#307

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss. BRCR2013-00983

COMMONWEALTH

vs.

AARON HERNANDEZ

COMMONWEALTH'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF JAIL TELEPHONE CONVERSATIONS

Introduction. The Commonwealth opposes the defendant's motion and respectfully requests that this Honorable Court deem admissible certain recorded telephone calls originating from or placed to a county jail or other government-administered detention facility, including calls by and between the defendant and Shayanna Jenkins and Tanya Singleton. The Commonwealth previously provided to the defendant recordings and transcripts of additional calls, not enumerated in the defendant's motion. This includes calls between Ernest Wallace and Tanya Singleton as well as calls between Gina Mercado and Tanya Singleton. The defendant did not append the content of these calls to his filing and has simply concluded that since the co-defendants had been apprehended there is no potential for an ongoing conspiracy among the parties.

Calls placed by or to the defendant. The Commonwealth seeks to admit portions of the recorded phone calls placed by or to the defendant, at least to the extent of the defendant's statements made during those calls, and provided they are probative of facts in dispute at the defendant's trial. There is no issue of secret recording with respect to these calls. The sheriff's office, both through frequent recorded messages made during the calls, through signs near the inmate telephones, and through their written policies distributed to inmates made it clear that all calls were being recorded. See in Matter of a Grand Jury Subpoena, 454 Mass. 685, 687-688, 692-693 (2009) (approving practice of recording jailhouse telephone calls). As a result, the state's wiretap statue is not implicated in any way. See G. L. c. 272, § 99; 18 U.S.C. §§ 2510 et seq.

Further, the defendant cannot complain about the admission of his own statements since they indisputably constitute party admissions. As the SJC observed in Commonwealth v. Spencer, 465 Mass. 32, 46 (2013), which specifically addressed the admission of jailhouse telephone calls: "[a]n extrajudicial statement made by a party opponent is an exception to the rule against the introduction of hearsay, and is admissible unless subject

to exclusion on other grounds. See Commonwealth v. Allison, 434 Mass. 670, 676 n.5 (2001); Mass. G. Evid. § 801(d)(2)(A) (2012). Although often referred to as the rule on 'admissions' by a party opponent, it encompasses any extrajudicial statement made by a party opponent regardless whether it is inculpatory or against the party's interest. See Commonwealth v. Cutts, 444 Mass. 821, 834 (2005), citing P.J. Liacos, M.S. Brodin, & M. Avery, Massachusetts Evidence § 8.8.1, at 496 (7th ed. 1999). See also Care & Protection of Sophie, 449 Mass. 100, 110 n.14 (2007)." The defendant's "side" of these jailhouse calls plainly amount to opposing party statements under this standard and so they are all admissible.

The portion of the conversations spoken by others should be admitted to provide the full context of the defendant's statements. E.g. Commonwealth v. Deane, 458 Mass. 43, 54 (1010). With respect to any individuals as to whom the court finds there is the requisite predicate for finding that the person with whom the defendant was speaking was a co-conspirator and that the calls were made in furtherance of a conspiracy. The co-conspirator exception to the hearsay rule provides that "a conspirator's extrajudicial statement is admissible

against a coconspirator if made during the course of and in furtherance of the conspiracy . . . once the Commonwealth establishes the existence of the conspiracy by a preponderance of other admissible evidence." Commonwealth v. McLaughlin, 431 Mass. 241, 248 (2000). Such a predicate exists as to any calls, for example, between the defendant and Tanya Singeton - who assisted codefendant Ernest Wallace in his flight after the murder, functioned as a go-between with the defendant and his co-defendant, and committed contempt in refusing to testify when immunized and ordered to do so - as well as any calls with Shayanna Jenkins who assisted the defendant in disposing of evidence after the murder, lied to the police and grand jury on behalf of the defendant, and met with the defendant's murderous co-venturers to provide them with support and assistance; all steps designed to help conceal the crime and assist the escape of Wallace and Ortiz. Similarly, any calls between the defendant and his codefendants would necessarily qualify under the co-conspirator statement exception to the hearsay rule. See Commonwealth v. Nascimento, 421 Mass. 677, 681 (1996).

