

Transcript

Trial Testimony of Juan Carlos Garcia

Wednesday, September 27, 2017  
Tr. III/111-167

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT

## JURY TRIAL (DAY 3)

BEFORE: HONORABLE MITCHELL H. KAPLAN  
Suffolk Superior Courthouse  
Courtroom 907  
Boston, Massachusetts  
Wednesday, September 27, 2017

Catherine Ham, Assistant District Attorney  
For the Commonwealth of Massachusetts

John M. Galvin, Esquire  
On behalf of Tsunami Ortiz

Michael T. Phelan, Esquire  
On behalf of Enrique Auch

NANCY MCCANN, CVR-C.M.  
OFFICIAL COURT REPORTER  
SUFFOLK SUPERIOR COURT

1 time, where did you go?

2 A I went straight downstairs.

3 Q You went downstairs?

4 A Yeah.

5 Q Did you go outside?

6 A No.

7 Q Where did you go downstairs?

8 A To see my mother.

9 Q Is that in the same unit?

10 A Yeah, she's downstairs.

11 Q Do you have a two-floor unit?

12 A Yes.

13 MR. PHELAN: Thank you, Mr. Guerrero.

14 THE COURT: Anything further?

15 MS. HAM: Nothing further, Your Honor,  
16 thank you.

17 THE COURT: Thank you so much for  
18 coming in, Mr. Guerrero.

19 MS. HAM: Next witness, Your Honor,  
20 Commonwealth calls Juan Carlos Garcia.

21 THE CLERK: Do you swear to tell the  
22 truth, the whole truth, and nothing but the truth,  
23 so help you God?

24 THE WITNESS: Yeah.

25 THE CLERK: Sir, if you want to step

1 right around here, take the witness stand, please.  
2 Please try to keep your voice up as you testify,  
3 sir.

4 MS. HAM: May I proceed, Your Honor?

5 THE COURT: Yes, Ms. Ham.

6 MS. HAM: Thank you.

7 JUAN CARLOS GARCIA, Sworn

8 DIRECT EXAMINATION

9 (BY MS. HAM)

10 Q Good afternoon. Could you please tell us your  
11 full name, spelling your last name.

12 A Juan Garcia.

13 Q And is your middle name Carlos?

14 A Yeah.

15 Q Okay, I'm going to ask you to speak up as loud as  
16 you can, all right?

17 A It's cold as a motherfucker.

18 Q Mr. Garcia, how old are you?

19 A 17.

20 Q Do you go to school?

21 A Yeah.

22 Q What grade are you in?

23 A Senior.

24 Q Where are you at school?

25 A I go to Eggleston.

1 Q I'm sorry?

2 A Go to Eggleston.

3 THE COURT: Mr. Garcia, these people are  
4 the ones that most need to hear what you say, so  
5 try and project your voice. You can pull that  
6 microphone down a little closer to you, that  
7 would help.

8 Q Back in December of 2015, what neighborhood were  
9 you living in?

10 A Mission Hill.

11 Q Mission Hill. Is Annunciation Road part of  
12 Mission Hill?

13 A I don't know.

14 Q Do you know Annunciation Road?

15 A No.

16 Q Do you know the street name you lived in in  
17 December of 2015?

18 A Yeah.

19 Q What street was that?

20 A McGreevey.

21 Q McGreevey? Did you know D'Andre King Settles?

22 A Yeah.

23 Q How did you know him?

24 A He was my friend.

25 Q How long had you known him for? For years or for

1                   months?

2   A   For years.

3   Q   Did you go to the same school together or how is  
4                   it that you knew him?

5   A   Football.

6   Q   How often back in December 2015 did you hang out  
7                   with him?

8   A   I don't recall.

9   Q   Were you hanging out with him every single day or  
10                  every other day? Did you see him often?

11   A   I don't recall.

12   Q   Do you recall hanging out with him, though?

13   A   I don't recall.

14   Q   Do you remember what D'Andre looks like?

15   A   I don't recall.

16   Q   I'm going to ask you to take a look at the  
17                  photograph.

18                   MS. HAM: May I approach?

19                   THE COURT: You may.

20   Q   Do you recognize this photograph?

21   A   Yes.

22   Q   Who is it?

23   A   That's D'Andre.

24   Q   Is this how he appeared back in December of 2015  
25                  when he was your friend?

1 A I don't recall.

2 Q Is this what he looks like?

3 A Yes.

4 Q Is this what he looked like back in December of  
5 2015?

6 A I don't recall.

7 Q So this is your friend, D'Andre.

8 A Yes.

9 Q This is what he looked like?

10 A Yes.

11 MR. GALVIN: Objection, Your Honor,  
12 asked and answered.

13 MS. HAM: Your Honor, I would ask to  
14 submit this as the next exhibit.

15 THE COURT: Is there any objection?

16 MR. GALVIN: Your Honor, I don't know  
17 if there's been a complete foundation.

18 THE COURT: That's why I'm asking if you  
19 have an objection.

20 MR. GALVIN: I do, Your Honor.

21 MS. HAM: Just for identification?

22 THE COURT: Okay, mark it for  
23 identification.

24 COURT REPORTER: That's B for  
25 identification.

1 (Exhibit B was marked for  
2 Identification, Photo of D'Andre King  
3 Settles.)

4 THE COURT: Ladies and gentlemen, when  
5 something gets a letter, that means we're just  
6 marking it for identification so we know that's  
7 part of the record. Before it's in evidence, it  
8 gets a number, that's how you know it's an exhibit  
9 in evidence.

10 Q Do you know the day he died?

11 A I don't recall.

12 Q Do you remember that he died? Did D'Andre die?

13 A Yes.

14 Q Do you remember the day he died?

15 A No.

16 Q Were you with him on the day he died?

17 A Yes.

18 Q Were you friends with him then?

19 A Yes.

20 Q Do you remember meeting up with him in Mission  
21 Hill?

22 A No.

23 Q Do you remember being with him when shots  
24 occurred?

25 A No.

1 Q Do you remember testifying in grand jury?

2 A No.

3 Q You don't remember testifying on January 20th,  
4 2016?

5 A No.

6 Q Do you remember speaking with me on January 20th,  
7 2016 answering questions about D'Andre's homicide?

8 A No.

9 MS. HAM: May we approach, Your Honor?

10 THE COURT: You may.

11 SIDEBAR CONFERENCE:

12 MS. HAM: Your Honor, under *Commonwealth*  
13 *v. Day*, I would and ask for permission to ask and  
14 have him answer questions from the grand jury --

15 THE COURT: Okay. Well, I'm not sure  
16 what you're trying to do.

17 THE COURT: The Court finds that  
18 Mr. Garcia is feigning his memory. So his grand  
19 jury testimony can be used substantively to the  
20 extent that there are questions and general  
21 responses, not simply leading questions to which  
22 there is an answer of yes or no.

23 There has to be a substantive response,  
24 in which case that could be read to the jury. But  
25 without you showing it to me, I can't know.

1                   MR. GALVIN: Your Honor, I would think  
2 a little more that he hasn't been shown his grand  
3 jury minutes to see if it might refresh his  
4 recollection.

5                   THE COURT: Well --

6                   MR. GALVIN: Judge, we all know what  
7 he's doing, but nonetheless, for the purpose of  
8 the record, I think at least they need to prepare  
9 the foundation.

10                  THE COURT: I'm not sure that  
11 *Commonwealth v. Day* requires that he be shown his  
12 grand jury deposition, testimony minutes, and  
13 asked if that refreshes his recollection, although  
14 it seems to me a matter of no particular import  
15 whether you ask him that question or not because  
16 it's not going anywhere.

17                  But the issue here is whether he's  
18 feigning a lack of memory, and I've found that he  
19 is feigning a lack of memory. So under  
20 *Commonwealth v. Day*, to the extent that he's  
21 answering in an open-ended way and not simply  
22 answering yes or no to leading questions, that his  
23 grand jury testimony can be read to the jury and  
24 it can be substantive evidence.

25                  MR. PHELAN: I have a concern that if

1                   that's done, that's going to effectively do away  
2                   with my right to a meaningful cross examination.

3                   THE COURT: Well, you can cross-examine  
4                   him as best you can under the circumstances.

5                   I think that *Commonwealth v. Day* makes it clear  
6                   that if the Court determines that he's feigning a  
7                   lack of memory of these events, and we might lay a  
8                   somewhat better foundation with some questions  
9                   concerning precisely what --

10                  THE COURT REPORTER: Judge, if you can  
11                  just turn.

12                  THE COURT: Oh, I'm sorry, Nancy.  
13                  -- precisely what it is you're asking him for,  
14                  and if he continues to testify in the manner that  
15                  he has, then you're permitted to read his grand  
16                  jury testimony, and you can cross-examine because  
17                  he's here in court and capable of being cross-  
18                  examined.

19                  MR. PHELAN: Please note my objection.

20                  THE COURT: Your objection is noted.

21                  MR. GALVIN: Likewise.

22                  MS. HAM: Is Your Honor inclined to  
23                  make an instruction right now or no?

24                  THE COURT: It's not my job to tell the  
25                  jury that he's feigning a lack of memory.

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1 MS. HAM: No.

2 THE COURT: I'm simply telling the jury  
3 that you can read from his grand jury testimony,  
4 at which point the jury doesn't know that it's an  
5 out of court -- I mean, the jury will assume and  
6 understand that it's something they can take into  
7 account without my instruction. I'm not going to  
8 give a limiting instruction as it relates to that.

