

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH**

No. SJ-2021-0129

**CHRIS GRAHAM, JORGE LOPEZ, MEREDITH RYAN, KELLY AUER,
COMMITTEE FOR PUBLIC COUNSEL SERVICES,
and HAMPDEN COUNTY LAWYERS FOR JUSTICE,
Petitioners**

v.

**DISTRICT ATTORNEY FOR HAMPDEN COUNTY,
Respondent**

**RESPONDENT'S RECORD APPENDIX IN
OPPOSITION TO PETITION FOR RELIEF PURSUANT
TO G.L. c. 211 §3, AND c. 231A §1**

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I, JENNIFER N. FITZGERALD, on oath depose and state as follows:

1. I am an attorney licensed to practice in the Commonwealth of Massachusetts since 1987.

2. I have been employed by the Hampden County District Attorney's Office ("HCDAO") since 2011 and have served as the First Assistant District Attorney since 2013.

3. As First Assistant, I am familiar with the operations of the office, including the establishment of office policies. This includes policies relating to the disclosure of exculpatory evidence (so-called *Brady* disclosures). In that capacity I participated in or am aware of many communications between the HCDA Office and other government agencies, including the United States Department of Justice ("DOJ"), the United States Attorney's Office, the Springfield Police Department ("SPD"), and the City of Springfield. I have also participated in or am aware of the time and manner in which various materials have been disclosed to defense counsel in satisfaction of the HCDAO's obligations under *Brady*.

DEPARTMENT OF JUSTICE REPORT

4. I am aware of a report prepared by the United States Department of Justice regarding its 27-month long pattern and practice

investigation of the Springfield Police Department and released on July 8, 2020. (C.R.A. 3-30). The DOJ investigation was conducted using materials and interviews provided by the SPD. Since its publication, I have participated in or been privy to numerous conversations regarding the DOJ report. I have also participated in the HCDAO's continuing attempts to obtain the pertinent documents as well as the specific details underlying the report's findings.

5. Among others, these attempts have included the following:

a. On July 20, 2020, I participated in a telephone conversation with Assistant United States Attorney Torey Cummings from the Civil Rights Division. During the course of the conversation, I verbally requested that our office be provided with the SPD reports that DOJ investigators referenced in their report as "falsified reports" (C.R.A. 00004). I expressly stated the information was necessary in order to meet our *Brady* and Rule 14 legal and ethical obligations. She told me that she would pass along the request to her supervisors and get back to me.

b. On July 28, 2020, I left a follow-up message for AUSA Cummings, to which she responded by email that they were still considering my request.

c. On August 6, 2020, I participated in a conference call with AUSA Cummings and AUSA Jude Volek, at which time they stated they were denying the HCDAO's request for underlying documents and additional details regarding their report and their findings.

d. On August 19, 2020, I helped draft and review letters from the Hampden County District Attorney to United States Assistant Attorney General Eric S. Dreiband and United States Attorney for Massachusetts Andrew E. Lelling requesting production or disclosure of the "false" or "falsified" SPD reports and attendant photographs and/or digital images. (C.R.A. 00227-00231).

e. On September 14, 2020, I reviewed second letters from the Hampden County District Attorney to United States Assistant Attorney General Eric S. Dreiband and United States Attorney for Massachusetts Andrew E. Lelling again requesting SPD documents (to which the HCDAO had received no response), and citing this Court's recent decision in *Matter of a Grand Jury Investigation*.

f. On October 29, 2020, I received a copy of USA-MA Lelling's letter to the HCDAO's denying our request for documents and details. The letter was the "final agency decision" in response to the *Touhy* request.

g. On December 2, 2020, I reviewed and helped draft a letter from Hampden County District Attorney Anthony Gulluni to Springfield Police Commissioner Cheryl Clapprood requesting the underlying documents cited in the DOJ report. (C.R.A. 00211-00213).

h. On December 10, 2020, I was provided a copy of the letter from Springfield City Solicitor Edward M. Pikula to HCDA Gulluni stating that the City had no information that would permit it to identify the incidents described in the DOJ report. Attorney Pikula further assured the HCDAO that the SPD would comply with its obligations to disclose Brady material in the department's possession to prosecutors. (C.R.A. 00214-00216)

i. On March 11, 2021, I helped draft and review a letter from HCDA Gulluni to the Springfield City Solicitor, agreeing to the review of tens of thousands of pages of SPD documents in order to meet the HCDAO's *Brady/Giglio* obligations.

j. On April 26, 2021, the City Solicitor indicated he would forward some of the requested documents along with a suggested method and manner for review of the 114,000 pages the DOJ accessed for their report. To date the HCDAO has not received any of those documents.

6. On May 19, 2021, having exhausted all other options to obtain documents from the DOJ or the USA-MA, Hamden County District

Attorney Gulluni filed a federal civil law suit against the United States Attorney for the District of Massachusetts, Docket No. 3:21-cv-30058. The lawsuit seeks access to information that formed the basis of the DOJ report, which the HCDAO must review in order to fulfill its constitutional responsibility to learn of and disclose exculpatory evidence.

**HAMPDEN COUNTY DISTRICT ATTORNEY'S
ON-GOING *BRADY* COMPLIANCE**

7. Although the HCDAO had previously made disclosures of potentially exculpatory information in unrelated cases even before the Supreme Judicial Court's decision in *Matter of a Grand Jury Investigation*, 485 Mass. 641 (2020), the District Attorney recognized the significance of that opinion and its holding. Based on the Court's advice to district attorneys' offices, 485 Mass. at 658-660, as well as the HCDAO's understanding of the potentially widespread consequences of the decision, the District Attorney convened a working group of experienced prosecutors within the office to formulate policy, review specific cases, and provide guidance to all assistant district attorneys. This group, of which I am a member, continues to meet and communicate regularly to study and develop appropriate policies on *Brady/Giglio* issues and to address individual situations. The working group also monitors the evolution of the law in this area. As part of the efforts to comply with the disclosure obligations as

stated in *Matter of a Grand Jury Investigation*, the District Attorney sent a letter to all police chiefs in Hampden County, including SPD's police commissioner, requesting the departments disclose the type of information in the approved federal *Giglio* policy. Further, as it had done even before September 2020, the HCDAO continues to seek out and disclose this type of material on an on-going basis as required by individual cases.

8. Further, the District Attorney for Hampden County has retained the services of Robert J. Cordy, a former associate justice of this Court to advise him and assist the working group in reviewing current discovery policies and practices, and developing, where necessary, new office policies and best practices surrounding *Brady* obligations.

NATHAN BILL'S INCIDENT

9. In August 2015, the HCDAO received a completed investigation file from Springfield Police Department Captain Trent Duda. The investigation concerned allegations of misconduct, including possible assault or excessive use of force, by members of the SPD during an encounter with four civilians outside Nathan Bill's bar in April 2015. The HCDAO had had no previous involvement in this investigation. The HCDAO's role was to review the SPD investigation to determine whether any criminal charges were warranted.

10. According to his report, Captain Duda first learned of the incident when one of the four civilians filed a complaint on May 7, 2015, alleging officer misconduct. Captain Duda then interviewed multiple witnesses, some on more than one occasion. He showed photographs of potentially involved officers to the witnesses, who were unable to identify the assailants. He also recovered video surveillance footage, which did not show the alleged assault. Completing his investigation, Captain Duda concluded that he was unable to establish an identification of the assailants by any alternative means.

11. I was involved with the review of the file on behalf of the HCDAO. As part of my review, I watched the videotape interviews of the witnesses. The conflicting statements and evidence, as well as the serious nature of the underlying allegations, raised questions and concerns. I also received reports from two separate later investigations conducted by the Internal Investigation Unit, which summarized the IIU's unrecorded oral interviews of various witnesses. Because of the continued receipt of additional information and the many factual discrepancies, the HCDAO necessarily delayed our final decision until February 2017. At that time, for the reasons set forth in the file memo, including the absence of a positive civilian identification, the HCDAO determined that there was no probable

cause to file charges against any of the individual officers. (C.R.A. 00044-00052).

12. The United States Department of Justice, which was reviewing the Bigda video from the February 2016 juvenile arrests, also reviewed the file pertaining to the Nathan Bill's incident, which the HCDAO voluntarily provided to the DOJ. The DOJ declined to file charges, but referred the case to the Massachusetts Attorney General's Office. Sometime in 2018, the HCDAO was contacted by the Attorney General's Office, which indicated that it intended to convene a grand jury to investigate the Nathan Bill's incident. Again, the HCDAO voluntarily shared its file with the Attorney General's Office.

13. In March 2019, the Attorney General's Office announced indictments against fourteen SPD officers. Four of those indictments have been dismissed, and the cases remain pending against the remaining defendants. None of the SPD officers have pleaded or been convicted. (HDA R.A. 022).

14. After the indictments were handed down, the HCDAO requested that the Attorney General's Office provide us with any exculpatory information pertaining to the case so that we could meet our ethical and legal obligations to defendants in cases involving these officers.

In response, the Attorney General's Office provided us with a single-page letter summarizing the charges against each officer. (C.R.A. 00257-00272). The Attorney General's Office did not provide us with the indictments or other pertinent documents.

15. The HCDAO provided the Attorney General's letters to CPCS, bar advocates and individual defense attorneys as cases arose with the involved officers. We had no other documents to provide regarding this matter. (C.R.A. 00249 ¶3(c)).

FEBRUARY 2016 BIGDA INCIDENT

16. I am familiar with events related to Springfield Police Officer Gregg Bigda that occurred in Palmer, Massachusetts, on February 27, 2016 during the arrest of three juveniles who were subsequently charged with stealing an unmarked police cruiser. In accordance with the usual practice of the HCDAO to pursue potentially exculpatory evidence, on February 29, 2016, the office requested DVDs from the Palmer Police Department. On March 14, 2016, the office received nine hours of DVD recording, which were made available to the three defense counsel representing the juveniles. Defense counsel retrieved these DVDs from the HCDAO on April 25, 2016.

17. The first time anyone in the HCDAO became aware of the contents of the DVDs was on July 11, 2016, when the assistant district

attorney assigned to prosecute the matter sat down to watch all nine hours of video as part of his preparation for trial. When he saw the interaction between Detective Bigda and the juveniles, he immediately brought the video to the attention of his supervisor, who informed me. Our office informed the SPD, which was apparently unaware of the incident, of the existence of this video and provided it with copies of the DVDs.

