No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Thomas A. Woods,
Petitioner,

v.

Massachusetts,
Respondent

On Petition for a Writ of Certiorari
to the Supreme Judicial Court of Massachusetts

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Myles D. Jacobson
Counsel of Record
Law Office of Myles Jacobson
16 Center Street, Suite 314
Northampton, MA 01060
(413) 584-8181
mylesdj@gmail.com

October 30, 2018

APPENDIX

Commonwealth v. Woods

Supreme Judicial Court of Massachusetts

April 5, 2018, Argued; August 7, 2018, Decided

SJC-12324.

Reporter
480 Mass. 231 *; 102 N.E.3d 961 **; 2018 Mass. LEXIS 548 ***; 2018 WL 3733601

COMMONWEALTH *vs.* THOMAS A. WOODS.

Prior History: Plymouth. INDICTMENT found and returned in the Superior Court Department on October 5, 2006.

Following review by this court, *466 Mass. 707, 1 N.E.3d 762 (2014)* [***1], a motion for a new trial was heard by *Thomas F. McGuire, Jr.*, J.

A request for leave to appeal was allowed by *Lowy*, J., in the Supreme Judicial Court for the county of Suffolk.

Commonwealth v. Woods, 466 Mass. 707, 2014 Mass. LEXIS 1, 1 N.E.3d 762 (Jan. 2, 2014)

Core Terms

target, trial judge, witnesses, grand jury testimony, grand jury, warnings, new trial, self-incrimination, grand jury investigation, defense motion, direct appeal, in limine, substantial evidence, testifying, pretrial, shooting

Case Summary

Overview
HOLDINGS: [1]-Defendant was not entitled to a new trial based on a failure to warn him of his privilege against self-incrimination before he testified before a grand jury because, even if he were a "target" of investigation, the Commonwealth was under no obligation to warn him of that status, and it was inappropriate to speculate that a trial court would have excluded his testimony had it known he was a likely target, and the rule requiring advising a grand jury witness who is or may become a target of investigation of his or her privilege against self-incrimination before testifying was not the law at the time defendant testified, and the rule was explicitly made prospective.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Self-Incrimination Privilege > Invocation by Witnesses > Warnings

HN1[] **Invocation by Witnesses, Warnings**

Grand jury witnesses who are targets or likely targets of a criminal investigation must be given self-incrimination warnings before testifying.

Criminal Law & Procedure > ... > Self-Incrimination Privilege > Invocation by Witnesses > Warnings

HN2[] **Invocation by Witnesses, Warnings**

Where, at the time a person appears to testify before a grand jury, the prosecutor has reason to believe that the witness is either a target or is likely to become one, the witness must be advised, before testifying, that (1) he or she may refuse to answer any question if a truthful answer would tend to incriminate the witness, and (2) anything that he or she does say may be used against the witness in a subsequent legal proceeding. This rule is nonconstitutional and therefore is only required to be applied prospectively.

Criminal Law & Procedure > Appeals > Reviewability

HN3[] **Appeals, Reviewability**

A single justice's determination that a petition raises a new and substantial question under Mass. Gen. Laws ch. 277, § 33E, is final and unreviewable.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > New Trial

HN4[] **Abuse of Discretion, New Trial**

The denial of a defendant's motion for a new trial is reviewed for a significant error of law or other abuse of discretion.

Headnotes/Syllabus

Headnotes

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Homicide > *Grand Jury* > *Evidence* > Testimony before grand jury > *Practice, Criminal* > Grand jury proceedings > *Witness* > Self-incrimination

A Superior Court judge did not err in denying a criminal defendant's motion for a new trial, in which the defendant argued that his grand jury testimony had been improperly admitted at trial, where, even if the defendant had been a target of a criminal investigation at the time he testified before the grand jury, the Commonwealth was under no obligation at that time to advise him of his right against self-incrimination, in that the defendant was not entitled to retrospective application of a rule announced by this court in a prior case requiring that grand jury witnesses who are targets or likely targets of a criminal investigation be given such warnings before testifying; and where, even if the trial judge would have concluded based on the testimony of certain other grand jury witnesses that the defendant had been a target of a criminal investigation, it could not be said that the trial judge would have excluded the defendant's grand jury testimony from evidence on that basis. [237-239]

Counsel: *Myles D. Jacobson* for the defendant.

Carolyn A. Burbine, Assistant District Attorney, for the Commonwealth.

Judges: Present: GANTS, C.J., LENK, LOWY, BUDD, CYPHER, & KAFKER, JJ.

Opinion by: CYPHER

Opinion

[962]** CYPHER, J. The defendant, Thomas A. Woods, appeals from the denial of his motion for a new trial. In 2009, the defendant was convicted of murder in the first degree and sentenced to life in prison. On direct appeal, he challenged the admission of his grand jury testimony — later used as substantive evidence at trial — arguing that it was illegally obtained, because he was not informed before testifying either that he was a target of a grand jury investigation, or that he had a right against self-incrimination. **[*232]** The court concluded that the trial judge did not err in finding that the defendant was not a target of the grand jury when he was called before the grand jury to testify, **[***2]** and affirmed his conviction. See *Commonwealth v. Woods, 466 Mass. 707, 709, 716-720, 1 N.E.3d 762*, cert. denied, *134 S. Ct. 2855, 189 L. Ed. 2d 818 (2014)* (*Woods I*). In doing so, the court also announced a prospective rule, pursuant to its superintendence authority, *HN1*[] requiring that grand jury witnesses who are targets or likely targets of a criminal investigation be given self-incrimination warnings before testifying. *Id. at 719-720*.

Following *Woods I*, the defendant moved for a new trial, contending that facts not before the trial judge or this court during his direct appeal establish that the defendant was a target of a grand jury investigation; accordingly, the defendant argued, his grand jury testimony was improperly admitted, and he deserved a new trial. The motion judge, who was not the trial judge, disagreed, concluding that although the new facts raised in the defendant's motion establish that he was a target of the investigation, this court's holding in *Woods I* "was not dependent on the finding that the defendant was not a target." The defendant then filed a petition before a single justice of the county court pursuant to *G. L. c. 278, § 33E*, asking that his appeal from the denial of his motion be considered by the full court. The single justice granted the petition in March, 2017, concluding that it "present[ed] **[***3]** a new and substantial question which ought to be determined by the full court." *G. L. c. 278, § 33E*.

For the reasons that follow, we discern no error in the motion judge's conclusion, **[**963]** and affirm the denial

of the defendant's motion for a new trial.

Background. The facts underlying the defendant's conviction of murder in the first degree are fully set forth in Woods I, 466 Mass. at 709-712. We review only those facts pertinent to the defendant's postconviction proceedings.

1. *Grand jury investigation.* In February, 2006, the defendant appeared as the fifth witness to testify before a grand jury investigating the December, 2005, shooting death of Paul Mullen in Brockton. Prior to testifying, the defendant had been interviewed by police twice. Four witnesses testified before the grand jury prior to the defendant, and two of those witnesses — David Sheff and Nicole Derochea — stated that they had had heard, secondhand, that the defendant had threatened to shoot the victim before the killing occurred. When the defendant appeared to testify, he was not informed that he was a target of the investigation or that **[*233]** he had a right against self-incrimination. In his grand jury testimony, he provided an exculpatory version of events on the night **[***4]** of the shooting, and explained certain inconsistencies between this version of events and what he had said during his prior interviews with police. At the end of a nine-month investigation that involved approximately forty witnesses and generated 1,700 pages of transcripts, the grand jury returned an indictment against the defendant in October, 2006.

2. *Defendant's pretrial motion in limine.* In March, 2009, the defendant filed a motion in limine to exclude his grand jury testimony from use at his trial,[1]

arguing that he was "not informed that [he] was a target of the grand jury investigation" or that he could exercise his right not to testify. The motion stated the date of the defendant's grand jury appearance (February 10, 2006). The Commonwealth sought to introduce that testimony in order to illustrate "wide-ranging inconsistencies and implausibilities in [the defendant's] account[ ]" of the night of the shooting. See Woods I, 466 Mass. at 712 ("His grand jury testimony was admitted in evidence ... to illustrate his conflicting stories and outright lies").

3. *Commonwealth's pretrial motion in limine.* On April 24, 2009, the Commonwealth filed its own motion in limine seeking to admit evidence of prior bad acts **[***5]** by the defendant. The motion described the testimony of five grand jury witnesses, including Derochea, who were expected to testify at trial regarding threats made by the defendant against the victim. The Commonwealth attached to the motion the transcripts of the five witnesses' testimony. It is not clear from the record, however, the form in which those transcripts were presented — specifically, whether the attachments clarified the date of each witness's testimony — because those attachments were not included with the Commonwealth's motion as part of the instant record.[2]

4. *Pretrial hearing on the motions.* On April 27, 2009, the trial judge held a hearing on both motions. Defense counsel reiterated the position that the defendant's testimony was involuntary because he was a target of the investigation but did not receive "any warnings that he didn't have to submit to that questioning or that **[*234]** he could assert his *Fifth Amendment* privilege."[3]

[964]** He argued that the issue was "whether or not the government was under any obligation to inform [the defendant] he was the target of the investigation and ... that he had a *Fifth Amendment* privilege." Counsel acknowledged that he "ha[d]n't found a [S]tate case directly on point," **[***6]** and stated that his argument was based on his own practical experience, having

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[1] The motion was also directed at the defendant's prior statements to police, but the defendant raises no claim of error with respect to those statements.

[2] We can nevertheless conclude that the Commonwealth provided these transcripts to the trial judge because the Commonwealth's motion stated that the grand jury transcripts for the witnesses were attached and, at the hearing on the motion, the Commonwealth asked the judge to impound those attachments.

[3] Defense counsel's pretrial argument that the defendant was a target was based solely on the defendant's own grand jury testimony: "[I]f you read [the defendant's grand jury testimony], it's abundantly clear that he was a target . ... [H]e is being confronted by the prosecutor in a way that is designed to further build the case against him that they already have, in their mind, made. ... It's not a well, what happened, what did you see, and what did you do; it's a confrontational interview or interrogation in front of the grand jury where he's not represented by counsel. And he's clearly the target of the investigation at that point." The prosecutor responded that he had taken the same approach to examining the defendant as he had with other grand jury witnesses who had provided inconsistent statements to police, and that such "a vigorous examination of a witness [in] a grand jury investigation ... doesn't make the person a target at the time of the examination." At the hearing, the trial judge indicated that he agreed with the Commonwealth: "[W]hen I read the grand jury, it didn't jump out to me that he was a target. ... I got the impression, clearly, that they felt he knew more than he was saying, and that was the gist of the question[ing]."

never witnessed a situation where a grand jury target was not informed of that status or given warnings before testifying. Before asking the Commonwealth for its position, the trial judge likewise stated, "I didn't realize this was an issue, so I haven't researched the law on it. I know in the [F]ederal system if somebody's going to be a target, they're told. But I haven't researched this whole issue, but I will."