9 MS. HAM: Thank you.

10 END OF SIDEBAR CONFERENCE.

11 Q Mr. Garcia, do you remember testifying on  
12 January 20th, 2016?

13 A No.

14 Q Do you remember answering questions by myself in  
15 front of the grand jurors and questions about  
16 D'Andre King Settles' death?

17 A No.

18 MS. HAM: Are you cold?

19 THE WITNESS: It's fucking cold in here.

20 THE COURT: Mr. Garcia, I'm going to ask  
21 you to try to use the appropriate language for a  
22 courtroom. I wish I could make it warmer in here,  
23 but I can't.

24 MS. HAM: I'm sorry about the  
25 temperature.

1 Q Do you recall being asked, how do you know him,  
2 D'Andre?

3 A My friend.

4 Q And the next question was, how long have you known  
5 him. Do you remember that?

6 THE COURT: Well, you've asked him those  
7 questions already.

8 THE WITNESS: Yeah, she keeps asking the  
9 same thing.

10 MS. HAM: And he did not respond.

11 THE COURT: I think he did respond, so  
12 let's move on to something else.

13 Q How often you hung out with him, you hung out with  
14 him every day after school; is that right?

15 A Who told you that?

16 Q You did.

17 A I never said that.

18 MS. HAM: May I approach?

19 THE COURT: No. No, you may read  
20 question and answer.

21 MS. HAM: How often did you hang out  
22 with him --

23 THE COURT: So that the jury knows,  
24 you're now reading from the grand jury minutes.

25 In other words, Mr. Garcia was asked questions at

1 the grand jury under oath and he gave some  
2 answers, and so now Ms. Ham is going to read to  
3 you question and answer.

4 MS. HAM: Question, how often did you  
5 hang out with him? Answer, every day after  
6 school.

11 MS. HAM: Thank you, Your Honor,  
12 I apologize. Page 22, line 9.

22 Question, is that how it typically  
23 happens? Answer, um-hmm, yes.

24 Question, where did you see him on the  
25 streets? Answer, around his mom's house.

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1 Question, and his mom lives where?

2 Answer, near 58 Annunciation.

3 Q Now, after you met up with D'Andre, did you see  
4 another person?

5 | A No.

6 MS. HAM: Question, page 23, line 14,  
7 you met up with him. Is he with somebody?

8 Answer --

9 A I don't recall.

10 THE COURT: These aren't questions put  
11 to you now, she's just reading a section of the  
12 transcript of previous testimony.

13 MS. HAM: Answer, at first, it didn't  
14 look like it, but yeah, he was.

15 Question, who else did you meet up --  
16 Answer, someone named Jaquan.

22 Question, and this person by the name of  
23 Jaquan; is that right? Answer, yeah.

24 Question, is there any other nickname  
25 for him? Answer, JO.

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1 Q And then I asked you questions, this is for you,  
2 Mr. Garcia, I asked you questions about how you  
3 know Jaquan. Had you met Jaquan before that day?

4 A I don't recall.

5 MS. HAM: Page 24, lines 9 through 10.

6 Question, you've never seen him before?  
7 Answer, oh, I seen him before, but not recently,  
8 like.

9 Question, and who does he hang out  
10 with? Does he hang out with Andre, D'Andre?  
11 Answer, he -- D'Andre isn't somebody he chills  
12 with on a regular basis.

13 Q So after you meet up with D'Andre and Jaquan, you  
14 guys are hanging out together and walk towards  
15 where?

16 A I don't recall.

17 MS. HAM: Page 24, line 19.

18 Question, where are you walking to?  
19 Answer, 58 Annunciation.

20 Question, why do you walk towards there?  
21 Answer, because it was raining that day.

22 Q Mr. Garcia, do you recall it being rainy that day?

23 A Yeah.

24 Q And because it started to rain, do you recall that  
25 you went into the building at 58 Annunciation?

1 A No.

2 MS. HAM: Page 24, line 23.

3 Question, and what was the purpose of  
4 you going into that particular building? Answer,  
5 to stay dry.

6 Question, was there any plan for you  
7 guys to do something in that building? Answer,  
8 to wait for D'Andre.

9 Q Do you remember, Mr. Garcia, where D'Andre went?

10 A I don't recall.

11 MS. HAM: Question, line 4, where did  
12 D'Andre go? Answer, to his mother's house.

13 Question, for what purpose? Answer,  
14 I think to throw out her trash.

15 Question, throw out her trash? Answer,  
16 yeah.

17 Question, and while D'Andre went to his  
18 house, what did you and Jaquan do? Answer, talk.

19 Question, Jaquan, Jaquan is J-A-Q-U-A-N  
20 for the record, to talk, and where were you  
21 talking? Answer, in the hallway.

22 Question, which hallway? Answer, third  
23 floor.

24 Question, I'm sorry? Answer, third  
25 floor.

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3 Q Mr. Garcia, do you remember whether or not you've  
4 been to the third floor of 58 Annunciation before?

5 A I don't recall.

6 Q Do you know why you go there or you went there?

7 A I don't recall.

8 Q Do you remember what you were doing in the hallway  
9 with Jaquan when you were waiting for D'Andre?

10 A Didn't you just state to stay dry?

11 Q Well, is it to stay dry?

12 A If I said it that day maybe, yeah.

13 Q And what were you doing in the hallway?

## 14 A Staying dry.

15 Q How long did it take until D'Andre came up?

16 A I don't recall.

17 MS. HAM: Page 26, line 24.

1                   dapped, he dapped us up and we just left.

2   Q    Mr. Garcia, what does dap mean, what does that  
3                   mean?

4   A    Handshake.

5   Q    After you dapped, then what did you do next?

6   A    I don't recall.

7   Q    Do you recall going back into the elevator to get  
8                   out of the building?

9   A    I don't recall anything.

10                  MS. HAM: Page 27, line 23.

11                  And at this point, do all three of you  
12                  get back into the elevator? Answer, yeah.

13                  Question, what do you do next? Answer,  
14                  leave the hallway.

15                  Line 7. Get out of the elevator and  
16                  leave that building; is that right? Answer, Um-  
17                  hmm.

18   Q    Mr. Garcia, what was your plan when you left and  
19                  exited 58 Annunciation building?

20   A    I can't tell you.

21   Q    Why not?

22   A    Because I don't recall.

23                  MS. HAM: Page 28, line 10.

24                  Question, what were your plans with  
25                  D'Andre and Jaquan when you left the building?

1                   Answer, we were still making them.

2                   Question, okay, so you left the  
3                   building; is that right? Yeah? Answer, Um-hmm.  
4                   Question, you have to say yes. Answer, yes.

5                   Question, now, shortly before you came  
6                   in here, the detective showed you a glimpse of  
7                   you, Jaquan, and D'Andre leaving 58 Annunciation  
8                   Road; is that right? Answer, um-hmm, yes.

9                   Q    Mr. Garcia, do you remember seeing a still  
10                   photograph of you, D'Andre, and Jaquan leaving?

11                   A    I don't recall.

12                   MS. HAM: Page 28, line 21.

13                   Question, and when they showed you a  
14                   small snippet of the surveillance, you identified  
15                   yourself; is that right? Answer, yes.

16                   Question, and you identified D'Andre.  
17                   Answer, yes.

18                   Question, and you identified Jaquan.  
19                   Answer, yes.

20                   Question, and the order that is coming  
21                   out is Jaquan, D'Andre, and then you; is that  
22                   right? Answer, yes. Wait --

23                   Question, as you -- Answer, yeah, yes,  
24                   as you leave.

25                   Question, as you leave, do you see

1 anyone behind you or leaving after you guys?

2 Q Mr. Garcia, do you remember as you leave the  
3 building whether or not you knew anyone was  
4 behind you?

5 A I don't recall.

6 MS. HAM: Question again, page --

7 MR. GALVIN: Your Honor, may we get the  
8 answer to that last question for completeness?

9 THE COURT: Yes.

10 MS. HAM: Yes, I will continue on.

11 Question, line number nine, as you  
12 leave, do you see anyone behind you or leaving  
13 after you guys? Answer, no, I did not.

14 Question, now, when you leave, where do  
15 you go? Answer, we took a right.

16 Question, and prior to you coming in  
17 here, I showed you a map; is that right? Answer,  
18 yes.

19 Q Do you remember looking at a map, Mr. Garcia?

20 A I don't recall.

21 Q Mr. Garcia, do you at this point recall whether or  
22 not you knew that there was someone following you?

23 A Say it again?

24 Q Was someone following you, you, Jaquan, and  
25 D'Andre?

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1 A I don't recall, I don't think so. I don't recall.

2 Q When you say you don't think so, what do you mean  
3 by that?

4 A Because I can't remember that day.

5 Q Well, you certainly weren't looking back as you  
6 were exiting the building; were you?

7 A I don't remember that day.

8 Q Well, do you remember looking back to see if  
9 someone is behind you?

10 A No, I don't recall.

11 Q You didn't do that; did you?

12 A I don't recall.

13 Q Did anyone show you any videos of people following  
14 you after?

15 A I don't recall.

16 Q Nobody showed you that video; is that right?

17 A I don't think so.

18 Q You only --

19 MR. PHELAN: Objection, Your Honor.

20 Q -- saw a video of you and your friends leaving;  
21 is that right?

22 THE COURT: Objection is sustained.

23 I'll see you at sidebar, please.

24 SIDEBAR CONFERENCE:

25 THE COURT: The fact that something

1                   might have been asked or answered before the grand  
2                   jury doesn't make it admissible evidence if it's  
3                   not admissible under our rules of evidence. But  
4                   if somebody showed him a video, it's in evidence  
5                   in this case. What the evidence is is what he  
6                   saw and remembered from that day. So I have made  
7                   a ruling and I stand by the ruling that he has  
8                   feigned a lack of memory as to what happened on  
9                   that day. But you can't ask him questions about  
10                   whether or not somebody showed him a video at the  
11                   grand jury because that's not dealing with his  
12                   memory of the events of that day. If he testified  
13                   whether he recalled ever seeing anybody behind him  
14                   at the grand jury, then he can answer that, but  
15                   this, did anybody ever show you a video, is not  
16                   admissible testimony.