18. The events depicted on the DVD raised difficult questions about whether and to whom disclosure was required (this video preceded this Court's decision in *Matter of a Grand Jury Investigation* by more than four years), how to protect the identity of the juveniles if disclosure was to be made in unrelated cases, how to identify cases in which Bigda was involved, the nature of his involvement, and whether the questions about admissibility in unrelated cases affected the office's disclosure obligations.

19. After research and discussion, the HCDAO decided to disclose the video as widely as possible, and to ask the receiving defense attorneys to agree to a non-disclosure order to protect the identities of the juveniles. The HCDAO instructed all ADAs to seek a court ordered protective order before disseminating the video in any matter where defense counsel did not agree to the non-disclosure order.

FEDERAL GRAND JURY TRANSCRIPTS


20. In December 2018, the HCDAO learned that seven SPD officers had testified before federal grand jury several months earlier. This information came not from the United States Attorney, but SPD Captain Philip Tarpey, who informed me that he had learned of the testimony from the Springfield City Solicitor. The City Solicitor had learned of the testimony during a deposition of SPD Commissioner Barbieri in a civil suit against SPD officers by a lawyer representing one of the officers. It was during this deposition that the City Solicitor obtained transcripts for five SPD officers (Kalish, Ayala, Robles, Kent and Cournoyer) from the lawyer, and gave them to Captain Tarpey, instructing him to provide the transcripts to the HCDAO.

21. The HCDAO received the five transcripts on December 13, 2018, and began to disseminate them five days later, on December 18, 2018. Although it was unclear, factually and legally, whether these transcripts represented *Brady* material, the HCDAO nevertheless notified CPCS and bar advocates and the materials were disseminated by ADAs in individual cases as well. (C.R.A. 00254).

22. The HCDAO also made a written request to the United States Attorney for the transcripts of all officers who had appeared before the grand

jury. These were received in April and June 2019, accompanied by orders from United States District Judge Mastroianni permitting dissemination only for purposes of satisfying *Brady* obligations. These new transcripts were disseminated to defense counsel as appropriate.

Signed under the Pains and Penalties of Perjury this 25th day of May,
2021.


JENNIFER N. FITZGERALD
First Assistant District Attorney,
Hampden County
BBO# 550089

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
NO. 1779CR403

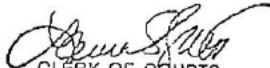
COMMONWEALTH

HAMPDEN COUNTY
SUPERIOR COURT
FILED

vs.

DEC 30 2019

CHRIS GRAHAM


CLERK OF COURTS

MEMORANDUM OF DECISION AND ORDER ON
DEFENDANT'S MOTION FOR NEW TRIAL

1. Introduction

On April 5, 2018, after a two day trial over which I presided, a jury convicted the defendant, Chris Graham, for possession of a firearm without a license (G. L. c. 269, § 10 (a)) and possession of a loaded shotgun (G. L. c. 269, §10(n)). The charges stem from an altercation in the parking lot of a Springfield bar on July 2, 2017, between The defendant and Remington McNabb, an off-duty officer of the Springfield Police Department (SPD), and McNabb's friend, Adam Pafumi, an off-duty correctional officer. At trial, the question of whether The defendant had a gun during the incident boiled down to a credibility contest. In post-conviction discovery, the defendant learned of another eye witness's account which supports the defense. The defendant now moves for a new trial and argues that trial counsel was ineffective by, *inter alia*, failing to conduct adequate discovery. After consideration of the parties' submissions, the record of proceedings, and my recollection of the trial, I allow The defendant's motion.

2. Background

a. The Trial

On July 2, 2017, at approximately 2 a.m., Samuel's Tavern in Springfield closed and dozens of patrons exited. Among them were McNabb and Pafumi, both of whom had been

54. N. 12/30/19 ADA Baker & AMH notes (mailed)
(GTM)

HDA R.A.013

drinking alcohol. Both men are white. As they walked over the driveway to the parking lot, The defendant, who is black, drove by in his car and nearly hit them. Pafumi banged his hand on the back of the defendant's car. The defendant first stopped his car and a heated exchange occurred between him and Pafumi. The defendant then drove to the parking lot to check his car for damage.

There, the three men had a second encounter. At trial, the jury heard varying accounts of what occurred and who was present. Pafumi testified that the defendant approached them, lifted a handgun from his waist and pressed it against Pafumi's chest for 30-45 seconds. At that point, according to Pafumi, "someone came up behind me and -- or a couple of people" and Pafumi lost consciousness and awoke hours later with a broken nose, a concussion and other injuries. Pafumi also testified that a lot people were outside the bar when it "empties out" at closing time, but he was unaware of anyone walking with them to the parking lot, and that "[e]veryone was pretty stationary."

McNabb testified that when he and Pafumi were walking to the parking lot, a crowd of 20-30 other people began walking to the parking lot. McNabb saw the defendant get out of his parked car while holding a silver handgun and asking, "So what's up now?" According to McNabb, the defendant walked to Pafumi, put the gun to Pafumi's chest for "a couple of seconds" before lowering the gun and starting to walk back to his car. McNabb testified that at that time, the only persons present in that area were the three of them. McNabb then pulled out his gun, grabbed the defendant, pushed him against a car, and ordered him to put up his hands. McNabb saw that the defendant did not then have a gun in his hand. McNabb pat frisked him, found a gun in the defendant's left pocket and moved it to his own pocket. McNabb testified that

he asked the defendant if he had a license to carry a firearm, to which the defendant responded that he did not. McNabb then saw Pafumi lying on the ground and bleeding, but denied knowing what had happened to Pafumi. McNabb saw "a few" other people standing around and yelled at them to back away, while pointing his gun at the defendant. McNabb was not asked on direct or cross-examination how it was that he, standing nearby, had not seen what had happened to Pafumi and, if he did not know, why he did not ask the other people standing around about Pafumi's loss of consciousness and injuries.

McNabb made telephone calls requesting help from the SPD. Officers arrived and, at the direction of McNabb, placed the defendant in the cruiser in handcuffs. Officer Brendan O'Brien was in the first cruiser called to the scene, where a crowd was present. O'Brien prepared a report of the incident but did not interview any witnesses or seek additional investigative information apart from McNabb, despite seeing the crowd and being told that a man identifying himself as the defendant's brother had been at the scene.

Another SPD officer, Matthew Garcia, also testified that people were gathered around the scene when he arrived. Police obtained the handgun which McNabb said he had taken from the defendant, along with a single bullet which had been in the chamber. Police did not use gloves when handling the gun or the bullet. At trial, the Commonwealth presented no physical evidence, including DNA tests or fingerprints, tying the defendant to the gun or the bullet.

The defense theory at trial was that the defendant did not have a gun with him. The defendant's trial counsel called as witnesses Joshua¹ Bosworth and the defendant, who did not know each other before the incident. Bosworth testified that he first noticed McNabb and the

¹The court uses the first name of this witness as he stated it in his trial testimony, not as identified by others.

defendant when a fight broke out. Bosworth recalled

"a fight going on, a large group of Latino men and probably a few white people. White kid falls down, hits his head, starts bleeding . . . I go over to the cop, because I'm trying to get this man help. The cop seems kind of aggressive, so I back up because I don't want anything bad happening to me. And from there, I just watch as they search [the defendant's] car. They seem to find nothing."

Bosworth testified that at the same time as the fight, a police officer was holding a gun to the defendant, who was up against a car and appeared to be cooperating. Bosworth testified that he saw McNabb pat down the defendant but never saw McNabb remove a firearm from him nor saw did he see the defendant holding a firearm. Bosworth's testimony contradicts that of McNabb, that he pulled a gun from the defendant's pants when pat-frisking him. It also contradicts Pafumi's testimony that he lost consciousness just as the defendant was lowering a firearm from Pafumi's chest. There was no evidence at trial that the defendant was involved in the fight which resulted in Pafumi's injuries.

The defendant testified that he had been in Hartford with a brother-in-law who gave him a ride back to the parking lot in Springfield, where the defendant had left his car hours earlier. When the defendant was driving in the roadway between the bar and the parking lot, he saw McNabb and Pafumi drifting back and forth in the road and told them to get out of the road. When the defendant drove by, Pafumi hit the back of the defendant's car. The defendant moved his car to a parking spot to check for damage to his car. As The defendant exited his car, he saw McNabb and Pafumi approach him. He asked why Pafumi hit his car, and Pafumi became aggressive. The defendant backed up. He saw a "whole group of guys coming behind them [McNabb and Pafumi] at the same time." One of the men in the group then knocked out Pafumi, who was on the ground and bleeding. McNabb "got into like a frantic state" and "pulled his

weapon out and start[ed] pointing it around to the crowd," which scattered. McNabb then turned to the defendant and pointed his gun at him. The defendant took his cell phone from his pocket and called 911 for assistance. In response, McNabb hit the defendant in the face with his gun and held the defendant at gunpoint until responding officers arrived and arrested the defendant and placed him in a cruiser. The defendant testified that while he was in the cruiser, he saw McNabb pick up something from the ground.² The defendant denied having a gun at the scene.

Trial counsel's closing argument was cursory and perfunctory. As in her cross-examination of the Commonwealth's witnesses, she neglected in the closing argument to mention significant weaknesses in the Commonwealth's case. Those included: (1) McNabb's highly suspect claim that he was unaware of the crowd's presence or that persons in the crowd had attacked Pafumi as McNabb stood nearby; (2) how Pafumi's account, that he fell unconscious just as the defendant was lowering his gun from Pafumi's chest, was at odds with others' accounts that Pafumi was attacked and fell unconscious while McNabb held the defendant at gunpoint; (3) that Bosworth watched McNabb pat frisk the defendant and did not see McNabb pull out a gun from the defendant's pocket; (4) that police investigators neglected to interview any of the many witnesses at the scene other than McNabb; and (5) how and why investigators did not handle the gun in such a way as to try to preserve fingerprint and DNA evidence. For all these reasons, the Commonwealth's evidence at trial that the defendant had a loaded firearm at the scene was not strong.