The trial judge asked the prosecutor, who had also been responsible for the grand jury investigation: "At the time — if you can say this, because it would change the whole way that I'd have to view this, in your opinion, was [the defendant] a target of the investigation when you brought him to the grand jury?" The prosecutor replied that although the defendant's inconsistencies in his earlier statements to police made him "a person of interest" — "[t]here were things that weren't adding up ... that he seemed to know a lot more than he was letting on. And so that was the nature of our inquiry with [the defendant]" — the Commonwealth did not consider him a "target" until additional "witnesses came **[***7]** in and testified about threatening statements ... that [the defendant] had made to [the victim], and additional information was gathered about [the defendant] as the investigation went on **[*235]** in subsequent months leading up to [the] October" indictment. The prosecutor added that had the defendant been a target, he would have received a letter informing him of that status.

On May 6, 2009, the trial judge issued an oral ruling denying the defendant's motion. He found that "[b]ased upon the evidence before [him], the defendant ... was not a target, but [the Commonwealth] believed that he knew more than he told and he was not being fully truthful."[4]

The judge also found that the defendant was **[**965]** not under the influence of drugs or alcohol, threatened, coerced, or offered false promises when appearing before the grand jury, and "was treated appropriately," such that his testimony was free and voluntary under the totality of the circumstances.

5. *Defendant's direct appeal.* At trial, the jury found the defendant guilty of murder in the first degree. On direct appeal, he continued to press his objection to the introduction of his grand jury testimony, arguing that it infringed on his "[F]ederal and **[***8]** [S]tate law rights against compelled self-incrimination." We rejected the argument that self-incrimination warnings were legally required at the time, thus upholding the trial judge's denial of the defendant's motion in limine. *Woods I, 466 Mass. at 716-720*. We discerned no error in the trial judge's finding that the defendant was not a target, and added that "[e]ven if the defendant were a 'target,' the Commonwealth was under no obligation to warn him of that status" under Federal or State law. *Id. at 717*, citing *United States v. Washington, 431 U.S. 181, 188-190, 97 S. Ct. 1814, 52 L. Ed. 2d 238 (1977)*, and *Commonwealth v. D'Amour, 428 Mass. 725, 743, 704 N.E.2d 1166 (1999)*.

We then "consider[ed] for the first time" what we perceived as "the defendant's separate argument that the Commonwealth must advise targets or potential targets of the grand jury's investigation of their right not to incriminate themselves." *Woods I, 466 Mass. at 717-718*. Concluding that a grand jury summons "is a form of **[*236]** compulsion," we "adopt[ed] a rule that *HN2* where, at the time a person appears to testify before a grand jury, the prosecutor has reason to believe that the witness is either a 'target' or is likely to become one, the witness must be advised, before testifying, that (1) he or she may refuse to answer any question if a truthful answer would tend to incriminate the witness, and (2) anything that he or she does say may **[***9]** be used against the witness in a subsequent legal proceeding" (footnote omitted). *Id. at 719-720*.[5]

We clarified that the rule is nonconstitutional and therefore "is only required to be applied prospectively." *Id. at 720*.

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[4] As for what the trial judge had before him when making this determination, it appears from the available record that the judge had received the date and transcript of the defendant's own grand jury testimony, established through the defendant's motion in limine and the submission of the transcript of the defendant's testimony. In addition (albeit in connection with the Commonwealth's separate motion to admit evidence of the defendant's prior bad acts), the trial judge had received the transcripts of five additional grand jury witnesses (including Nicole Derochea); however, because the Commonwealth's attachments are not a part of the instant record, we cannot discern how informed the judge might have been as to the content and date of each of those five witness's testimony.

[5] The court adopted the United States Attorney's Manual definition of "target," as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." *Commonwealth v. Woods, 466 Mass. 707, 716, 719 n.12, 1 N.E.3d 762 (2014)* (*Woods I*), quoting United States Attorneys' Manual § 9-11.151 (2009).

6. *Motion for a new trial.* The defendant subsequently moved for a new trial, where he focused primarily on refuting the trial judge's factual determination that he was not a target of the investigation.[6]

The defendant attached the grand jury testimony of the four witnesses who had testified before the defendant during the grand jury investigation, but whose testimony was largely unknown to the trial judge, and therefore was not a part of the record in *Woods I*.[7]

Two of those witnesses — **[**966]** Sheff and Derochea — testified to hearsay statements they had heard about threats the defendant had made against the victim before the shooting. The motion judge agreed that the grand jury testimony of these two witnesses constituted "substantial evidence" linking the defendant to the crime, thus rendering him "a target or potential target of the investigation." The judge declined to grant the defendant a new trial on that basis, however, concluding that this court's decision in *Woods I* was not dependent **[***10]** on the factual **[*237]** finding that the defendant was not a target of the investigation.

[↑] *Discussion.* HN3[↑] A single justice's determination that a petition raises a "new and substantial question" under G. L. c. 277, § 33E, is "final and unreviewable." *Commonwealth v. Scott, 437 Mass. 1008, 1008, 770 N.E.2d 474 (2002).* HN4[↑] We review the denial of the defendant's motion for a new trial for "a significant error of law or other abuse of discretion" (citation omitted). *Commonwealth v. Acevedo, 446 Mass. 435, 441, 845 N.E.2d 274 (2006).* The defendant argues that the motion judge made such an error in concluding that this court's decision in *Woods I* upholding the admission of the defendant's grand jury testimony did not depend on the factual finding that the defendant was not a target of the investigation. The motion judge did not err.

First, the language of *Woods I* makes clear that the motion judge was correct. On direct appeal, the defendant raised the very same legal argument that he puts before us now: because he was a target of the grand jury, he was entitled to self-incrimination warnings. The court specified in *Woods I, 466 Mass. at 717*, that "*[e]ven if the defendant were a 'target,'* the Commonwealth was under no obligation to warn him of that status" (emphasis added). Likewise, addressing "the defendant's separate argument" regarding self-incrimination warnings, the court **[***11]** acknowledged that it was considering the issue "for the first time" — meaning that nothing prior to *Woods I* required self-incrimination warnings as a matter of law. *Id. at 717-718.* In other words, just as the Commonwealth was under no obligation to warn the defendant of his target status, even if he were a target, so too was the Commonwealth under no obligation at that time to advise the defendant of his right against self-incrimination. The court adopted that very requirement in the defendant's case, and stated that it was to apply only prospectively, "to grand jury testimony elicited after the issuance of the rescript in [that] case." *Id. at 720.* Thus, irrespective of the defendant's target status, he was not entitled to the new rule.[8]

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[6] The defendant contended that the trial judge's finding that the defendant was not a target resulted from ineffective assistance of counsel or prosecutorial misconduct. The defendant separately argued that he was "deprived of a fair opportunity for proper application of the Humane Practice Rule," but he does not continue to pursue that claim before us.

[7] The defendant submitted the grand jury testimony of the four witnesses who had testified at the grand jury prior to his own testimony, including David Sheff and Derochea, with his motion for a new trial. Although the trial judge had received Derochea's testimony in some manner (as part of the Commonwealth's motion in limine to admit prior bad act evidence, see note 4, *supra*), it does not appear that the transcripts of the testimony of Sheff and the other two witnesses were provided to the trial judge.

[8] Notwithstanding the language of *Woods I*, the defendant suggests in a single sentence of his brief that he is entitled to the retroactive benefit of the *Woods I* rule, based on the court's opinion in *Commonwealth v. Adjutant, 443 Mass. 649, 667, 824 N.E.2d 1 (2005).* See *Commonwealth v. Candelario, 446 Mass. 847, 859, 848 N.E.2d 769 (2006)*, quoting *Commonwealth v. Donahue, 430 Mass. 710, 714 n.1, 723 N.E.2d 25 (2000)* (single sentence stating claim with citation "[in]adequate for appellate consideration" under *Mass. R. A. P. 16 [a] [4]*, as amended, 367 Mass. 921 [1975]). He expands on this argument somewhat in a postargument letter prompted by a question during oral argument concerning *Adjutant*'s potential application. In *Adjutant*, the court announced a new common-law rule of evidence, and concluded that the defendant should be given the benefit of the new rule — thus entitling her to a new trial — because the defendant had alleged the error and argued for the new rule on direct appeal. *Adjutant, supra*, citing *Commonwealth v. Dagley, 442 Mass. 713, 721 n.10, 816 N.E.2d 527 (2004)*, cert. denied, *544 U.S. 930, 125 S. Ct. 1668, 161 L. Ed. 2d 494 (2005).* *Adjutant* is inapposite because that case involved a defendant's direct appeal, whereas this case involves the defendant's postconviction proceedings. The defendant offers no authority to support the claim that he is entitled to the retroactive benefit, on collateral review, of a nonconstitutional rule first announced in his direct appeal, where the court specified that

[967]** As the motion judge recognized, the sole difference between **[*238]** the defendant's argument on direct review and his argument on collateral review is the factual basis for his claim that he was a target: now, in addition to his own testimony, he offers the testimony of the four witnesses who appeared before him during the grand jury investigation (and whose testimony the motion judge deemed "substantial evidence" establishing **[***12]** that the defendant was a target). At the core of the defendant's instant argument are the dual suggestions that, had the trial judge been made aware that two witnesses (Sheff and Derochea) testified at the grand jury before the defendant did, regarding prior threats the defendant had made against the victim, the trial judge (1) would have found that the defendant was a "target" by the time he testified, and (2) would have granted on that basis the defendant's motion to exclude the defendant's grand jury testimony.

We are in no position to engage in such speculation. First, the fact that the motion judge concluded, based on this new testimony, that the defendant was a target does not automatically establish that the trial judge would have reached the same conclusion. Both Sheff and Derochea's testimony involved hearsay, and this may well have affected the weight that the trial judge would have assigned their testimony when determining whether it constituted "substantial evidence" that the defendant was a target when he testified.[9]

It was not until after the defendant testified that the grand jury heard from additional witnesses who described hearing the defendant's threats firsthand.