17                   MS. HAM: Okay, thank you.

18                   END OF SIDEBAR CONFERENCE.

19                   Q         After leaving the building, you make a right. Do  
20                   you remember what happens after that, Mr. Garcia?

21                   A         I don't recall.

22                   MS. HAM: Page 29, line 21.

23                   Question, now, when you get out and  
24                   basically make a right. Answer, yes.

25                   Question, and where do you go? Answer,

1 I went straight down.

2 Question, so, initially, you had given  
3 us an X here, I'm going to put a 1 here. Answer,  
4 yes.

5 Q Mr. Garcia, do you remember the map we went over?

6 A I don't recall.

7 MS. HAM: Question, line 3, right here,  
8 that's where you were; is that right? Answer,  
9 (no verbal response).

10 Question, were you with D'Andre and  
11 Jaquan? Answer, when we ran?

12 Question, no, when you're just walking.  
13 Answer, yeah, we was next to each other.

14 Question, were you guys like all three  
15 next to each other walking? Answer, yes.

16 Question, do you remember who was in the  
17 middle? Answer, Um-hmm.

18 Question, and did you remember who was  
19 with the order of you guys?

20 Q Mr. Garcia, do you remember the order of how you  
21 guys were standing next to each other as you were  
22 leaving the building?

23 A I don't recall.

24 MS. HAM: Page 30, line 17.

25 Answer, I think, I think it was D'Andre

1                   on, next to the fence, Jaquan in the middle, and  
2                   me on the left.

3                   Question, so is it fair -- give me the  
4                   order again? Answer, D'Andre next to the fence or  
5                   next to the house closer, Jaquan in the middle,  
6                   and me next to the cars.

7                   Question, is it D'Andre, Jaquan, and  
8                   then you, Juan Carlos? Answer, yeah.

9                   Question, is that fair? Answer, yeah.

10                  Q    When you guys are walking on the sidewalk,  
11                   Mr. Garcia, do you remember what happens next?

12                  A    I don't recall.

13                   MS. HAM: Page 31, line 7.

14                   Are you guys all lined up together or  
15                   are you kind of staggered? Answer, it's lined up  
16                   together, but like, it's like, it's like, like  
17                   spaces, me, Jaquan, and D'Andre, so it's like,  
18                   like that, but still lined up.

19                   Question, okay, all right. So when you,  
20                   you're walking, what do you hear next?

21                  Q    Mr. Garcia, do you remember hearing something?

22                  A    I don't recall.

23                   MS. HAM: Answer, line 14, I hear a  
24                   gunshot.

25                   Question, so you had indicated

1 previously and put an X. I'm going to put one  
2 here. That's exactly where you were, about where  
3 you were when you heard the gunshots; is that  
4 right? Answer, yes.

5 Question, is that a fair statement?  
6 Answer, yes.

7 Question, now, before you hear the  
8 gunshots, do you turn around?

9 MR. PHELAN: Objection.

10 THE COURT: Overruled.

11 MS. HAM: Answer, for a quick second,  
12 yeah.

13 Question, why do you turn around?  
14 Answer, to try to see what's happening.

15 Question, this is before, during, or  
16 after the shots? Answer, during.

17 Question, okay, so you hear the shots.  
18 Answer, yeah.

19 Question, and how many shots do you  
20 think you hear?

21 Q Mr. Garcia, do you remember how many shots you  
22 think you heard?

23 A I don't recall.

24 MS. HAM: Answer, I heard three.

25 Question, and where did they come from

1                   in front of you? Answer, behind.

2                   Question, left of you, right of you,  
3                   behind? Do you know how close it is behind you?  
4                   Answer, no.

5                   Question, did it seem loud or soft?  
6                   Answer, sounded like blanks.

7                   Question, sounded like blanks? Answer,  
8                   yeah.

9                   Question, but did it sound loud to you?  
10                  Answer, not that loud.

11                  Question, okay, all right. But you knew  
12                  it was coming behind you? Answer, yeah, yes.

13                  Question, during the shots, do you turn  
14                  around? Answer, for a quick second, yes.

15                  Question, for a quick second, why do you  
16                  turn around? Answer, to try to see.

17                  Q      Mr. Garcia, when you turn around, what do you see?  
18                  A      I don't recall.

19                  MS. HAM: Question, what's going on?  
20                  So you do a quick turnaround; is that right?  
21                  Answer, yes.

22                  Question, and this is in the midst of  
23                  the shots? Answer, um-hmm.

24                  Question, yes? Answer, of one of them,  
25                  yeah.

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3 Line 13, when you turn around, what do  
4 you see? Answer, I see one person.

10 THE COURT: Forget about the part with  
11 the X's and the map.

12 MS. HAM: Yes, Your Honor, I can move  
13 on.

14 Line 20. This person that you saw at a  
15 glimpse, what was this person doing?

16 Q Mr. Garcia, do you remember what you saw this  
17 person doing when you turned around for a very  
18 short time?

19 THE WITNESS: Judge, can I say something  
20 real quick?

21 THE COURT: You can answer the question  
22 if you remember if you saw it.

23 A I don't recall.

24 MS. HAM: I'll read the question again.

25 Question, this person that you saw at a

1 glimpse, what was his person doing? Answer,  
2 shooting at us.

3 Question, did you see the actual gun in  
4 his hand? Answer, no.

5 Question, did you see anything that made  
6 you aware that this was a firearm? Answer, no.

7 Question, did you tell us previously  
8 that you had seen some flashes?

9 Q Mr. Garcia, do you remember seeing some flashes?

10 A Yeah.

11 Q Can you tell us about that?

12 A It's like a firework and I just blanked out.

13 Q When you blanked out, when you saw this, what did  
14 you do?

15 A What do you mean?

16 Q What direction did you go?

17 A I don't recall.

18 Q Did you go straight, to the right, to the left,  
19 to the back?

20 A I don't recall.

21 THE COURT: Mr. Garcia, do you need a  
22 glass of water?

23 THE WITNESS: I need a coat.

24 THE COURT: You need a coat. I'm sorry  
25 that I don't have a coat for you, but I can get

1                   you a glass of water if you would like one. No?

2                   THE WITNESS: Thank you.

3           Q    Mr. Garcia, when you saw the flashes, can you tell  
4                   us how far the distance or how far that person was  
5                   behind you?

6           A    I don't recall.

7           Q    Do you remember running behind Johnson Center?

8           A    I don't recall.

9           Q    As you run, do you remember seeing a woman who was  
10                   taking out a stroller?

11           A    I don't recall.

12                   MS. HAM: Question, page 36, line 18.

13                   When you run, do you see a woman with a stroller?  
14                   Answer, yes.

15                   Question, and how do you see this  
16                   person? Answer, what do you mean?

17                   Question, where do you see this person?  
18                   Answer, next to a car.

19                   Question, okay, where is her car?

20                   Answer, I don't know if it's her car, but I see  
21                   her next to the car.

22           Q    Do you remember where D'Andre went after the  
23                   gunshots?

24           A    Are you talking to me?

25           Q    Yes, Mr. Garcia.

1 A I don't recall.

2 MS. HAM: Page 37, line 15.

3 Question, and where do you see D'Andre  
4 go? Answer, he, him and Jaquan hit the cuff to  
5 where his mom lives.

6 Question, when you say hit the cuff, you  
7 mean by this way?

8 Line 24. Question, what about Jaquan?  
9 Answer, they ran in the same direction.

10 Question, ran in the same direction, who  
11 was going first, do you know? Answer, uh-huh.

12 Question, they ran in the same --  
13 Answer, no.

14 Question, -- direction, and were they  
15 running pretty fast, just as you were? Answer,  
16 yes.

17 Q Mr. Garcia, do you hear D'Andre say anything?

18 A I don't recall.

19 MS. HAM: Question, do you hear D'Andre  
20 say anything? Answer, fuck.

21 Question, fuck? Answer, (no verbal  
22 response).

23 Question, do you hear Jaquan say  
24 anything?

25 Q Mr. Garcia, do you hear Jaquan say anything?

1 A I don't recall.

2 MS. HAM: Answer, oh, shit.

3 Question, oh, shit? And do you hear  
4 D'Andre, whether or not he's gotten shot? Answer,  
5 no, I do not.

6 Question, as you're running, do you hear  
7 anything else? Answer, no, I do not.

8 Question, do you hear a second set of  
9 shots? Answer, no, I do not.

10 Question, do you know whether or not  
11 D'Andre or Jaquan had a firearm?

12 Q Now, Mr. Garcia, do you recall whether or not you  
13 knew Jaquan or D'Andre had a firearm?

14 A I don't recall.

15 MS. HAM: Answer, no, I do not.

16 Question, do you know whether or not  
17 Jaquan shot back? Answer, no, I do not.

18 Q Do you remember going home and finally getting  
19 home?

20 A I don't recall.

21 Q Did you get hit anywhere?

22 A No.

23 Q Do you remember talking to Jaquan when you went  
24 back home?

25 A I don't recall.

1                   MS. HAM: Page 40, line 8.  
2                   Did Jaquan respond back to you? Answer,  
3                   yes.