²The defendant testified that when McNabb had held him at gunpoint, McNabb hit the defendant in the mouth with the gun and left it bleeding, as the defendant testified it appeared in his booking photo. That photo was not in evidence at trial and there was no evidence contradicting his description of the booking photo. McNabb denied hitting the defendant. Other officers who were at the scene denied seeing the defendant injured and denied that the defendant had requested medical attention.

b. Post-Conviction Discovery

The defendant's post-conviction counsel, Attorney MarySita³ Miles, states in an affidavit that she learned from many conversations with trial counsel that she had not requested discovery from the Commonwealth or investigated the defendant's claims of innocence.⁴ Attorney Miles pursued such an investigation and found out that the defendant, aided by his trial counsel, had lodged with the SPD in July 2017 a complaint against McNabb for harassment. When Attorney Miles asked trial counsel for materials related to that complaint, trial counsel did not produce a copy of the SPD's conclusions or notes of a meeting.. Attorney Miles requested and obtained a redacted Internal Investigations Unit (IIU) report dated August 22, 2017. The IIU report discloses that the SPD received a 911 call from a witness at 2:09 a.m. on July 2, 2017. The IIU report describes a police investigator's conversation on July 21, 2017, with that 911 caller. In that conversation, the caller recounted the entire chain of incidents, beginning with the defendant's car speeding past McNabb and Pafumi, who asked the defendant why he was speeding. The defendant backed up his car and asked "What's up?" and then parked the car. The IIU report describes the caller's account of what happened thereafter.

"[T]he two white guys met him in the parking lot and an argument began. [The caller said that] a black guy punched one of the white guys and he fell to the ground knocked unconscious. He stated that he doesn't know if it was the driver . . . that punched the white guy. The caller further stated that the black guy was kicking and punching the white guy on the ground. He stated that the other white guy pulled out a gun to defend his buddy and everyone scattered. He stated that the only one he saw with a gun was the white guy. He never saw anyone else with a gun."

³The court uses the spelling of this name as written by post-conviction counsel, not others.

⁴The docket sheet shows that trial counsel filed no motions for discovery, dismissal of the indictments, or suppression.

Trial counsel had not sought evidence related to any potential 911 calls. Attorney Miles obtained that evidence from the prosecution and spoke with the 911 caller. The caller told Attorney Miles what he recalled: (1) two drunk white men were harassing a driver of a car and followed him to his car, (2) many other people were present, and one person was on the ground, and (3) only the white man had a firearm.

Attorney Miles obtained a recording of the 911 call made at 2:09 a.m. In that recording, the caller reported that (1) there was a man on the ground, (2) the friend of the man on the ground pulled a gun on a bunch of people, (3) everyone in the group saw the man with the gun and everyone ran away, and (4) there were two men and a bunch of people trying to punch "this guy."

3. Discussion

A judge may grant a new trial "at any time if it appears that justice may not have been done." Mass. R. Crim. P. 30(b). In ruling on a new trial motion, the judge determines whether there has been a significant error of law or other abuse of discretion. *Commonwealth v. Milley*, 67 Mass. App. Ct. 685, 687 (2006). The burden is on the defendant to demonstrate that the alleged errors possibly weakened his case in some significant way as to require a new trial. See *Commonwealth v. Schulze*, 389 Mass. 735, 741 (1983). An error creates a substantial risk of a miscarriage of justice when it has materially influenced the verdict. *Commonwealth v. Alphas*, 430 Mass. 8, 13 (1999). The judge ruling on a new trial motion may use her knowledge of what occurred at trial where, as in this case, she was the trial judge. See *Commonwealth v. Grace*, 370 Mass. 746, 752-753 (1976). Credibility questions are for the trial judge in disposing of a motion for new trial. See *Commonwealth v. Markham*, 10 Mass. App. Ct. 651, 652 (1980).

When a new trial motion is based upon a claim of ineffective assistance of counsel, the

court considers “whether there has been serious incompetency, inefficiency, or inattention of counsel –behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer – and, if that is found, then, typically, whether it has likely deprived the defendant of an otherwise available, substantial ground of defence.” *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974). In order to satisfy the second prong of an ineffective assistance claim, the defendant must show that “better work might have accomplished something material for the defense.” *Commonwealth v. Satterfield*, 373 Mass. 109, 115 (1977).

The defendant has met his burden for a new trial under Mass. R. Crim. P. 30(b). The Commonwealth's case was thin, as it rested on the credibility of two witnesses with inconsistent and facially unrealistic accounts of the incident; accounts that were contradicted by the credible, unimpeached testimony of Bosworth. As delineated above, trial counsel could and should have done far more to mount an effective defense throughout the trial on the evidence then in her possession. Had she done so, it is reasonable to conclude that the jury verdict would likely have been different.

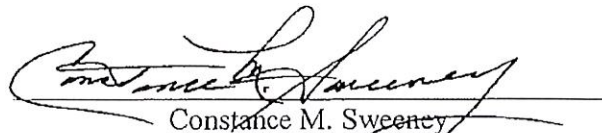
Equally inexcusable was trial counsel's failure to request discovery. Because she was aware of the defendant's harassment complaint to the SPD against McNabb, it was unreasonable for her to have waited passively for the prosecution to turn over evidence rather than to have sought and used portions of the IIU report in developing a viable defense. The information in the IIU report, and particularly the 911 caller's account in that report, would have substantially bolstered the defense that the defendant had no gun and would have effectively undermined the credibility of McNabb and Pafumi. Even apart from the IIU report, trial counsel knew that the incident occurred in the presence of a crowd. In these circumstances, it was unreasonable for trial

counsel not to have requested 911 recordings from July 2, 2017, to seek potential accounts from other witnesses.

Trial counsel's inaction amounted to serious inattention falling measurably below that which might be expected from an ordinary fallible lawyer. See *Commonwealth v. Saferian*, 366 Mass. at 96. The defendant has demonstrated that trial counsel's ineffectiveness deprived him of an available and substantial ground of defense. See *id.*

ORDER

For the reasons explained above, it is hereby **ORDERED** that the defendant's conviction is vacated and his motion for new a new trial is **ALLOWED**.


Constance M. Sweeney
Justice of the Superior Court

Dated: December 30, 2019

E-Filed 8/10/2020

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

HAMPDEN, ss.

DISTRICT COURT
SPRINGFIELD DIVISION
Docket # [Redacted by Petitioners]

COMMONWEALTH

v.

[Redacted by Petitioners]

NOLLE PROSEQUI: ALL COUNTS

Now comes the Commonwealth in the above entitled complaint and enters a nolle prosequi as to ALL COUNTS for the following reasons:


The offense occurred on December 17, 2018. The Defendant was a passenger in a vehicle, which was stopped based on a suspicion that a firearm was in the vehicle. No firearm was located.

The Defendant is alleged to have resisted officers' commands after having been brought to the ground.

In the twenty months since the incident, the Defendant has not accrued any further criminal charges. As of 08/10/2020 the Defendant's criminal record shows zero convictions, with this case being his only unresolved matter.

The Commonwealth has weighed the alleged conduct against the Defendant's lack of criminal history, the age of the case, and the scheduling challenges posed by the ongoing pandemic.

Respectfully submitted,
THE COMMONWEALTH


Christopher Nickels
Assistant District Attorney
Springfield District Court

DATED: 08/10/2020

HDA R.A.022

CRIMINAL COMPLAINT PROSECUTOR COPY		DOCKET NUMBER 1523CR009099	NO. OF COUNTS 2	Trial Court of Massachusetts District Court Department
DEFENDANT NAME & ADDRESS Ryan Nicholas Livernois [REDACTED] [REDACTED]				COURT NAME & ADDRESS Springfield District Court 50 State Street PO Box 2421 Springfield, MA 01101 (413)748-8600
DEFENDANT DOB [REDACTED]	COMPLAINT ISSUED 11/04/2015	DATE OF OFFENSE 11/03/2015	ARREST DATE 11/03/2015	
OFFENSE CITY / TOWN Springfield	OFFENSE ADDRESS			NEXT EVENT DATE & TIME 11/04/2015 09:00 AM
POLICE DEPARTMENT Springfield PD	POLICE INCIDENT NUMBER			NEXT SCHEDULED EVENT Arraignment
OBTN [REDACTED]	PCF NUMBER [REDACTED]	DEFENDANT XREF ID [REDACTED]		ROOM / SESSION Courtroom 1
The undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date(s) indicated below the defendant committed the offense(s) listed below and on any attached pages.				

COUNT	CODE	DESCRIPTION
1	265/13D/A	A&B ON POLICE OFFICER c265 §13D

On 11/03/2015 did assault and beat JOSE ROBLES, a police officer who was then engaged in the performance of his or her duties, in violation of G.L. c.265, §13D.

PENALTY: house of correction not less than 90 days, not more than 2½ years; or not less than \$500, not more than \$5000.

2	268/32B	RESIST ARREST c268 §32B
---	---------	-------------------------

On 11/03/2015 did knowingly prevent or attempt to prevent a police officer, as defined in G.L. c. 268, §32B(c), who was acting under color of his or her official authority, from effecting an arrest, by: (1) using or threatening to use physical force or violence against the police officer or another; or (2) using some other means which created a substantial risk of causing bodily injury to such police officer or another, in violation of G.L. c. 268, §32B.

PENALTY: jail or house of correction for not more than 2½ years; or not more than \$500; or both.

SIGNATURE OF COMPLAINANT X	SWORN TO BEFORE CLERK-MAGISTRATE/ASST. CLERK/DEP. ASST. CLERK X		DATE
NAME OF COMPLAINANT	A TRUE COPY ATTEST X	CLERK-MAGISTRATE/ ASST. CLERK	DATE

Notice to Defendant: 42 U.S.C. § 3796gg-4(e) requires this notice: If you are convicted of a misdemeanor crime of domestic violence you may be prohibited permanently from purchasing and/or possessing a firearm and/or ammunition pursuant to 18 U.S.C. § 922 (g) (9) and other applicable related Federal, State, or local laws.