[*239] Second, even assuming that the trial judge would have concluded based on this additional testimony that the defendant was a target, we cannot say that he would have excluded the defendant's grand jury testimony on that basis. The defendant focuses extensively, and exclusively, on the trial judge's comment at the motion in limine hearing that the defendant's status as a target "would change the whole way that [he would] have to view this" issue. What the defendant omits is the trial judge's additional comment, made at the very outset of the hearing, that he had not yet researched the law regarding the defendant's position that target warnings were required. As our above discussion makes clear, had the trial judge done so, he would have discovered that such warnings were not legally required at that time, and thus the Commonwealth's failure to provide the defendant with such a warning did not preclude it from using that testimony at trial.

Conclusion. We decline to grant the defendant a new trial on collateral review based on an alleged violation of a right that simply did not exist at the time of his **[**968]** trial.[10]

We affirm the denial of the defendant's motion for a new trial.

[14]** So ordered.*

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the rule would apply "only ... to grand jury testimony elicited after the issuance of the rescript in [*Woods I.*]" Woods I, 466 Mass. at 720. We likewise reject the defendant's related assertion that the *Woods I* rule is in fact constitutional, not procedural, on the ground that it is "based in" the constitutional protection against self-incrimination. See *id. at 720* ("This rule is not a new constitutional rule, but rather an exercise of our power of superintendence").

[9] In ruling on the defendant's pretrial motion in limine, the trial judge rejected the defendant's argument (which he continues to argue before us) that the defendant's own grand jury testimony, and the nature of the prosecutor's questioning, also demonstrate that he was a target. See note 3, *supra* ***[***13]***.

[10] In light of our conclusion that the *Woods I* rule did not hinge on the defendant's target status, we need not address the defendant's related arguments that the trial judge's finding that the defendant was not a target was the product of ineffective assistance of counsel, prosecutorial misconduct, or both.

Paid 11/17/16 102

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
SUPERIOR COURT DEPARTMENT

PLYMOUTH, ss. **Docket No. 0683CR498**

COMMONWEALTH

v.

THOMAS A. WOODS

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

On May 20, 2009, the defendant was found guilty (Troy, J.) of the first degree murder of Paul Mullen. The crime was committed in Brockton on December 2, 2005. The conviction was affirmed by the Supreme Judicial Court in *Commonwealth v. Woods,* 466 Mass. 707 (2014).

The defendant has filed a motion for a new trial pursuant to rule 30(b) of the Massachusetts Rules of Criminal Procedure. His primary claim is that his compelled grand jury testimony was improperly used against him at trial "because (1) he was one of the targets [of the grand jury investigation] and (2) he was not advised of his right to remain silent." *Reply to Commonwealth's Opposition to Defendant's Motion for New Trial,* p. 1 (Paper # 99) (clarifying issue raised by motion). He contends that the trial judge's finding that he was not a target at the time of his grand jury testimony resulted from constitutionally ineffective assistance of his trial counsel combined with prosecutorial misconduct.

The Commonwealth has filed a written opposition to the motion in which it contends that this court is without authority to consider the claim because the Supreme Judicial Court already ruled on it. The defendant contends that the issue raised here is distinct from the issue decided on appeal. The court held a non-evidentiary hearing on the motion on July 13, 2016.

cc: DA, DJ

FACTS

The basic facts of the case are set out in *Woods, supra.* In addition, the defendant has submitted grand jury minutes of witnesses who testified before he testified at the grand jury and an affidavit of his trial counsel.

The defendant testified before the grand jury on February 10, 2006. Prior to that, Takisha Turner, David Sheff, William Boyle and Nicole Derochea all testified before the grand jury.

Takisha Turner testified on December 16, 2005. She was a witness to the shooting of the victim at a Hess gasoline station. She testified that the defendant was at the gas station at the time of the shooting but was not the shooter.

David Sheff testified before the grand jury on January 20, 2006. He testified that two other friends of the victim, Michael Clancy and John Tillis told him that the defendant had threatened to shoot the victim in a voice mail the defendant left for the victim.

William Boyle also testified on January 20, 2006. He testified that he was socializing with the victim early on the evening when the victim was later shot and killed. He testified that the victim and the defendant were friends.

Nicole Derochea, the victim's fiancée, testified before the grand jury on February 3, 2006. She testified that the victim and the defendant were always arguing. She testified that in July of 2005, the defendant threatened to shoot the victim. She also testified that on November 1, 2005 she and the victim learned that the defendant told another friend of the victim, Sean Flaherty, that the defendant again threatened to shoot the victim. Later in November, the victim said that the defendant had threatened to shoot him a third time. In response, the victim and another friend, Sean Monteiro, went to a bar and found the defendant. The victim threw the defendant against a wall.

The defendant's trial counsel, Attorney John Amabile, submitted an affidavit in which he explained that he filed a motion *in limine* at trial seeking to exclude the defendant's grand jury testimony from evidence on grounds that the defendant was a target of the investigation at the time he testified before the grand jury but was not advised of his privilege against self-incrimination. He further averred that at the time of the hearing he was in possession of the transcripts of the grand jury testimony of Turner, Sheff, Boyle and Derochea but failed to introduce them as evidence that the defendant was a target at the time he testified. Attorney Amabile also stated that he had no strategic reason for failing to introduce this evidence.

ANALYSIS

The defendant contends that he is entitled to a new trial because: (1) his grand jury testimony was improperly admitted at trial; and (2) he was deprived of the protection of the "Humane Practice Rule."

1. Grand Jury Testimony

The defendant first contends that the trial judge erred in finding that he was not a target of the investigation at the time he was compelled to testify before the grand jury. He argues that the error resulted from his attorney's constitutionally deficient performance in failing to introduce the transcripts of testimony by Turner, Sheff, Boyle and Derochea, as well as misconduct by the prosecutor in misrepresenting to the court that the defendant did not become a target of the investigation until after he testified before the grand jury. The defendant argues that had the court correctly determined that he was a target at the time he was compelled to testify before the grand jury, that testimony would have been excluded at trial because he had not been advised of his right to refuse to testify. Without his grand jury testimony, he contends, he would not have been convicted.

The Commonwealth contends that the defendant's claim was already rejected by the Supreme Judicial Court on direct appeal. The Supreme Judicial Court described the defendant's claim on appeal as follows:

> He further argues that the trial judge erred in finding that he was not a 'target' of the investigation when he was called to testify before the grand jury, and that, because he was a 'target,' he was entitled to be advised of his right not to incriminate himself pursuant to the Fifth Amendment to the United States Constitution before he testified. In the absence of such advice, the defendant contends that his testimony was improperly compelled.
>
> *Woods* at 708.

In this court, "Woods claims that his compelled testimony can not constitutionally be used against him because (1) he was one of the targets and (2) he was not advised of his right to remain silent." *Reply to Commonwealth's Opposition to Defendant's Motion for New Trial,* p. 1 (Paper # 99) (clarifying issue raised by motion). This is the same claim as raised on appeal.

In his direct appeal, the Supreme Judicial Court rejected this claim: "We find no error in the judge's ruling that the defendant was not a target, and that the prosecutor was not required to advise him of his Fifth Amendment rights before eliciting his testimony." *Woods* at 716-717.

While the defendant's argument remains the same, he now submits evidence that was unknown to the trial judge and the Supreme Judicial Court indicating that he was a target of the investigation when he testified before the grand jury. The newly-submitted transcripts reveal that at the time the defendant was compelled to appear before the grand jury the prosecutor was aware that the defendant had threatened to shoot Mullen three times in the months leading up to the shooting – twice within about a month of the shooting – and that Mullen had physically attacked the defendant in retaliation just a week or two before Mullen was shot and killed.

A "'target' of a grand jury investigation [is] 'a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.'" *Woods* at 716 & 719 n. 12 (2014), quoting and adopting definition of "target" set out in United States Attorneys' Manual § 9-11.151 (2009). Evidence of the defendant's multiple, recent threats to shoot Mullen and Mullen's retaliatory assault on the defendant constitutes "substantial evidence" linking the defendant to the shooting. That evidence came from David Sheff, who testified before the grand jury three weeks before the defendant testified and, in more detail, from Nicole Derochea, who testified one week before the defendant. That evidence made the defendant a target or potential target of the investigation.

Nevertheless, the fact that the defendant was a target does not change the result. The Supreme Judicial Court's holding that the defendant was not entitled to a warning was not dependent on the finding that the defendant was not a target. The Supreme Judicial Court held that the defendant was not entitled to a warning ***regardless of his status as a target.*** It is not accurate to say, as the defendant does, that "because it accepted this lower court's ruling that Woods was not a target, the Woods Court did not address this constitutional issue...." *Defendant's Memorandum in Support of Motion for New Trial,* p. 16. The Court expressly addressed it: "we consider for the first time the defendant's ... argument that the Commonwealth must advise targets or potential targets of the grand jury's investigation of their right not to incriminate themselves." *Woods* at 717-718.

The Supreme Judicial Court determined that a grand jury summons is "a form of compulsion" that "ought to be ameliorated with an advisement of rights where there is a substantial likelihood that the witness may become an accused; that is, where the witness is a

'target' or is reasonably likely to become one." *Woods* at 719. The Court therefore established a new rule that requires prosecutors to warn targets of their privilege against self-incrimination:

> Accordingly, we adopt a rule that where, at the time a person appears to testify before a grand jury, the prosecutor has reason to believe that the witness is either a "target" or is likely to become one, the witness must be advised, before testifying, that (1) he or she may refuse to answer any question if a truthful answer would tend to incriminate the witness, and (2) anything that he or she does say may be used against the witness in a subsequent legal proceeding.
>
> *Woods* at 719-720.

The Court decided, however, that this new rule was not required by the State or Federal Constitutions: "This rule is not a new constitutional rule, but rather an exercise of our power of superintendence 'to regulate the presentation of evidence in court proceedings.'" *Woods* at 720. Therefore, the rule applies only "prospectively." *Id.* Since targets have no constitutional right to a warning, the failure to give a warning to the defendant did not violate the defendant's rights even if he was a target of the investigation.

Because the Supreme Judicial Court has already considered and rejected the defendant's claim that his grand jury testimony was improperly admitted, this court is without authority to consider the claim. "A defendant may not raise anew in a motion for new trial a claim that has already been considered in his direct appeal." Cypher, *Criminal Practice and Procedure* § 42:47 (4th ed.), citing *Commonwealth v. Jackson,* 468 Mass. 1009, 1010 (2014).

2. <u>Humane Practice Rule</u>

In his motion for a new trial, the defendant also asserts that he was "deprived of a fair opportunity for proper application of the Humane Practice Rule" because the jury was not informed that he was compelled by summons to testify before the grand jury and was not informed of his right to refuse to testify.

