

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

BRISTOL, ss.

SJC-10635

2009 BITESS

COMMONWEALTH

v.

LEONARD C. FARLENG

ON APPEAL FROM A JUDGMENT OF
THE ATTLEBORO DISTRICT COURT

COMMONWEALTH'S BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

ISSUE PRESENTED 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 4

 A. Facts of the Case 4

 B. Motion in Limine: Admission of Ms. Lennon's
 Prior Statements 6

 C. The Motion Hearing 7

 The Defense Case 16

 Closing Arguments 19

 Verdict and Sentence 19

Summary of the Argument 20

Argument 22

 I. WHEN IT ALLOWED THE COMMONWEALTH'S MOTION TO
 ADMIT VARIOUS HEARSAY STATEMENTS OF THE VICTIM,
 THE TRIAL COURT CORRECTLY CONCLUDED THAT THE
 DEFENDANT HAD FORFEITED HIS HEARSAY OBJECTION
 BY PROCURING THE VICTIM'S UNAVAILABILITY..... 22

 A. Forfeiture as a Basis for Hearsay Admission.... 24

 II. THE TRIAL JUDGE CORRECTLY RULED THAT BY
 PROCURING THE UNAVAILABILITY OF MS. LENNON THE
 DEFENDANT HAD FORFEITED THE RIGHT TO OBJECT ON
 CONFRONTATION GROUNDS TO THE INTRODUCTION OF
 HER PRIOR STATEMENTS..... 31

 A. The Bulk of Ms. Lennon's Statements Were
 Non-Testimonial Because, In The Context of
 This Case, Ms.Lennon Clearly Did Not
 Anticipate Her Statements Being Used in
 Future Litigation..... 31

 B. The Edwards Rule Requires Sufficient
 Findings to Make Any Application of the
 Massachusetts Forfeiture by Wrongdoing
 Doctrine, Including the Application in the
 Present Case, Compliant with Federal
 Confrontation Clause Guarantees..... 34

C. The Defendant's Contention That His Right To Marry Was Somehow Compromised By His Inability To Confront His Wife's Out-Of Court Statement Is Completely Devoid Of Merit And Ignores That He Did, In Fact, Succeed In Marrying His Wife And That She, In Turn, Successfully Asserted Her Marital Privilege..... 38

III. THE PROSECUTOR'S ARGUMENT WAS WITHIN THE GROUNDS OF PERMISSIBLE ARGUMENT AND ANY MISSTATEMENT DURING CLOSING ARGUMENTS DID NOT AMOUNT TO SUBSTANTIAL RISK OF A MISCARRIAGE OF JUSTICE..... 41

CONCLUSION 43

ADDENDUM A-1

TABLE OF AUTHORITIES

Cases

Alberts v. Devine, 395 Mass. 59, cert denied sub nom. Carroll v. Alberts, 474 U.S. 1013 (1985)	26
Commonwealth v. Allison, 434 Mass. 670 (2001)	41
Commonwealth v. Caillot, 454 Mass.245 (2009)	44
Commonwealth v. Edwards, 444 Mass. 526 (2005)	passim
Commonwealth v. Kater, 432 Mass. 404 (2000)	45
Commonwealth v. Kozec, 399 Mass. 514 (1987)	44
Commonwealth v. Perez, 444 Mass. 143 (2005)	45
Commonwealth v. Robinson, 451 Mass. 672 (2008)	32
Crawford v. Washington, 541 U.S. 36 (2004)	31
Davis v. Washington, 547 U.S. 813 126 S.Ct. 2266 (2006)	36
Giles v. California, 128 S.Ct. 2678 Mass.(2008)	33,35
Goodridge v. Department of Public Health, 440 Mass. 309 (2005)	22
Horton v. Allen, 370 F. 3d 75 (1 st Cir. 2004)	33
Loving v. Virginia, 388 U.S. 1 (1967)	22,39
Reynolds v. United States, 98 U.S. 145 (1878)	24,25
Steele v. Taylor, 684 F.2d 1193 (6 th Cir. 1982)	25

United States v. Brown,
441 F. 3d 1330 (11th Cir.2006) 33

United States v. Montague,
421 F. 3d 1099 (10th Cir.2005) 39

Statutes and Other Authorities

Fed. Rule of Evid, 804(b) (6) 36

G.L.c. 233 § 20 39

G.L. c. 276, § 58A 3

Mass. Guide to Evidence Section 804(b) (6) 20

U.S. Constitution Amendment VI 35

ISSUES PRESENTED

I. The prosecution is permitted to put prior statements of an unavailable witness into evidence when a defendant has knowingly acted to make the witness unavailable. Here, the defendant married the victim of his crime between the time that police became involved and the trial, from which the trial judge inferred that the defendant married the victim in part to make her unavailable to testify. Did the judge correctly conclude that the defendant had forfeited the right to object to prior statements by his now-wife, given the defendant's intentional act in making her unavailable?

II. The right to confrontation is subject to some exceptions, including an exception for situations where the defendant is responsible for the witness's unavailability. Here, the only impediment to confrontation was the defendant's marriage to the witness, an event undertaken and indeed only first planned after the police began investigating the crime in this case. In those circumstances, does the defendant by his intentional action - making the

witness unavailable by marrying her - forfeit his right to confront her about her prior statements?

III. Prosecutors are permitted to respond to arguments made by the defense in closing. Here, after the defense counsel noted in closing that the defendant had married the victim since the incident and that the victim, his now-wife, was sitting in the courtroom, the prosecutor stated that the jury could draw their own inferences about "witnesses and whether or not they testify." Was the prosecutor's comment permissible or at least sufficiently innocuous as to create no substantial risk of a miscarriage of justice?

STATEMENT OF THE CASE

On December 21, 2007, a complaint was issued in the Attleboro District Court charging the defendant with Assault and Battery, Assault with a Dangerous Weapon and Home Invasion. [R. 1]¹. The home invasion charge was subsequently nolle pros'd and the Commonwealth's motion to join a new charge of Breaking and Entering into a building at nighttime with intent

¹ References to the record will be as follows: Trial transcript [T., (volume #)-(page#)]; Record Appendix [R. (page#)]; Defendant's appellate brief [DB (page #)].

to commit a felony was allowed. [R. 2-4]. At the defendant's arraignment the Commonwealth moved for a dangerousness Hearing pursuant to M.G.L. c. 276 § 58A. [R. 8]. The dangerousness hearing was held on January 23, 2008. [R. 8]. At the hearing the victim asserted her marital privilege. [R. 16]. Prior to trial, the Commonwealth filed a Motion In Limine to admit out-of-court statements made by the victim. [R. 14-18]. The basis for the Commonwealth's motion was the "Forfeiture by Wrongdoing" doctrine after the victim stated her intention to invoke her martial privilege. [R. 14-18]. After an evidentiary hearing, the trial judge allowed the Commonwealth's motion. [R. 14]. After the Commonwealth rested, the defendant's motion for a required finding was allowed on the Breaking and Entering charge. [R. 23]. Following a two-day jury trial on May 5-6, 2008, before the Honorable Justice Gregory Phillips, defendant was found guilty of the Assault and Battery charge and not guilty of Assault with a Dangerous Weapon. [R. 9]. The trial judge sentenced the defendant to two and a half years committed to the House of Correction on the Assault and Battery Charge. [R. 9].