Springfield Police Department
Arrest Report

Page: 1
11/04/2015

Arrest #: 15-3863-AR

Date/Time Reported: 11/03/2015 @ 2110
Arrest Date/Time: 11/03/2015 @ 2115
Booking Date/Time: 11/03/2015 @ 2206

OBTN: [REDACTED]

Reporting Officer: Officer Luke Cournoyer
Assisting Officer: Lieutenant Alberto Ayala
Booking Officer: Sergeant Louis Bortolussi
Approving Officer: Lieutenant Alberto Ayala

Signature: _____



Bail For Court: Springfield Set: 11/03/2015 @ 2323
RELEASED ON OWN RECOGNIZANCE 0.00
Released On Own Recognizance
Bail Set By: SS Clerk Shelly Sankar
Bail Paid:

Signature: _____

#	DEFENDANT (S)	SEX	RACE	AGE	SSN	PHONE
1	LIVERNOS, RYAN [REDACTED]	M	W	29	[REDACTED]	[REDACTED]

Military Active Duty: N
HEIGHT: 509 WEIGHT: 180 HAIR: BROWN EYES: BROWN
BODY: SKINNY COMPLEXION: LIGHT
DOB: [REDACTED] PLACE OF BIRTH: WORCESTER MA
LICENSE NUMBER: [REDACTED] ETHNICITY: NOT HISPANIC

[CONTACT INFORMATION]

Home Phone (Primary) [REDACTED]

[APPEARANCE]

GENERAL APPEARANCE: ROUGH

HAT: NO HAT
SHIRT: T-SHIRT
SWEATERS/COATS/JACKETS: NO COAT OR JACKET
PANTS/SKIRT: JEANS-COLOR
SHOE: JOGGING SHOES
MASK: NO MASK
GLASSES WORN: NO

TATTOOS: TAT R CALF(MAN W/ HATCHET)

Springfield Police Department
Arrest Report

Page: 2
11/04/2015

Arrest #: 15-3863-AR

#	DEFENDANT (S)	SEX	RACE	AGE	SSN	PHONE
---	---------------	-----	------	-----	-----	-------

[FAMILY/EMPLOYMENT INFORMATION]

MARITAL STATUS: SINGLE

FATHER'S NAME: [REDACTED]

MOTHER'S NAME: [REDACTED]

EMPLOYER/SCHOOL: HOOTERS WORCESTER MA

OCCUPATION: KITCHEN

[RIGHTS/BOOKING CHECKS]

RIGHTS ADVISED BY: Sergeant Louis R Bortolussi DATE/TIME: 11/03/2015 @ 2208
PHONE USED: N PHONED DATE/TIME: 11/03/2015 @ 2209
ARRESTEE SECURED: Y 11/03/2015 2211
ARRESTEE CELL #: M25

FINGERPRINTED: N

PHOTOGRAPHED: N

VIDEO: BOOKING

SUICIDE CHECK: Performed

PERSONS: State&Federal

NCIC VEHICLE CHECK: Not Performed

INJURY OR ILLNESS: N

#	OFFENSE (S)	ATTEMPTED	TYPE
---	-------------	-----------	------

LOCATION TYPE: Parking Lot/Garage
265 DWIGHT ST
SPRINGFIELD MA

Zone: Sector E1 Metro/South End

1	A&B ON POLICE OFFICER 265/13D/A OCCURRED: 11/03/2015 2110 WEAPON/FORCED USED: Personal Weapons (Hands/Feet/Etc)	N	Misdemeanor
2	RESIST ARREST 268/32B OCCURRED: 11/03/2015 2110 WEAPON/FORCED USED: Personal Weapons (Hands/Feet/Etc)	N	Misdemeanor

#	VICTIM(S)	SEX	RACE	AGE	SSN	PHONE
---	-----------	-----	------	-----	-----	-------

1 CONFIDENTIAL

HDA R.A.025

Springfield Police Department
Arrest Report

Page: 3
11/04/2015

Arrest #: 15-3863-AR

CONFIDENTIAL VICTIM REPORT

#	VICTIM(S)	SEX	RACE	AGE	SSN	PHONE
1	[REDACTED]	M	W	48	NOT AVAIL	[REDACTED]

EMPLOYER: SPRINGFIELD [REDACTED]
INJURIES: None
ETHNICITY: Hispanic
RESIDENT STATUS: Resident
VICTIM CONNECTED TO OFFENSE NUMBER(S): 1 2
RELATION TO: LIVERNOIS RYAN Stranger
CONTACT INFORMATION:
Home Phone (Primary) [REDACTED]
Home Phone [REDACTED]
Work Phone (Primary) [REDACTED]
Work Phone (Primary) [REDACTED]
Work Phone (Primary) [REDACTED]

ADDITIONAL ASSISTING OFFICERS

Officer Edwin Hernandez
Officer Matthew Rief
Officer Steven Vigneault
Officer Jose Robles

Officer Juan Rodriguez
Officer Gregg Bigda
Officer Edward Kalish

Ref: 15-3863-AR

Entered: 11/03/2015 @ 2228

Entry ID: 106667

Modified: 11/03/2015 @ 2243

Modified ID: 106667

Approved: 11/03/2015 @ 2243

Approval ID: A919

Sir,

On 11/03/2015 at around 2110 hours Members of the Narcotics Bureau under the supervision of Lt. A. Ayala arrested Ryan Livernois (DOB [REDACTED], SSN# [REDACTED]) of [REDACTED] MA, in the parking lot of 265 Dwight Street (Center Stage) for the following offenses;

- 1) Assault and Battery on a Police Officer
- 2) Resisting Arrest

On 11/03/2015 Det. Bigda and I (L. Cournoyer) were parked in the Center Stage parking lot with a clear and unobstructed view of the alley behind 70 Harrison Street. Officers were in the area in response numerous complaints involving drug activity. On this particular date our attention was drawn to three males who exited the front entrance of the aforementioned establishment. Upon exiting they walked directly to the rear alley of 70 Harrison. I observed as these individuals walked to the very end of the alley at which point one of the individuals began to talk on his cell phone. After appearing to hang up the phone all three subjects waited another minute or two before an unidentified male wearing a red polo shirt and blue jeans exited the rear entrance of the building. This subject then approached the white male in a blue t-shirt and blue jeans (ID Ryan Livernois). After a brief interaction I observed Mr. Livernois hand this subject what appeared to be paper currency in exchange for a small item. Mr. Livernois scrutinized this item for a moment before placing it into his right pocket. Based on my training and experience I believed that a drug transaction had just occurred.

I then notified the other Officers of my observations. I continued to watch their direction of travel as they exited the alley and heading down Hillman Street, back to the front of the Center Stage. I then observed one of the males (unidentified) re-enter the establishment as Mr. Livernois and the other male (ID Steven Fishman DOB [REDACTED]) continued towards the parking lot and began to enter a grey Volkswagen jetta. It was at this time that Detectives approached Mr. Livernois and Mr. Fishman to detain them. Upon doing so officers exited their vehicle with police badges clearly displayed while continuously announcing their presences. Mr. Fishman, who was on the passenger side of the vehicle, immediately complied with commands by placing his hands in the air saying "yes sir, Officer! Yes Sir, Officer!" Meanwhile Det. Robles approached Mr. Livernois who had just entered the driver side of the vehicle. Upon seeing Det. Robles approaching Mr. Livernois immediately bladed his body to the right appearing to reach for his waistband. Fearing that Mr. Livernois may be reaching for a weapon Det. Robles began to remove Mr. Livernois from the vehicle while shouting "show me your hands!! Show me your hands!!" Immediately Mr. Livernois refused to comply as he continued to reach behind his back. Mr. Livernois who was now extremely combative began striking and pushing Det. Robles. Detectives then quickly responded to assist and were forced to take Mr. Livernois to the ground where he continued to struggle by clenching his arms beneath his body while flailing back and forth. After a brief but violent struggle Officers were able to place Mr. Livernois into custody. During this struggle Officers observed

Springfield Police Department

Page: 2

NARRATIVE FOR OFFICER LUKE F COURNOYER

Ref: 15-3863-AR

Entered: 11/03/2015 @ 2228 Entry ID: 106667
Modified: 11/03/2015 @ 2243 Modified ID: 106667
Approved: 11/03/2015 @ 2243 Approval ID: A919

Mr. Livernois drop an item on the ground from his right hand.

Det. Robles then recovered the item that Mr. Livernois was seen dropping. After further inspection Det. Robles observed a clear plastic baggie containing a vegetable matter consistent with marijuana. Also located by Det. Robles inside the driver side door handle were two more clear plastic baggies of marijuana. It is important to note that all three bags recovered were consistent in quantity and packaging.

Once in custody Officers observed that Mr. Livernois, after being forced to the ground, sustained minor abrasions to the side of his face and back of his hands.

Mr. Livernois was then transported to 130 Pearl Street for booking procedures.

Injury Reports Filed

Tag# 367956- 3 bags of Marijuana

Watch Commander Notified

Respectfully Submitted,

Officer L. Cournoyer Badge# 323

DATE 11/05/15

SPRINGFIELD POLICE DEPT.
PROPERTY RECEIPT

CODE _____

367956

TO BE FILLED OUT BY OFFICER SUBMITTING PROPERTY

CIRCLE ONE STOLEN ☒ EVIDENCE ☐ PAWNED ☐ LOST/FOUND ☐ OTHER ☐

CIRCLE ONE ARREST MADE ☒ Y N SEARCH WARRANT Y N PHOTOS TAKEN Y N

PERSON(S) ARRESTED Ryan N. Livermore

D.O.B. [REDACTED]

I.D. # _____

CHARGES A&B on Police / Resisting Arrest

ITEM 3 Bags of Marijuana

VALUE _____

MAKE _____ SERIAL # _____ MODEL _____

OWNER/VICTIM _____

ADDRESS _____ TELE. # _____

PROPERTY FOUND AT/IN SEE Bags for DETAILS.

IF PAWNED, BY WHO _____ WHERE _____

OFFICER SUBMITTING PROPERTY E. HERNANDEZ EMP. # 106662

REMARKS: 15-3863-AR

FOR PROPERTY DIV. USE

OFFICER RECEIVING PROPERTY _____

LOCATION WHERE STORED _____

RM. # _____ SHELF _____

FINAL DISPOSITION
OF PROPERTY:

TURNED OVER TO: _____

ADDRESS: _____

TELE. # _____

JUNKED-DESTROYED-AUCTION
OFFICER MAKING FINAL DISP.