"[I]n a capital case, issues raised in a postappeal motion for a new trial that were or could have been raised at trial or in the direct appeal are to be measured by the substantial risk of a miscarriage of justice standard. [The Supreme Judicial Court has] said that '[e]rrors of this magnitude are extraordinary events and relief is seldom granted,' *Commonwealth v. Randolph,* 438 Mass. 290, 297 (2002), citing *Commonwealth v. Amirault,* 424 Mass. 618, 646–647 (1997), and that '[s]uch errors are particularly unlikely where, as here, the defendant's conviction ... has undergone the exacting scrutiny of plenary review under [G.L. c. 278,] § 33E.' *Commonwealth v. Randolph, supra.* See *Commonwealth v. Drew,* 447 Mass. 635, 638–639 (2006), cert. denied, 550 U.S. 943, (2007)." *Commonwealth v. Smith,* 460 Mass. 318, 320-321 (2011) (footnote omitted).

Since the defendant failed to raise the issue of a violation of the Humane Practice Rule in his direct appeal, the court will consider whether an error occurred at trial and, if so, whether the error created a substantial risk of a miscarriage of justice.

Contrary to the defendant's assertion, the jury was informed that the defendant was summonsed to appear before the grand jury. Lieutenant Richard Scott Warmington of the State Police testified as follows on direct examination:

Q. Did you have an opportunity after to serve a grand jury subpoena on the defendant?

A. There was one served. I don't recall who served it.

Q. As a result of reviewing the case and the state of the evidence?

A. Yes.

Q. In fact, was that summons to appear at the grand jury on February 10, 2006, served on the defendant?

A. He appeared, yes.

Q. Now, I'm going to ask you, sir, on February 10, 2006, after having been served in hand, did the defendant show up at this building in the basement?

A. Yes, he did.

Q. Is that where the superior court grand jury hearing room is located?

A. Yes, it is.

Trial Tr. Vol. 6, pp. 103-104.

As noted above, the Supreme Judicial Court ruled on the defendant's direct appeal that he had no right to a warning regarding his privilege against self-incrimination when he appeared before the grand jury in response to the subpoena.

Since the jury was aware that the defendant appeared before the grand jury because he was served with a subpoena to appear, and since the defendant had no right to a warning, his claim that he was denied the benefit of the Humane Practice Rule fails.

ORDER

The defendant's motion for new trial (Paper # 96) is **DENIED**.

November 17, 2016

Thomas F. McGuire, Jr.
Justice of the Superior Court

Commonwealth v. Woods

Supreme Judicial Court of Massachusetts

September 10, 2013, Argued; January 2, 2014, Decided

SJC-10793

Reporter
466 Mass. 707 *; 1 N.E.3d 762 **; 2014 Mass. LEXIS 1 ***; 2014 WL 12355

COMMONWEALTH vs. THOMAS A. WOODS.

Subsequent History: US Supreme Court certiorari denied by *Woods v. Massachusetts, 134 S. Ct. 2855, 189 L. Ed. 2d 818, 2014 U.S. LEXIS 4356 (U.S., June 23, 2014)*

Decision reached on appeal by, Motion for new trial denied by *Commonwealth v. Woods, 2018 Mass. LEXIS 548 (Mass., Aug. 7, 2018)*

Prior History: [***1] Plymouth. Indictment found and returned in the Superior Court Department on October 5, 2006. The case was tried before by Paul E. Troy, J.

Disposition: Judgment affirmed.

Core Terms

grand jury, interview, target, shooting, station, murder, warning, shooter, witnesses, guilty conscience, recorded, wearing, notice, kill, incriminate, marijuana, drove, shot, police station, advise, dark, thin, first degree, interrogation, inferences, jacket, masked, rights, tall, grand jury testimony

Case Summary

Overview
HOLDINGS: [1]-Where defendant met the victim, whom he had threatened to shoot, in a gas station parking lot, and left the victim alone in a vehicle, whereupon he was fatally shot by a masked man, the evidence was sufficient to convict defendant of first-degree murder as a joint venturer. The jury could have inferred that defendant hired the shooter and lured the victim to the parking lot; moreover, defendant's flight and inconsistent statements to police indicated consciousness of guilt. [2]-The trial court properly ruled that defendant was not a target of a grand jury's investigation and thus was not entitled to an advisement of his Fifth Amendment rights before he testified; [3]-In the future, if a prosecutor believed a grand jury witness was either a target of the investigation or was likely to become one, an advisement of the witness's rights against self-incrimination was required.

Outcome
The judgment was affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Factual Issues

Evidence > Types of Evidence > Circumstantial Evidence

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Evidence > Inferences & Presumptions > Inferences

HN1 **Province of Court & Jury, Factual Issues**

In reviewing the sufficiency of the evidence, the standard an appellate court applies is whether, after viewing the evidence in the light most favorable to the Commonwealth of Massachusetts, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Circumstantial evidence alone may be sufficient to meet the burden of establishing guilt. Indeed, the Commonwealth may submit a case wholly on circumstantial evidence, and inferences drawn from that evidence need only be reasonable and possible; they need not be necessary or inescapable. Where conflicting inferences are possible

from the evidence, it is for the jury to determine where the truth lies.

Criminal Law & Procedure > Accessories > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Knowledge

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN2[] **Criminal Law & Procedure, Accessories**

Where the Commonwealth of Massachusetts proceeded on a theory of joint venture, an appellate court must consider whether the Commonwealth established that the defendant knowingly participated in the commission of the crime charged, alone or with others, with the intent required for that offense.

Criminal Law & Procedure > Accessories > General Overview

Evidence > Types of Evidence > Circumstantial Evidence

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

Evidence > Inferences & Presumptions > Inferences

HN3[] **Criminal Law & Procedure, Accessories**

A joint venture may be proved by circumstantial evidence. The intent required for the offense may be inferred from the defendant's knowledge of the circumstances and subsequent participation in the offense.

Criminal Law & Procedure > ... > Resisting Arrest > Fleeing & Eluding > Consciousness of Guilt

Evidence > Inferences & Presumptions > Inferences

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN4[] **Fleeing & Eluding, Consciousness of Guilt**

In conjunction with other evidence, a jury may properly consider actions and statements of a defendant that show a consciousness of guilt. While consciousness of guilt alone is insufficient to support a guilty verdict, such evidence may be sufficient when combined with other probable inferences. This type of conduct includes making false or inconsistent statements to police. Flight is perhaps the classic evidence of consciousness of guilt.

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Evidence > Types of Evidence > Circumstantial Evidence

Evidence > Inferences & Presumptions > Inferences

HN5[] **Substantial Evidence, Sufficiency of Evidence**

In the context of a challenge to the sufficiency of the evidence, where the Commonwealth of Massachusetts' case was largely circumstantial, and not every inference the jury could draw was compelled, permissible inferences need not be necessary or inescapable.

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN6[] **Burdens of Proof, Prosecution**

The Commonwealth of Massachusetts need not disprove every possible theory of the case.

Criminal Law & Procedure > ... > Grand Juries > Procedures > General Overview

Criminal Law & Procedure > ... > Grand Juries > Self-Incrimination Privilege > General Overview

HN7 **Grand Juries, Procedures**

U.S. Atty's Manual § 9-11.151 defines a "target" of a grand jury investigation as a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

Criminal Law & Procedure > Trials > Witnesses > Credibility

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Motions to Suppress

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Motions to Suppress

HN8 **De Novo Review, Conclusions of Law**

In reviewing a trial judge's ruling on a motion to suppress, an appellate court accepts the judge's subsidiary findings of fact absent clear error, but conducts an independent review of his ultimate findings and conclusions of law. The judge determines the weight and credibility of the testimony, while the appellate court's duty is to make an independent determination of the correctness of the judge's application of constitutional principles to the facts as found.

Criminal Law & Procedure > ... > Grand Juries > Procedures > General Overview

Criminal Law & Procedure > ... > Grand Juries > Witnesses > General Overview

HN9 **Grand Juries, Procedures**

Warning a witness that he is target of a grand jury investigation is not constitutionally required.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

Criminal Law & Procedure > ... > Self-Incrimination Privilege > Invocation by Witnesses > Warnings

HN10 **Procedural Due Process, Self-Incrimination Privilege**

Because grand jury testimony is compelled, it ought to be ameliorated with an advisement of rights where there is a substantial likelihood that the witness may become an accused; that is, where the witness is a "target" or is reasonably likely to become one. Accordingly, where at the time a person appears to testify before a grand jury, the prosecutor has reason to believe that the witness is either a "target" or is likely to become one, the witness must be advised, before testifying, that (1) he or she may refuse to answer any question if a truthful answer would tend to incriminate the witness, and (2) anything that he or she does say may be used against the witness in a subsequent legal proceeding. This rule is meant to discourage the Commonwealth of Massachusetts from identifying a person as a likely participant in the crime under investigation, compelling his or her appearance and testimony at the grand jury without adequate warnings, and then using that testimony in a criminal trial. This rule is not a new constitutional rule, but rather an exercise of the Supreme Judicial Court of Massachusetts' power of superintendence to regulate the presentation of evidence in court proceedings. Therefore, this rule is only required to be applied prospectively to grand jury testimony.

Criminal Law & Procedure > Trials > Jury Instructions > Cautionary Instructions

Criminal Law & Procedure > Trials > Jury Instructions > Requests to Charge

HN11 **Jury Instructions, Cautionary Instructions**

Under Commonwealth v. DiGiambattista, when the prosecution introduces evidence of a defendant's confession or statement that is the product of a custodial interrogation or an interrogation conducted at a place of detention (e.g., a police station), and there is not at least an audiotape recording of the complete interrogation, the defendant is entitled (on request) to a jury instruction advising that the State of Massachusetts'

highest court has expressed a preference that such interrogations be recorded wherever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care. However, a trial judge need only give a DiGiambattista instruction upon request. Where the defendant does not request such an instruction, there is no error in not giving one.

Headnotes/Syllabus

Headnotes

Homicide. Joint Enterprise. Evidence, Joint enterprise, Intent, Motive, Consciousness of guilt, Testimony before grand jury, Voluntariness of statement. *Intent. Grand Jury*. Constitutional Law, Grand jury, Self-incrimination, Voluntariness of statement, Assistance of counsel. *Witness*, Self-incrimination. *Practice, Criminal*, Grand jury proceedings, Voluntariness of statement, Request for jury instructions, Assistance of counsel, Capital case. *Supreme Judicial Court*, Superintendence of inferior courts.

Counsel: Myles Jacobson for the defendant.

Mary Lee, Assistant District Attorney, for the Commonwealth.

Judges: Present: Ireland, C.J., Spina, Cordy, Botsford, Gants, Duffly, & Lenk, JJ.

