima as consistent with a magazine with a distinct "U" shaped design as well as a "lip" on the bottom forward edge of the magazine without concluding that it was specifically a Glock magazine as other manufacturer's use a similar design.

Sergeant Stephen Walsh, a Massachusetts State Police ballisticsian, described that the shell casings recovered at the scene and from the automobile had distinctive markings on them and were fired by the same weapon. In commercially manufactured firearms, only Glock makes a .45 caliber handgun with the characteristics necessary to make these marks. Sergeant Walsh also described that in his opinion, based on an examination of four recovered projectiles they were all fired by a single handgun. Glock is the only commercial manufacturer of a .45 caliber handgun that would

produce the effects observed on the projectiles. During cross-examination of Sergeant Walsh, counsel, among other things, inquired about the number of .45 caliber Glock firearms and the difference in their configurations.

Witnesses have testified to their observation of different firearms in the defendant's house and the Court has already determined that some additional testimony regarding firearms possessed or controlled by the defendant will be admissible. Notwithstanding the observations of multiple witnesses of the defendant's possession of firearms prior to the murder, no handgun was recovered inside of his home.

The witness's display and explanation of Glock .45 caliber handguns will assist the jury in understanding and contextualizing the testimony of the multiple witnesses. This includes the defendant's housekeepers' testimony regarding the size, shape, color and weight¹ of firearms they variously observed in the defendant's home shortly

¹ The exhibit will be particularly relevant to assessing the housekeepers' testimony regarding color, shape, size and weight particularly where one of the housekeepers in response to questions by the defense testified that the weight of the firearm she handled in the basement of the defendant's home was heavy and whose weight was "probably around a kilogram." The jurors would necessarily have to see and handle the Glock .45 to determine if her testimony was consistent with their own conclusion of the weight of a .45 caliber Glock semi-automatic handgun.

before the murder as well as Sergeant Walsh's description regarding ballistics evidence. Viewing the Glock .45 firearms will assist the jury in assessing the defendant's claim that the object in his hand in the aforementioned video evidence was not, in fact, a firearm but instead an iPod, an iPad, a blackberry or a television remote control.

Analysis. The defendant's motion, aimed at preventing the Commonwealth from conducting what he himself concedes is a very typical form of demonstration, seeks to deprive the jury of significant relevant evidence. The defendant seeks to preclude the Commonwealth from conducting a typical demonstration without citation to any controlling legal authority. In fact the cases the defendant briefly mentions, appear generally to support the government's approach. The controlling law supports admission of the contested exhibit and the Court should so rule.

Indeed, not only is the law clear on the admissibility of the type of evidence the Commonwealth seeks to introduce here, but the SJC has unreservedly confirmed that view within the past few weeks. In Commonwealth v. Housewright, 470 Mass. 665, 678-679 (2015) quoting Commonwealth v. Luna, 46 Mass. App. Ct. 90, 93 (1998), the Court stated: "Where for whatever reasons original items of physical evidence cannot be produced, substitutes similar to the originals

have often been received as exhibits, in criminal as well as civil trials, to illustrate and corroborate testimony in which the originals figured" This language is, standing alone, dispositive of the present situation. Moreover, there was nothing novel about Housewright; the decision merely echoed a long and unbroken evidentiary rule in the Commonwealth.

For example, in Commonwealth v. Ellis, 373 Mass. 1, 7 (1977). The SJC held that "admission in evidence of a gun, similar but not identical, to the alleged murder weapon was not an abuse of discretion. Commonwealth v. Russell, 2 Mass. App. Ct. 293, 297-298 (1974). See Everson v. Casualty Co. of America, 208 Mass. 214, 220-221 (1911)." As in the present case, the gun introduced in Ellis "was not the murder weapon but was merely illustrative." Ibid. See also Commonwealth v. Souza, 34 Mass. App. Ct. 436, 444-445 (1993) (spiked wristband "similar but perhaps not identical" to one used in crime was admissible where questioning made clear that witness could not say that exemplar wristband was actual wristband used in attack). As long as the demonstration weapon was introduced for the purpose of clarifying other trial evidence, and as long as its introduction was accompanied by an appropriate

instruction emphasizing the provenance of the exhibit, it should be admitted.

The same result was obtained in Commonwealth v. Florentino, 381 Mass. 193, 196-197 (1980). There, as in the present case, "the weapon actually used by [the defendant] was never recovered." At trial, a weapon similar to the weapon used in the offense "was admitted in evidence over the defendant's objection." Ibid. "A witness trained in ballistics and firearms identification testified to the characteristics of the gun and stated that the gun was 'consistent with' the type of weapon that fired a .38 caliber projectile recovered from the [scene of the crime]." This is exactly the same as the present situation where the Commonwealth has presented ballistics evidence regarding the gun used to kill the victim as well as ammunition found at the scene and the vehicle used by the defendant to transport the victim to the place where he was murdered. As the Court stated in Florentino, citing Ellis, supra, 373 Mass. at 7, "[t]he admission in evidence of a gun, similar but not identical, to the alleged murder weapon was not an abuse of discretion." So too here.

Similarly, in Commonwealth v. Stewart, 398 Mass. 535, 541-542 (1986), the defendant argued "that it was error to admit in evidence a weapon identical in shape, size,

configuration, and appearance to the missing murder weapon." The SJC, however, rejected the defendant's claim, holding that it was "foreclosed by our holding in Commonwealth v. Ellis, 373 Mass. 1 (1977)." More specifically, the Court stated that "[t]he duplicate weapon was relevant because, by seeing it and judging its weight, the jury were rendered more capable of inferring that [it was the murder] weapon" Ibid. Again, precisely the same principles are relevant here. Indeed, as already noted, the weight of the gun is very significant in the present case because the defendant's housekeepers testified about their observations of handguns in the defendant's home before the murder. One of the witnesses provided detail about the weight of the gun that she discovered in the defendant's basement. The contested exhibit will directly assist the jury in understanding the evidence.

The defendant asserts that no one can tell what the defendant is holding in the images or if he is holding a handgun, what kind of gun it is. These claims and others made by the defendant illustrate why the Commonwealth's use of the demonstration is appropriate. The demonstration of the various Glock .45 caliber models shows the range of difference in their sizes. The demonstration of the .45 caliber models shows their appearance in color. The

demonstration of the .45 caliber models shows the backstrap of the handgun. In the absence of such a demonstration the jury would have no evidence against which to evaluate the defendant's bald claims.

WHEREFORE, the Commonwealth respectfully requests that admission of the contested demonstration firearm is entirely consistent with the long-settled and recently re-affirmed law of the Commonwealth. On this basis, the defendant's motion in limine should be denied and the firearm deemed admissible.

RESPECTFULLY SUBMITTED,

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