DATE _____

DIVISION COPY



U.S. Department of Justice

Andrew E. Lelling
United States Attorney
District of Massachusetts

Main Reception: (413) 785-0235
Facsimile: (413) 785-0394

United States Courthouse
300 State Street, Suite 230
Springfield, Massachusetts 01105-2926

June 12, 2019

VIA FEDERAL EXPRESS

First Assistant District Attorney Jennifer N. Fitzgerald
Hampden County District Attorney's Office
Hall of Justice
50 State Street
Springfield, MA 01103

RE: In Re: Grand Jury Investigation

Dear Counsel:

The United States has produced to the Hampden County District Attorney's Office the entire federal grand jury transcript of the April 19, 2018, testimony of witness **EDWARD KALISH**, and a redacted version of the June 28, 2018, testimony of **EDWARD KALISH**.

The government did not provide in that production pages 2, 5-13, 19, 21-22, 26-35, 38, 48, 51-53.

Furthermore, the pages that the government produced contain redactions.

Very truly yours,

ANDREW E. LELLING
United States Attorney

By: /s/ Deepika Bains Shukla
DEEPIKA BAINS SHUKLA
Assistant U.S. Attorney

DBS/pap

HDA R.A.030



U.S. Department of Justice

Andrew E. Lelling
*United States Attorney
District of Massachusetts*

Main Reception: (413) 785-0235
Facsimile: (413) 785-0394

*United States Courthouse
300 State Street, Suite 230
Springfield, Massachusetts 01105-2926*

April 1, 2019

BY HAND DELIVERY

Anthony Gulluni
Hampden County District Attorney
Hampden County District Attorney's Office
Hall of Justice
50 State Street
Springfield, MA 01103

Dear DA Gulluni:


In response to your January 22, 2019 letter requesting information related to Springfield Police Officers, please find enclosed excerpts of certain federal grand jury transcripts of Springfield Police Officers. United States District Court Judge Mark G. Mastroianni has ordered their disclosure to you only and only for your use in disclosing information pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and impeachment information in state prosecutions (See enclosed Order).

Please do not hesitate to call me with any questions regarding the enclosed information.

Very truly yours,

ANDREW E. LELLING
United States Attorney

By:



Deepika Bains Shukla
Assistant United States Attorney

DBS/pap
Enclosures

HDA R.A.031

I

1 - 9

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE UNITED STATES ATTORNEY
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,

VS.

JOHN DOE.

Case No.

Federal Grand Jury
U.S. Courthouse
300 State Street
Springfield, Massachusetts

Thursday
April 19, 2018

APPEARANCE: CHRISTOPHER J. PERRAS
Trial Attorney

DEEPIKA BAINS SHUKLA
Assistant U.S. Attorney

WITNESS: EDWARD KALISH

Apex Reporting
(617) 269-2900

I

1 - 9

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE UNITED STATES ATTORNEY
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Thursday
April 19, 2018

APPEARANCE: CHRISTOPHER J. PERRAS
Trial Attorney

DEEPIKA BAINS SHUKLA
Assistant U.S. Attorney

WITNESS: EDWARD KALISH

Apex Reporting
(617) 269-2900

HDA R.A.033

From: Green, Matthew (WES)
Sent: Monday, December 17, 2018 1:55 PM
To: WES-DL-ALL-Hampden County ADA's
Subject: SPD Officers Cournoyer, Robles, Kalish, Lt. Ayala and Captain Kent

Please be advised that effective immediately you should not move forward with, or dispose of, any criminal matters involving any of the five SPD officers listed above. Our office is going to begin disseminating potentially exculpatory information about these officers as soon as it is possible. However, considering the volume of the discovery and the extent of our obligations it may take several days. In the meantime if you have a matter on that involves one of these officers please see your supervisor.

Thank you,

Matthew W. Green
Assistant District Attorney
Supervisor of Gun and Drug Unit
Hampden County District Attorney's Office
55 State Street
Springfield, MA 01102
Phone: 413-505-5662
Fax: 413-781-4745



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From: Mccarthy, Karen (WES)

Sent: Tuesday, January 29, 2019 8:32 AM

To: Koehler, Kerry (WES); Sullivan, Hilary (WES); Gallucci, Peter (WES); Fila, Sarah (WES); Perne, Mitchell (WES); Loftus, Matthew (WES); Innes, Katy (WES); Clarke, Jeffrey (WES); Spinella, Jamie (WES); Joyce, Catherine (WES); Margeson, Johanna (WES); Clarke, Jeffrey (WES); McDonald, Jeffrey (WES); Kenniston, Carolyn (WES); Wright, Clarissa (WES); Oconnor, Jill (WES); Burns, Fred (WES); Melanson, David (WES)

Subject: RE: FGJ minutes.

REMINDER IF YOU HAVE NOT GIVN ME A LIST OF YOUR UPCOMING EVIDENTIARY HEARINGS (DOCKET NUMBER DATE AND EVENT, OFFICER) WITH KALISH AND OTHERS PLEASE DO SO BY TOMORROW JANUARY 30TH BY 4:30. IF YOU HAVE NONE THEN LET ME KNOW. THANKS KAREN

From: Mccarthy, Karen (WES)

Sent: Wednesday, January 23, 2019 5:04 PM

To: Koehler, Kerry (WES); Sullivan, Hilary (WES); Gallucci, Peter (WES); Fila, Sarah (WES); Perne, Mitchell (WES); Loftus, Matthew (WES); Innes, Katy (WES); Clarke, Jeffrey (WES); Spinella, Jamie (WES); Joyce, Catherine (WES); Margeson, Johanna (WES); Clarke, Jeffrey (WES); McDonald, Jeffrey (WES); Kenniston, Carolyn (WES); Wright, Clarissa (WES); Oconnor, Jill (WES); Burns, Fred (WES); Melanson, David (WES); Mccarthy, Karen (WES)

Subject: FW: FGJ minutes.

Importance: High

Hi everyone,

Here are officer kalish's entire GJ minutes that we discussed in the meeting. Please provide them in full or the additional pages that are not on the disk to defense on all relevant cases in addition to the original disk. Remember to address cases where you already provided the disc only. IF YOU WERE NOT AT THE MEETING HELD 1/23/19 AT 4:00 COME SEE ME TO DISCUSS. Thanks, Karen

From: Fitzgerald, Jennifer (WES)

Sent: Wednesday, January 23, 2019 9:50 AM

To: Mccarthy, Karen (WES)

Subject: FW: FGJ minutes.

Here is the full transcript of Ed Kalish's GJ testimony. Please see that all prosecutors have it and get it to defense counsel in their matters where Ed is a witness or potential witness.

From: Tarpey, Philip [mailto:PTarpey@springfieldpolice.net]

Sent: Wednesday, January 23, 2019 8:30 AM

To: Fitzgerald, Jennifer (WES)

Subject: FGJ minutes.

Ma'am,

Not sure how that happened with the FGJ pages. Hope this helps.

This e-mail message is generated from the Office of the Hampden District Attorney and contains information that is confidential and may be privileged as an attorney/client communication or as attorney work product. The information is intended to be disclosed solely to the addressee(s). If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this email information is prohibited. If you have received this email in error, please notify the sender by return email and delete it from your computer system.

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Springfield Police Officers charged are: A&B's

1. Springfield Police Officer Daniel Billingsley, age 30, of Springfield
 1. 19-0155 – Status 6/3
2. Springfield Police Officer Anthony Cicero, age 29, of Hampden
 1. 19-0157 – Status 6/3
3. Springfield Police Officer Christian Cicero, age 28, of Longmeadow
 1. 19-0158 – Status 6/3
4. Springfield Police Officer Igor Basovskiy, age 34, of Springfield
 1. 19-0154-NP – ALL COUNTS 3/13/20
5. Springfield Police Officer Jameson Williams, age 33, of East Longmeadow
 1. 19-0159 – Status 6/3
6. Springfield Police Officer Jose Diaz, 54, of Springfield
 1. 19-0156 ab – Status 6/3
 2. 19-034 misleading PO Stauts 6/3
7. **Springfield Police Officer Darren Nguyen, age 40, of Holland**
 1. 19-0343 – Perjury – Status 6/3
 2. 19-0343 - Misleading a Police Officer/Investigator Status
 3. 19-0161 Filing a False Police Report – Status 6/3
8. **Springfield Police Officer Shavonne Lewis, age 29, of Springfield**
 1. 19-0348 Perjury – Status 6/3
 2. 19-0348 Misleading a Police Officer/Investigator – Status 6/3
 3. 19-0163 Filing a False Police Report – Status 6/3
9. **Springfield Police Sergeant Louis Bortolussi, age 57, of East Longmeadow**
 1. 19-0340 Perjury
 2. 19-0340 Misleading a Police Officer/Investigator Dismissed 2/18/20
 3. 19-0165 Filing a False Police Report – Dismissed 1/27/20
10. **Springfield Police Officer Derrick Gentry-Mitchell, age 29, of Springfield**
 1. 19-0345 Perjury - Status 6/3
 2. 19-0345 Misleading a Police Officer/Investigator/Grand Jury - Status 6/3
 3. 18-0235 Filing a False Police Report - Status 6/3
11. **Springfield Police Officer James D'Amour, age 42, of Hampden**
 1. 19-0342 Perjury - Status 6/3
 2. 19-0342 Misleading a Police Officer/Investigator - Status 6/3
 3. 19-0162 Filing a False Police Report - Status 6/3
12. **Springfield Police Officer John Wajdula, age 34, of Springfield**
 1. 19-0346 Perjury - Status 6/3
 2. 19-0346 Misleading a Police Officer/Investigator/Federal Agent - Status 6/3
 3. 19-0167 Filing a False Police Report - Status 6/3
13. **Former Springfield Police Officer Nathaniel Perez, age 27, of West Springfield**
 1. 19- 0339 Perjury – Dismiss 1/3/20
 2. 19-0339 Misleading a Police Officer/Investigator - Dismiss 1/3/20
 3. 19-0166 Filing a False Police Report - Dismissed 1/22/20
14. **Springfield Police Officer Melissa Rodriguez, age 32, of Springfield**
 1. 19-0341 Perjury – NP 4/17/20

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN ss.

