

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
22-00117

COMMONWEALTH

vs.

KAREN READ

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

On June 9, 2022, a Norfolk County grand jury indicted defendant Karen Read on charges of murder in the second degree, manslaughter while operating under the influence of alcohol, and leaving the scene of personal injury and death following the death of her boyfriend, John O'Keefe, on January 29, 2022. The defendant is pursuing a third-party culprit defense, arguing that one or more persons attending a social gathering at the home of Boston Police Officer Brian Albert on January 29, 2022 killed O'Keefe and that they, along with others, including the Canton and State Police, engaged in a coverup of the crime.

The defendant now moves to dismiss the indictments against her on the grounds that the Commonwealth's presentation of evidence impaired the integrity of the grand jury proceedings. See *Commonwealth v. O'Dell*, 392 Mass. 445 (1984). She argues that the Commonwealth knowingly and recklessly presented false and deceptive evidence to the grand jury and withheld exculpatory evidence for the purpose of obtaining the indictments. The defendant also argues that the Commonwealth deliberately admitted inadmissible evidence to secure the indictments.

On March 12, 2024, the Court conducted a non-evidentiary hearing on the defendant's motion to dismiss. The Court has carefully reviewed all the grand jury minutes and considered each of the defendant's arguments. Given the extensive evidence supporting the indictments, to

the extent that the Commonwealth improperly put before or withheld any evidence from the grand jury, it is unlikely that it affected the outcome of the proceedings. Accordingly, the defendant's motion is **DENIED**.

BACKGROUND

During the grand jury proceedings, the Commonwealth presented evidence of the following.¹

On the night of January 28, 2022, the defendant, O'Keefe, and a group of friends went to the Waterfall Bar and Grill in Canton ("Waterfall") where the defendant consumed several alcoholic beverages. Shortly after midnight, on January 29, 2022, she drove O'Keefe to the home of Boston Police Officer Brian Albert ("Albert residence") where a group of people from the bar were meeting.

Early in the morning on January 29, 2022, a heavy snow was falling with blizzard-like conditions. At 4:53am, O'Keefe's niece called Jennifer McCabe, a friend of O'Keefe's, and told her that she needed to talk to the defendant. Jennifer McCabe had been at the bar with the defendant and O'Keefe the night before and went to the Albert residence afterwards. The defendant was distraught because O'Keefe had not yet come home and was not answering his cell phone. Jennifer McCabe heard defendant screaming, "John didn't come home. We had a fight. I left him at the Waterfall." Grand Jury Transcript ("GJT") at 002165. At around 5:00am, the defendant called Kerry Roberts, whose husband is friends with O'Keefe. The defendant was "hysterical and she screamed: John's dead" and then hung up. *Id.* at 002026. She called Roberts back and told her that O'Keefe had not come home. During their conversation, she stated:

¹ The grand jury heard fourteen days of testimony from over forty witnesses and received fifty-six exhibits. This background section is merely a summary of the Commonwealth's grand jury presentation and is not intended to reflect the entirety of the evidence it presented. The discussion of certain evidence has been reserved for the analysis section below.

“Something must have happened to him . . . What if he’s dead. What if a plow hit him.” *Id.*

The defendant also stated, “I don’t remember anything from last night, we drank so much I don’t remember anything.” *Id.* at 002028.

The defendant, McCabe, and Roberts went to look for O’Keefe together at the Albert residence. While on their way there, the defendant wondered out loud whether she could have hit O’Keefe with her car and mentioned she had a crack in her taillight. Shortly after 6:00am on January 29, 2022, they arrived at the Albert residence where the defendant spotted O’Keefe lying in the front yard covered in snow and unresponsive. When the paramedics arrived and asked what happened, the defendant, who was hysterical and inconsolable, repeatedly stated, “I hit him, I hit him.” *Id.* at 000148. The paramedics transported O’Keefe to the hospital where he was pronounced dead. The medical examiner ruled the cause of death as blunt impact injuries of the head and hypothermia. She did not see “any obvious signs of an altercation or a fight.” GTI at 000927.