The defendant appealed his conviction on May 6, 2008. [R. 13].

STATEMENT OF THE FACTS

A. Facts of the Case

On December 12, 2007, the defendant entered into the home of the victim, Maureen Lennon, and attempted to strangle her while their 13 month child slept in the other room. [T. 1-87]. The defendant had both of his hands around Ms. Lennon's neck and was threatening to either kill her or himself. [T. 1-87,88]. While this altercation was taking place, the young child began crying and Ms. Lennon was able to break away to the child's room until the defendant left the residence. [T. 1-88,89]. Ms. Lennon and the defendant were not married, nor did they have any plans to marry at the time of this incident. [T. 2-19].

Ms. Lennon told two people about this incident. The first, Tracy Jordan, had been a friend of Ms. Lennon's for 20 years. [T. 1-76]. Ms. Lennon told Ms. Jordan what had occurred when she arrived at Ms. Jordan's the following day because Ms. Jordan was going to watch the young child for her. [T. 1-76]. Ms. Jordan saw that both Ms. Lennon and the child were

upset and also observed red marks on Ms. Lennon's neck. [T. 1-79]. Ms. Jordan inquired about this, and Ms. Lennon told Ms. Jordan what had occurred. [T. 1-76-79]. Ms. Lennon also called her sister, Ann Marie Johnson, and told her of the events that occurred on December 12, 2007. [T. 1-85]. After a conversation with her sister, Ms. Johnson notified the police because she was in fear for her sister's safety. [T. 1-89].

North Attleboro Police Detective, John Reilly, was assigned to investigate this matter. [T. 1-102]. As part of his investigation he contacted Ms. Lennon. [T. 1-105]. When Detective Reilly spoke to Ms. Lennon, he informed her of the allegations that Ms. Johnson had made regarding this defendant. [T. 1-108]. In response, Ms. Lennon told Detective Reilly that everything Detective Reilly had been told was true. [T. 1-106]. Detective Reilly asked Ms. Lennon to come into the station and to make a statement to the police. [T. 1-109]. The North Attleboro Police Department had no further contact with Ms. Lennon. She failed to show at the station or return calls to the police department. [T. 1-109]. At the time Ms. Lennon spoke to the North Attleboro Police Department

she was not married, nor was she engaged to the defendant. [T. 2-14,19]

A complaint was issued by the North Attleboro Police Department on December 21, 2007. [R. 1]. Ms. Lennon and the defendant were not married on this date. [T. 2-14,19].

On January 15, 2008 the defendant turned himself in. At that time the Commonwealth moved for a Dangerousness Hearing pursuant to M.G.L. 276 c. 58A. [R. 8]. At the same time, Ms. Lennon moved to recover bail money she had posted for the defendant. [R. 16]. Ms. Lennon asserted that on January 15, 2008, knowing Ms. Lennon was in financial distress the defendant turned himself in and allowed her to recover her bail money. [R. 16].

On January 23, 2008 at the Dangerousness Hearing, Ms. Lennon asserted her marital privileged. [R. 16]. Upon cross examination she testified that she and the defendant were married at North Attleboro Town Hall on January 5, 2008, just days prior to the defendant's incarceration. [R. 16].

B. Motion in Limine: Admission of Ms. Lennon's Prior Statements

Prior to trial, the Commonwealth filed a Motion in Limine pursuant to the "Forfeiture by Wrongdoing" doctrine. [R. 14]. In its Motion, the Commonwealth requested an evidentiary hearing after which the Commonwealth would be asking the court to allow the Commonwealth to introduce out-of-court statements made by the victim because her marriage to the defendant prior to the trial had been undertaken with the purpose of making her unavailable as a witness. [R. 14-18]. In its response, the defendant opposed the Commonwealth's motion asserting that the victim had married the defendant of her own free will and was asserting her marital privilege of "my own free will without threats, influences, or inducements." [R. 19-22].

C. The Motion Hearing

At the motion hearing, Tracy Jordan testified. Ms. Jordan said she had been a friend of Ms. Lennon's for twenty years. [T. 1-74]. Ms. Jordan testified that she received a phone call from Ms. Lennon sometime after December 12, 2007. [T. 1-8]. Ms. Jordan said that at the time of this incident, Ms. Lennon and the defendant were not married, nor did they have any intention to marry. [T. 1-9]. She said that during

their conversation Ms. Lennon continued to "beat around the bush." [T. 1-11]. Eventually, Ms. Lennon told Ms. Jordan that she had married the defendant. [T. 1-11]. Ms. Jordan questioned Ms. Lennon as to why she would marry him. [T. 1-11]. Ms. Lennon replied that she and the defendant had married because it was "the only way that she would not have to testify against Lenny in this proceeding because she had had a prior proceeding where she had to testify in court and said that she would never want to, have to go through something like that again." [T. 1-19] When asked by defense counsel whether there was "a plan - a preconceived plan that the defendant was involved in, that she told you about - not that you suspect, that she told you about." [T. 1-13]. Ms. Jordan said "yes," and added that "they (Ms. Lennon and the defendant) had a discussion and that would be the only way that she would not have to testify against him." [T. 1-13]. Ms. Lennon further told Ms. Jordan that "Now that I am married, I do not have to testify." [T. 1-22].