SUPERIOR COURT
ACTION NOS. 1979CR00339
1979CR00166

COMMONWEALTH

HAMPDEN COUNTY
SUPERIOR COURT
FILED

vs.

JAN - 3 2020

NATHANIEL PEREZ

[Signature]
CLERK OF COURTS

**MEMORANDUM OF DECISION AND
ORDER ON DEFENDANT'S MOTION TO DISMISS**

The defendant, Nathaniel Perez, a Springfield police officer, is charged with perjury in violation of G.L. c. 268, § 1 (Action No. 1979CR00339, charge 1); misleading in violation of G.L. c. 268, § 13B (Action No. 1979CR00339, charge 2); and making a false report in violation of G.L. c. 269, § 13A (Action No. 1979CR00166, charge 1). The charges stem from Perez's testimony before the grand jury on February 21, 2015, and written reports submitted by him within the police department on July 24, 2015, and August 17, 2015, concerning events occurring in the early morning of April 8, 2015. Perez argues that the indictments against him should be dismissed because the evidence presented to the grand jury was insufficient as a matter of law to establish the requisite probable cause. For the reasons set forth below, Perez's motion to dismiss is **ALLOWED**.

BACKGROUND

The testimony and other evidence presented to the grand jury, viewed in the light most favorable to the Commonwealth, set forth the following:¹ On April 8, 2015, Perez was on patrol

¹ The facts recited here pertain to Perez and his actions with regard to the early morning of April 8, 2015. The parties are familiar with facts presented to the grand jury concerning the evening of April 7, 2015 and the early morning of April 8, 2015 as I have recited them in previous decisions in related cases. I, therefore, do not repeat them here.

22 emailed to parties
per W. Walsh

in a cruiser with his partner for that evening, Officer James D'Amour, working midnight to eight a.m. patrolling the area known as "Hotel 3." At approximately 1:16 a.m., Perez and D'Amour became aware of a call from Springfield dispatch regarding a report of a disturbance in the area of a bar known as Nathan Bill's (the "Nathan Bill's disturbance call"). Although not directed to do so by dispatch, Perez and D'Amour drove to the area of Nathan Bill's to assist on the call.

Perez testified that upon arriving at Nathan Bill's, he saw another marked cruiser outside the bar and two uniformed officers interacting with three visibly upset males.² He testified that he also observed "a group of 10 to 20 people outside smoking, talking and just being around the entrance to the bar." Among the group of people around the entrance, Perez saw John Sullivan, the owner of Nathan Bill's, and off-duty police officers Melissa Rodriguez, Daniel Billingsley and Christian Cicero. Perez spoke to Sullivan. Sullivan told Perez that the three individuals with whom the other uniformed officers were speaking had been "causing a ruckus at the bar and were asked to leave." Perez then spoke to Cicero, who "verif[ied] the story of the bar owner." Perez testified that he did not recall speaking to anyone else from the group around the bar entrance. Within a few minutes, the three individuals who had been asked to leave Nathan Bill's left. Perez and D'Amour stayed at the scene for a short time after to make sure that the individuals had left and then returned to their patrol.

Less than an hour after the Nathan Bill's disturbance call, shortly after 2 a.m., Perez and D'Amour received a call for a disturbance near Murphy's Pop Shop on Island Pond Road (the "Murphy's Pop Shop disturbance call"). Murphy's Pop Shop is near Nathan Bill's. Perez and D'Amour drove to Murphy's Pop Shop to assist. There were other uniformed police officers at

² Perez testified that he could not recall if a second cruiser was also at the scene. He testified that he remembered one cruiser and two officers but could not recall whether the officers were Darren Nguyen and Shavonne Lewis or Derrick Gentry-Mitchell and Jeremy Rivas.

the scene when Perez and D'Amour arrived as well as four males, three of whom were the individuals asked to leave Nathan Bill's earlier.³ One of the four males was injured and lying on the ground. Perez spoke with the individuals, who told him that "they got attacked or beat up by a group of white people" who "took off on Island Pond Road." The individuals also told Perez that they had gone back to Nathan Bill's and "got jumped by a group of white people." Perez did not ask the individuals where their assailants had come from or for a more detailed description of the assailants.

Perez and D'Amour then returned to their cruiser and drove to "the top of Island Pond Road and off to maybe some of those side streets coming off of Island Pond Road" to look for the assailants. Perez and D'Amour then returned to the Murphy's Pop Shop parking lot. The drive took approximately two to five minutes. When they returned, Perez asked Bortolussi, the officer in charge, what to do but did not receive any directions. Perez observed an ambulance at the scene with emergency medical technicians treating one of the individuals. Perez also observed one of the individuals in handcuffs in the back of a cruiser, then observed Bortolussi order the individual to be released. The four individuals left the scene in a car that arrived to pick them up. In sum, Perez admitted to no knowledge that off-duty police officers were involved in the Murphy's Pop Shop disturbance.

EMT John Sheehan-Ferreira testified before the grand jury on February 14, 2018. He stated that upon arriving at the parking lot of Murphy's Pop Shop he encountered "kind of a hectic scene. There was a few cruisers and a handful of gentlemen besides the cops All the gentlemen on scene were pretty ripped up. They were going on about how they just got into a

³ Perez could not recall which officers were at the scene when he and D'Amour arrived. He testified that, at some point, Sergeant Louis Bortolussi, Lewis, Nguyen, Gentry-Mitchell and Rivas were all there.

bar fight and had just gotten beaten up by off-duty officers.” When asked by the prosecutor, “how loud were those individuals stating that they had been jumped or had a fight with off-duty officers,” Sheehan-Ferreira answered: “Very loud,” and noted that uniformed officers were in the vicinity at that time. Michael Cintron, one of the African-American male victims, testified before the grand jury on February 8, 2018. He testified that as marked cruisers arrived in the aftermath of the assault in the parking lot of Murphy’s Pop Shop, he informed police that “[w]e just got jumped by guys from the bar. They just walked back to the bar.”

On July 24, 2015, Perez submitted a report concerning the morning of April 8, 2015 to Captain Trent Duda. Prior to submitting the report, Perez received a list of questions to address in the report. The list of questions was entered as an exhibit during D’Amour’s testimony to the grand jury on February 21, 2018. One of the questions to be addressed was, with respect to the Nathan Bill’s disturbance call, “Upon arrival what did you see occurring?” On August 17, 2015, Perez submitted a report to Sergeant William Andrew concerning the morning of April 8, 2015. Perez’s July 24, 2015 report and his August 17, 2015 report were entered as exhibits before the grand jury on March 27, 2019.

In his July 24, 2015 report, Perez stated, with regard to the Nathan Bill’s disturbance call, “Upon arrival, we observed three black males, one of whom appeared to be very upset and was yelling, leaving the bar.” Perez also described seeing “a crowd of people standing outside of the entrance of the bar,” among whom Perez “observed Officers C. Cicero, D. Billingsley, and M. Rodriguez.” Perez stated that “[w]e spoke with people on scene, as well as one of the bar owners, known to me as ‘Sully,’ who stated that the male who was visibly upset was kicked out of the bar for causing a disturbance.” In his August 17, 2015 report, Perez added that, when responding to the Nathan Bill’s disturbance call, he spoke with Christian Cicero, who stated “that

the male who was upset was kicked out of the bar by the owner.”

With regard to the Murphy’s Pop Shop disturbance call, Perez stated, in his July 24, 2015 report, that he observed “four black males” when he arrived at the scene, one of whom appeared to be injured and three of whom had been asked to leave Nathan Bill’s earlier. Perez stated that the African American males told him and D’Amour that they had returned to Nathan Bill’s and “were ‘jumped’ by a group of white people” who “took off, heading north on Island Pond Road.” In his August 17, 2015 report, Perez added that one of the African-American males told Perez and D’Amour to go look for the assailants, stating, “Go do what you guys do.” On March 27, 2019, the grand jury returned indictments against Perez for perjury, misleading and making a false report. All of the charges are based on the contention that Perez knew, when responding to the Murphy’s Pop Shop disturbance, that off-duty police officers were involved in the disturbance but omitted this information from his grand jury testimony and his written reports.

DISCUSSION

A. Standard—Probable Cause

In order to issue a valid indictment, the grand jury must “hear sufficient evidence to establish the identity of the accused and probable cause to arrest.” *Commonwealth v. McCarthy*, 385 Mass. 160, 163 (1982). “It is well established that ‘[p]robable cause to arrest requires more than mere suspicion but something less than evidence sufficient to warrant a conviction.’” *Commonwealth v. Rex*, 469 Mass. 36, 40 (2014), quoting *Commonwealth v. Roman*, 414 Mass. 642, 643 (1993). “The standard of sufficiency has been defined as whether the grand jury heard reasonably trustworthy information sufficient to warrant a prudent man in believing that the defendant had committed or was committing an offense.” *Commonwealth v. Goldstein*, 54 Mass. App. Ct. 863, 866 (2002). Circumstantial evidence, which “is competent to establish guilt

beyond a reasonable doubt,” *Commonwealth v. Gilbert*, 423 Mass. 863, 868 (1996), may certainly establish probable cause to indict. See *Commonwealth v. Torres*, 442 Mass. 554, 563 (2004) (“The evidence, although entirely circumstantial, was sufficient to support” the conviction); *Commonwealth v. Guerrero*, 32 Mass. App. Ct. 263, 266 (1992) (“web of circumstantial evidence” supported conviction). “An inference drawn from circumstantial evidence need only be reasonable and possible; it need not be necessary or inescapable.” *Gilbert*, 423 Mass. at 868. “Whether an inference is warranted or is impermissibly remote must be determined, not by hard and fast rules of law, but by experience and common sense.” *Commonwealth v. Gonzalez*, 452 Mass. 142, 146 (2008). For an indictment to survive a motion to dismiss, “the grand jury must simply have been presented with evidence supporting a finding of probable cause as to ‘each of the ... elements’ of the charged crime.” *Commonwealth v. Walczak*, 463 Mass. 808, 817 (2012), quoting *Commonwealth v. Moran*, 453 Mass. 880, 884 (1984). An invalid indictment is subject to dismissal. *McCarthy*, 385 Mass. at 163.