During the subsequent police investigation, officers discovered pieces of a taillight and a broken cocktail glass at the scene. They seized the defendant’s vehicle which had a shattered rear taillight and scratches on the bumper. A forensic toxicologist opined that the defendant’s blood alcohol level around 12:45am on January 29, 2022 would have been between .13 percent to .29 percent.²

Police officers spoke with the people who were present at the Albert residence who all reported that they did not see O’Keefe and he never entered the residence. The Norfolk Advocates for Children interviewed O’Keefe’s niece and nephew who lived with him. They stated that the defendant and O’Keefe argued frequently. They both described a recent

² The defendant’s blood was drawn at Good Samaritan Medical Center where she was taken after O’Keefe’s body was discovered.

argument, within two weeks of O’Keefe’s death, where he had asked the defendant to leave his house, but she refused to leave. O’Keefe’s niece described a second argument within a week of his death where she heard O’Keefe tell the defendant that he wanted to end the relationship, that it had run its course, that it was not healthy, and that they argued too often. The defendant did not want the relationship to end and again refused to leave the house.

Officers also recovered text messages exchanged between the defendant and O’Keefe on January 28, 2022, and voicemails the defendant left O’Keefe on January 29, 2022, after 1:00am. Leading up to the night at the Waterfall, the defendant and O’Keefe exchanged several text messages about their strained relationship. In the voicemails that the defendant left O’Keefe on January 29, 2022, she stated, “you are fucking using me right now, you are fucking another girl . . . you are a fucking loser, fuck yourself,” she called him, “a fucking pervert,” and she yelled at him, “John, I fucking hate you.” See GJ Exh. 48

LEGAL STANDARD

“A defendant may be entitled to dismissal of an indictment if the integrity of the grand jury was impaired by a prosecutor’s improper conduct in the introduction of certain evidence.” *Commonwealth v. Brown*, 490 Mass. 171, 181 (2022). “[T]he heavy burden to show impairment of the grand jury proceeding is borne by the defendant.” *Commonwealth v. Stevenson*, 474 Mass. 372, 376 (2016). The defendant must establish that: “(1) the Commonwealth knowingly or recklessly presented false or deceptive evidence to the grand jury; (2) the evidence was presented for the purpose of obtaining an indictment; and (3) the evidence probably influenced the grand jury’s decision to indict.” *Commonwealth v. Silva*, 455 Mass. 503, 509 (2009), citing *Commonwealth v. Mayfield*, 398 Mass. 615, 620-622 (1986).

“In certain instances, the failure to disclose known information may impair the grand jury proceedings.” *Mayfield*, 398 Mass. at 620. “Prosecutors are not required in every instance to reveal all exculpatory evidence to a grand jury.” *Commonwealth v. McGahee*, 393 Mass. 743, 746 (1985). However, “they must present exculpatory evidence ‘that would greatly undermine either the credibility of an important witness or evidence likely to affect the grand jury’s decision,’ as well as evidence the withholding of which would cause the presentation to be seriously tainted.” *Commonwealth v. Clemmey*, 447 Mass. 121, 130 (2006), quoting *Commonwealth v. Wilcox*, 437 Mass. 33, 37 (2002). See also *Commonwealth v. Arroyo*, 442 Mass. 135, 143 (2004), quoting *O’Dell*, 392 at 449 (“we require that prosecutors not ‘distort the meaning’ of the evidence that they present by withholding certain portions of it”). “If the defendant can show that the prosecutor omitted such exculpatory evidence and that the evidence withheld would likely have affected the grand jury’s decision to indict, dismissal is warranted.” *Clemmey*, 447 Mass. at 130. Because there is no “satisfactory, comprehensive statement of what conduct does, and what conduct does not, impair the integrity of the grand jury process,” the Court must deal with the conduct in question “case by case.” *Mayfield*, 398 Mass. at 620.

DISCUSSION

As noted above, the defendant maintains that the Commonwealth knowingly and recklessly presented false and deceptive evidence to the grand jury and withheld exculpatory evidence for the purpose of obtaining the indictments. The defendant also maintains that the Commonwealth deliberately admitted inadmissible evidence to secure the indictments. The Court addresses each of the defendant’s several arguments for dismissal in turn.