Also testifying at the motion hearing was Ms. Lennon's sister, Ann Marie Johnson. Ms. Johnson said that she first became aware that her sister had

married the defendant on March 10, 2008. [T. 1-26]. She said that neither she nor any other members of her family were present at the wedding. [T. 1-26]. Ms. Johnson said that she believed her parents still did not know about Ms. Lennon's marriage to the defendant [T. 1-26]. When questioned about how Ms. Johnson became aware of the marriage, she said that Ms. Lennon had called her and said "that I had gotten summonsed and she said she wanted to tell me something, that she didn't want me to be blindsided in court that I was supposed to attend on March 13th, and that she was afraid to tell me because she was afraid it was going to put a strain on our relationship as sisters. And she said that the only way she could get out of not having to testify in court against him was if you're married to someone, and so that's what she did, that she married Lenny." [T. 1-27]. Ms. Lennon told Ms. Johnson "that she doesn't want to testify and she's not going to go through it and that she doesn't want to be the one to put him in jail." [T. 1-32]. Ms. Lennon further told Ms. Johnson "that she just did not want to have to testify against him and I said that I was - I had been summonsed to court and she - you know, said well, you don't have to go, you don't have

to do this, and that, you know, the only way that I would get in trouble not going is if I had gotten pulled over, then I could be arrested for not - because there can be a warrant out for not showing up. And we just - I just said to her that I just can't believe that she has - she did that. And she said she just would not go through testifying against him." [T. 1-27,28]. The prosecutor then argued that the court should allow the Commonwealth's motion because "after hearing the testimony, that the defendant and the victim in this matter married for the sole purpose of the victim not having to testify in this case." [T. 1-34] The prosecutor went on to say that "the basis of the Commonwealth's assertion is that the defendant colluded with the victim to make her unavailable for purposes of testifying; and as a result, the defendant has waived his rights to object on confrontation clause and on hearsay grounds." [T. 1-35,36]. The Commonwealth argued that "It's the Commonwealth's position, and I believe the case law supports it, that as long as the defendant participates in some meaningful manner about making the witness unavailable to testify, he has now forfeited his right." [T. 1-37]. The Commonwealth further asserted that "The

cases have stated there must be some [causal] connection between the defendant's action and the witness's ultimate unavailability. The method by which the witness becomes unavailable must at the very least be a logical outgrowth or foreseeable result of the collusion. Thus, where a defendant has had a meaningful impact on the witness's unavailability, the defendant may have forfeited confrontation and hearsay objections to the witness's out-of-court statements, even where the witness modified the initial strategy to procure the witness's silence. In addition, the courts have found that the defendant's actions do not have to be unlawful, they do not have to be illegal; but as long as he plays a meaningful role in the witness's becoming unavailable, he waives his rights under the confrontation clause --" [T. 1-38].

There then ensued a debate about whether to let Ms. Lennon testify. The court inquired about whether Ms. Lennon should be called to testify. [T. 1-39]. Defense counsel stated that "I debated over that and the only way - to respond to that, I really thought about whether I should call her, but then there's some language that if she's subject to cross-examination, her marital privilege is out the window." [T. 1-39].

The court granted the Commonwealth's motion, allowing the Commonwealth to admit the victim's out of court statement about the incident on December 12, 2007. [T. 1-46].

D. The Trial

The Commonwealth's first witness was Tracy Jordan. She had been friends with the victim, Ms. Lennon, for approximately twenty years. [T. 1-74]. Ms. Lennon had a child who was at that time approximately a year and a half old. [T. 1-75]. In December of 2007, Ms. Jordan was caring for Ms. Lennon's child Monday through Friday. Ms. Lennon would drop off and pick up her child at Ms. Jordan's house. [T. 1-75]. Ms. Lennon arrived to drop off her child on December 13, 2007 at Ms. Jordan's house. [T. 1-75]. Ms. Jordan testified that the minor child who was always very happy and outgoing seemed really sad that morning. [T. 1-75,76]. Ms. Jordan asked Ms. Lennon why the child seemed so sad. "At that point, Ms. Lennon broke out in tears and started crying and told me that the night before Lenny had broken - broke down her door and came up into her bedroom and was strangling her at two o'clock in the morning and then got a knife and threatened either to kill himself or her." [T. 1-76].

Ms. Jordan identified the defendant as the "Lenny" she was referring to. She said that she observed strangle marks on Ms. Lennon's neck: "it was the whole side of her neck, and it was all red, but you could see, like, where there was marks, like, in between. It looked like strangle marks. It was on her whole neck." [T. 1-79].

On cross-examination defense counsel asked "(a)nd she married the defendant afterwards; didn't she, ma'am?" [T. 1-82]. Ms. Jordan responded in the affirmative. On redirect examination Ms. Jordan was questioned about her knowledge of the marriage and responded that "she told me that they got married so she wouldn't have to testify him - against him in this case." [T. 1-82].

The Commonwealth's next witness was Ann Marie Johnson. Ms. Johnson stated that Ms. Lennon called her on or about December 16, 2007. [T. 1-85]. She states that "she called to tell me that Lenny had tried to strangle her and had a knife to her throat." [T. 1-85]. Ms. Johnson identified the defendant as "Lenny." [T. 1-85]. Ms. Johnson continued that "she said that she had woken - she had been awoken by him strangling her and a knife to her throat, and she was

screaming and was able to somehow get out of his release. And their, at the time, 13 month old daughter awoke crying, and that he had left - she had told me he had left the house after that time." [T. 1-87]. This incident occurred "very early morning, middle of the night type, three o'clock in the morning." [T. 1-87]. Ms. Johnson testified that Ms. Lennon said that the defendant's hands were "around her neck" [T. 1-88]; "there were red marks left on her neck"; she "fled to into her daughter's room and that he had left" [T. 1-88,89]. Ms. Johnson told Ms. Lennon that she was going to seek help for her and Ms. Lennon "did not want to do that." [T. 1-89]. Ms. Lennon told Ms. Johnson that "she did not want to be the one to put Lenny in jail." [T. 1-89]. Ms. Johnson then contacted the North Attleboro Police Department to report this incident. [T. 1-89].

Officer Scott Weiner from the North Attleboro Police Department testified that he received a report from a relative of the victim regarding an assault and battery that occurred on December 12, 2007. [T. 1-92]. He took all of the information and attempted to contact the victim. [T. 1-93]. He referred the matter to the detectives division and "made numerous attempts

by phone, as well as - when I contacted the detectives, they actually went and tried to make contact with the party, but they weren't home at the time." [T. 1-93].

Detective John Reilly was the Commonwealth's final witness. Detective Reilly investigated the incident involving the defendant on December 12, 2007. [T. 1-101]. Detective Reilly testified that he made numerous attempts to contact Ms. Lennon and was finally able to reach her at her place of employment. [T. 1-105]. When Detective Reilly explained to Ms. Lennon why he was contacting her, Ms. Lennon responded the "she was not going to cooperate with my investigation and that she was not going to be the one responsible for putting Leonard Szerlong in jail." [T. 1-106]. Detective Reilly "explained to her what her sister had alleged happened, and I told her that the information I had was that Mr. Szerlong had broken in on the night of the 12th into her residence by forcing the door open, by finding her up in her bedroom, by climbing on top of her, by holding one hand over her throat while holding a knife in the other hand, and indicating something about being on drugs, this is what drugs do to a person, and he had threatened her

with the knife." [T. 1-108]. Detective Reilly testified that Ms. Lennon replied "everything that I said was true." [T. 1-108]. Detective Reilly asked Ms. Lennon to come into the station so that he could get a statement from her. She never arrived. [T. 1-109].