B. Perjury

The elements of perjury are (1) that the defendant made a statement under oath in a judicial proceeding; (2) the statement was false; (3) the defendant made the statement willfully and knew the statement was false when he made it; and (4) the statement was material to the issue or point in question. See *Commonwealth v. White*, 70 Mass. App. Ct. 71, 76 (2007). Knowledge that a statement was false “may be inferred from the falsity of the statement itself when considered in relation 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 Commonwealth claims that Perez perjured himself in his grand jury testimony by omitting from his testimony that he knew, on April 8, 2015, that off-duty police officers were

involved in the Murphy's Pop Shop disturbance. In order to sustain the perjury indictment, therefore, the Commonwealth must have presented evidence to the grand jury sufficient to warrant a belief that Perez did know that off-duty officers were involved in the Murphy's Pop Shop disturbance. See *Walczak*, 463 Mass. at 817 (grand jury must hear evidence supporting a finding of probable cause as to each element of charged crime). The Commonwealth did not do so.

From the evidence presented, the grand jury could have inferred that one or more unidentified police officers on the scene were aware that the victims were alleging that off-duty police officers were involved in the physical altercation. The grand jury could have inferred this (1) from Sheehan-Ferreira's testimony, which was that uniformed police officers were in the vicinity when one of the victims loudly stated that they "had just gotten beaten up by off-duty officers"; and (2) from Cintron's testimony that, when police arrived at the scene, he told police that "[w]e just got jumped by guys from the bar."

There was no evidence, however, that Perez heard the statement referred to by Sheehan-Ferreira or that Perez was the officer (or one of the officers) to whom Cintron spoke. Sheehan-Ferreira did not state which police officers were in the vicinity when the victim stated that they "had just gotten beaten up by off-duty officers." And Cintron did not identify to which officer or officers he made the statement. Importantly, Perez arrived at Murphy's Pop Shop after other officers, and, after his arrival, left the scene to drive to "the top of Island Pond Road and off to maybe some of those side streets coming off of Island Pond Road" to look for the assailants. Finally, the Commonwealth presented no evidence from which the grand jury could infer that anyone at the scene told Perez about the victims' statements.

The Commonwealth argues that the grand jury could infer that Perez knew that off-duty

police officers were involved in the assault outside of Murphy's Pop Shop because his not knowing was "unbelievable," citing to *Commonwealth v. Brown*, 55 Mass. App. Ct. 440, 447 (2002). *Brown* is inapposite. In *Brown*, the Appeals Court held that the grand jury heard sufficient evidence to indict the defendant for perjury where the grand jury heard direct evidence of the falsity of the defendant's testimony and where the defendant's testimony contained "internal contradictions and strong improbabilities." *Brown*, 55 Mass. App. Ct. at 447. Here, there was no direct evidence that Perez knew that off-duty officers were involved in the Murphy's Pop Shop disturbance and the Commonwealth does not point to any internal contradictions in Perez's testimony.

Rather, the Commonwealth insists that Perez could not have been ignorant of the involvement of off-duty officers in the earlier Nathan Bill's disturbance and, because he knew that off-duty officers were involved in the earlier Nathan Bill's disturbance, he must have realized that off-duty police officers were involved in the later Murphy's Pop Shop disturbance. The Commonwealth argues that Perez must have known that off-duty officers were involved in the earlier Nathan Bill's disturbance because there were off-duty police officers at Nathan Bill's when Perez responded to the Nathan Bill's disturbance call and because the two people that Perez spoke to while at the scene of the Nathan Bill's disturbance call, Sullivan and Cicero, knew that off-duty officers were involved in the earlier altercation. These two facts were insufficient, however, to warrant the grand jury in believing that Perez knew that off-duty officers were involved in the earlier Nathan Bill's disturbance. They cannot, therefore, support the further inference that Perez realized that off-duty officers were involved in the Murphy's Pop Shop disturbance.

Because the grand jury heard insufficient evidence to warrant a belief that Perez knew

that off-duty officers were involved in the Murphy's Pop Shop disturbance, the perjury charge must be dismissed. See *McCarthy*, 385 Mass. at 163, quoting *Commonwealth v. Stevens*, 362 Mass. 24, 26 (1972) (holding that indictment defective where grand jury did not hear "reasonably trustworthy information ... sufficient to warrant a prudent man in believing that defendant had committed or was committing an offense").

C. Misleading

General Laws c. 268, § 13B, effective from November 4, 2010 to April 12, 2018, provided, in pertinent part, "[w]hoever, directly or indirectly, willfully... misleads ... a ... grand juror, prosecutor, police officer, ... [or] investigator ... with the intent to impede, obstruct, delay, harm, punish or otherwise interfere thereby ... with [a criminal investigation, grand jury proceeding [or] other criminal proceeding of any type] shall be punished...." G.L. c. 268, § 13B (1) (c) (iii) & (v) (effective November 4, 2010 to April 12, 2018).⁴

"[M]islead[ing]" is not defined in § 13B, but the Supreme Judicial Court, relying on the definition for "misleading conduct" in the federal witness tampering statute, has defined it, in part, as "knowingly making a false statement" or "intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement."

Commonwealth v. Tejeda, 476 Mass. 817, 818-819 (2017), quoting 18 U.S.C. § 1515(a)(3) (2012). Realizing that this definition is, to some extent, circular, the Supreme Judicial Court has clarified that, "misleading conduct within the meaning of § 13B is conduct that is intended to create a false impression such that it was reasonably likely to send investigators astray or in the wrong direction." *Tejeda*, 476 Mass. at 820. Therefore, to find a defendant guilty of

⁴ Section 13B was revised effective April 13, 2018.

violating § 13B, “the jury would need to find not only that the statement was false, but that it reasonably could have led law enforcement officers to pursue a materially different course in their investigation from one they otherwise would have pursued because it sent them in the wrong direction.” *Commonwealth v. Paquette*, 475 Mass.793, 805 (2016).

The Commonwealth argues that the grand jury heard sufficient evidence to warrant a belief that Perez violated the misleading statute during his grand jury testimony and in his written reports dated July 24, 2015, and August 17, 2015 by omitting from them that he knew, on April 8, 2015, that off-duty police officers were involved in the Murphy’s Pop Shop disturbance. As noted above, the grand jury heard insufficient evidence, however, to warrant a belief that Perez did know, on April 8, 2015, that off-duty police officers were involved in the Murphy’s Pop Shop disturbance. Accordingly, the misleading charge must be dismissed. See *McCarthy*, 385 Mass. at 163.

D. False Report


It is a crime to “intentionally and knowingly make[] or cause[] to be made a false report of a crime to police officers.” G.L. c. 269, § 13A. In order to violate the statute, the false statement must have been knowing and intentional, *Commonwealth v. Salyer*, 84 Mass. App. Ct. 346, 351-352 (2013), and the false information given to the police must be material. See *Fortuna*, 80 Mass. App. Ct. at 52 (“to violate the statute, the defendant has to have made a substantially inaccurate accounting of a crime, not just have reported some untrue detail related to it”). The Commonwealth claims that Perez made false reports when he omitted from his written reports dated July 24, 2015 and August 17, 2015 that he knew, on April 8, 2015, that off-duty officers were involved in the Murphy’s Pop Shop disturbance. As noted above, the grand jury heard insufficient evidence, however, to warrant a belief that Perez did know, on April 8,

2015, that off-duty officers were involved in the Murphy's Pop Shop disturbance. Because there was insufficient evidence to warrant a belief that Perez's statements were false, the false report charge must be dismissed. See *McCarthy*, 385 Mass. at 163.

ORDER

For the reasons set forth above, Defendant's Motion to Dismiss is **ALLOWED**.

DATE: January 3, 2020


MARK D MASON
Justice of the Superior Court

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN ss.

**SUPERIOR COURT
ACTION NO. 1979CR00165**

COMMONWEALTH

vs.

LOUIS BORTOLUSSI

**MEMORANDUM OF DECISION AND
ORDER ON DEFENDANT'S MOTION TO DISMISS**

The defendant, Louis Bortolussi, a Springfield police officer, is charged with making a false report in violation of G.L. c. 269, § 13A. The charge stems from two written reports submitted by Bortolussi within the police department concerning events occurring in the early morning of April 8, 2015. Bortolussi argues that the false report indictment against him should be dismissed because the evidence presented to the grand jury was insufficient as a matter of law to establish the requisite probable cause.¹ For the reasons set forth below, Bortolussi's motion to dismiss is **ALLOWED**.

BACKGROUND

On February 16, 2018, Bortolussi testified before the grand jury. On March 27, 2019, two written reports submitted by Bortolussi within the Springfield Police Department were entered as exhibits: a report to Captain Trent Duda dated July 27, 2015 (the "July 27, 2015 report"), and an undated report to Sergeant William Andrew (the "undated report"). Also presented to the grand jury were the testimony of other witnesses and numerous other exhibits. The testimony and other evidence presented to the grand jury, viewed in the light most favorable

¹ Bortolussi is also charged with perjury in violation of G.L. c. 268, § 1 (Action No. 1979CR00340, charge 1) and misleading in violation of G.L. c. 268, § 13B (Action No. 1979CR00340, charge 2). The instant motion concerns only the false report charge, not the perjury or misleading charges.

to the Commonwealth, set forth the following:²

In the early morning of April 8, 2015, a group of off-duty Springfield police officers was drinking at a bar known as "Nathan Bill's." While there, some of the off-duty officers became involved in a verbal altercation with a group of African-American males, who then left the bar. Three police cruisers, with on-duty officers Darren Nguyen, Shavonne Lewis, Jeremy Rivas, Derrick Gentry-Mitchell, James D'Amour and Nathaniel Perez, responded to the scene. Outside of Nathan Bill's, the on-duty officers saw a number of off-duty police officers. Officers Lewis and Nguyen were told by the bar owner that off-duty police officers were involved in the altercation inside the bar. The on-duty police officers spoke to the African-American males and returned to their respective patrols after the African-American males left the area on foot.