I. Sergeant Michael Lank's False and Deceptive Statements and Conflict of Interest

The defendant argues that Canton Police Sergeant Michael Lank, who was one of the first police officers to arrive at the scene on the morning of January 29, 2022, gave false and deceptive testimony to the grand jury and withheld evidence of his personal relationship with the Albert family. Specifically, the defendant contends that the Commonwealth and Sergeant Lank (1) gave false and deceptive testimony to the grand jury regarding purported admissions made by the defendant; (2) gave deceptive testimony as to the reason the State Police took over the investigation from the Canton Police Department; and (3) withheld exculpatory information as to Sergeant Lank's longstanding relationship with members of the Albert family.

i. The Defendant's Statements at the Scene

With respect to the first argument, Sergeant Lank testified:

“So officers that were there prior to my arrival had attempted to speak with Read. But from what I had gathered from them, she was too hysterical and was unable to really assist us in any way. The only information they were able to retrieve from her is that she could not recall whether or not she had been there.”

GJT at 00081. The defendant contends that this testimony impaired the grand jury proceedings because it was not based on personal observations, distorted the defendant's statements to the responding officers, and strongly suggested an admission of guilt. After careful review, the Court concludes that this testimony does not meet the standard for dismissal.

To establish that the Commonwealth impaired the integrity of the grand jury, the defendant must first demonstrate that false or deceptive evidence was given to the grand jury knowingly or with reckless disregard of the truth. *Mayfield*, 398 Mass. at 621. Nothing before the Court suggests that Sergeant Lank gave knowingly false testimony to the grand jury or that the Commonwealth sought to deceive the grand jury with the presentation of his testimony.

Sergeant Lank clearly stated that his knowledge of the defendant on the morning of January 29, 2022, came from what “he had gathered” from other officers who spoke with Read, not his personal observations. See *Commonwealth v. St. Pierre*, 377 Mass. 650, 655 (1979) (indictment may be based on hearsay so long as the hearsay testimony is not used to deceive the grand jurors). Moreover, although other evidence presented to the grand jury demonstrates that the officers on the scene obtained more information from the defendant than that stated by Sergeant Lank, nothing before the Court demonstrates that those other officers communicated that information to Sergeant Lank, or that he purposely withheld it from the grand jury. See *Mayfield*, 398 Mass. at 620 (“inaccurate statements made in good faith do not require dismissal of an indictment”).

Even if Sergeant Lank knowingly or recklessly gave a false statement to the grand jury, the defendant has not established that the Commonwealth presented Sergeant Lank’s testimony for the purpose of obtaining the indictment or that it probably influenced the grand jury’s decision to indict. See *id.* at 621. Prior to Sergeant Lank’s testimony, the three police officers who were first on the scene testified before the grand jury as to their first-hand observations of the defendant and statements she made. Canton Police Officer Steven Saraf described the defendant as “very, very distraught, very upset.” See GJT at 000031. She kept loudly and “hysterically” saying “this is my fault” and “I can’t believe this happened” and asked several times if O’Keefe was going to die. *Id.* at 000032. Canton Police Officer Stephen Mullaney described the defendant as “hysterical and distraught” and repeatedly screaming, “Is he dead?” and “[t]hat’s my boyfriend.” *Id.* at 000070. Canton Police Officer Sean Goode described the defendant as “hysterical, continually yelling, ‘Is he dead.’” *Id.* at 000047. Officer Goode asked the defendant how O’Keefe ended up outside the residence and she stated, “I don’t know.” *Id.*

He asked if she drove O'Keefe there the night before and she stated, "I think so," and then "I can't remember." *Id.* He stopped asking her questions because "she was too upset and she was unable to keep a train of thought." *Id.* Given the preceding testimony of these three officers, it is highly unlikely that the Commonwealth sought to deceive the grand jurors into thinking the only information officers could gather from the defendant was that she did not remember whether she had been to the Albert residence. For the same reason, it is equally unlikely that Sergeant Lank's testimony made a difference in the grand jury's decision to indict the defendant.

ii. State Police Involvement in Investigation

The defendant also argues that Sergeant Lank gave deceptive testimony as to the reason the State Police took over the investigation from the Canton Police Department. Specifically, the defendant contends that Sergeant Lank's testimony that the State Police "assumed jurisdiction" and "took over the investigation" as soon as it was determined that O'Keefe was deceased, see *id.* at 000098, was an effort to conceal the fact that the Canton Police "lost jurisdiction in the case because their agency was conflicted." See Defendant's Memorandum at 17.