Opinion by: CORDY

Opinion

[*708] [764]** CORDY, J. In the early morning hours of December 2, 2005, the defendant, Thomas A. Woods, and the victim, Paul Mullen, left a nightclub and agreed to meet later to smoke marijuana. The defendant drove to the local Hess gasoline station located in the city of Brockton, which was a popular late-night meeting place. When the victim telephoned the defendant to ask where he was, the defendant told him he was at Hess, and the victim said he would be right there. Once the victim arrived, the defendant asked him to sit in the driver's side seat and roll a marijuana "blunt," while he went into the store to buy some pizza. While the defendant made idle conversation with the cashier inside the station, two masked men approached the vehicle and one shot the victim eight times, killing him almost instantly. The defendant went to the vehicle, laid the victim on the ground, **[***2]** and drove to his girl friend's house, where he was seen talking to a man similar in description to the shooter.[1]

The defendant later gave two noncustodial interviews to police, and testified before the grand jury as a witness. After further investigation, he was indicted and tried for murder in the first degree. On May 20, 2009, the defendant was found guilty and sentenced to life in prison.

On appeal, the defendant argues that the evidence was insufficient to prove his guilt as a joint venturer. He contends that the Commonwealth's case, which relied almost entirely on circumstantial evidence, did not include any direct evidence that he knew the shooting was to take place. He further argues that the trial judge erred in finding that he was not a "target" of the investigation when he was called to testify before the grand jury, and that, because he was a "target," he was entitled to be advised of his right not to incriminate himself pursuant to the *Fifth Amendment to the United States Constitution* before he testified. In the absence of such advice, the defendant contends that **[**765]** his testimony was improperly compelled. **[***3]** Additionally, the defendant argues that the judge erred in not including, sua sponte, an instruction pursuant to *Commonwealth v. DiGiambattista, 442 Mass. 423, 447-448, 813 N.E.2d 516 (2004)*, in his final charge to the jury, where the defendant's interviews at the police station had not been recorded. Finally, the defendant urges this court to invoke its plenary power under *G. L. c. 278, § 33E*, to grant a **[*709]** new trial or, alternatively, to reduce the verdict of murder in the first degree.

We conclude that the evidence was sufficient to permit a jury to find the defendant guilty of murder in the first degree. We also conclude that there was no error in the judge's determination that the defendant was not a target of the investigation at the time of his grand jury testimony. However, we announce a prospective rule requiring self-incrimination warnings to those witnesses testifying before the grand jury who fall within a class of persons that we define as targets, or those reasonably likely to become targets, of the investigation. Finally, we also conclude that the defendant was not entitled to a *DiGiambattista* instruction where it was not requested at

[1] Neither the shooter nor the other masked individual was ever identified.

trial. Because we find no reversible error and discern [***4] no basis to exercise our authority under G. L. c. 278, § 33E, we affirm the defendant's conviction.

1. Background. We summarize the facts as the jury could have found them, in the light most favorable to the Commonwealth. Commonwealth v. Sanna, 424 Mass. 92, 93, 674 N.E.2d 1067 (1997).

a. Threats. The defendant and the victim were longtime friends and street-level marijuana dealers. At some point, however, a rift arose between them over a debt of $3,700 that the victim owed to the defendant. In August, 2005, the defendant told a mutual friend that the victim was "lucky he was such a good friend of [mine] because anybody else would have been killed a long time ago for the money he owed [me]." He later left the victim a voicemail message, where he angrily stated, "cracker, you better have my money, or I'm going to shoot you."

In November, 2005, the victim's friend, Shawn Flaherty, attempted to purchase a pound of marijuana from the defendant for $1,300. Before the transaction took place, the defendant told Flaherty that "Paul Mullen owed him $3,700 for a long time now and that he was upset that it had been so long, he was extremely upset, that he wanted to kill Paul because of it, and that he would shoot [***5] him in the stomach." He added, in a hostile tone, "I'll shoot that dude." He then took Flaherty's money, did not give him his marijuana, and told him to get his money from the victim.

[*710] Later that month, the defendant saw Steven Deutsch, a friend of the victim, at a bar. Deutsch spoke to the defendant in an attempt to get Flaherty's money back. The defendant responded by saying, "tell Mully if he doesn't pay me my money, I'm going to shoot him in the stomach."[2]

b. The shooting. On December 1, 2005, the defendant drove the automobile owned by his girl friend, Erin Andrews, to a bar, where he spent some time socializing with two friends, Serena Epps and Takisha Turner. While there, he recognized another friend, Eldon Terry (Eldon), and the two left together and drove to Boomers nightclub.[3] Once there, they met [**766] the victim and his friend, Shawn Montiero. The four went into the club and spent the night having drinks together.

After the nightclub closed, the defendant and the victim agreed that the victim would go home, retrieve some marijuana, and call the defendant, and then the two would meet and smoke it together. The defendant then drove with Eldon to the Hess station and parked at the rear of the right side of the building, knowing that this area was out of the view of any security cameras. The two exited the vehicle, and when Eldon went to use the restroom, the defendant began chatting with women outside the station. He went into the Hess station to buy a cigar "blunt," where he encountered, among others, Epps, Turner, and Tomiko Terry (Tomiko), the mother of his child. After noticing Eldon and "paying him no mind," he continued "roaming around" the station and parking lot, periodically checking on his vehicle.

When he returned to his vehicle to begin preparing to smoke marijuana, the defendant received a cellular telephone call from the victim, who agreed to meet the defendant at the Hess station.[4]

The victim arrived almost immediately, and the defendant [*711] directed him to the open driver's [***7] side door of the vehicle. He told the victim to roll a blunt of marijuana while he went inside to purchase pizza and soda for both himself and the victim. Once inside the station, the defendant made idle conversation with the clerk, who did not know the defendant, for ten minutes. He did not attempt to purchase anything.

Meanwhile, as the victim sat alone in the driver's seat of the vehicle, two masked men walked to the back of the station. Jane Morais, an eyewitness sitting in a parked vehicle, noticed the two men and described one of them as a thin, "olive"-skinned man, wearing black shorts, a black mask, and a black hooded sweatshirt, standing about five feet, eight or nine inches tall. She described the other as a thin man wearing black pants, a black hooded sweatshirt, and a lighter jacket.

Moments later, Turner, who was standing outside the Hess station, saw a tall, thin, masked, very dark-skinned [***8] black man walk to the front of the vehicle and

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[2] While it appears that neither the victim nor the witnesses took any of these threats seriously, the jury could have concluded that they were expressive of the defendant's anger with the victim and probative of his motive.

[3] There was some confusion among the witnesses [***6] whether the nightclub was called Boomers or the Safari Club at the time of the incident. We refer to it as Boomers.

[4] According to the defendant, the conversation went as follows: the victim called the defendant and asked where he was. The defendant replied, "I'm up at the Hess. I'm about to roll this blunt." On hearing this, the victim replied, "Hold on a second. I'm on the way there. Let me roll it."

begin shooting at the victim. The shooter was wearing a black baseball cap, a black T-shirt, black jeans, and black shoes, under what appeared to be a black Carhartt-brand jacket. She described him as approximately six feet tall. The victim was shot in the head, chest, and abdomen, perforating his brain, heart, and viscera. He lost consciousness almost instantaneously, and died within minutes.

Turner ran into the store, found Eldon and Epps, and told them what had happened. She noticed the defendant standing in front of the station, after which he followed her inside and announced that "someone" had been shot. He also announced to the clerk, "somebody's laying on the side of [my] car." He then told Turner and Epps, "you all need to get out of here," and, "go home." Turner, Epps, and Eldon then got into Epps's automobile and drove off, as the defendant told them to "get home safely, be careful."

The defendant moved the victim's body out of the driver's seat and onto the concrete and drove to Andrews's house. Jessica Campbell, Andrews's cousin, heard the **[**767]** defendant yelling for Andrews and came to the window. She saw the defendant standing in **[***9]** the driveway, talking to a five foot ten inch tall black man. He was wearing a dark hooded sweatshirt and dark jeans.

Andrews eventually went outside, and noticed the other man **[*712]** walking away from the defendant while waving at him. She described him as a thin man, standing about five feet, seven or eight inches tall,[5] wearing dark jeans, a black hooded sweatshirt, and a Carhartt-brand jacket. The defendant told Andrews that the victim had been shot and then, unbeknownst to her, discarded his blood-soaked clothes in her trash.

c. The interviews and grand jury. On December 2, 2005, the defendant drove from Andrews's house to the police station, where he voluntarily gave an interview to police as a witness. Two months later, in February, 2006, the police asked the defendant if he would be willing to submit to a second interview, to which he agreed. At the second interview, which took place on February 6, 2006, the defendant was read the Miranda rights, although the police did not intend to place him in custody and still viewed him as a witness.

The officers explained to the defendant that the court preferred that **[***10]** in-station interviews were tape recorded, and thus they would prefer to do so. The defendant stated that he did not want the interview to be recorded, and signed a form indicating his waiver. Once the second interview began, the officers told the defendant that their investigation had revealed that some of his initial statements to them were not true.[6] The defendant explained that he had not wanted to be considered a "snitch," and gave several different, yet still exculpatory, versions of the events.

On February 10, 2006, pursuant to a summons, the defendant testified before the grand jury. He gave another version of the events, and further explained the inconsistencies between his initial interview and his grand jury testimony. His grand jury testimony was admitted in evidence at his trial in order to illustrate his conflicting stories and outright lies.

2. Discussion. a. Sufficiency of the evidence. The defendant argues that the evidence was insufficient to show that he acted in joint venture with the shooter. We conclude that the Commonwealth's evidence was sufficient to support a conviction of murder in **[***11]** the first degree.

HN1[↑] The standard we apply is whether, after viewing the evidence **[*713]** in the light most favorable to the Commonwealth, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Commonwealth v. Latimore, 378 Mass. 671, 677-678, 393 N.E.2d 370 (1979)*, quoting *Jackson v. Virginia, 443 U.S. 307, 318-319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*. Circumstantial evidence alone may be sufficient to meet the burden of establishing guilt. *Commonwealth v. Nolin, 448 Mass. 207, 215, 859 N.E.2d 843 (2007)*. *Commonwealth v. Rojas, 388 Mass. 626, 629, 447 N.E.2d 4 (1983)*. Indeed, the Commonwealth may submit a case wholly on circumstantial evidence, and inferences drawn from that evidence "need only be reasonable and possible; [they] need not be necessary or inescapable." *Commonwealth v. Merola, 405 Mass. 529, 533, 542 N.E.2d 249 (1989)*, quoting *Commonwealth v. Beckett, 373 Mass. 329, 341, 366 N.E.2d 1252 (1977)*. Where conflicting inferences **[**768]** are possible from the evidence, "it is for the jury to determine where the truth lies." *Commonwealth v. Martino, 412 Mass. 267, 272, 588 N.E.2d 651 (1992)*, quoting *Commonwealth v.*

[5] Erin Andrews did not see the man's face, and was unable to discern his skin color.