4                   THE COURT: I'll see counsel at sidebar.

5                   SIDEBAR CONFERENCE:

6                   THE COURT: Okay, just the fact that he  
7                   said it in this grand jury doesn't make it not  
8                   hearsay. I don't have a copy of his transcript in  
9                   front of me, but I don't want to get into hearsay  
10                  just because that was presented to the grand jury.

11                  MS. HAM: I'll just leave it at that and  
12                  not the actual conversation.

13                  THE COURT: Okay.

14                  MS. HAM: Thank you.

15                  MR. PHELAN: I would just like to renew  
16                  an objection to this, the transcripts being read.  
17                  I don't quite frankly see any difference --

18                  THE CLERK: You've got to get closer to  
19                  the microphone, Counsel.

20                  MR. GALVIN: I don't see any difference  
21                  between this and Jaquan just refusing to testify.  
22                  This man is doing the same thing, and now we're  
23                  reading the transcript to get it into evidence.

24                  THE COURT: Well, the Commonwealth, the  
25                  Supreme Judicial Court, in its wisdom, has told us

1                   that when the Court determines that a witness has  
2                   taken the stand and sworn to tell the truth and  
3                   then feigns a lack of memory, if he gave testimony  
4                   concerning this before the grand jury, then it can  
5                   come in for its substantive purpose. That's what  
6                   the Court has taught us and that's what I'm trying  
7                   to follow in this instance. I would caution that  
8                   material -- a lot of things are presented to the  
9                   grand jury that cannot come in during the course  
10                   of the trial, and we need to take care as we go  
11                   through this grand jury testimony to make sure  
12                   that we aren't asking questions that can slide in  
13                   that would have been inadmissible were Mr. Garcia  
14                   not feigning a lack of memory concerning these  
15                   events.

16                   MR. GALVIN: Your Honor, I know there's  
17                   not much the Court perhaps can do about it, but  
18                   I do know that on occasion, this gentleman's  
19                   memory seems to suddenly snap back in certain  
20                   instances that are deemed, I guess, helpful.

21                   THE COURT: Well, no, I think quite the  
22                   reverse. I think from time to time, I think, and  
23                   the record can reflect that Mr. Garcia is  
24                   extremely emotional when he's giving his answers  
25                   to this testimony, and from time to time, it's my

1 view that he forgets that he's not remembering and  
2 says something in reaction. But as it relates to  
3 the substantive events of the day, I think that,  
4 as I have found, he is feigning a lack of memory.

5 MR. GALVIN: Thank you, Your Honor.

6 END OF SIDEBAR CONFERENCE.

7 Q Mr. Garcia, when you're hanging out with D'Andre  
8 and Jaquan, do you remember D'Andre or Jaquan  
9 making any phone calls?

10 A I don't recall.

11 Q Do you remember D'Andre making any phone calls?

12 A I don't recall.

13 Q Do you remember him checking his phone?

14 A I don't recall.

15 MS. HAM: Page 41, line 18.

16 He had checked his phone and then put it  
17 back, his phone into his pocket; is that right?  
18 Answer, entering and leaving, he would just, he  
19 would just take it out and put it back.

20 Question, okay, he didn't make any phone  
21 calls? Answer, no.

22 Q Mr. Garcia, when you saw the flashes and you  
23 looked back, do you remember or can you describe  
24 the individual for us?

25 A I don't recall.

1 MS. HAM: Page 41, line 24.

2 Now, this individual that you saw with  
3 flashes as you looked back, can you describe that  
4 person for us? First, is this a male or female?  
5 Answer, a male with a little darker skin than me.

11 Question, is that right? Answer, yes.

21 Q Do you remember this person's clothing, Mr.  
22 Garcia?

23 A I don't recall.

24 MS. HAM: Line 21.

25 Question, okay, what about his clothing?

1                   Answer, a hoodie with a rain jacket and some  
2                   khaki, khakis.

3                   Question, so a hoodie, and was he  
4                   actually wearing the hood up? Answer, he was.

5                   Question, to his head? Answer, (no  
6                   verbal response).

7                   Question, what color was it, if you can  
8                   remember? Answer, gray or black.

9                   Question, and -- Answer, I can't  
10                  remember.

11                  Question, and so at this point, you're  
12                  not able to see his hair; are you? Answer,  
13                  Uh-huh, no, I'm --

14                  Question, yes or no? Answer, no, I'm  
15                  not.

16                  Question, line 21, can you describe the  
17                  jacket for us? Answer, it was a thin black  
18                  jacket.

19                  Question, page 44, line 12, could you  
20                  tell whether or not there were any other colors in  
21                  that jacket? Answer, no.

22                  Question, and you indicated his pants,  
23                  what color were his pants? Answer, khaki.

24                  Question, khakis? Answer, yeah.

25                  Q            Mr. Garcia, do you remember the details of the

1                   jacket?

2   A   I don't recall.

3   Q   Do you remember how far it went down?

4   A   I don't recall.

5                   MS. HAM: Line 24, page 44.

6                   Question, was it like down to the waist  
7                   or a little bit below? Answer, it went past down  
8                   his belt.

9                   Question, past down his belt? Answer,  
10                  yeah.

11                  Question, okay, and you had described  
12                  him previously as someone who was dressed well?  
13                  Answer, yes.

14                  Question, can you describe that for me?  
15                  Explain a little bit more? Answer, when I got the  
16                  glance of him, he looked like everything on him  
17                  was, like, overpriced, like Polo, and it looked  
18                  like he had money to spend, like that.

19                  Question, he looked like he had taken  
20                  some time to dress himself; is that a fair  
21                  statement? Answer, yes.

22   Q   Mr. Garcia, were you able to see this person's  
23                  face?

24   A   I don't recall.

25                  MS. HAM: Question, line 20, were you

1                   able to see his face? Answer, no.

2                   Question, did you see anyone around him  
3                   or with him? Answer, no.

4                   Question, did you see anyone else around  
5                   that neighborhood? Around that area, sorry.

6                   Answer, besides the mom with the stroller, no.

7                   MS. HAM: Could I have a moment, Your  
8                   Honor.

9                   THE COURT: You may.

10                  Q        Mr. Garcia, when you're leaving the building of  
11                    58 Annunciation Road, do you recall -- sorry.  
12                   When you were leaving that building, did you know  
13                   if anyone had followed you?

14                  A        I don't recall.

15                  Q        Do you know Enrique Auch?

16                  A        Who's that?

17                  Q        Do you know Tsunami Ortiz?

18                  A        Who's that?

19                  Q        Do you know the two men that are seated at the  
20                   table?

21                  A        I don't know them.

22                  MS. HAM: Your Honor, I have no other  
23                   questions.

24                  THE COURT: All right, cross  
25                   examination.

1 Let me point out to you, ladies and  
2 gentlemen, Ms. Ham read passages from a transcript  
3 made of Mr. Garcia's testimony before the grand  
4 jury. We can take it that those were the  
5 questions that were asked and those were the  
6 answers that were given before the grand jury.  
7 You have the same powers with respect to whether  
8 or not you think that those were truthful answers  
9 or whether or not Mr. Garcia was in a position to  
10 see what he thought he saw and so on. You have  
11 the same powers to consider whether that's  
12 truthful because it was -- whether or not it was  
13 credible and believable testimony, whether or not  
14 you think that at that time, Mr. Garcia was  
15 telling the truth, or whether or not at that time,  
16 he remembered or whether he was able to see that  
17 which he thought he saw, and so on. So the fact  
18 that that's what he said before the grand jury  
19 doesn't make it any more, nor less, likely to be  
20 true than if he happened to remember that today  
21 and was able to give that testimony today.

22                           All right, gentlemen, which of you is  
23                           going --

24 MR. GALVIN: May we be briefly seen at  
25 sidebar?

1 THE COURT: Yes.

## SIDE BAR CONFERENCE:

3 MR. GALVIN: I have two requests. Can  
4 you further instruct them that defense attorneys  
5 are not present at the grand jury?

6 THE COURT: Yes, absolutely.

7 MR. GALVIN: And that there's no  
8 opportunity for anyone to test their recollection.

9 THE COURT: Right.

10 MR. GALVIN: The second is before we  
11 begin cross, can we give this gentleman five  
12 minutes to sort of get warm?

13 MS. HAM: I'm trying to get him a  
14 jacket.

15 THE COURT: Okay.

16 MR. GALVIN: Thank you, Your Honor.

17 END OF SIDEBAR CONFERENCE.

18 THE COURT: Two things. One, I should  
19 have mentioned to you, before the grand jury,  
20 there's no judge present when a member of the  
21 District Attorney's office asks questions of any  
22 witness before the grand jury, and obviously,  
23 there's no opportunity for counsel for any, nobody  
24 is charged yet at that point, there's no attorneys  
25 for the lawyers able to cross-examine and to ask

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1           questions that might help elicit additional  
2           information.

3           But those are questions that were asked  
4           of Mr. Garcia before the grand jury and those were  
5           the answers that he gave, and we tried to make it  
6           clear what was grand jury testimony and what  
7           wasn't by having Ms. Ham say question and answer,  
8           so that indicates to you that she's reading from  
9           that transcript.

10           Let's take a five minute break.

11           (Court in recess at 3:15 p.m.)

12           (Jury entering at 3:30 p.m.)