The Defense Case

The Defendant called his aunt, Margaret Foley to the stand. When asked by defense counsel how Ms. Foley knew Ms. Lennon she said "She is my nephew's wife." [T. 1-123]. Defense counsel then asked "And on December 19th, 2007, was Maureen Lennon married to Leonard Szerlong." [T. 1-123,124]. Later during questioning, defense counsel asked his witness "And had you talked to Maureen Lennon about her marriage to Leonard?" [T. 1-126]. This question led to an objection by the Commonwealth and a lengthy debate at side bar outside the presence of the jury. [T. 1-127-133].

The Commonwealth's objection was grounded on the fact that the marriage took place after the incident for which the defendant was on trial. The reason for the marriage was the "basis for the preliminary motion." [T. 1-129]. It was not relevant to the trial

and the elements of the crime. It had only been relevant to the preliminary motion which had already been decided and was not an issue for the jury. The Commonwealth reminded the court that it had not "introduced any evidence [regarding the marriage] in its [case in] chief." [T. 1-129]. The Commonwealth said that if the court was inclined to allow defense counsel to make the marriage between the parties relevant and therefore admissible, the Commonwealth wanted an "opportunity for rebuttal witnesses and . . . sort of the same testimony that we heard at the motion in limine, to allow the jury to hear all of the evidence." [T. 1-129]. The Court agreed that the Commonwealth had not brought up the issue in its case in chief and sustained the Commonwealth's objection. [T. 1-133].

Ms. Foley testified that on the night of the incident she had a telephone conversation with the defendant and Ms. Lennon at approximately one o'clock in the morning. [T. 1-134]. She testified that she could tell they were both agitated with each other. [T. 1-125]. Ms. Foley stated that she never saw Ms. Lennon on the night of the incident and that she

didn't see Ms. Lennon until approximately a week later. [T. 1-139,140].

The defendant took the stand after Ms. Foley. Defense counsel asked the defendant "Who if anyone did you marry since 12/12/07?" [T. 2-7]. The defendant stated he married his wife "Maureen Lennon." [T. 2-7]. When asked by his own attorney if he could point to his wife and "indicate an article of clothing she is wearing" the defendant stated she was "right there" and identified the victim in this matter sitting in the courtroom. [T. 2-7].

The defendant testified that on the night of the incident he "came home at approximately 12:30 or one o'clock in the morning." [T. 2-4]. He further stated that he and Ms. Lennon had an argument and he had called his aunt to try to mediate the fight. [T. 2-6]. The defendant said that he went to Ms. Lennon's house on December 12, 2007. [T. 2-4]. That Ms. Lennon was home and sleeping at the time he arrived. [T. 2-18]. When he arrived at the house he went upstairs and woke Ms. Lennon up. [T. 2-18]. He denied all other allegations of the incident. [T. 2-18]. The defendant said that he and Ms. Lennon were married on January 5, 2008. [T. 2-14]. The defendant said that

he and Ms. Lennon were not engaged at the time of the incident. [T. 2-19].

Closing Arguments

In his closing argument, defense counsel argued "And she married Leonard, after the alleged incident, 12/12/07. Maureen Lennon Szerlong was in court yesterday, and she's present today." [T. 2-25]. In response, the Commonwealth's closing argument included the following: "you've heard some other testimony in this trial about the defendant and the victim getting - and the alleged victim getting married sometime after the incident. You've heard Counsel's argument about whether or not - how the victim is present in this courtroom. And I'm not going to instruct you on the law or any instructions you are going to get from the judge; but you, as the jury, can make your own inferences about witnesses and about whether or not they testify." [T 2-29, 30].

Verdict and Sentence

The defendant was found guilty of the charge of assault and battery. [T. 2-43]. The court then sentenced the defendant to two and one-half years committed. [T. 2-45].

SUMMARY OF THE ARGUMENT

Massachusetts law permits statements of an unavailable witness to be admitted into evidence if the judge finds that the witness is unavailable through the "wrongdoing of the defendant". An act is "wrongdoing" if it is intended to deprive the court of evidence, irrespective of whether the act is inherently evil or even inherently good. When the defendant and the victim jointly decided to marry to make the victim unavailable as a witness, the defendant's intentional act rendered the witness unavailable and the doctrine was correctly invoked in the trial court. [Pages 22-30].

Admitted hearsay must pass not only the admissibility standards of Massachusetts law, but also comply with the defendant's Sixth Amendment right to confrontation. The Supreme Court has permitted testimonial statements to be admitted into evidence under the forfeiture by wrongdoing doctrine, as long as that doctrine does not exceed the scope it had at the founding, at which time the doctrine required a showing of intent. The Massachusetts doctrine on forfeiture by wrongdoing requires a showing of intent, and is thus no broader than the doctrine of forfeiture

by wrongdoing recognized at the founding. Any showing sufficient under Massachusetts law will also be sufficient for Sixth Amendment purposes. Because the judge found that the defendant had the intent of making a witness unavailable, the defendant's confrontation claim must fail [Pages 31-40].

Defense counsel, in closing, emphasized the victim's failure to cooperate with the prosecution, noting her marriage to the defendant after the incident and her presence in the courtroom during the trial. The prosecutor, in a response to the defense argument, suggested that the jury could draw their own inferences about why individuals do or do not testify. In context, the prosecutor was asking the jury only to reject the inference urged by the defense. Where the comment was a relatively brief remark in what was otherwise a lengthy summary of the evidence, the defendant has failed to demonstrate a substantial risk of a miscarriage of justice. [Pages 41-47].

ARGUMENT

I. WHEN IT ALLOWED THE COMMONWEALTH'S MOTION TO ADMIT VARIOUS HEARSAY STATEMENTS OF THE VICTIM, THE TRIAL COURT CORRECTLY CONCLUDED THAT THE DEFENDANT HAD FORFEITED HIS HEARSAY OBJECTION BY PROCURING THE VICTIM'S UNAVAILABILITY.

The Massachusetts Guide to Evidence, which reflects the current state of Massachusetts case law, recognizes a hearsay exception it terms "forfeiture by wrongdoing" in Section 804(b)(6):

(6) *Forfeiture by Wrongdoing.* A statement offered against a party who forfeits, by virtue of wrongdoing, the right to object to its admission based on findings by the court that (A) the witness is unavailable; (B) the party was involved in, or responsible for, procuring the unavailability of the witness; and (C) the party acted with the intent to procure the witness's unavailability.