The defendant misapplies the law relating to joint-venture and statements made in furtherance thereof where the post-apprehension acts were designed to conceal the

underlying crim. While appearing implicitly to acknowledge that statements made by others may be admissible as either party admissions or statements of co-conspirators, the defendant asserts that the latter rule does not apply here because he was under arrest at the time the statements were made. This is an over-simplification of the governing law. In Commonwealth v. Colon-Cruz, 408 Mass. 533, 543 (1990), quoting Commonwealth v. White, 370 Mass. 703, 708-709 (1976), the SJC stated the well-settled rule that "out-of-court statements by joint criminal venturers are admissible against the others if the statements are made "both during the pendency of the cooperative effort and in furtherance of its goal." However, the Court added in Commonwealth v. Angiulo, 415 Mass. 502, 519 (1993), that "[t]his exception does not apply after the criminal enterprise has ended, see Commonwealth v. Drew, 397 Mass. 65, 71 (1986)." In Drew, the criminal enterprise was, in fact, deemed to be over at the time the contested statements were made, in part because the conspiracy had been exposed and the coconspirators incarcerated. However, the very cases cited by the defendant make it crystal clear that the mere fact of arrest does not mandate the inference that a conspiracy has ended.

For example, in Drew, supra at 71, the co-conspirator exception was deemed not to apply "[b]ecause Davis's statement was made long after the crime while he and the defendant were imprisoned" - i.e. after the criminal enterprise, as an undisputed factual matter, had ended. The defendant's arrest in Drew was just one indicia of the fact the criminal conspiracy had ended; it was not, is isolation, dispositive of the fact. Indeed, Angiulo made it clear that the principles delineated in Drew would not apply in situations where there is evidence of a continuing criminal enterprise, including efforts - as in the present case - to conceal evidence of the existence of the original conspiracy.

As the Court observed in Angiulo, the hearsay exception for co-conspirators "does apply where the joint venturers are acting to conceal the crime that formed the basis of the enterprise. See Commonwealth v. White, supra at 709-710 & n.8." Angiulo, supra, at 519. The SJC added, with especial relevance here, that where "[e]fforts on the part of a joint venturer to conceal the occurrence of the enterprise's unlawful purpose or to effect an escape warrant the inference that the joint venture continued through the time the statements were made. Commonwealth v. White, supra at 709-710." Ibid. Contrast

Commonwealth v. Dahlstrom, 345 Mass. 130, 134 (1962)("[t]here is no basis in the evidence for concluding that a joint undertaking to break and enter and commit larceny was in effect six days after the date of the crime when the statements were made").

Here, there is ample evidence to suggest that at the time all of the disputed statements herein were made the defendant and his agents and co-conspirators were still actively endeavoring to conceal evidence of their conspiracy. Specifically the defendant was still actively trying to manipulate what his co-conspirators and others were revealing to police and prosecutors. He was indeed successful in obtaining the silence, in the face of a duty to testify at the grand jury, of Tanya Singleton and the continuing loyalty of Ernest Wallace. Further, he was still actively trying to conceal physical evidence of the crimes with which he is charged. In these circumstances, consistent with Angiulo and Drew, it is impossible to say that the criminal enterprise had ended; indeed, exactly the opposite. Accordingly, all of the disputed statements are admissible either as party admissions or statements of co-conspirators.

Calls placed by Tanya Singleton and others on the defendant's behalf. Here the Commonwealth also seeks to

admit recorded calls by or to Tanya Singleton, who has also been charged as an accessory in the murder of Odin Lloyd,[1] as well as by or to other persons acting on behalf or at the direction of the defendant. The Commonwealth asks the Court to admit recordings of such calls to the same extent as calls placed by or to the defendant in any instances in which Tanya Singleton or any other person was acting as the defendant's agent.