13           THE COURT: Mr. Phelan, are you going to  
14           cross-examine first?

15           MR. PHELAN: Yes, Your Honor.

16           CROSS EXAMINATION

17           (BY MR. PHELAN)

18           Q       Good afternoon, Mr. Garcia. Can you hear me okay?

19           A       Yeah.

20           Q       Mr. Garcia, were you friends with Jaquan McIver-  
21           Bennett?

22           A       Huh?

23           Q       Were you friends with Jaquan McIver-Bennett?

24           A       No.

25           Q       I'm sorry?

1 A No.

2 Q No. Did you know who he was?

3 A No.

4 Q Do you know an individual by the name of JQ?

5 A Yeah.

6 Q Is JQ a friend of yours?

7 A No.

8 Q Is JQ the same person as Jaquan McIver-Bennett?

9 A Yeah.

10 Q Have you ever been a friend of JQ?

11 A No.

12 Q Did you ever hang out with Jaquan?

13 A No.

14 Q Never?

15 A No.

16 Q Did you get together with Jaquan back on  
17 December 18th of 2015?

18 A I don't recall.

19 Q Did you go into the building at 58 Annunciation  
20 Road on November the 15th -- let me try that  
21 again -- on December the 18th, 2015,

22 A I don't recall.

23 Q Do you recall -- what do you recall ever doing  
24 with Jaquan?

25 A (No verbal response).

1 Q You've known him for a period of time.  
2 A Says who?  
3 Q I'm asking, you've known him for a period of time.  
4 You weren't a friend of his, but you knew him.  
5 A Yeah.  
6 Q But nonetheless, even though you weren't a friend  
7 of his, you still hung out with him on occasion.  
8 A Says who?  
9 Q Says videotape evidence that we have of you two  
10 together.  
11 A So the video, a videotape, a videotape of me and  
12 a guy, that tells you that we hung out together  
13 multiple times?  
14 Q Well, it tells me that you hung out together at  
15 least once.  
16 A He was with D'Andre, if I recall.  
17 Q The three of you hung out together on one  
18 particular day.  
19 A Yes.  
20 Q And when you hung out together, what was the  
21 purpose of you hanging out together? Was it to  
22 smoke marijuana?  
23 A That moment only lasted a number of minutes, so  
24 there was no purpose, yeah.  
25 Q That moment, were you smoking marijuana?

1 A I don't recall.

2 Q Did you ever smoke marijuana with D'Andre?

3 A No.

4 Q Did you ever smoke marijuana with JQ or Jaquan?

5 A No.

6 Q You do recall hanging out with Jaquan on at least  
7 one occasion?

8 A I don't recall.

9 Q Well, you said earlier you hung out together for a  
10 short period of time, it was a very short moment.

11 A Yes.

12 Q How many times did you have brief encounters with  
13 JQ?

14 A I don't recall.

15 Q Do you recall if you met with him more than once?

16 A No.

17 Q On December the 18th of 2015, did you have in your  
18 possession a firearm?

19 A No.

20 Q D'Andre was with you on that particular day. Did  
21 you ever see him with a firearm?

22 A No.

23 Q Did you ever see D'Andre with a firearm the day  
24 before the shooting?

25 A No.

1 Q Did you ever see JQ with a firearm?  
2 A No.  
3 Q When you went up into 58 Annunciation Road to the  
4 third floor, did you go into any of the apartments  
5 up there?  
6 A No.  
7 Q Did you go into the hallway?  
8 A Yeah.  
9 Q What did you do when you went to the hallway?  
10 A I don't recall.  
11 Q Were you with D'Andre and JQ or D'Andre and  
12 yourself?  
13 A I don't recall.  
14 Q Would you have any purpose to go into  
15 58 Annunciation Road by yourself?  
16 A It was raining that day.  
17 Q You said to the grand jury you went in there to  
18 stay dry. Do you remember that being read earlier  
19 today?  
20 A It was read, but I didn't say it, but yeah.  
21 Q When you went in there to stay dry, were you going  
22 into any particular apartment to try to meet  
23 someone, did you stay in the stairwell, or did you  
24 stay in the hall?  
25 A I don't recall.

1 Q When was the first time that you met Jaquan  
2 McIver-Bennett?

3 A I don't recall.

4 Q When was the last time you spoke to JQ?

5 A I don't recall.

6 Q Have you spoken to him today?

7 A No.

8 Q Have you spoken to him in the past week?

9 A No.

10 Q D'Andre was a friend of yours.

11 A Yes.

12 Q You would hang out with him on a regular basis  
13 after school.

14 A I don't recall.

15 Q You had known D'Andre for more than five years.

16 A Yes.

17 Q When you met up with D'Andre on December the 18th  
18 of 2015, it was not a planned meeting.

19 A I don't recall.

20 Q Would it be common for you to bump into D'Andre  
21 just walking around?

22 A I don't recall.

23 Q What was your street address on December the 18<sup>th</sup>  
24 of 2015?

25 A I don't recall.

1 Q You don't recall where you lived? You don't  
2 remember your address?

3 A I don't remember the number.

4 Q Can you tell me the street?

5 A McGreevey.

6 Q And how far away is that from Annunciation Road?

7 A Do you want me to give you --

8 Q If you were walking, how many minutes would it  
9 take you to get there?

10 A I don't know, can't tell you.

11 Q You had been to that apartment complex before.

12 A I don't recall.

13 Q Had you ever walked there before?

14 A I don't recall.

15 Q On December the 18th when you were there, do you  
16 recall whether you walked there or whether you  
17 drove there?

18 A I walked.

19 Q Who did you walk there with?

20 A Myself.

21 Q Do you recall meeting up with Jaquan on December  
22 the 18th?

23 A I don't recall.

24 Q And do you remember once again meeting up with  
25 D'Andre?

1 A I don't recall.

2 Q Reading from your grand jury minutes, page 23,  
3 line 14. You met up with him, is he with  
4 somebody? And they're talking about D'Andre. At  
5 first, it didn't look like it, but yeah, it was.

6 Who else did you meet up? Someone named  
7 Jaquan.

8 And when I say meet up, this is not a  
9 scheduled meet-up, right?

10 No, it is not.

11 You just happen to run into people? Yeah.

12 Do you remember testifying to that?

13 A I don't recall.

14 Q So you don't recall whether there was any  
15 scheduled meeting between you, D'Andre, and  
16 Jaquan. That's your testimony today.

17 A (No verbal response).

18 Q When you went into 58 Annunciation Road initially,  
19 who did you go in with?

20 A I don't recall.

21 Q Do you recall ever going into 58 Annunciation Road  
22 with D'Andre?

23 A No, I do not.

24 Q Does D'Andre have a nickname?

25 A Drey.

1 Q And does he have any others?

2 A (Shaking head).

3 Q Not that you know of?

4 A No.

5 Q Did you have marijuana on your possession that

6 day?

7 A I don't recall.

8 Q Do you recall hearing gunshots?

9 A I don't recall.

10 Q Did you see anyone with a firearm in their hand at

11 all on December the 18th of 2015?

12 A No.

13 Q Did you have a firearm in your hand on

14 December the 18th, 2015?

15 A No.

16 Q You can say no or do you not recall?

17 A No, I didn't have a firearm.

18 Q When you were in the grand jury, you identified

19 one individual that you noticed behind you,

20 I guess. Do you recall that?

21 A Say it again?

22 Q Do you recall anyone being behind you after you

23 left 58 Annunciation Road?

24 A No, I do not recall.

25 Q Do you recall being asked if that particular

1           individual had particular footwear on?

2   A    No, I do not recall.

3   Q    Page 44, line 20. And what about his shoes, do  
4           you remember his shoes? No, I do not.

5           Do you remember stating that at the grand  
6           jury?

7   A    I don't recall.

8   Q    At the grand jury, you were unable to recognize or  
9           give a description of the face of the individuals,  
10           individual.

11   A    What?

12   Q    Were you able to recognize the face of the  
13           individual?

14   A    I don't recall.

15   Q    Since December the 18th of 2015, have you seen  
16           Jaquan?

17   A    No.

18   Q    You haven't even laid eyes on him?

19   A    No.

20   Q    Have you spoken to him?

21   A    No.

22   Q    Have you called him on the telephone?

23   A    No.

24   Q    Have you sent him a text message?

25   A    No.

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1 Q Have you contacted him through Facebook?  
2 A No.  
3 Q Do you remember D'Andre being shot?  
4 A What do you mean?  
5 Q Do you remember D'Andre being shot?  
6 A As in shot in front of me or as in shot when he  
7 died?  
8 Q I'm sorry, I didn't hear your answer.  
9 A As in shot in front of me, if he was laid in front  
10 of me, or as in shot, like do I remember the day  
11 he died?  
12 Q Were you with him when he was shot?  
13 A Yes, I was.  
14 Q Were you beside him when he was shot?  
15 A No, I wasn't.  
16 Q Where were you when he was shot?  
17 A Running home.  
18 Q Do you remember the day that he was shot?  
19 A No.  
20 Q Well, you remember that he was shot and you ran  
21 home.  
22 A I remember hearing gunshots and running home.  
23 Q How many gunshots did you hear?  
24 A I don't recall.  
25 Q Did you hear more than one?

1 A I don't recall.

2 Q You did hear gunshots and you do remember when

3 D'Andre was shot.

4 A Say it again?

5 Q You heard gunshots.

6 A Yes.

7 Q D'Andre was shot.

8 A I don't know. Well, I know now, but I didn't know

9 at the time.