The defendant has not shown that Sergeant Lank's testimony in this regard was false or deceptive or that he withheld exculpatory evidence. His testimony as to the reason the State Police took over the investigation is consistent with G. L. c. 38, § 4, which requires that the Norfolk County District Attorney's Office and its law enforcement representative, here the State Police detective unit, direct and control an investigation of a death that occurs under the circumstances presented by this case. See G. L. c. 38, § 4 ("The district attorney or his law enforcement representative shall direct and control the investigation of the death [in the circumstances enumerated in section three] and shall coordinate the investigation with the office of the chief medical examiner and the police department within whose jurisdiction the death

occurred.”). The defendant has not put forth any evidence that suggests the State Police took over the investigation for some other reason. The defendant refers only to a Boston Globe article wherein Norfolk County District Attorney Michael Morrissey is quoted as saying the Canton Police Department recognized a potential conflict early on and recused itself from the case. This article is neither competent evidence the Court can rely upon for purposes of this motion, nor does it lead to the conclusion that Sergeant Lank falsely testified that the State Police took over the investigation once it was determined O’Keefe was deceased. Moreover, because the State Police directed and controlled the investigation and the Canton police officers testified only as to their involvement when O’Keefe’s body was first discovered, it is unlikely that if the grand jurors had known the Canton Police had a conflict in connection with the investigation, it would have had any impact on their decision to indict.

iii. Relationship with the Alberts

The defendant contends that the Commonwealth intentionally withheld exculpatory information that Sergeant Lank had a longstanding relationship with members of the Albert family and that he had, in the past, “deputiz[ed] himself” to “shield [the Alberts] from criminal liability.” Defendants’ Memorandum at 19. In support of this argument, the defendant cites a complaint filed in a civil action against Sergeant Lank regarding an incident that occurred in 2002 where Sergeant Lank, while off duty, allegedly physically assaulted two individuals and had one arrested after they had an altercation with Tim Albert, Brian Albert’s brother. The case later settled. According to the defendant, the Commonwealth’s failure to disclose this information impaired the integrity of the grand jury proceedings because, had the grand jurors known of this incident, it would have undermined Sergeant Lank’s credibility in this case. The Court is not persuaded.

The Commonwealth's obligation is to present exculpatory evidence "that would greatly undermine either the credibility of an important witness or evidence likely to affect the grand jury's decision as well as evidence the withholding of which would cause the presentation to be seriously tainted" (quotation and citation omitted). *Clemmey*, 447 Mass. at 130. The defendant has not directed this Court to any case law that suggests allegations in a civil complaint from twenty years ago against one of the many police officers preliminarily involved in the investigation would be considered exculpatory evidence. Cf. *Commonwealth v. McFarlane*, 493 Mass. 385, 391 (2024) (allegations from a civil lawsuit which was not full adjudicated are not exculpatory evidence); *Commonwealth v. LaVelle*, 414 Mass. 146, 149-151 (1993) (informing the grand jury that the police informant had convictions for larceny and breaking and entering six years before the investigation into the defendant began would not have undermined the credibility of the evidence). Nor is there any evidence before the Court that Sergeant Lank engaged in conduct during his brief involvement with this case that suggests he was not impartial.³

Even if knowing that Sergeant Lank had a history of friendship with Brian Albert's brother may have colored the grand jurors' view of his testimony, Sergeant Lank was one of many police officers who testified before the grand jury and his role in the investigation was minimal. His entire testimony makes up only twenty-seven pages of the grand jury transcript, which is over fourteen hundred pages in length. Given the extensive amount of other evidence against the defendant, it is "unlikely that [disclosure of the withheld information] would have affected the grand jury's decision to indict." See *McGahee*, 393 Mass. at 747.

³ To the extent that the defendant contends that the Alberts did not come out of their residence at the time O'Keefe's body was discovered because they were waiting for their friend, Sergeant Lank, to interview them, that assertion is purely conjecture. The testimony before the grand jury was that the Brian Albert and his wife Nicole were sleeping during the early morning hours when the body was discovered.