[6] These inconsistent statements are discussed more fully, see part 2.a, infra.

Wilborne, 382 Mass. 241, 245, 415 N.E.2d 192 (1981).

There is no question that the evidence sufficed to show that the shooter acted with an intent to kill and premeditation **[***12]** when he donned a mask and fired eight shots into the victim as he sat defenseless in a vehicle. See Commonwealth v. Diaz, 426 Mass. 548, 552-554, 689 N.E.2d 804 (1998) (stating requirements for finding of murder in first degree). However, HN2[↑] where the Commonwealth proceeded on a theory of joint venture, we must consider whether the Commonwealth established that the defendant "knowingly participated in the commission of the crime charged, alone or with others, with the intent required for that offense." Commonwealth v. Zanetti, 454 Mass. 449, 467-468, 910 N.E.2d 869 (2009). HN3[↑] A joint venture "may be proved by circumstantial evidence." Commonwealth v. Bright, 463 Mass. 421, 435, 974 N.E.2d 1092 (2012), quoting Commonwealth v. Braley, 449 Mass. 316, 320, 867 N.E.2d 743 (2007). The intent required for the offense may be inferred from "the defendant's knowledge of the circumstances and subsequent participation in the offense." Commonwealth v. Cohen, 412 Mass. 375, 381, 589 N.E.2d 289 (1992), quoting Commonwealth v. Soares, 377 Mass. 461, 470, 387 N.E.2d 499, cert. denied, 444 U.S. 881, 100 S. Ct. 170, 62 L. Ed. 2d 110 (1979).

The jury could properly have considered the defendant's four threats to shoot the victim over a debt as evidence of his motive and intent to commit the murder. See Commonwealth v. Morgan, **[*714]** 449 Mass. 343, 346-348, 351, 868 N.E.2d 99 (2007). **[***13]** The jury also could have found that the defendant arranged to meet the victim at the Hess station, parked in an area the defendant knew to be unrecorded by surveillance, and left the victim alone in the vehicle while the defendant pretended to purchase pizza and soda for the two of them during the ten-minute period when the victim was shot. An inference could properly be drawn from these facts that the defendant was motivated to kill the victim by the debt that the victim owed to him, commissioned a shooter to carry out the murder, lured the victim into a position where the shooting would be possible, and attempted to construct an alibi for himself by being seen chatting aimlessly with the clerk of the Hess station while the murder took place. See id. at 351-352 (sufficient evidence where defendant had motive and opportunity, and announced intention to kill victim). See also Commonwealth v. Fitzpatrick, 463 Mass. 581, 594, 977 N.E.2d 505 (2012) (sufficient where Commonwealth produced evidence that defendant had motive and opportunity to commit murder, along with evidence showing consciousness of guilt); Commonwealth v. Cordle, 404 Mass. 733, 739, 741, 537 N.E.2d 130 (1989) (presence at scene of crime in addition **[***14]** to evidence of ill will and consciousness of guilt sufficient); Commonwealth v. Anderson, 396 Mass. 306, 311-313, 486 N.E.2d 19 (1985) (evidence that defendant was alone with victim at approximate time of murder and consciousness of guilt was sufficient to sustain verdict).

Further, the jury could have found that the defendant met with the shooter in Andrews's driveway immediately after the murder, which would support a permissible inference that he was complicit in the shooting. While the descriptions of the man in the driveway varied somewhat, both witnesses agreed that he was a thin man, between five feet, seven inches and six feet tall, wearing dark pants and a dark **[**769]** shirt. While Andrews did not notice that he was black, she did notice that he was wearing what appeared to be a Carhartt-brand jacket. This description was sufficiently similar to Turner's description of the shooter as a thin black man wearing black pants, a black shirt, and a Carhartt-brand jacket, as well as Morais's description of a thin man wearing dark pants, a dark shirt, and a light jacket, to allow the jury to find that the man in the driveway participated in the shooting **[*715]** that had occurred moments earlier. See Commonwealth v. Sylvia, 456 Mass. 182, 190-191, 921 N.E.2d 968 (2010) **[***15]** (varied and erroneous descriptions of shooter acceptable where other evidence supported identification). Such an inference is certainly not necessary or inescapable, but it is permissible given the evidence presented. Beckett, 373 Mass. at 341.

In addition, the defendant's actions and statements after the shooting showed a consciousness of guilt that supported the Commonwealth's case. HN4[↑] "In conjunction with other evidence, a jury may properly consider actions and statements of a defendant that show a consciousness of guilt." Rojas, 388 Mass. at 629. While consciousness of guilt alone is insufficient to support a guilty verdict, such evidence may be sufficient when combined with other probable inferences. See Commonwealth v. Best, 381 Mass. 472, 483, 411 N.E.2d 442 (1980); Commonwealth v. Montecalvo, 367 Mass. 46, 52, 323 N.E.2d 888 (1975). This type of conduct includes making false or inconsistent statements to police. See Commonwealth v. Basch, 386 Mass. 620, 624-625, 437 N.E.2d 200 (1982); Commonwealth v. Connors, 345 Mass. 102, 105, 185 N.E.2d 629 (1962).

Here, the defendant's inconsistencies were many. He

initially told police that he did not know anyone in the Hess station, despite the fact that he knew several of the patrons -- including Turner, **[***16]** an eyewitness to the shooting, and Tomika, the mother of his child -- in what could be seen as an attempt to hamper the police officers' investigation by preventing them from locating witnesses. *Commonwealth v. Porter, 384 Mass. 647, 653, 429 N.E.2d 14 (1981)* (intentionally false and misleading statements by defendant could have been found to indicate consciousness of guilt). See *Montecalvo, 367 Mass. at 52*; *Commonwealth v. Spezzaro, 250 Mass. 454, 457, 146 N.E. 3 (1925)*. The defendant also falsely told police that the victim told the defendant to leave him in the parking lot and leave the scene. This could be viewed as medically improbable in light of the victim's wounds, and, rather, an attempt at concealing the true reason for his flight. See *Commonwealth v. Carrion, 407 Mass. 263, 277, 552 N.E.2d 558 (1990)* ("Flight is perhaps the classic evidence of consciousness of guilt"); *Commonwealth v. Booker, 386 Mass. 466, 470, 436 N.E.2d 160 (1982)*. He also denied that he met with anyone outside Andrews's house, which was refuted by two witnesses. He also claimed he did not have any **[*716]** monetary issues with the victim. In short, the defendant's inconsistent statements could be seen as an attempt to hide witnesses and conceal his motivation and his **[***17]** actions.

The evidence included other instances of consciousness of guilt. The defendant acted as though he did not know the victim immediately after the shooting. He discarded his bloody clothing at Andrews's house, a fact that he did not disclose to anyone, and he lied to Andrews about many of the details of the shooting.[7]

Essentially, **[**770]** the Commonwealth's case is replete with evidence of the defendant's consciousness of guilt.

While *HN5*[↑] the Commonwealth's case was largely circumstantial, and not every inference the jury could draw was compelled, permissible inferences need not be necessary or inescapable. *Beckett, 373 Mass. at 341*. While the defendant's theories of the case are possible,[8] the jury were warranted in rejecting them based on the evidence presented.

b. Self-incrimination advisement. The defendant argues that, at the time of his testimony before the grand jury, he was a target of the investigation and the Commonwealth was thus required to advise him of his *Fifth Amendment* right to avoid self-incrimination. *HN7*[↑] The United States Attorney's Manual, § 9-11.151 (2009), defines a "target" of a grand jury investigation as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." We find no **[***19]** error in the judge's ruling that the defendant was not a target, and that the prosecutor was not **[*717]** required to advise him of his *Fifth Amendment* rights before eliciting his testimony.

We first review the judge's finding that the defendant was not a target. *HN8*[↑] In reviewing a judge's ruling on a motion to suppress, we accept the judge's subsidiary findings of fact absent clear error, "but conduct an independent review of his ultimate findings and conclusions of law." *Commonwealth v. Scott, 440 Mass. 642, 646, 801 N.E.2d 233 (2004)*, quoting *Commonwealth v. Jimenez, 438 Mass. 213, 218, 780 N.E.2d 2 (2002)*. The judge determines the weight and credibility of the testimony, *Commonwealth v. Sinforoso, 434 Mass. 320, 321, 749 N.E.2d 128 (2001)*, while "our duty is to make an independent determination of the correctness of the judge's application of constitutional principles to the facts as found." *Commonwealth v. Mercado, 422 Mass. 367, 369, 663 N.E.2d 243 (1996)*.

The police officers testified that the defendant had never, throughout his two interviews, been in custody or been a suspect. He voluntarily came to the police

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[7] The defendant told Andrews that he had gone to the bar by himself; that a woman had specifically told him, "Tommy, your car is getting shot up"; that the victim asked to be taken out of the car and laid down because he was in pain; and that he had lost his cellular telephone that night.

[8] The defendant postulates that the facts support three inferences: (1) the shooter was en route to another shooting and killed the victim on impulse **[***18]** when he was surprised at the sight of him; (2) the shooter intended to kill the defendant, a black man, and mistakenly shot the Caucasian victim; or (3) someone at the Hess station saw the victim and decided to shoot him. While all three scenarios are feasible, the defendant errs in arguing that these theories were equally as supported by the evidence as the Commonwealth's theory. There was little to no evidence supporting these possibilities beyond mere speculation, and *HN6*[↑] the Commonwealth need not disprove every possible theory of the case. See *Brown v. Commonwealth, 407 Mass. 84, 89, 551 N.E.2d 531 (1990)*, *S.C., 414 Mass. 123, 605 N.E.2d 837 (1993)*.

station and submitted to both interviews. Further, as of the date the defendant appeared before the grand jury, he was described by the police **[***20]** as "somebody that was very interesting," because his statements throughout the two interviews had been inconsistent, but he was not a "suspect," for whom they had either "probable cause" or "reasonable suspicion" to believe was involved in the murder.[9]

Based on **[**771]** this record, we see no error in the judge's finding that the defendant was not a target when he was called to the grand jury to testify.

Even if the defendant were a "target," the Commonwealth was under no obligation to warn him of that status. *United States v. Washington, 431 U.S. 181, 188-190, 97 S. Ct. 1814, 52 L. Ed. 2d 238 (1977)* (**HN9**[↑] warning witness that he is target of grand jury investigation is not constitutionally required). *Commonwealth v. D'Amour, 428 Mass. 725, 743, 704 N.E.2d 1166 (1999)* (same). While we do not disturb our holding in *D'Amour*, we consider for the first time the defendant's separate argument that **[***21]** the Commonwealth must advise targets or **[*718]** potential targets of the grand jury's investigation of their right not to incriminate themselves.