10 Q After you heard the gunshots, you ran home.

11 A Yes.

12 Q You did not have a firearm on you.

13 A No, I did not.

14 Q You did not use a firearm that day.

15 A No, I did not.

16 Q Does that refresh your memory on that particular

17 day as to what you were doing earlier in the day?

18 A No, it does not.

19 Q Do you remember what you were doing immediately

20 before D'Andre was shot?

21 A No, I do not.

22 Q I'm sorry?

23 A No, I do not.

24 Q When you've hung out with D'Andre in the past,

25 can you tell me what you would do for social

1           activities?

2   A    Play football.

3   Q    Is that when you were in high school?

4   A    Middle school.

5   Q    Middle school? And is that how you came to know  
6           him?

7   A    Yes.

8   Q    And it's your memory that you have no memory of  
9           ever meeting Jaquan at any other time except for  
10           one meeting with him?

11   A    I don't recall.

12   Q    You do recall meeting with him once. On the time  
13           that you met with him, was that the day that  
14           D'Andre was shot?

15   A    I don't recall.

16   Q    After D'Andre was shot, you did not contact the  
17           police.

18   A    No, I did not.

19   Q    You did not contact the police until two weeks  
20           later.

21   A    I don't recall.

22   Q    You don't recall?

23   A    Uh-huh.

24   Q    Did you contact the police or did they contact you  
25           about this incident?

1 A I don't recall.

2 Q But after the shooting when you ran, you ran home.

3 A Yeah.

4 Q Did not go to the police station and did not call  
5 911.

6 A No.

7 MR. PHELAN: Thank you, Mr. Garcia.

8 MR. GALVIN: If I may, Your Honor, I'll  
9 be very brief. I'll try to be brief.

10 CROSS EXAMINATION

11 (BY MR. GALVIN)

12 Q Mr. Garcia, good afternoon. My name is John  
13 Galvin, I represent Mr. Ortiz. I have a few  
14 questions for you. Do you understand me?

15 A Yes, I do.

16 Q Are you comfortable now?

17 A A little.

18 Q Okay, you're not as cold as you were earlier?

19 A Still cold.

20 Q If you have any trouble understanding any question  
21 I ask, just say so and I'll ask another question,  
22 okay?

23 A All right.

24 Q I'm going to briefly ask you one or two questions  
25 that may have been asked by Attorney Phelan. You

1                   indicated you didn't have a gun in your hand on  
2                   December 18th; is that correct?

3           A    Yes.

4           Q    Is there any reason you would have had a gun in  
5                   your side pocket, like this?

6           A    Say it again?

7           Q    Is there any reason you would have had a gun  
8                   inside your pocket, your right pocket?

9           A    No.

10          Q    You don't remember running, holding your right  
11                   side?

12          A    No.

13          Q    And you do remember running when you heard that  
14                   shot straight through that parking lot; didn't  
15                   you?

16          A    Yes.

17          Q    And you do remember seeing a woman with a child  
18                   in a stroller; don't you?

19          A    I don't recall.

20          Q    Now, you said when you heard the shot, that's when  
21                   you started to run, correct?

22          A    Yes.

23          Q    And at that point in time, D'Andre King Settles is  
24                   right there with you, correct?

25          A    I don't recall.

1 Q He was beside you; wasn't he?

2 A I don't recall.

3 Q Do you remember the two of you running at the same

4 time?

5 A I ran home.

6 Q Was he ahead of you?

7 A I don't recall.

8 Q You don't recall that. Now, a few moments ago,

9 you indicated when you got home, you did not call

10 the police, you did not call 911.

11 A No.

12 Q And you have a phone, correct?

13 A No.

14 Q You didn't have a phone at that time?

15 A No.

16 Q Did you say to a family member, I just got shot

17 at, call the police?

18 A I don't recall.

19 Q You don't recall saying anything to your family

20 about it.

21 A (Shaking head).

22 Q Do you recall in your testimony in the grand jury

23 saying that you contacted JQ and he told you that

24 D'Andre got shot?

25 A I don't recall.

1 Q You don't recall that now, either. Now, is it  
2 fair to say the first time you ever talked to  
3 the police was when they came to your home on  
4 January 4th of 2016; do you remember that? Your  
5 mother was there with you?

6 A I don't recall.

7 Q You don't recall two detectives coming to your  
8 home to talk about this, January 4th of 2016, and  
9 that your mother was present with you when they  
10 came to your home.

11 A Yeah.

12 Q You do remember that. And that's the first time  
13 that you ever spoke to the police about this.  
14 True?

15 A Yeah.

16 Q And in fact, they told you that they knew you were  
17 there because they had seen you in the video. Do  
18 you remember them telling you that?

19 A I don't recall.

20 Q You don't recall that at all?

21 MR. GALVIN: Your Honor, may I approach  
22 the witness?

23 THE COURT: I think we're going to have  
24 to break for the day, Mr. Galvin.

25 MR. GALVIN: Thank you, Your Honor.

1 THE COURT: Ladies and gentlemen, please  
2 keep my instructions in mind. Don't chat with  
3 anyone concerning this case, don't post anything  
4 on the Internet concerning it, and please don't  
5 look for additional information. We'll try to  
6 get going at 9 o'clock tomorrow morning.

7 (Jury excused at 4:00 p.m.)

12 You'll be back here by 9 o'clock? Do  
13 you want me to send someone to pick you up so it  
14 will be easier for you to get here?

15 | THE WITNESS: No.

16 THE COURT: You'll be here at a quarter  
17 of 9 tomorrow and check in with Ms. Ham?

18 | THE WITNESS: Yeah.

19 THE COURT: Okay? Very well. If you're  
20 not here, we will send someone to go get you.  
21 You understand that, sir?

22 | THE WITNESS: Y

23 THE COURT: Okay, you're excused.

24 Let me see counsel at sidebar. Everyone  
25 else can be seated.

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PAGES: 158  
EXHIBITS: 43-66

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT

\*  
COMMONWEALTH OF MASSACHUSETTS \*  
\* 2016-00216  
-v- \* 2016-00218  
\*  
TSUNAMI ORTIZ and ENRIQUE AUCH \*  
\* \*

JURY TRIAL  
(DAY 4)

BEFORE: HONORABLE MITCHELL H. KAPLAN  
Suffolk Superior Courthouse  
Courtroom 907  
Boston, Massachusetts  
Thursday, September 28, 2017

Catherine Ham, Assistant District Attorney  
For the Commonwealth of Massachusetts

John M. Galvin, Esquire  
On behalf of Tsunami Ortiz

Michael T. Phelan, Esquire  
On behalf of Enrique Auch

NANCY MCCANN, CVR-C.M.  
OFFICIAL COURT REPORTER  
SUFFOLK SUPERIOR COURT

1 a sergeant, is it standard operating procedure  
2 that an officer or officers would be assigned to  
3 look and report, make a report about any  
4 projectile strikes?

5 A Yes, sir.

6 MR. PHELAN: Thank you. Nothing  
7 further, Your Honor.

10 MS. HAM: Nothing further, Your Honor.

11 THE COURT: Thank you very much for  
12 coming in, Sergeant.

13 MS. HAM: I believe Mr. Garcia is  
14 outside.

18 THE CLERK: Mr. Garcia, I remind you,  
19 sir, you're still under oath. You can resume the  
20 stand.

21 MR. GALVIN: Good morning, Your Honor,  
22 may I proceed?

23 THE COURT: Please.

24 JUAN CARLOS GARCIA, Resumed  
25 CONTINUED CROSS EXAMINATION

1 (BY MR. GALVIN)

2 Q Good morning, Mr. Garcia. How are you today?

3 A I'm good.

4 Q You're comfortable up there today, you're not cold  
5 or anything?

6 A No.

7 Q Thank you. Mr. Garcia, when we broke for the day  
8 yesterday, I had asked you, I believe, if you went  
9 home and called 911 and asked for help. Did you?

10 A No.

11 Q Did you reach out or contact any family member or  
12 neighbor and say please call 911, there's been a  
13 shooting?

14 A No.

15 Q Did you call, did you message JQ and ask him what  
16 happened?

17 A No.

18 Q Are you sure about that?

19 A Yeah.

20 Q Do you recall testifying in the grand jury?

21 A When?

22 Q Do you recall coming up to this building and  
23 meeting Ms. Ham and some police officers and  
24 giving testimony downstairs in a room with just  
25 the police officers and people sitting like you

1           see here?

2   A    I don't recall.

3   Q    You have no recollection of that at all?

4   A    No.

5           MR. GALVIN: May I, Your Honor?

6           THE COURT: You may.

7   Q    Grand jury minutes dated January 20th, 2016,  
8           appearance is Juan Garcia. At page 39, line 19,  
9           carrying through into page 40, line 18.

10          If I may back it up, we'll start at line 6.

11          Did you hear that? What did you do? I text is  
12           the answer.

13          Question, what do you mean by that? Answer,  
14           him.

15          Question, you texted him. You didn't have a  
16           cell phone at that time; did you? Answer, no.

17          Question, you don't have a cell phone.  
18          Answer, no.

19          Question, when you text him, how did you text  
20           him? Answer, through Facebook.

21          Question, through Facebook Messenger?  
22          Answer, yes.

23          And what did you write to D'Andre? Answer,  
24           yo.

25          Question, Yo? And that's just to check up on

1 him basically. Answer, yeah.

10 Question, and did Jaquan respond back to you?  
11 Answer, yes.

14 And what did he say? Answer, he, like, yo,  
15 you're good? I said yeah, I was like, where's  
16 D'Andre? He was like, he's dead, and I was like,  
17 nah, I don't believe that, I saw him running. He  
18 was like, he was like, nah, bro, he's dead. And  
19 then I was like, I got mad and I just hung up.