In the Commonwealth, the admissions of a party's agent are admissible to the same extent as admissions by the party himself. As the Appeals Court noted in Thorell v. ADAP, Inc., 58 Mass. App. Ct. 334, 339 (2003), quoting from Turners Falls Ltd. Partnership v. Board of Assessors of Montague, 54 Mass. App. Ct. 732, 736 (2002), "a vicarious admission describes an exception to the hearsay rule; namely, a witness may testify to the out-of-court statement of an agent of a party." Many of the statements

[1] In his motion, the defendant asserts that Singleton "is not a codefendant and she is not alleged to be a co-venturer notwithstanding that she was charged with conspiracy to be an accessory after the fact for her role in aiding the defendants after the murder. Ms. Singleton has already pleaded guilty to an indictment charging contempt for her refusal to testify before a grand jury investigating the death of Odin Lloyd. She was also held in custody in the in connection with that charge. The Commonwealth's request would also reach calls made during that time, as well.

contained in Singleton's jailhouse calls fall squarely under that rubric.

In Thorell, the court described the two-prong test used to determine whether out-of-court statements made by a party's agent should be considered a vicarious admission; viz, "[t]o determine whether a statement qualifies as a vicarious admission, the judge first must decide as a preliminary question of fact whether the declarant was authorized to act on the matters about which he spoke . . . If the judge finds that the declarant was so authorized, the judge must then decide whether the probative value of the statement substantially outweighs its potential for unfair prejudice." Id at 338-339. As with other rulings on evidence, the admission of vicarious admissions is largely committed to the sound discretion of the trial judge. Ibid.

Here, for example, the evidence strongly supports the inference that Singleton and Wallace were acting in furtherance of an agreement to continue the concealment of the role of the defendant and Wallace in the murder and that this was nothing more than the continuation of their prior attempts to conceal the crime by flight set off by the defendant's call to Wallace with the police at his door. Specifically, Singleton, at the defendant's

direction, was passing along information to Wallace communicated to her by the defendant.

All such communications should also be treated as vicarious admissions. Singleton's statements are independently admissible as vicarious admissions, even in the absence of the foundational requirements for admission as co-conspirator statements. The same rule would apply to any person acting on behalf of or at the direction of the defendant. Finally, all of the same arguments cited above with respect to the admissibility of the "other half" of and such calls placed on the defendant's behalf (or in furtherance of a joint criminal enterprise) apply with equal force here.

Applying these principles, the Commonwealth seeks to adduce portions of phone calls as follows:

7/12/2013 6:48 a.m. call between Tanya Singleton and Ernest Wallace while Wallace is being held and before Tanya Singleton is held on contempt charge.

Wallace: You tell Ink, tell Ink I love him, man. Tell Ink I love him.

Singleton: I will

Wallace: Tell him no matter what man, don't think I'm la la la'ing. I'll never go against the grain. You hear me?

Singleton: Yup

Wallace: Tell him that we gotta work together. Tell him we gotta work together.

7/12/2013 1:03 p.m. call between Singleton and Aaron Hernandez.

Hernandez: Hey, what you say. The phone is recorded. What you up to?

Singleton: I know, I know, I know. Hi, honey.

Hernandez: You got my letter?

Singleton: Yeah, I did. I—of course I did. I got you one. I got you a card and a letter. (Inaudible) letter (inaudible)—

Hernandez: Watch what you write. They read the shit.

Singleton: I -no, no, like I don't know that.

Hernandez: Well, I got to get going. I will probably call you, um, probably like once a week or something like that. Like—

Singleton: Yeah, that's perfect.

Hernandez: Yeah, and -I'll also help you out with that, too. Obviously don't say nothing, but I love you.

Singleton: I know. I'm not saying nothing. I love you so much.

7/17/2013 10:22 a.m. call Singleton and Wallace.

Singleton: I know because Prince said—Prince said, he said you and him all the way, you know.

Wallace: All right. I love that nigga, man.

Singleton: He love you, too.

Wallace: I'm riding.

Singleton: That's what he said.

Wallace: I'm riding, you know what I mean, I'm riding.

Singleton: Yeah, that's what he said. And I'll let her know that you know.

Wallace: "cause, yo, this la la la got us all into this, man, and they gotta know.

Singleton: I know, yeah, it's gonna be fine. I'm gonna call your lawyer today.

7/19/2013 call Singleton and Wallace.

Wallace: You talk to Princess, ask her if she can tell my nigga—ask her if he got any—you know what I'm aying—if she got in her heart ask my nigga if she can give us something to send to you to give to me so I can be a little bit comfortable in the motherfucker, please, yo.

Singleton: Yup, I will.