While the United States Supreme Court has indicated that full Miranda warnings are not required for grand jury witnesses, *United States v. Mandujano, 425 U.S. 564, 580-581, 96 S. Ct. 1768, 48 L. Ed. 2d 212 (1976)*, it has never determined "whether any *Fifth Amendment* warnings whatever are constitutionally required for grand jury witnesses." *United States v. Pacheco-Ortiz, 889 F.2d 301, 307 (1st Cir. 1989)*, quoting *Washington, 431 U.S. at 186*. The United States Court of Appeals for the First Circuit has, however, "expressed 'considerable sympathy' with the approach 'of giving at least notice that a witness need not testify if such would incriminate him.'" *Pacheco-Ortiz, supra at 308*, quoting *United States v. Chevoor, 526 F.2d 178, 181-182 (1st Cir. 1975)*, cert. denied, *425 U.S. 935, 96 S. Ct. 1666, 48 L. Ed. 2d 176 (1976)* (grand jury context "gives rise to a kind of coerciveness suggesting the wisdom of giving at least notice that a witness need not testify if such would incriminate him"). See *United States v. Babb, 807 F.2d 272, 278 (1st. Cir. 1986)* (assuming that some warning was constitutionally mandated where defendant **[***22]** was in fact warned of *Fifth Amendment* rights). See also *United States v. Whitaker, 619 F.2d 1142, 1150 (5th Cir. 1980)* (declining to exercise supervisory jurisdiction to require warning of *Fifth Amendment* rights, but noting that "we agree that it is a better practice to so inform a potential defendant prior to his testimony before a grand jury").

The United States Department of Justice requires that grand jury "target[s]" and "subject[s]," defined as persons "whose conduct is within the scope of the grand jury investigation," United States Attorneys' Manual, at § 9-11.151, be advised of their right to avoid self-incrimination as a matter of policy.[10]

See *Commonwealth v. Gilliard, 36 Mass. App. Ct. 183, 188, 629 N.E.2d 349 [*719] (1994)*; *Pacheco-Ortiz, 889 F.2d at 308*. Further, courts in other States have opted to require some variation of a rights advisement to those who could be considered targets of the **[**772]** grand jury's investigation. See, e.g., *State v. Caperton, 276 Mo. 314, 319-320, 207 S.W. 795 (1918)* ("No person whose alleged crimes are under investigation by a grand jury ought to be haled unwillingly before that body and questioned as to such crimes. . . . [H]e ought to be advised that it is his privilege not to testify **[***23]** unless he wants to do so, and that anything he may say may be used against him"); *State v. Williams, 59 N.J. 493, 503, 284 A.2d 172 (1971)* (citing precedent that target of grand jury proceeding must be advised that he is target and of right not to incriminate himself); *State v. Cook, 11 Ohio App. 3d 237, 241, 11 Ohio B. 362, 464 N.E.2d 577 (1983)* (witness is "putative defendant if, at the time he appears before the grand jury, the witness is potentially the focus of the investigation and is thus subject to possible indictment,"

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[9] In response to the prosecutor's inquiry regarding whether the defendant was a suspect, Officer Scott Warmington of the Brockton police department responded: "I think he was a little more than a witness. But, like I said, he was giving us information. It wasn't adding up. Was he a suspect that we believed we had probable cause or even reasonable suspicion? No."

[10] Section 9-11.151 of the United States Attorneys' Manual requires that the prosecutor warn "subject[s]" that (1) the grand jury is conducting an investigation of possible violations of Federal criminal laws; (2) they may refuse to answer any question if a truthful answer to the question would tend to incriminate them; (3) anything they say may be used against them before the grand jury or in a subsequent legal proceeding; and (4) if they have retained counsel, they may be permitted **[***24]** a reasonable opportunity to step outside the grand jury room to consult with counsel if they so desire. As for witnesses who are "target[s]," they must also be warned that their conduct is being investigated for possible violation of Federal criminal law. Id.

and he must be warned that he has constitutional privilege to refuse to answer any question that may incriminate him, that statements may be used against him, and that he may have attorney to confer with outside grand jury room).

The issuance of a summons requiring a witness to appear and give testimony before the grand jury is a form of compulsion.[11]

HN10[↑] Because grand jury testimony is compelled, it ought to be ameliorated with an advisement of rights where there is a substantial likelihood that the witness may become an accused; that is, where the witness is a "target" or is reasonably likely to become one. Accordingly, we adopt a rule that where, at the time a person appears to testify before a grand jury, the prosecutor has reason to believe that the witness is either a "target" or is likely to become one,[12]

the witness must be advised, before testifying, **[*720]** that (1) he or she may refuse to answer any question if a truthful answer would tend to incriminate the witness, and (2) anything that he or she does say may be used against the witness in a subsequent legal proceeding. The rule we adopt is meant to discourage the Commonwealth from identifying a person **[***25]** as a likely participant in the crime under investigation, compelling his or her appearance and testimony at the grand jury without adequate warnings, and then using that testimony in a criminal trial.

This rule is not a new constitutional rule, but rather an exercise of our power of superintendence "to regulate the presentation of evidence in court proceedings." *Commonwealth v. Dagley, 442 Mass. 713, 720-721, 816 N.E.2d 527 (2004)*, cert. denied, *544 U.S. 930, 125 S. Ct. 1668, 161 L. Ed. 2d 494 (2005)*, quoting *Commonwealth v. DiGiambattista, 442 Mass. 423, 444-445, 813 N.E.2d 516 (2004)*. **[***26]** See *Commonwealth v. Rosario, 422 Mass. 48, 56, 661 N.E.2d 71 (1996)* (prospectively adopting six-hour safe harbor period for postarrest interrogation as exercise of superintendence authority, not new constitutional rule). Therefore, this rule is only required to be applied prospectively to grand jury testimony elicited after the issuance of the rescript in this case. *Dagley, supra at 721*.

[773]** c. Videotaped interview. The defendant argues that the trial judge erred in not giving a DiGiambattista instruction where the initial interview at the police station on December 2, 2005, was unrecorded.[13]

This court held in *DiGiambattista, 442 Mass. at 447-448*:

> HN11[↑] "[W]hen the prosecution introduces evidence of a defendant's confession or statement that is the product of a custodial interrogation or an interrogation conducted at a place of detention (e.g., a police station), and there is not at least an audiotape recording of the complete interrogation, the defendant is entitled (on request) to a jury instruction advising that the State's highest court has expressed a preference that such interrogations be recorded wherever **[*721]** practicable, and cautioning the jury that, because of the absence of any recording of the interrogation **[***27]** in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care."

The defendant may have been entitled to an instruction, because he was interviewed during the course of an investigation at "a place of detention," namely, a police station.[14]

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[11] At the request of the court, and pursuant to *Mass. R. A. P. 16 (l)*, as amended, 386 Mass. 1247 (1982), the Commonwealth has produced a copy of the type of grand jury summons sent to the defendant. The summons reads: "In the name of the Commonwealth, you are commanded to appear before the Plymouth County Grand Jury at the Superior Court in the County of Plymouth located at [location] on [date] and from day to day thereafter until said action is disposed of, to testify in the matter of Commonwealth vs. Grand Jury Investigation. Hereof fail not, as you will answer your default under the pains and penalties of law."

[12] We adopt the United States Attorneys' Manual definition of "target," as noted in the text, supra.

[13] The defendant's interview on February 6, 2006, also was not recorded, pursuant to his own refusal to consent to a recording. The defendant does not argue that he was entitled to a DiGiambattista warning based on this second, unrecorded interview, instead focusing only on the December 2, 2005 interview. In any event, our analysis would not change upon consideration of the second interview.

[14] The situation here is distinguished from that in Commonwealth v. Issa, ante 1, 20 (2013), in which the defendant was not entitled to an instruction where he "voluntarily and without advance notice showed up at the [police] station," and "[t]he police had not asked the defendant to come in or be interviewed, did not know who the defendant

,[15]

Id. However, a trial judge need only give a DiGiambattista instruction upon request. Id. Where the defendant did not request such an instruction, there was no error.

The defendant has not claimed that his trial counsel was ineffective, although he briefly argues that "[f]or no apparent reason, defense counsel did not ask for a *DiGiambattista* instruction. . . . [T]here could have been no legitimate, strategic reason not to make such a request and no reason for the judge not to give one." To the contrary, trial counsel may have had valid reasons not to request a DiGiambattista instruction. First, the value of such an instruction is lessened where, as here, the defendant's statements, dubious as they may be, were largely exculpatory. **[***29]** See *Commonwealth v. Barbosa, 457 Mass. 773, 801-802, 933 N.E.2d 93 (2010)*, cert. denied, *131 S. Ct. 2441, 179 L. Ed. 2d 1214 (2011)* (judge's failure to give instruction not prejudicial where defendant's comments partially exculpatory). Further, trial counsel may have simply opted not to bring any more attention to the defendant's statements than necessary. In any event, the record before us does not support a claim of ineffectiveness.

d. *General Laws c. 278, § 33E*. We have reviewed the record **[*722]** in accordance **[**774]** with *G. L. c. 278, § 33E*, to determine whether there is any basis to set aside or reduce the verdict of murder in the first degree, regardless of whether such grounds were raised on appeal. We find no such reason, and we decline to exercise our powers under the statute.

Judgment affirmed.

End of Document

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was **[***28]** until he told them, had yet to ascertain that the cause of death was a homicide, and did not identify the defendant as a suspect until after the completion of the interview." Here, the police knew there had been a murder, and the defendant informed them that he had been with the victim moments before he was killed. He therefore was more closely connected to the crime than the defendant in *Issa*, and may therefore have been entitled to a DiGiambattista instruction.

[15] This is true even where, as here, the defendant affirmatively requests that the interview not be recorded. See *Commonwealth v. Rousseau, 465 Mass. 372, 392, 990 N.E.2d 543 (2013)*.

COMMONWEALTH OF MASSCHUSETTS v. THOMAS A. WOODS
Plymouth, SS. Docket No. PLCR2006-00498

Jury Trial - Day 3

Before The Honorable Judge Paul E. Troy

May 6, 2009

Excerpt from Transcript Volume 3

Judge Troy's findings on Defendant's Motions in Limine

Transcript pages: 3-4 through 3-10

Judge Troy

(Court called to order.)
(Defendant present.)
(Jury not present.)
(9:28 a.m.)