You don't remember testifying to that?

21 Mr. Garcia?

22 A (No verbal response).

23 Q Let me ask you another question. Jaquan, JQ,  
24 clearly was your friend, right.

25 A No.

1 Q You knew how to reach him, right?

2 A I wouldn't call someone a friend just because you  
3 know how to reach them.

4 Q You would have called other friends, you wouldn't  
5 have called JQ?

6 A No.

7 Q So when you testified to this in the grand jury,  
8 you weren't telling the truth.

9 A They came in my house in the middle of the morning  
10 when I just woke up.

11 Q Who came into your house in the middle of the  
12 morning when you just woke up?

13 A I don't recall.

14 Q Well, these people, do you know who they were?  
15 Are they police officers, were they your friends?

16 A They didn't tell me, they just came inside the  
17 house.

18 Q Is this on January 20th when you were brought to  
19 the courthouse?

20 A I don't recall.

21 Q This wasn't December 18th when the incident  
22 occurred; was it?

23 A I don't recall.

24 Q You go to school, correct?

25 A Yes.

1 Q What grade are you in?  
2 A Senior.  
3 Q Senior in high school. In school, it's fair to  
4 say, you listen to your teacher?  
5 A Yeah.  
6 Q Yes?  
7 A Yes.  
8 Q You're able to follow what they're saying,  
9 correct?  
10 A Sometimes.  
11 Q Well, you raise your hand when you don't follow  
12 what they're saying.  
13 A I --  
14 Q You take tests, don't you?  
15 A Sometimes.  
16 Q And when you take them, you answer the questions  
17 based on your memory and material, correct?  
18 A Maybe.  
19 Q Well, you're a senior in high school, you're going  
20 to graduate this year, correct?  
21 A Maybe.  
22 Q Are you 18 years old now?  
23 A No, I'm not, I'm a juvenile.  
24 Q You're a juvenile. You're a senior in high  
25 school, so you got promoted each year. And you

1 have to take tests, don't you have to take an  
2 MCAS, a standardized test, correct?  
3 A I wouldn't say that.  
4 Q You never had to take it?  
5 A I had to take it, but I wouldn't say the test,  
6 the answers of those tests glorify who I am.  
7 Q But the point is, you were able to answer the test  
8 and make correct answers because you remembered  
9 things, but you're here today, it's fair to say,  
10 you seem to have no memory of any of that.  
11 A School just goes by.  
12 Q Pardon me?  
13 A School just goes by.  
14 Q School just goes by.  
15 A They don't care if you learn or not.  
16 Q Well, you seem like a very bright young man.  
17 A Thank you.  
18 Q And I'd like you now to try to answer our  
19 questions if you could. This is a recording of  
20 your testimony in the grand jury, an official  
21 record of it, and you're saying now you didn't  
22 say these things or you don't recall?  
23 A The grand jury yesterday?  
24 Q No. Remember you were brought to the building  
25 downstairs, sixth floor maybe --

1 A I don't.

2 Q -- and the only ones there are the district  
3 attorney and the police officers, no lawyers, no  
4 one else allowed to be there, and the jurors, and  
5 you're asked questions and you answer the  
6 questions and you're under oath. You remember  
7 that; don't you?

8 A I don't recall.

9 Q You don't recall.

10 MR. GALVIN: May I have a moment, Your  
11 Honor?

12 THE COURT: You may.

13 Q Mr. Garcia, on the date of this incident, you did  
14 remember running, you told us that yesterday;  
15 didn't you?

16 A Yes.

17 Q And you did recall going up to the third floor at  
18 58. Didn't you tell us that yesterday?

19 A A little.

20 Q You remember a little, you remember being on the  
21 third floor.

22 A I remember trying to stay dry.

23 Q And you went in the building, you went up to the  
24 third floor. Isn't that where D'Andre told you he  
25 was going to meet everybody?

1 A I don't recall.

2 Q And were you in the hallway or in the stairwell?

3 A I don't recall.

4 Q Do you recall that you may have been in the back

5 stairwell or the front stairwell?

6 A I don't recall.

7 Q Having that problem again with recollection?

8 A (No audible response).

9 Q What were you guys up there for, was there

10 something going on?

11 A I just said to stay dry.

12 Q So you were just there to stay dry because

13 D'Andre told you to stay dry?

14 A Because it's raining and I wanted to stay dry.

15 Q But what was it about the third floor as opposed

16 to under the awning just inside the front door?

17 A It's just a floor.

18 Q It's just a floor. Is that the place everyone

19 goes to me or everyone goes to stay dry? Let's go

20 to 58 on the third floor, it's raining. Is that

21 where everybody goes?

22 A I'm not everybody, I'm myself.

23 Q But you were with somebody, you were with JQ.

24 Did you tell him, come on, let's get up to the

25 third floor to get dry?

1 A No.

2 Q Did he follow you up there?

3 A It's just the floor.

4 Q I know, my question is, and you understand my

5 question, did he follow you up to the third floor

6 or did you follow him to the third floor? Which

7 is it going to be?

8 A I don't recall, it's just a floor.

9 Q It's just a floor, you don't recall, but you do

10 recall being there, right?

11 A Yes.

12 Q And you do recall being there with JQ; is that

13 correct?

14 A For a little.

15 Q So the two of you were there for a little while.

16 Now, it's fair to say JQ had a gun. Didn't he

17 tell you he had a gun?

18 A I don't recall.

19 Q When you left there, he had a gun. Do you

20 remember that?

21 A I don't recall.

22 Q You recall when you were running, holding your

23 side like this --

24 A What are you talking about?

25 Q Pardon me?

1 A What are you talking about?

2 Q I'm asking you a question.

3 A Running with my side? Who's running with --

4 THE COURT: Excuse me, Mr. Garcia.

5 We're going to have a question and we're going to  
6 have an answer, and Mr. Galvin, you have to give  
7 Mr. Garcia an opportunity to answer the question.

8 MR. GALVIN: Certainly, Your Honor.

9 THE WITNESS: Can I have a lawyer?

10 THE COURT: Not at this moment. Listen  
11 to the question and -- actually, Mr. Galvin, let  
12 me see counsel at sidebar.

13 SIDEBAR CONFERENCE:

14 THE COURT: In point of fact, you're  
15 now suggesting that he was in possession of an  
16 unlawful firearm, and he has a Fifth Amendment  
17 right not to answer these questions and a right to  
18 discuss the matter with counsel if you're going to  
19 ask him questions that imply the possession of a  
20 firearm.

21 MR. GALVIN: Your Honor, I have a good  
22 faith basis for making this argument. There's a  
23 witness summonsed named Eddie Smith, and Mr. Smith  
24 is a gentleman that sounds like he's been around a  
25 while, he was interviewed by the Commonwealth, and

1                   he described this gentleman as the one running  
2                   through the parking lot, and according to Mr.  
3                   Smith, based on his observation, he was holding  
4                   the side as if he had a firearm. Mr. Smith will  
5                   say he never saw him take it out, but based on his  
6                   experience, he felt that he was. So that's why  
7                   I'm asking him that question.

8                   THE COURT: That may be, but he's right,  
9                   he doesn't have to answer that question and he has  
10                   a right to consult with counsel if you're going to  
11                   continue along those lines.

12                   MR. GALVIN: Well, I won't ask him  
13                   anything further about him carrying, but I'll move  
14                   back a bit maybe to Mr. Jaquan for a few minutes,  
15                   but I shouldn't be too much longer, Your Honor.

16                   END OF SIDEBAR CONFERENCE.

17                   Q        Mr. Garcia, listen carefully to my question, okay?  
18                   When you got outside and you heard the shots, you  
19                   told us yesterday you ran through that parking lot  
20                   towards the dumpster on the backside; is that  
21                   correct?

22                   A        I don't recall.

23                   Q        There's a gymnasium on the right side of that  
24                   parking lot?

25                   A        I don't recall.

1 Q I asked you a moment ago on JQ. Did you at any  
2 time see him with a gun?

3 A I don't recall.

4 Q Specifically, I'm going to be specific. At any  
5 time on the third floor, did you see him take  
6 possession of a gun?

7 A I don't recall.

8 MR. GALVIN: May I have one moment,  
9 Your Honor? I may be finished.

10 (Pause.)

11 Q Last question. Now, JQ, he is a friend of yours,  
12 correct?

13 A No.

14 Q Was he a friend or an acquaintance on  
15 December 18th when this incident occurred?

16 A I don't recall.

17 MR. GALVIN: Your Honor, I think that's  
18 all the questions I have at this time.

19 THE COURT: Ms. Ham, anything further?

20 MS. HAM: Yes, Your Honor, thank you.

21 REDIRECT EXAMINATION

22 (BY MS. HAM)

23 Q Mr. Garcia, do you remember whether or not you  
24 were wearing baggy pants or tight pants or what  
25 kind of pants you were wearing?

1 A I don't recall.

2 Q Do you remember whether or not the door to  
3 58 Annunciation was --

4 A I don't recall.

5 Q -- locked or unlocked? Let me finish the  
6 question.

7 THE COURT: Mr. Garcia, wait until the  
8 question has been asked.

9 THE WITNESS: I don't recall, though.

10 THE COURT: If you don't recall the  
11 answer, that's fine, but you need to let Ms. Ham  
12 finish her question before you answer it.