Wallace: I mean, I appreciate everything—you know what I'm saying what she's doing for me--

7/23/13 1:33 p.m. call Singleton and Hernandez.

Hernandez: I set up an account, don't tell nobody, a trust fund for Jano and [Eddie].

Singleton: You did?

Hernandez: Yeah, so maybe like 18, 21 they gonna have a chunk of money.

Singleton: I didn't know you did that.

Hernandez: Yo, yo so at least if they struggle now, if they can mature enough, they may have like $250,000 just to have (inaudible).

Singleton: Yeah.

Hernandez: And the longer they wait the longer it grows. So they can take out a little bit when they're like 18. They can take out a little bit when they are 21. And then if they wait until, like, they're 30 years old, it will be like, could be like $400,000 or something like that, do you know what I mean?

Singleton: Yeah, I was going to say if they don't have to, they can just leave it in ther until they're ready to settle down and get married.

Hernandez: Yeah, it depends on, obviously (inaudible). It depends on—I think it depends on me (inaudible).

Singleton: Yes

Hernandez: 'Cause that's going to be—the reason I did that is that's my way to have some control so I can be like, hey, you guys want to do this, then once they're old enough (inaudible). But once they mature, (inaudible) do you know what I mean, and you did that. Do you know what I'm saying.

Singleton: Yeah

Hernandez: So don't tell nobody. I don't want nobody to know about it. And I ain't even telling my girl, nobody. And—but what you call it, 'cause it already started off at $100,000 for them, do you know what I'm saying, I think about $75 a piece or something like that and every 7 years it doubles.

7/28/2013 1:34 p.m. call Singleton and Wallace.

Singleton: Um, I'm going back up there Tuesday.

Wallace: What, to go visit?

Singleton: No. I have to be up there to be in front of the grand jury whatever 'cause they're fucking dumb, but I got a good lawyer.

Wallace: Wait up, wait up, wait up. You gotta go to court for what?

Singleton: They subpoenaed me to go in front of the grand jury and I got a lawyer. That's why I got, uh, a real nice lawyer, a good lawyer from over there.

Wallace: Yeah, my nigga—

Singleton: Yup.

Wallace: My nigga got you with that?

Singleton: You already know.

Wallace: All right. Say no more.

8/1/2013 6:13 p.m. Shayanna Jenkins and Aaron Hernandez.

Jenkins: Um, Tanya's in jail.

Hernandez: Tanya?

Jenkins: Yeah.

Hernandez: For what?

Jenkins: I don't know. Yup. So she's in jail. She got arrested today.

Hernandez: They picked her up by her house?

Jenkins: No, she went for—she was—I don't know. You probably should talk to your lawyers about it.

Hernandez: Oh.

Jenkins: But she told me to tell you that she's gonna be just fine and to keep your head up and to know that she love you.

Hernandez: Oh, my God. Let me call you right back.

8/1/2013 6:30 p.m. call Jenkins and Hernandez

Hernandez: Hey.

Jenkins: Yeah.

Hernandez: I knew about

Jenkins: Huh?

Hernandez: I knew about that. I thought it was (inaudible).

Jenkins: (Inaudible) I'm just letting you know.

Hernandez: Yes, they just being asses about it, but they get—they got to go out of their way to be assholes and, like, the longest she'll do is, like, probably less than a month or a month until the grand jury is don, investigation, do you know what I mean?

Hernandez: The only good thing about Tanya being locked up is she's gonna lose weight.

8/2/2013 12:50 p.m. Terri Hernandez call with Hernandez.

T. Hernandez: Hey, how's Tanya?

Hernandez: She's good. She's all right. Ain't nothing. They only can hold her for, like, a month or 'til the investigation's over so they ain't nothing.

T. Hernandez: Three months.

Hernandez: Yeah, like, that's the most, most. The most's usual like a month.

8/3/2013 call Jenkins to Hernandez.

Hernandez: Yeah, and I want you to do me a favor.

Jenkins: All right.

Hernandez: Can you, um, give, uh somehow stop by Tanya's house and give them a little bit of money to put on her canteen.

Jenkins: Bab, I'm not going over there. I'm not going over there.

Hernandez: Oh well, send her money or something.

Jenkins: I don't know why you keep—

Hernandez: She's got no money in jail.