The reference to wrongdoing explains the intent of the hearsay exception, but there is no requirement in Massachusetts law that the court find that the specific action taken by the defendant constitute a "wrongdoing" in the sense that it be an independently reprehensible act. Rather, the act of the defendant may be in itself innocuous or even one, like marriage, that is indisputably a protected freedom of the individual (see generally *Loving v. Virginia*, 388 U.S. 1 (1967); *Goodridge v. Department of Public Health*, 440 Mass. 309 (2005)). When the Supreme Judicial Court

adopted this doctrine, (*Commonwealth v. Edwards*, 444 Mass. 526 (2005)), it acknowledged that the traditional formulation of the doctrine "contemplates some wrongful act on the part of the defendant". The Supreme Judicial Court in *Edwards*, however, ultimately concluded that "[a] defendant's involvement in procuring a witness's unavailability need not consist of a criminal act, and may include a defendant's collusion with a witness to ensure that the witness will not be heard at trial." *Edwards*, 444 Mass. at 540.

In light of *Edwards*, it is clear the "wrongdoing" referenced by the Section 804(b)(6) refers to the wrong of acting to impede the workings of the court system, not necessarily any wrong committed against the witness. In other words, the court and not the witness is the victim of the "wrong". No additional iniquity is required of the defendant's acts; they may even be acts with which the government would have no right to interfere. See *Edwards*, 444 Mass. at 538 (defendant's action consisted of statements encouraging his brother not to testify). The defendant here had a right to marry just as the defendant in the scenario discussed by *Edwards* had a right to free

speech. But that the defendant's act lacks a per se wrongness in itself or even that it rises to the level of a right does not remove the action from the doctrine.

Here, as discussed below, there was sufficient evidence from which the judge could conclude that the defendant had forfeited his objection to the hearsay statements of the victim.

A. Forfeiture as a Basis for Hearsay Admission

The United States' Supreme Court applied the doctrine of "forfeiture" or "waiver" by a defendant's intervention² for the first time in *Reynolds v. United States*, 98 U.S. 145 (1878). The Supreme Court then affirmed the doctrine in *Crawford v. Washington*, 541 U.S. 36 (2004). Some version of the doctrine has been adopted in several states and the District of Columbia. *Commonwealth v. Edwards*, 444 Mass. 526 (2005). While not all states have adopted the doctrine in the same way, "we are aware of no

²As noted above, the "Forfeiture by wrongdoing" nomenclature is misleading. "A defendant's involvement in procuring a witness's unavailability need not consist of a criminal act, and may include a defendant's collusion with a witness to ensure that the witness will not be heard at trial." *Commonwealth v. Edwards* 444 Mass. 526 (2005).

jurisdiction that, after considering the doctrine, has rejected it." Id.

The doctrine is designed to support public and jurisprudential interests. "The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong." *Reynolds v. United States*, 98 U.S. 145 (1878). This was stressed in *Steele v. Taylor*, 684 F.2d 1193 (6th Cir. 1982), where the United States Court of Appeals stated "The rule...is [also] based on a public policy protecting the integrity of the adversary process by deterring litigants from acting on strong incentives to prevent the testimony of an adverse witness." *Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982). In 2005, the Supreme Judicial Court said, "given the overwhelming precedential and policy support for its adoption, we recognize the 'forfeiture by wrongdoing' doctrine in the Commonwealth." *Commonwealth v. Edwards*, 444 Mass 526, 536 (2005). In adopting this doctrine, the Supreme Judicial Court emphasized that it furthers the truth-seeking function of the adversary process, allowing fact finders access to valuable evidence no longer available through live testimony. "Society is entitled to every person's evidence in order that the

truth may be discovered." *Id.* at 535, quoting *Alberts v. Devine*, 395 Mass. 59, 67, cert. denied sub nom. *Carroll v. Alberts*, 474 U.S. 1013 (1985).

This case is about a defendant who, it can be inferred, married the victim so she would assert her marital privilege and not testify against the defendant. The defendant was not married or engaged to Ms. Lennon on December 12, 2007, when this incident of domestic violence occurred. A little less than a month later Ms. Lennon went with the defendant to town hall where they were married. Ms. Lennon told at least two people of the marriage. She explained to both of them that she and the defendant had discussed it and had married so that she, Ms. Lennon, did not have to testify against the defendant. Because the defendant intended his action to render a witness unavailable, he has forfeited his right to object to the hearsay nature of that witness's prior statements.

The Supreme Judicial Court in *Edwards* outlined the test for the implementation of the doctrine:

We hold that a defendant forfeits, by virtue of wrongdoing, the right to object to the admission of an unavailable witness's out-of-court statement on both confrontation and hearsay grounds on findings that (1) the witness is unavailable; (2) the defendant was involved in, or responsible for,

procuring the unavailability of the witness; and (3) the defendant acted with the intent to procure the witness's unavailability. A defendant's involvement in procuring a witness's unavailability need not consist of a criminal act, and may include a defendant's collusion with a witness to ensure that the witness will not be heard at trial.

Commonwealth v. Edward 444 Mass 526, 540 (2005). The case at hand meets this test. Ms. Lennon asserted her marital privilege, rendering her unavailable. The defendant and Ms. Lennon had a conversation prior to the marriage. Each party understood the marriage would allow Ms. Lennon to assert this privilege. And as a result, they walked into town hall and married just a few days prior to the defendant turning himself in. The defendant participated and was involved in the wedding ceremony with Ms. Lennon, rendering her unavailable. It is not the Commonwealth's position that the defendant's actions were unlawful, but simply that the defendant's actions were intended to ensure that Ms. Lennon would not be heard at trial.

The Supreme Judicial Court has said that, "the causal link necessary between a defendant's actions and a witness's unavailability may be established where (1) a defendant puts forward to a witness the idea to avoid testifying, either by threats, coercion,

persuasion, or pressure; (2) a defendant physically prevents a witness from testifying; or (3) a defendant actively facilitates the carrying out of a witness's independent intent not to testify." *Id.* It is the third prong of this test that is relevant to the case at hand. The *Edwards* Court then expanded on this notion of "collusion." It noted that "there must be some causal connection between the defendant's actions and the witness's ultimate unavailability. The method by which the witness becomes unavailable must, at the very least, be a logical outgrowth or foreseeable result of the collusion." *Id.* The Court stated that the doctrine will still apply "even if the collusion is carried out through lawful means." *Id.*

The defendant's intervention in the case at hand clearly falls within the third prong of the *Edwards* test. Ms. Jordan and Ms. Johnson both testified that the victim, Ms. Lennon, stated that she and the defendant had found a way for her not to testify: marriage. By the defendant's own admissions on cross-examination he and Ms. Lennon were not married or engaged to be married at the time of the incident and yet, within weeks the two were married, just days before he turned himself in to authorities. According

to Ms. Johnson, the victim's sister, neither she nor her parents nor any other members of her family were invited or even made aware of the marriage. In fact, in the victim's own affidavit she states "I may have said: now that I am married I do not have to testify;" [R. 22]. When Ms. Lennon and the defendant were aware of a criminal investigation, discussed how to prevent Ms. Lennon from testifying, and then married within days of the defendant surrendering himself, it becomes clear that the witness's unavailability is the logical outgrowth or foreseeable result of the collusion.