13 Q Do you remember whether or not the door was locked  
14 or unlocked?

15 A I don't recall.

16 Q You didn't have a key to 58 Annunciation; did you?

17 A I don't recall.

18 Q Did you ever live in 58 Annunciation?

19 A No, I did not.

20 Q So you didn't have keys to 58 Annunciation.

21 A I don't recall.

22 Q Did you ever volunteer to the police that you were  
23 there with D'Andre?

24 A I don't recall.

25 Q Did you ever call up the police and say my name is

1           Juan Carlos Garcia and I was with D'Andre?

2   A    I don't recall.

3   Q    Did you ever cooperate with the police?

4           THE COURT: I don't know what that  
5           question means. Ask it a different way.

6           MS. HAM: Sure.

7   Q    Did you ever willingly come to speak with the  
8           police when they asked you?

9   A    No.

10   Q    Why not?

11   A    I don't recall.

12   Q    As you stand here today, do you want to be here?

13   A    Not without a lawyer.

14   Q    As you answer my questions, do you want to be here  
15           or not?

16   A    Not without a lawyer.

17   Q    Yesterday, did you want to be here?

18   A    Not without a lawyer.

19   Q    Why is it that you don't want to speak to us and  
20           answer the questions?

21   A    Not without a lawyer.

22           MS. HAM: May I very briefly approach,  
23           Your Honor?

24           THE COURT: Okay.

25           SIDEBAR CONFERENCE:

1                   MS. HAM: I just want to make the  
2 record clear that there is absolutely no issue  
3 with Juan Carlos Garcia, and the fact that he's  
4 asking for a lawyer does not indicate that he does  
5 have a Fifth, and him sitting here before and  
6 answering the questions, in itself, I don't think  
7 that there's any reason to believe that there's a  
8 Fifth Amendment issue or the need to be able to  
9 give him an attorney. I just want to make the  
10 record clear.

11                  THE COURT: It's not your decision  
12 whether to give him an attorney. I've concluded  
13 that with respect to the testimony, that I don't  
14 see any issue with respect to Fifth Amendment  
15 issues, at least I didn't until the questions  
16 that Mr. Galvin asked, but now we've moved on  
17 beyond that. I don't think we're teaching the  
18 jury anything more with respect to Mr. Garcia.  
19 Repeated questions that go to the same point, if  
20 somebody raised an objection, I would sustain it,  
21 but I think you've sort of covered this subject.

22                  MS. HAM: Your Honor, I'm done.

23                  END OF SIDEBAR CONFERENCE.

24                  THE COURT: All right, Ms. Ham?

25                  MS. HAM: I don't have any more

1           questions, Your Honor.

2           THE COURT: Mr. Galvin, Mr. Phelan, do  
3           you have any more questions?

4           MR. GALVIN: No further questions, Your  
5           Honor.

6           MR. PHELAN: I don't.

7           THE COURT: Thank you very much for  
8           coming in, Mr. Garcia.

9           I think this is an appropriate time for  
10          us to take our morning break.

11          (Court in recess at 11:30 a.m.)

12          (Jury entering at 11:50 a.m.)

13          THE COURT: Welcome back, everyone.

14          Ms. Ham, is the Commonwealth ready to  
15          call its next witness?

16          MS. HAM: Yes, Your Honor, Commonwealth  
17          calls Aracelis Acosta.

18          COURT OFFICER: Stand right here, face  
19          the Clerk, raise your right hand.

20          THE CLERK: Do you swear to tell the  
21          truth, the whole truth, and nothing but the truth  
22          so help you God?

23          THE WITNESS: I do.

24          THE CLERK: Ma'am, just step around here  
25          and take the witness stand, please. Try to keep

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1216

COMMONWEALTH

vs.

ENRIQUE AUCH.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Enrique Auch, was convicted of murder in the second degree, G. L. c. 265, § 1, and two counts of assault by means of a dangerous weapon, G. L. c. 265, § 15B (b). He now appeals.

The defendant was convicted of shooting and killing D'Andre King-Settles. The jury saw surveillance videos showing two men walking toward the building at 58 Annunciation Road in the Roxbury section of Boston. Auch stipulated that he was the man in the video wearing khaki pants and a black, red, and white jacket. The other man was Tsunami Ortiz. Auch and Ortiz entered through the main entrance of the building and opened one door, then another. They remained in the building until they came to the rear exit, where Auch inspected the rear door. They left through the rear door. Auch and Ortiz returned

approximately twenty minutes later, appearing to retrace their earlier route. They reentered the building, again through the main entrance, and walked through a door off camera. Two minutes later, Juan Garcia and Jaquan McIver-Bennett entered the building and rode the elevator to the third floor. Four minutes later, King-Settles entered the building and went up to the third floor on the elevator. He returned on the elevator with Garcia and McIver-Bennett less than two minutes later. They walked out the front door together. Seconds later, Auch emerged back into the camera view and followed King-Settles's group out the front door. Ortiz followed Auch approximately ten seconds later. Seconds later, shots were fired in front of 58 Annunciation Road. King-Settles died at the scene from four gunshot wounds.

Witnesses at trial included Aracelis Acosta, who testified that she heard gunfire and seconds later saw two male teenagers walking closely one behind the other, away toward Ruggles Station. After a second set of shots, she saw them break into a run. One had a white jacket and khaki pants. Yendry Guerrero also heard gunshots and saw two males running away in the direction of Ruggles Station.

At trial, Garcia was called as a witness. He had testified before the grand jury, but gave nonresponsive answers to some preliminary questions from the Commonwealth at trial. The trial

judge declared that Garcia was feigning lack of memory and therefore permitted the Commonwealth to read to the jury the questions and answers from Garcia's previous grand jury testimony. These included the statements that Garcia had turned around "for a quick second" during the shooting to see what was happening, and that he saw someone who was "shooting at [them]."<sup>1</sup> This person was a male wearing "a hoodie with a rain jacket and some khaki[s]," who the jury could have concluded was Auch.<sup>1</sup>

The defendant argues that he was denied his Sixth Amendment right to confront the witnesses against him because on cross-examination, Garcia continued to feign memory loss, although he did episodically give substantive answers to some of defense counsel's questions. The confrontation clause requires that a defendant be given "adequate opportunity to cross-examine adverse witnesses." United States v. Owens, 484 U.S. 554, 557 (1988). This right gives the defendant the chance for "effective cross-examination of the witness at trial." Commonwealth v. Andrade, 481 Mass. 139, 142 (2018). But it does not guarantee "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Owens,

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<sup>1</sup> Before the grand jury, Garcia later testified that he saw "flashes," which he described at trial as "like a firework," from where the person was standing, and that he did not see the person actually shooting a gun. The jury could have inferred that these flashes were from the discharge of a gun being shot by Auch.

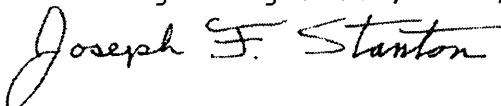
supra at 559, quoting Kentucky v. Stincer, 482 U.S. 730, 739 (1987).

There are circumstances in which a witness's refusal to answer questions during cross-examination has been held to deprive the defendant of his right to confrontation when that witness's prior statements have been introduced during direct examination. See Commonwealth v. Kirouac, 405 Mass. 557, 560 (1989) (confrontation rights violated where complainant witness, aged six, "resisted answering nearly all questions put to her on cross-examination"). See also Commonwealth v. Funches, 379 Mass. 283, 293 (1979) (confrontation rights violated when key prosecution witness testified extensively on direct but then asserted privilege when cross-examined on same subject). However, as we said in Andrade, "any limitation on the effectiveness of a cross-examination of a witness who has been found to have feigned memory loss generally does not implicate the confrontation clause" (quotations and citation omitted). Andrade, 481 Mass. at 143. See United States v. Fiore, 443 F.2d 112, 115 (2d Cir. 1971) (Friendly, J.) (cross-examination is sufficient to meet confrontation clause objection if there is "meaningful cross-examination on the issue whether his present alleged lack of recollection of the defendant's participation in the crime or his previous sworn testimony to the contrary was the truth"). Indeed, the defendant has not cited, and we have

not found, any case in which the feigning of memory loss by a witness during cross-examination about his or her prior testimony resulted in a finding of a violation of the confrontation clause. Because under the case law the defendant had the opportunity effectively to cross-examine the witness, we conclude that the confrontation clause was not violated by the Commonwealth's introduction of Garcia's grand jury testimony.

Given this, the defendant's second argument, that there was insufficient evidence to support his convictions, is also without merit. The grand jury testimony, along with the video evidence and statements of the other witnesses, permitted a rational jury to find the defendant guilty beyond a reasonable doubt.

Judgments affirmed.

By the Court (Rubin,  
Massing & Englander, JJ.<sup>2</sup>),  
  
Joseph F. Stanton  
Clerk

Entered: October 22, 2019.

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<sup>2</sup> The panelists are listed in order of seniority.

**Stephen Paul Maidman, Esquire**

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**From:** SJCCommClerk@sjc.state.ma.us  
**Sent:** Monday, December 23, 2019 12:44  
**To:** maidman@att.net  
**Subject:** FAR-27160 - Notice: FAR denied

Supreme Judicial Court for the Commonwealth of Massachusetts

RE: Docket No. FAR-27160

COMMONWEALTH  
vs.  
ENRIQUE AUCH

Suffolk Superior Court No. 1684CR00216  
A.C. No. 2018-P-1216

**NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW**

Please take note that on December 23, 2019, the application for further appellate review was denied.

Francis V. Kenneally, Clerk

Dated: December 23, 2019

To: Cailin M. Campbell, A.D.A.  
Stephen Paul Maidman, Esquire