Jenkins: I under—Aaron, I understand that, but why do I have to keep being the one to do that? That's what you're not understanding.

Hernandez: All right. Well, can you give it to, um, I don't know who to tell you to give it to.

Jenkins: Okay. Well, neither do I.

Hernandez: All right. Well—

Jenkins: I'm trying -well, I'm trying to follow what my lawyers are telling me to follow, and then you keep trying to have me do other things.

9/7/2013 1:05 p.m. call Gina Mercado and Aaron Hernandez.

Hernandez: Keep letting me know, write me letters, like, when she runs out or something or something like that, so I could get her canteen and stuff like that.

Mercado: Yeah, I just - I just sent you another letter, um, because she had called me to see if I could send her some because she didn't have any.

Hernandez: Yeah, um, you got that money from, um, my agent; right?

Mercado: Yeah.

Hernandez: I told him—I had him send $500 for her canteen and stuff and for the boys for stuff like that for school and everything.

The doctrine of verbal completeness.

The defendant's claim that he has a wholesale right to admit the balance of each phone call in full is a misapplication of the doctrine of verbal completeness.

A "defendant's statement, when offered by the defendant to prove the truth of the statement's contents is inadmissible hearsay." Commonwealth v. Eugene, 438 Mass. 343, 350 (2003). Under the doctrine of verbal completeness, "[w]hen a party introduces a portion of a statement or writing in evidence," a judge has the discretion to "allow[] admission of other relevant portions of the same statement or writing which serve to 'clarify the context' of the admitted portion." Commonwealth v. Carmona, 428 Mass. 268, 272 (1998)(quoting Commonwealth v. Robles, 423 Mass. 62, 69 (1996)). McAllister v. Boston Housing Authority, 429 Mass. 300, 303, 708 N.E.2d 95 (1999).

Such an evidentiary mechanism helps to ensure that a party does not present "a fragmented and misleading version of events" to the fact finder. Commonwealth v. Carmona, 428 Mass. 268 (1998). The doctrine of verbal completeness does not open the door for everything in a statement or document. Kobayashi v. Orion Ventures, Inc., 42 Mass. App. Ct. 492, 498 (1997).

Rather, in order for the other parts of a statement to be admissible under the doctrine of verbal completeness "the additional portions of the statement must be (1) on the same subject as the admitted statement; (2) part of the same conversation as the admitted statement; and (3) necessary to the understanding of the admitted statement." Eugene, 438 Mass. 343 at 350-351; Commonwealth v. Clark, 432 Mass. 1, 14-15, & n.8 (2000) (portions of statement sought to be introduced must qualify, explain, contradict, or put into context segments previously introduced); Commonwealth v. Leftwich, 430 Mass. 865, 871-872, (2000) (same); Commonwealth v. Watson, 377 Mass. 814, 825-831 (1979) (discussing scope and limitations of verbal completeness doctrine).

A defendant has no right to "use his declarations in his own favor in regard to distinct and independent subjects of inquiry, even though these subjects were of a kindred character, and related to the same general issue." Watson, 377 Mass. at 827 (quoting Cusick v. Whitcomb, 173 Mass. 330, 331 (1899)). Instead, the sole purpose of the rule is to avoid the danger of misconstruing a fragment of a defendant's statement that is modified or explained by another part of the same statement. Id. at 830.

The Doctrine of Verbal Completeness does not relate at all to whether the statement is relevant to other evidence. Eugene, 438 Mass. at 351. Mere relevance to a case is an insufficient basis for admissibility. Id. In his motion, the defendant asserts that the entirety of his statements are admissible upon admission of any portion of his calls. However, this is simply not a basis for admission. Id.

The defendant has made no attempt to explain how the admission of any portion of his statement, which the Commonwealth does not intend to adduce, satisfies the Rule of Completeness. He has made no showing that the passages the Commonwealth intends to adduce need to be further explained or modified. Watson, 377 Mass. at 830.

WHEREFORE the Commonwealth respectfully requests that the entire contents of any jailhouse calls relevant to the murder of Odin Lloyd placed by or to the defendant, and of his codefendants and agents be deemed admissible.

RESPECTFULLY SUBMITTED,

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