Upon recognizing this doctrine, the *Edwards* Court held that "like virtually all of the jurisdictions that have considered the issue, [we] hold that the prosecution must prove by a preponderance of the evidence that the defendant procured the witness's unavailability." *Commonwealth v. Edwards* 444 Mass. 526, 542 (2005). It provided that "the hearing is not intended to be a mini-trial and, accordingly, hearsay evidence, including the unavailable witness's out-of-court statement, may be considered." *Edwards*, 444 Mass. 526 (2005).

The Commonwealth presented two witnesses: Ms. Jordan and Ms. Johnson. Ms. Jordan testified that she

spoke to Ms. Lennon sometime after this incident occurred. She testified that Ms. Lennon had told her that she and the defendant had had a conversation and that they had found a way for Ms. Lennon to not have to testify, and so they got married. It was clear to Ms. Jordan from her conversation with Ms. Lennon that there was a plan that had been discussed between Ms. Lennon and the defendant. Ms. Johnson, the victim's sister, took the stand next. At the evidentiary hearing, she told the court that Ms. Lennon had called her in March, just a few days shy of a court date. Ms. Lennon informed her sister that she had something to tell her and didn't want her to get "blind sighted" in court. Ms. Lennon told her sister that she had found a way not to testify and that that was to marry the defendant, a step she and the defendant then took. The defendant places no witnesses or evidence in rebuttal.

The trial court correctly found the Commonwealth met its burden.

II. THE TRIAL JUDGE CORRECTLY RULED THAT BY PROCURING THE UNAVAILABILITY OF MS. LENNON THE DEFENDANT HAD FORFEITED THE RIGHT TO OBJECT ON CONFRONTATION GROUNDS TO THE INTRODUCTION OF HER PRIOR STATEMENTS.

The defendant's confrontation clause arguments fail for two reasons: first, the out-of-court statements of Ms. Lennon in this case are not testimonial and therefore not subject to confrontation and, second, the Massachusetts doctrine of forfeiture by wrongdoing does comply with federal constitutional law. The defendant's additional contention, that the court's decision has somehow implicated his right to marry, is without merit.

A. The Bulk of Ms. Lennon's Statements Were Non-Testimonial Because, In the Context of this Case, Ms. Lennon Clearly Did Not Anticipate Her Statements Being Used in Future Litigation.

The Supreme Court, in *Crawford v. Washington*, held that a "testimonial" statement cannot be admitted without an opportunity for the defendant to confront the declarant. *Crawford v. Washington*, 541 U.S. 36, 61 (). The Supreme Court did not "definitively resolve" the issue, however, of whether non-testimonial statements trigger any Sixth Amendment protection (*Id.* at 61), but observed that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the

Framers' design to afford the States flexibility in their development of hearsay law. . . ." *Id.* at 68.

The Supreme Judicial Court, though it has not defined an outer limit of what constitutes a testimonial statement, has noted the core class of testimonial statements:

The "core class" of testimonial statements are [1] *ex parte* in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; [2] extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; [or, 3] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Commonwealth v. Robinson, 451 Mass. 672, 678 n. 9 (2008) (internal citations and quotation marks omitted). The statements of Ms. Lennon to her friend Tracy Jordan and to her sister were not made in anticipation of trial: Ms. Lennon's later refusal to cooperate with the prosecution amply demonstrates that she had no belief that her statements would ultimately

be used to convict the defendant.³ See, e.g. *United States v. Brown*, 441 F.3d 1330, 1360 (11th Cir. 2006) (private conversation "was not made under examination, was not transcribed in a formal document, and was not made under circumstances leading an objective person to reasonably believe the statement would be available for use at a later trial. Thus, it is not testimonial and its admission is not barred by Crawford"); *Horton v. Allen*, 370 F.3d 75, 83-84 (1st Cir. 2004) (holding that a statement from a conversation, admitted under the state-of-mind exception to the hearsay rule, was non-testimonial because it was private, was not made under examination, was not contained in a formal document, and was not made "under circumstances in which an objective person would reasonably believe that the statement would be available for use at a later trial" (quotation marks omitted)).

Statements made by a domestic violence victim to friends was noted by the Supreme Court in *Giles v. California*, 128 S.Ct. 2678, 2692-2693 (2008), to be non-testimonial. "Statements to friends and neighbors

³ The evidence did include a statement that Ms. Lennon made to the investigating detective, which would be testimonial. [Tr. 1-108]. Therefore, the Sixth Amendment issue remains relevant for at least some of Ms. Lennon's statements.

about abuse and intimidation, and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules, which are free to adopt the dissent's version of forfeiture by wrongdoing." *Id.* at 2692-2693.

B. The Edwards Rule Requires Sufficient Findings to Make Any Application of the Massachusetts Forfeiture by Wrongdoing Doctrine, Including the Application in the Present Case, Compliant with Federal Confrontation Clause Guarantees.

For those statements that are testimonial and do implicate the defendant's Sixth Amendment confrontation right, two questions remain: 1) Is the evidence in this case sufficient to establish forfeiture by wrongdoing as that doctrine was conceived at the time of the founding? and 2) Is the rule in *Edwards* such that any finding of forfeiture by wrongdoing under Massachusetts law will also be a sufficient showing of forfeiture by wrongdoing for Sixth Amendment purposes? The answers to both questions is yes.

Although the Supreme Court's decision in *Crawford* made clear that only a founding era exception to the confrontation right would be sufficient to exempt a testimonial statement from confrontation (mentioning the forfeiture by wrong-doing doctrine specifically),

it was not until *Giles v. California*, 128 S.Ct. 2678 (2008), that the Supreme Court discussed at length the Sixth Amendment limitations on the forfeiture by wrongdoing doctrine. The Supreme Court explained in *Giles* that statements admissible under the broader doctrines of state evidentiary law might not comply with the Sixth Amendment guarantees. In the *Giles* case, the court noted that California courts "did not consider the intent of the defendant because they found that irrelevant to application of the forfeiture doctrine." *Giles*, 128 S.Ct. at 2693. The court explained the scope of the rule within Sixth Amendment jurisprudence: "The terms used to define the scope of the forfeiture rule suggest that the exception applied only when the defendant engaged in conduct designed to prevent the witness from testifying." *Giles*, 128 S.Ct. at 2683 (emphasis in original). Further, "[t]he manner in which the rule was applied makes plain that unfronted testimony would not be admitted without a showing that the defendant intended to prevent a witness from testifying." *Giles*, 128 S.Ct. at 2684 (emphasis in original).