II. Trooper Michael Proctor's False and Deceptive Statements and Conflict of Interest

The defendant argues that State Police Trooper Michael Proctor, the homicide investigator for the Norfolk County District Attorney's Office who co-led the investigation into O'Keefe's death, gave false and deceptive testimony to the grand jury and failed to disclose that he had a personal relationship with other percipient witnesses. Specifically, the defendant contends that the Commonwealth and Trooper Proctor (1) withheld from the grand jury that Trooper Proctor is a close family friend of the Alberts; (2) failed to inform the grand jury that there was an alternate explanation for the defendant's broken taillight; and (3) withheld from the grand jury that the death certificate stated that the manner of death could not be determined.

i. Relationship with the Alberts

With respect to the first argument, the defendant has proffered evidence that shows Trooper Proctor's sister was friends with Jennifer McCabe and Julie and Chris Albert, the brother and sister-in-law of Brian Albert.⁴ Even assuming that Trooper Proctor had a personal relationship with these witnesses, disclosure to the grand jury was not necessarily required. Only "when the prosecutor possesses evidence which would greatly undermine the credibility of evidence likely to affect the grand jury's decision to indict, [must he] alert the grand jury to the existence of such evidence." See *McGahee*, 393 Mass. at 746. The defendant has not pointed to any case law that suggests a police officer's credibility is greatly undermined if he knows witnesses in a case.⁵ Even if Trooper Proctor's familiarity with the witnesses suggests some sort

⁴ To the extent that the defendant argues Trooper Proctor's relationship with these and other witnesses is closer than what is shown in the evidence before the Court, such an issue is properly dealt with at trial on cross-examination.

⁵ The Court notes that there is an ongoing federal inquiry into the investigation of O'Keefe's death, and the State Police is also currently investigating Trooper Proctor. The Commonwealth and the defendant have received numerous documents regarding the federal investigation pursuant to a *Touhy* request, and the defendant cites several documents as evidence of a "longstanding compromising relationship between Trooper Proctor and the Alberts." See Defendant's Supplemental Memorandum at 5. The Court has reviewed all the documents from the federal

of bias in the investigation that the grand jury may have considered, to warrant dismissal, the defendant must show that the absence of the withheld evidence likely would have affected the grand jury's decision to indict. *Clemmey*, 447 Mass. at 130. The grand jury heard extensive evidence supporting probable cause to believe the defendant struck O'Keefe with her vehicle. Therefore, even if the grand jury had been aware of Trooper Proctor's relationship with the Alberts, it "would almost certainly have left unaltered the disposition to indict." *Commonwealth v. Biasiucci*, 60 Mass. App. Ct. 734, 738 (2004).⁶

ii. Alternate Explanation for the Broken Taillight

Turning to the second argument, Trooper Proctor testified that the State Police viewed footage from Ring cameras at O'Keefe's residence including one camera located above the garage doors. The Commonwealth showed the grand jury the video and Trooper Proctor testified as to what he saw. He stated that at 5:07am on January 29, 2022, the defendant is seen reversing out of the garage and driving off. As she backed out of the garage, her right rear taillight came "extremely close to Mr. O'Keefe's SUV." GJT at 002313-002314. No pieces of taillight were viewed anywhere in the driveway that day and no damage was observed anywhere

investigation. While they reveal several examples of Trooper Proctor's unprofessional and questionable conduct, they do not shed much light on the extent of his relationship with the witnesses and what impact, if any, the relationships had on his investigation. At this time, no specific evidence cited by the defendant warrants dismissal.

⁶ Citing Sergeant Bukhenik's testimony, the defendant also argues that the Commonwealth intentionally misled the grand jury as to Trooper Proctor's relationship with Chris and Julie Albert. Sergeant Bukhenik, read to the grand jury his report of the interview he conducted with Trooper Proctor of Chris and Julie Albert. The report began with the words "following formal introductions." The Court does not agree that this testimony was intentionally misleading. Sergeant Bukhenik wrote the report, and there is no suggestion that he knew either of the witnesses or used this language to misrepresent Trooper Proctor's connection to Chris and Julie Albert.

The Court also does not agree with the defendant's argument in her supplemental memorandum that the Commonwealth withheld evidence of Sergeant Bukhenik's preexisting relationship with another witness, Brian Higgins, because Sergeant Bukhenik and Higgins "had drinks," "socialized . . . at the gym," and had worked on a couple cases together. Defendant's Supplemental Memorandum at 9. For the same reasons the Court has concluded that Trooper Proctor's alleged preexisting relationship with some witnesses does not warrant dismissal of the indictment, it concludes Sergeant Bukhenik's familiarity with Higgins does not warrant dismissal.

on O'Keefe's SUV. The defendant argues that this testimony was misleading because her vehicle *did* strike the SUV breaking her taillight, thus providing an alternative explanation to the Commonwealth's theory that the taillight broke when the vehicle struck O'Keefe.

