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COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS.

SUPERIOR COURT DEPARTMENT
FALL RIVER SUPERIOR COURT
INDICTMENT: 2013-00983

COMMONWEALTH

v.

AARON HERNANDEZ

**COMMONWEALTH'S OPPOSITION TO DEFENDANT'S REQUEST FOR A
"MISSING WITNESS" INSTRUCTION**

Now comes the Commonwealth and respectfully opposes defendant's request for an instruction that Trooper Eric Benson was a missing witness. "The decision whether to provide a missing witness instruction to the jury is within the discretion of the trial judge..." Commonwealth v. Saletino, 449 Mass. 657, 667 (2007). Because the missing witness instruction can have a powerful impact on the jury, it "should be provided 'only in clear cases and with caution.'" Id. at 668 (citation omitted).

There is no basis for a missing witness instruction when it appears that the testimony would be "merely corroborative of, or merely cumulative upon, the testimony of one or more witnesses who have been called." Commonwealth v. Vasquez, 27 Mass.App.Ct. 655, 659 (1989) citing Commonwealth v. Schatvet, 23 Mass.App.Ct. 130, 134 (1986); see also, Commonwealth v. Doyle, 83 Mass.App.Ct. 384, 392 (2014) (instruction properly denied when "testimony likely would have been cumulative of [other evidence in the case]"). Because Trooper Benson was not a percipient witness, his testimony could only have been as a summary witness to the investigatory witnesses¹.

¹ As was made clear when Trooper Benson testified during the hearing on a motion to suppress, the defendant's pre-conceived notion of Trooper Benson's role as the "lead investigator" is not connected to the reality of Trooper Benson's duty. The defendant has no basis to represent that Trooper Benson actually made the investigative decisions in the case and to the extent that those decisions were made by others, any such testimony would be inadmissible hearsay. Furthermore, the Commonwealth called

During its presentation of evidence, the Commonwealth offered as witnesses the witnesses who were percipient or who had first-hand knowledge of the facts. On occasion, the defendant was able to use evidence of a witness's prior statement documented in a video or report of Trooper Benson. A witness's testimony is the actual evidence in the matter and there is no basis for the Commonwealth to call a witness to affirm that he conducted the interview where the hearsay rule prohibits him from testifying to the underlying facts. E.g. Commonwealth v. Thomas, 439 Mass. 362, 371 (2003)(holding that even repeating prior consistent statements is merely corroborative of witness testimony, and that not doing so provides no basis for a missing witness instruction). To the extent that the defendant claims he could make a case about the manner in which interviews were conducted, he had that opportunity in the cross-examination of the Commonwealth's witnesses and he was free to produce his own witnesses in his case in chief. His failure to do so belies the untested claims of his motion.

In the circumstances of the evidence, the Commonwealth recreated the course of the investigation through the testimony of the 131 witnesses, including forty-eight police office and crime scene witnesses, it called. After a long trial, there was no value to the jury in calling a witness to reiterate the previous investigatory witnesses' testimony. See Commonwealth v. Santos, 440 Mass. 281, 294 (2003) ("instruction should not be given where the Commonwealth has legitimate tactical reasons for not calling the witness.")

Furthermore, the instruction should not be given where, as is the case here, a witness is equally available to both parties. see Commonwealth v. Figueroa, 413 Mass. 193, 199 (1992) citing Commonwealth v. Cobb, 397 Mass. 105, 108 (1986) ("[w]here a witness is equally available to both sides of a dispute, no inference should be drawn against either side for failing to call the witness). This is particularly true where it would have required no effort on the part of defense counsel to secure the actual witnesses that


higher ranking police officers who participated in the decision making that the defendant has made the centerpiece of his attack on the investigation. They explained the decision making process to the jury and that evidence makes clear who participated in the process.

are the subject of his claims, and their failure to call Trp. Benson is a clear strategy decision on their part.²

The Commonwealth, respectfully requests that this court deny the defendant's request for a missing witness instruction.

RESPECTFULLY SUBMITTED,

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² This is particularly true in light of the eight separate reasons they list in their motions for why defense wanted Trooper Benson to testify. The defendant is simply wrong in multiple assertions of Trooper Benson's activities. Clearly, there were countervailing reasons that led to defense's strategy decision not to call Trooper Benson.