Furthermore, it is clear from the *Giles* opinion that the Supreme Court was not requiring that the intent must be held by the defendant alone:

In 1997, this Court approved a Federal Rule of Evidence, entitled "Forfeiture by wrongdoing," which applies only when the defendant "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Fed. Rule of Evid. 804(b)(6). We have described this as a rule "which codifies the forfeiture doctrine." *Davis v. Washington*, 547 U.S. 813, 833, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

Giles, 128 S.Ct. at 2688 n. 2. That *Giles* approved the Federal Rule of Evidence demonstrates that the defendant need not be the sole actor who brings about a witness's unavailability: the word "acquiesce" demonstrates that the defendant's required intention may be shared jointly with other actors. '

In the present case, the judge's ruling on the Motion in Limine was supported by ample evidence from which he could infer the required element of intent. The victim's friend, Tracy Jordan, said 'yes' when asked if this was a preconceived plan in which the defendant was involved [Tr. 1-13] and testified further:

- "[T]hey decided that they would get married and because they knew that if they had gotten married that she would

not have to testify against him." [Tr. 1-20 through 1-21].

- "And she said, 'Well, we decided that if we got married, there's a' - I think she said it's called a common law or something, I don't know what it's called; but there's a law that if you get married you don't have to testify against your husband or wife, vice versa." [Tr. 1-22]

The judge also heard evidence of the timing of the wedding, which was not planned at the time of the assault or during the investigation by police [Tr. 1-9; 1-25]. With this evidence before him, the judge's determination that the forfeiture by wrongdoing doctrine applied was amply supported by evidence of the defendant's intent.

More generally, the *Edwards* rule will always satisfy the intent requirement that *Giles* places on state formulations of the forfeiture by wrongdoing doctrine. *Edwards* set forth a three pronged test, discussed above, of which the third prong is that "the defendant acted with the intent to procure the witness's unavailability." *Edwards*, 444 Mass. at 540 (emphasis added). This third prong expressly requires a finding of intent, the same requirement that *Giles* found lacking in the California's application of the doctrine.

One aspect of the Massachusetts doctrine that is broader than that of some other states is its express approval of the use of the doctrine in cases of "a defendant's collusion with a witness to ensure that the witness will not be heard at trial." *Id.* at 540. But the notion of collusion is not at odds with *Giles*' requirement of intent; the Court's approval of the Federal Rules of Evidence, with its "acquiescence" language, demonstrates that the defendant need not be the only person with the intent to prevent the testimony or even the originator of the idea.

Where the *Edwards* formulation expressly requires intent, and where *Giles* has approved any acquiescence in wrongdoing as well as overt action, any fact pattern that meets the Massachusetts test of forfeiture by wrongdoing will also meet the test of forfeiture by wrongdoing for Sixth Amendment purposes.

C. The Defendant's Contention that His Right to Marry Was Somehow Compromised By His Inability to Confront His Wife's Out-of-Court Statement Is Completely Devoid of Merit and Ignores that He Did, In Fact, Succeed In Marrying His Wife and that She, In Turn, Successfully Asserted Her Marital Privilege.

The defendant's argument that his right to marry was impinged is without merit [DB. 32]. It is not disputed that "[t]he freedom to marry has long been

recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1 (1967). Nor is it disputed that Massachusetts law has created a privilege to protect that martial relationship. M.G.L. c. 233 § 20 provides for and gives "privileges [to] a spouse not to testify against his or her spouse when the spouse is a criminal defendant." This privilege applies to witness-spouse only, and allows one spouse to refuse to testify against the other spouse in a criminal case. Liacos, *Handbook of Massachusetts Evidence* (5th Ed. 1981), pg. 176.

Nor is it unheard of, in situations where the exercise of marital privilege by a witness spouse is due to the wrong-doing of a defendant-spouse, for a court to hold that the defendant has forfeited his hearsay objections to the spouse's prior statements. The Tenth Circuit has actually used the forfeiture doctrine in pre-existing marriages where the defendant-spouse's influence caused the witness-spouse to assert privilege. *United States v. Montague*, 421 F.3d 1099 (10th Cir. 2005).⁴

⁴This court need not reach the issue of pre-existing marriages in which the assertion of testimonial

This case is not about balancing the marital privilege against the defendant's forfeiture of his hearsay objection: use of Ms. Lennon's pre-marriage statements in no way interferes with her testimonial privilege. At issue here are only those limited situations where a witness's "unavailability" has been created, including "unavailability" because of a marital privilege, after a crime has been committed and before a trial through a willful act of the defendant. In those limited situations, the defendant cannot complain that his own actions have forfeited his hearsay objection or that his own actions gave rise to his inability to confront the witness. The defendant cannot complain of a deprivation that he himself created.

privilege is procured through coercion; the Commonwealth's argument in the present case is limited only to marriages undertaken for the purpose of asserting the privilege.

III. THE PROSECUTOR'S ARGUMENT WAS WITHIN THE GROUNDS OF PERMISSIBLE ARGUMENT AND ANY MISSTATEMENT DURING CLOSING ARGUMENTS DID NOT AMOUNT TO SUBSTANTIAL RISK OF A MISCARRIAGE OF JUSTICE.

Although the defendant did object to the Commonwealth's closing⁵ [Tr. 2-37], he did not object at the end of the Commonwealth's closing [Tr. 2-30]. Rather, he voiced his objection only after the judge had completed instructing the jury and the jury had left the room [Tr. 2-37]. The Supreme Judicial Court has held that such objections come too late. *Commonwealth v. Allison*, 434 Mass. 670, 687 (2001) ("The defendant's objection to the statement, made after the jury instructions, was too late.") The appropriate time for an objection would have been immediately after the closing, so that the judge could issue a curative instruction if, in his view, such was necessary. Therefore, any claim concerning the closing argument must be reviewed for a substantial risk of a miscarriage of justice. *Allison*, 434 Mass. at 687.

⁵ The defendant's specific objections were 1) "that she referred to what she agrees or disagrees with what I argued" and 2) that "she talks about what I argued about the victim's presence, what - you know, or my comment on the presence - about the victim being here".

The defendant, in his closing, highlighted the fact that the victim had not cooperated with the investigation [Tr. 2-25]. At the end of his closing argument, he stated:

Proof beyond a reasonable doubt. No 911 tape. Maureen is uncooperative with the police. There's no affidavit. As the 20-year veteran, 10-year detective told us, it's normal to get an affidavit in a domestic. "Tell me what happened."

No return phone calls from Maureen. She didn't show up for the appointment. And she married Leonard, after the alleged incident, 12/12/07.

Maureen Lennon Szerlong was in court yesterday, and she's present today. I ask you to weigh all the facts and all the testimony, and I ask that you find the defendant not guilty of assault with a dangerous weapon, and assault and battery to Maureen Lennon Szerlong. I thank you. [Tr. 2-25 through 2-26].