THE COURT: Good morning, everyone.

All right. A juror, I guess, got lost, so we got a little late start this morning. But as I told you yesterday, I'm going to give my rulings on the two motions that I had under advisement. One of them is the defendant's motion in limine to exclude four statements he allegedly made to three police officers and one in the grand jury, and the Commonwealth's motion in limine to allow evidence of threats to be admitted for trial.

I'll start with the motion in limine regarding the voluntariness of the defendant's statements.

An evidentiary hearing was held before me yesterday, May 5, 2009, on the defendant's motion in limine to exclude his alleged statements to Officer Healy and then Lieutenant Warmington and Detective Clark on December 2, 2005, at the Brockton police station; the statement to Lieutenant Warmington and Detective Clark on December 6, 2005, at the Brockton police station; and defendant's testimony before the grand jury sitting at Brockton Superior Court on February 10, 2006.

At the evidentiary hearing, only Lieutenant Warmington testified, and a number of documents were marked as exhibits.

The standard on whether the defendant's alleged statements must be excluded on the basis of voluntariness is, was the will of the defendant overborne, such that the statements were not the result of a free and voluntary act. Or put another way, was the statement made freely and voluntarily when considering the totality of circumstances.

The Court must make a finding in order to allow the statement in that the statement was voluntary within the meaning of the law beyond a reasonable doubt. And if the Court makes that finding, then the matter is still left to the jury for them to determine pursuant to a humane practice instruction.

Based upon the evidence introduced at the hearing, I make the following findings of fact and rulings of law:

The shooting took place at the Hess gas station on Main Street in Brockton in the early morning hours of December 2, 2005. Paul Mullen was shot multiple times while sitting in a vehicle. He died as a result of the gunshot wounds. The State Police and the Brockton Police Department began an investigation.

The defendant had been speaking with the decedent, Mr. Mullen, at the Safari Club earlier in the evening, and they subsequently met and spoke at the Hess gas station. Mullen was shot and killed while the defendant was inside the store portion of the Hess gas station. The defendant left the gas

station in his car shortly after the shooting.

After a short time, the defendant voluntarily went to the Brockton police station. He identified himself as an individual who was at the Hess gas station earlier in the evening and was spoken to by Officer Healy. Officer Healy radioed to the investigating officers that he was interviewing Mr. Woods and took a statement from him, which he recorded in handwriting.

I find that as to this statement of December 2, 2005, the defendant came in on his own to the Brockton police station. He spoke with Officer Healy who happened to be the lobby officer at the time. He was not in custody. He gave the statement to Officer Healy of his own accord. No threats or promises or other inducements or coercions were made by Officer Healy that would affect the giving of the statement. The defendant gave an exculpatory statement in which he did not inculpate himself in the shooting.

Based upon the evidence before me at the hearing, I find that this statement was voluntary beyond a reasonable doubt, considering the totality of circumstances.

Shortly thereafter, on the same day, December 2, 2005, Lieutenant Warmington and Detective Clark of the Brockton police arrived back at the police station. The defendant had waited to be interviewed by them. He was not in custody. At the time, he was viewed as just a witness. The murder had

taken place a few hours earlier.

They asked him to go up to the detective bureau, which meant climbing flights of stairs and navigating corridors to get to the bureau. Detective Warmington smelled alcohol on the defendant's breath. He asked the defendant about drinking. The defendant said he had several drinks in the last few hours. Detective Warmington drew the opinion that the defendant was not under the influence of alcohol. His eyes were not glassy, his speech was not slurred, he was coherent, and he negotiated his way to the detectives' office with no problem. He acted appropriately during the interview.

During the interview, he gave an exculpatory statement which he did not suggest any involvement of himself in the shooting of the decedent. The interview lasted about a half an hour. After the interview, the defendant remained for the gunshot residue test and to turn over his clothing -- some clothing.

Based upon this evidence, I find that the statements made by the defendant to Lieutenant Warmington and Detective Clark were made freely and voluntarily, when considering the totality of circumstances, beyond a reasonable doubt.

A few days later, on that Friday, Lieutenant Warmington and Detective Clark saw the defendant exiting a barbershop. They pulled up to him and asked if they could speak with him some more about the incident. The defendant said he couldn't come

in then, but he would meet them later on. They agreed to meet the following Monday.

On December 6, 2005, the defendant did not appear at the time he said he'd be there, so they called him and he voluntarily came in to the police station on his own. He was not in custody. He was interviewed again in the detectives' office.

The defendant was told that his story didn't add up, that they had checked the information he gave, and he had not told them everything he knew, and they believed he knew more. They advised the defendant of his Miranda rights orally and in writing. The defendant signed a waiver. They advised the defendant -- and Lieutenant Warmington was convinced the defendant understood his rights. The defendant said he did. They asked if he wanted the interview recorded, and the defendant declined and signed the declination form.

With respect to why he had not been more forthcoming with information, the defendant said basically two things: I didn't want to look like a snitch, and what I didn't tell you is not really important to the investigation. The tone used by the officers was conversational, he had a calm demeanor. I accept the testimony of Lieutenant Warmington that he did not lean or try to use difficult interrogation tactics with the defendant because he was concerned he might walk out.

The defendant understood the discussion, answered the

questions appropriately. No threats or promises were made to the defendant. The defendant never asked to stop the interview. The defendant gave an exculpatory statement denying any involvement in the incident. At the end of the interview, the officers thanked him. The defendant left on his own.

Based upon this evidence, I find beyond a reasonable doubt that the statement was made freely and voluntarily when considering the totality of circumstances.

The defendant received a summons to appear before the grand jury that was sitting in the Brockton Superior Court. He was one of many witnesses summonsed, including customers, employees, and police officers. And he came in in response to the summons. At the time, he was not considered a target of the investigation, but the police believed that he knew more than he was saying and that he was not telling them everything. He was treated like all other witnesses while at the grand jury. He waited in the hallway for his turn.

At some point he was asked to come to an interview room, where he was interviewed by -- he was spoken to by Lieutenant Warmington and Assistant District Attorney Flanagan. In the room, he was told to tell the truth in the grand jury and that he would be under oath.

Based upon the evidence before me, the defendant did not ask if he needed an attorney and he was not told he did not need an attorney. He was not a target, but they believed that

he knew more than he told and he was not being fully truthful. He was not under the influence. He was not abused or threatened or coerced. No promises were made to him. He acted like a gentleman throughout, and he was treated appropriately.

At the conclusion of his testimony, the defendant left the grand jury area on his own. His testimony before the grand jury was exculpatory. He denied any involvement in the incident.

Based upon the evidence before me, beyond a reasonable doubt, I find that his statements or his testimony before the grand jury was made freely and voluntarily when considering the totality of the circumstances.

That's the end of my rulings on that motion.

I'm now going to give my ruling on the motion in limine regarding statements of the defendant to civilian witnesses. There's two dovetail motions, one by the defendant and one by the Commonwealth.

The defendant's motion, I endorsed it, See the Court's ruling on Commonwealth's motion in limine to admit prior bad act evidence of this day. My endorsement on that motion is as follows:

After hearing, motion allowed as to the alleged statements of the defendant to Shawn Flaherty, Christopher Hobbs, and Stephen Deutsch. Denied without prejudice as to the alleged statement of the defendant to Michael Clancy and Nichole

6-4-09

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
NO. CR06-00498

COMMONWEALTH OF MASSACHUSETS,

v.

THOMAS WOODS,
Defendant.

AFFIDAVIT IN SUPPORT OF
MOTION IN LIMINE REGARDING STATEMENTS
OF THE DEFENDANT TO LAW ENFORCEMENT

The Defendant Affirms the following facts under the Penalties of Perjury.

1. I was interviewed on the night of the alleged crime. The interview took place at the Brockton Police Station. I was not held or arrested after the interview. I was not given Miranda warnings. I had consumed alcohol before the interview, and was under the influence of alcohol before the interview when I submitted to the interview. The interview was not recorded. The Police Officers were taking notes during the interview. My Attorney informs me that the notes of the interview have been destroyed. I was not aware that the police intended to use my statements against me. This statement was not made willingly, freely and voluntarily with an understanding of all of my rights and options.

2. I was interviewed by the police some weeks later. I was not held or arrested. I was given Miranda warnings. The interview was confrontational. The interview was not

recorded. The police took notes during the interview. My Attorney informs me the notes of the interview have been destroyed. I was not informed that I was a suspect in the murder of Paul Mullen. This statement was not made willingly, freely and voluntarily with an understanding of all of my rights and options.

3. On February 10, 2006, I was subpoenaed to testify before the Grand Jury that indicted me. I was not held or arrested. I was not given Miranda warnings. I was not informed that I was a target of the grand jury investigation. I was not informed that I could exercise my privilege not to testify. I was not represented by counsel. I believed that I had not choice but to testify and was not informed otherwise. This statement was not made willingly, freely and voluntarily with an understanding of all of my rights and options.

4. As to each of the three statements attributed to me, I allege that they were not voluntary.

Respectfully Submitted,

Thomas A. Woods

Thomas Woods

CONSTITUTIONAL PROVISIONS

USCS Const. Amend. 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

USCS Const. Amend. 14, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COPY

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH COUNTY GRAND JURY SUMMONS

PLYMOUTH, SS.

Case No.

To all officers authorized to serve criminal process in the Commonwealth.

GREETINGS:

WITNESS—PRESENT THIS FORM TO THE COURT OFFICER IN ORDER TO OBTAIN YOUR WITNESS FEE AS SOON AS YOU ARRIVE ON THE DATE, TIME AND PLACE MENTIONED ON THIS SUMMONS.

TO: Thomas Woods

In the name of the Commonwealth, you are commanded to appear before the PLYMOUTH COUNTY GRAND JURY at the Superior Court in the County of Plymouth located at:

72 Belmont Street, Brockton, MA

on FRIDAY the ~~31st~~ 10th day of FEBRUARY current at 9~~8~~0 A.M.-P.M. ~~XX~~

and from day to day thereafter until said action is disposed of, to testify in the matter of

COMMONWEALTH

VS.

GRAND JURY INVESTIGATION

Hereof fail not, as you will answer your default under the pains and penalties of law.

Witness, Suzanne Del Vecchio, ESQUIRE at Brockton the 31st day of JANUARY, 2006.

WITNESS: ***REPORT TO DISTRICT ATTORNEY'S OFFICE BASEMENT-LEVEL AT ABOVE-MENTIONED ADDRESS AND TIME.***

TIMOTHY J. CRUZ
District Attorney, Plymouth County

Assistant District Attorney THOMAS FLANAGAN

Police Officer

DA-009