On April 8, 2015, Bortolussi was working a midnight to 8 a.m. shift as the sergeant overseeing uniformed officers in the Southern Division of Squad A of the Springfield Police Department. As part of his duties that evening, Bortolussi monitored police radio communications. At approximately 1:16 a.m., Bortolussi heard a call for a disturbance at Nathan Bill's. He also heard a communication from an officer on scene stating that they were "all set" at the scene, meaning that the responding police officers did not need further assistance from other officers. Bortolussi did not respond to the Nathan Bill's disturbance call. At approximately 2:04 a.m., Bortolussi heard a call for a disturbance near Murphy's Pop Shop, which is located within a thirty second to two minute walk from Nathan Bill's. Bortolussi responded to the Murphy's Pop Shop disturbance call, arriving after on-duty officers Nguyen, Lewis, Rivas, Gentry-Mitchell,

² The facts recited here pertain to evidence before the grand jury concerning the truthfulness of statements made by Bortolussi in the July 27, 2015 report and the undated report. The parties are familiar with facts presented to the grand jury concerning the evening of April 7, 2015 and the early morning of April 8, 2015 as I have recited them in previous decisions in related cases. I, therefore, do not repeat them here.

D'Amour, and Perez. Bortolussi testified that he arrived either right after the ambulance arrived or at the same time as the ambulance. Also at the scene were four African-American male victims.

As sergeant, Bortolussi was the officer in charge at the Murphy's Pop Shop scene. Bortolussi testified that as the ranking officer on the scene, his job was to make sure that the victims received medical attention, that a report was made by the responding officers, and that all of the civilians left the scene safely. Bortolussi testified that he did not recall speaking to any of the African-American males on the scene. He stated that one of the victims was treated in the ambulance and then, after leaving the ambulance, was placed in the back of a cruiser to "calm down" because "he was getting a little hysterical." Bortolussi testified that he told Nguyen to gather the facts and write an incident report. Bortolussi testified that although he spoke to other on-duty officers on the scene, he did not remember what the conversations were about.

Bortolussi further testified that he did not recall hearing anything while he was on the scene of the Murphy's Pop Shop disturbance that suggested that off-duty Springfield police officers might have been involved in the disturbance. In his July 27, 2015 report, in describing his response to the Murphy's Pop Shop disturbance call, Bortolussi stated, "I was not aware that this altercation might have involved off duty police officers." Similarly, in his undated report, Bortolussi stated, "I ... was not informed that any on duty or off duty Officers were involved in this incident or the earlier incident at 0116hrs [sic]."

Among the exhibits presented to the grand jury were reports of police interviews with Jozelle Ligon, one of the four African-American males assaulted outside of Murphy's Pop Shop. Ligon stated that he told responding police officers that he believed the assailants were off-duty police officers. Michael Cintron, another of the victims, testified before the grand jury on

February 8, 2018 that, as marked cruisers arrived in the aftermath of the assault in the parking lot of Murphy's Pop Shop, he informed police that "[w]e just got jumped by guys from the bar. They just walked back to the bar." EMT John Sheehan-Ferreira testified before the grand jury on February 14, 2018. He stated: "All the gentlemen on scene were pretty ripped up. They were going on about how they just got into a bar fight and had just gotten beaten up by off-duty officers." When asked by the prosecutor, "how loud were those individuals stating that they had been jumped or had a fight with off-duty officers," Sheehan-Ferreira answered: "Very loud," and noted that uniformed officers were in the vicinity at that time.

Rivas testified that he learned at the scene that the victims had been attacked by a group of men from Nathan Bill's with whom they had the verbal altercation earlier, that off-duty officers were at the bar, and that the victims' assailants "could have been police officers." Rivas testified that he did not recall having any conversation with Bortolussi at the scene but that he informed Nguyen and Lewis that the assailants might have been off-duty police officers. He further testified that it is Springfield Police Department policy for a superior officer, such as a sergeant, to write the incident report when police officers are involved in an incident, and that he was surprised to learn that Nguyen was tasked with writing the report. Rivas testified that after he informed Nguyen that the assailants may have been off-duty police officers, he saw Nguyen and Bortolussi have an argument but did not hear what the two said. Nguyen testified that Bortolussi told him to release the victim Nguyen had previously placed in the back of his cruiser. Nguyen further testified that he did not agree with Bortolussi's order because he thought that the person in the back of his cruiser should be arrested, and that he told Bortolussi so. Nguyen testified that he was angry with Bortolussi but he did what he was ordered to do.

On March 27, 2019, the grand jury returned indictments against Bortolussi for perjury,

misleading and making a false report.

DISCUSSION

A. Standard—Probable Cause

In order to issue a valid indictment, the grand jury must “hear sufficient evidence to establish the identity of the accused and probable cause to arrest.” *Commonwealth v. McCarthy*, 385 Mass. 160, 163 (1982). “It is well established that ‘[p]robable cause to arrest requires more than mere suspicion but something less than evidence sufficient to warrant a conviction.’” *Commonwealth v. Rex*, 469 Mass. 36, 40 (2014), quoting *Commonwealth v. Roman*, 414 Mass. 642, 643 (1993). “The standard of sufficiency has been defined as whether the grand jury heard reasonably trustworthy information sufficient to warrant a prudent man in believing that the defendant had committed or was committing an offense.” *Commonwealth v. Goldstein*, 54 Mass. App. Ct. 863, 866 (2002). Circumstantial evidence, which “is competent to establish guilt beyond a reasonable doubt,” *Commonwealth v. Gilbert*, 423 Mass. 863, 868 (1996), may certainly establish probable cause to indict. See *Commonwealth v. Torres*, 442 Mass. 554, 563 (2004) (“The evidence, although entirely circumstantial, was sufficient to support” the conviction); *Commonwealth v. Guerrero*, 32 Mass. App. Ct. 263, 266 (1992) (“web of circumstantial evidence” supported conviction). “An inference drawn from circumstantial evidence need only be reasonable and possible; it need not be necessary or inescapable.” *Gilbert*, 423 Mass. at 868. “Whether an inference is warranted or is impermissibly remote must be determined, not by hard and fast rules of law, but by experience and common sense.” *Commonwealth v. Gonzalez*, 452 Mass. 142, 146 (2008). For an indictment to survive a motion to dismiss, “the grand jury must simply have been presented with evidence supporting a finding of probable cause as to ‘each of the ... elements’ of the charged crime.” *Commonwealth v.*

Walczak, 463 Mass. 808, 817 (2012), quoting *Commonwealth v. Moran*, 453 Mass. 880, 884 (1984). An invalid indictment is subject to dismissal. *McCarthy*, 385 Mass. at 163.

B. False Report

It is a crime to “intentionally and knowingly make[] or cause[] to be made a false report of a crime to police officers.” G.L. c. 269, § 13A. In order to violate the statute, the false statement must have been knowing and intentional, *Commonwealth v. Salyer*, 84 Mass. App. Ct. 346, 351-352 (2013), and the false information given to the police must be material. See *Commonwealth v. Fortuna*, 80 Mass. App. Ct. 45, 52 (2011) (“to violate the statute, the defendant has to have made a substantially inaccurate accounting of a crime, not just have reported some untrue detail related to it”). According to the bill of particulars, Bortolussi made a false report (1) when he stated, in his July 27, 2015 report that “I was not aware that this altercation might have involved off duty police officers” and (2) when he stated, in his undated report, “I ... was not informed that any on duty or off duty Officers were involved in this incident or the earlier incident at 0116hrs [sic].”

From the evidence presented, the grand jury could have concluded that Rivas, Nguyen, and Lewis were aware that off-duty police officers might have been involved in the Murphy’s Pop Shop assault. The grand jury could have concluded this based on (1) Rivas’s testimony that he told Nguyen and Lewis that the assailants might have been off-duty police officers; (2) from Sheehan-Ferreira’s testimony that uniformed police officers were in the vicinity when one of the victims loudly stated that they “had just gotten beaten up by off-duty officers”; (3) from Ligon’s statement that he told responding police officers that he believed the assailants were off-duty police officers; and (4) from Cintron’s testimony that, when police arrived at the scene, he told police that “[w]e just got jumped by guys from the bar.” There was no evidence,

however, that Rivas, Nguyen or Lewis told Bortolussi that off-duty police officers might have been involved or that Bortolussi, rather than one or more of the six uniformed officers who arrived at the scene *before* Bortolussi heard the statements referred to by Sheehan-Ferreira, Ligon, and Cintron.

The Commonwealth argues that “[c]ommon sense dictates” that the knowledge of Rivas, Nguyen and Lewis concerning the possible involvement of off-duty officers “can reasonably be imputed to the defendant, especially where the defendant served as the only ranking officer on scene responsible for supervising the assault the [sic] investigation” and that the facts of this case are similar to those in *Fortuna*. In *Fortuna*, the defendant, who had been shot in the leg, reported to police that he did not know by whom or why he was shot and that the shooter was far away. See *Fortuna*, 80 Mass. App. Ct. at 47. Gunshot residue on the defendant’s pants indicated that the shooter was no more than eighteen inches away from the defendant at the time of the shooting, thus contradicting the defendant’s statement that the shooter was far away. See *id.* at 50. Despite a lack of evidence concerning what actually happened, i.e., whether the defendant was shot by another person or accidentally shot himself, the Appeals Court stated, “we believe the jury could reasonable [sic] have convicted [the defendant] of falsely reporting a crime without knowing what really happened.” *Fortuna*, 80 Mass. Ct. at 53-54. Unlike in *Fortuna*, there was no evidence contradicting Bortolussi’s statements that he was unaware of the possible involvement of off-duty officers. Nor was there evidence of anything inconsistent with Bortolussi being unaware of the involvement of off-duty police officers. Compare *Commonwealth v. Brown*, 55 Mass. App. Ct. 440, 447 (2002) (noting that internal contradictions and strong improbabilities contained in defendant’s testimony corroborated direct evidence before grand jury that testimony false). In these circumstances,

any conclusion that Bortolussi knew that off-duty officers were involved in the Murphy's Pop Shop assault was not based on "common sense" but, rather, on suspicion alone. See *Commonwealth v. Rex*, 469 Mass. 36, 40 (2014), quoting *Commonwealth v. Roman*, 414 Mass. 642, 643 (1993) (probable cause requires more than mere suspicion).

ORDER

For the reasons set forth above, Defendant's Motion to Dismiss is **ALLOWED**.

DATE: January 22, 2020


MARK D MASON
Justice of the Superior Court