In this passage of the closing, the defense attorney's repeated references to the victim's failure to cooperate with the prosecution cannot be interpreted as anything but a suggestion that the jury should infer the defendant's innocence from his wife's continued support.

At the end of an argument that takes up just over four pages of transcript [Tr. 2-26 through 2-30], the prosecutor stated:

You've heard some other testimony in this trial about the defendant and the victim getting - and the alleged victim getting married sometime after the incident. You've heard Counsel's argument about whether or not - how the victim is present in this courtroom.

And I'm not going to instruct you on the law or any instructions that you're going to get from the judge; but you, as the jury, can make your own inferences about witnesses and about whether or not they testify.

I ask you to employ your common sense and your life experiences. Take the testimony of all the witnesses, all the evidence put together. And I ask, after you've done that, that you find the defendant guilty of these charges. Thank you. [Tr. 2-29 through 2-30].

Read in conjunction with the defense closing, the Commonwealth's reference to the victim's presence clearly responds to the defense attorney's implication that the victim's support for the defendant has relevance. In fact, the victim's marriage to the defendant was actually an incident that the prosecutor had, earlier in the trial, argued had no relevance to the elements of the charge [Tr. 1-127 through 1-128]. In context, the prosecutor's argument does not ask the jury to draw an impermissible inference from the victim's presence, but rather asks them to reject the inference suggested by the defense counsel ("you can make your own inferences" [Tr. 2-29]) and confine

their deliberations to the evidence ("Take the testimony of all the witnesses, all the evidence put together." [Tr. 2-30]).

Although a prosecutor may not "fight fire with fire", "defense counsel's argument may justify a particular rebuttal from the prosecutor". *Commonwealth v. Kozec*, 399 Mass. 514, 519 (1987). Where the implication of the defendant's argument clearly invited the jury to draw a conclusion about the victim's behavior, the prosecutor was entitled to discourage them from drawing that conclusion and to recommend that they review only the testimony and the evidence.

"Remarks made during closing arguments are considered in the context of the whole argument, the evidence admitted at trial, and the judge's instructions to the jury." *Commonwealth v. Caillot*, 454 Mass. 245, 258 (2009). Viewed in the context of the Commonwealth's entire argument, the references to the victim's presence is minimal. The vast majority of the argument was devoted to a recital of the evidence that had been introduced. Only in the closing moments did the prosecutor, in an echo of the argument made by

the defense, reference the victim's presence and suggest the jury to draw their own conclusions, a reference best understood in contradistinction to the conclusions urged by the defense.

"Whether it [an error in the prosecutor's closing argument] is reversible error depends on our consideration of (1) whether the defendant seasonably objected; (2) whether the error was limited to collateral issues or went to the heart of the case; (3) what specific or general instructions the judge gave the jury which may have mitigated the mistake; and (4) whether the error, in the circumstances, possibly made a difference in the jury's conclusions." *Commonwealth v. Perez*, 444 Mass. 143, 151 (2005), quoting *Commonwealth v. Kater*, 432 Mass. 404, 422-423 (2000).

As mentioned earlier, the defendant's objection was not seasonable (prong 1), depriving the judge of the opportunity to give any specifically directed instruction (prong 3). However, the judge did generally instruct at the beginning of the trial that argument is not evidence [Tr. 1-67] and instructed the jury at the end of the trial that the burden was on

the Commonwealth to produce evidence to prove the defendant guilty beyond a reasonable doubt [Tr. 2-30].

As for prong 2, whether the Ms. Lennon and the defendant are married, whether she is or is not present in the court room, and the purposes of their marriage do not go to the heart of the assault and battery charge. As such any error did not deprive the defendant of his right to a fair trial and the conviction should stand.

It is unlikely that the prosecutor's challenged comment would have made a difference in the jury's conclusions (prong 4). The jury heard two witnesses describe the victim's statements to them, statements that were similar to each other in such a way as would reinforce their credibility. The jury heard Tracy Jordan explain that the victim's statements to her were corroborated both by her extreme emotional reaction in relaying the story ("all of a sudden Maureen broke down and started crying" [Tr. 1-77]) and by her display of the physical after-effect of the assault ("It was the whole side of her neck, and it was all red, but you could see, like, where there was marks, like, in between." [Tr. 1-79]).

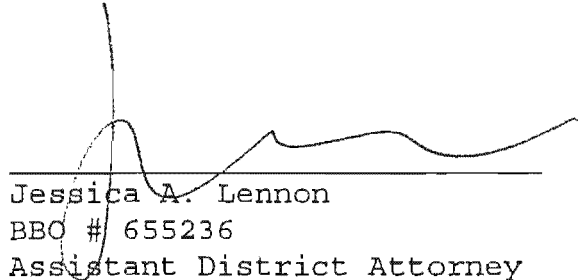
These factors, taken together, suggest that there was no error, and certainly no risk of a miscarriage of justice, in the Commonwealth's remark. Taken in light of the Commonwealth's argument as a whole and taken in the context of the defense closing, the Commonwealth's remark seems only a call to the jury to scrutinize the inference urged by the defense with care. Even if the error were deemed preserved by the defendant's untimely objection, there would be no error in the Commonwealth's closing to merit reversal. Where the error is unpreserved, the defendant has certainly not shown a substantial risk of miscarriage of justice.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Court affirm the judgment of the trial court.

Respectfully submitted,

C. SAMUEL SUTTER
District Attorney

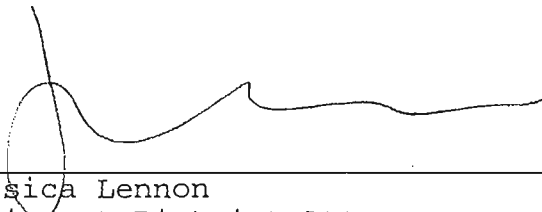


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CERTIFICATION

As counsel for the Commonwealth, I certify that this brief complies with the rules of the court pertaining to the filing of briefs, including Mass. R.A.P. 16(a)(6) (pertinent findings or memorandum of decision); Mass R.A.P.16(e) (references to the record); Mass. R.A.P. 16(f) reproduction of statutes, rules, regulations); Mass. R.A.P. 16(h) (length of briefs); Mass. R.A.P. 18 (appendix to the briefs); and Mass. R.A.P. 20 (form of briefs, appendices, and other papers).

COMMONWEALTH OF MASSACHUSETTS

A handwritten signature in black ink, appearing to read 'Jessica Lennon', is written over a horizontal line. The signature is fluid and cursive, with a large loop at the beginning.

Jessica Lennon
Assistant District Attorney

Dated: October 15, 2009