Nothing about Trooper Proctor's testimony was misleading. The Commonwealth was not obligated to offer an alternate explanation for the broken taillight. See *Silva*, 455 Mass. at 511 ("The Commonwealth is not required to present evidence of so-called defenses or otherwise disprove such matters before the grand jury."). Nor does the fact that the defendant has a different interpretation of the video make Trooper Proctor's testimony false or misleading. Moreover, the Ring video was introduced into evidence before the grand jury allowing the grand jurors to assess whether the defendant's vehicle made contact with O'Keefe's SUV. See GJ Exh. 44. Accordingly, there is no merit to the defendant's argument that Trooper Proctor's testimony about the Ring video impaired the integrity of the grand jury process.

iii. O'Keefe's Death Certificate

The defendant lastly contends that the Commonwealth attempted to deceive the grand jury with its presentation of evidence regarding O'Keefe's death certificate. During the proceedings, Trooper Proctor testified that the cause of death listed on the death certificate was blunt impact injuries of head and hypothermia. He was not asked and therefore did not testify that the death certificate listed the manner of death as "could not be determined." See GJ Exhibit 41. According to the defendant, like *O'Dell*, the Commonwealth distorted the evidence by only presenting a portion of the information from the death certificate. This argument, too, is unavailing.

The circumstances here are markedly different than *O'Dell*. In *O'Dell*, a police detective read the grand jury an edited version of the defendant's statement to police in the aftermath of an

armed robbery. 392 Mass. at 448. As edited, the statement suggested an admission of guilt by silence when, in fact, the defendant had disclaimed any knowledge of the robbery to police. *Id.* The Supreme Judicial Court held that the omission of part of the defendant's statement was not a "mere withholding of exculpatory evidence" but "tended to distort the meaning of that portion of the defendant's statement that was repeated to the grand jury." *Id.* at 449.

Here, unlike *O'Dell*, omitting that the manner of death "could not be determined" did not tend to distort the meaning of the cause of death. Indeed, this information sheds no light on the cause of death. See *Commonwealth v. Drumgold*, 423 Mass. 230, 240 (1996) (where the evidence presented to the grand jury was not distorted by the omission, the omission did not impair the integrity of the grand jury). Nor does it inculcate or exculpate the defendant. Moreover, because the death certificate was submitted to the grand jury as an exhibit, see GJ Exh. 41, the medical examiner's conclusion as to the manner of death was not concealed by the Commonwealth.⁷ Accordingly, Trooper Proctor's testimony as to the death certificate did not distort the presentation of the evidence to the grand jury.

III. Chris and Julie Albert's Inconsistent Statements

The defendant next challenges the testimony given by Chris and Julie Albert. She argues that Chris Albert gave an inconsistent statement regarding his presence at the Albert residence after the Waterfall, and Julie Albert changed her story as to how she found out O'Keefe has died, and that the Commonwealth withheld both inconsistent statements from the grand jury. The Court does not agree.

⁷ The Court notes that it is more likely that the Commonwealth did not elicit testimony about the manner of death because generally, it is impermissible as evidence. See G. L. c. 46, § 19 ("nothing contained in the record of death which has reference to the question of liability for causing the death shall be admissible in evidence"); Cf. *Commonwealth v. Ellis*, 373 Mass. 1, 8 (1977) ("The better and safer course is to exclude from a death certificate the words 'homicide,' 'suicide,' or 'accident' in a criminal trial.").

Before the grand jury, Chris and Julie Albert testified that they were at the Waterfall the night of January 28, 2022, but that neither went back to the Albert residence afterwards. Julie went home early with a headache, and Chris walked home when everyone left the bar. Sergeant Bukhenik testified as to his interview with Chris and Julie Albert on February 10, 2022 where both made similar statements. The defendant contends that Sergeant Bukhenik's February 21, 2022 report memorializing his interview of the witnesses indicated that Julie and Chris Albert *did* go back to the Albert residence after the Waterfall, and that the Commonwealth "intentionally failed to elicit Chris Albert's inconsistent statements" before the grand jury. Defendant's Memorandum at 24.⁸ Given that Chris Albert testified consistently with Sergeant Bukhenik's February 10, 2022 report that was read to the grand jury, it does not appear to the Court that he did, in fact, give an inconsistent statement. The error appears to lie in Sergeant Bukhenik's later report. Eliciting the inconsistency in Sergeant Bukhenik's report would not "likely have affected the grand jury's decision to indict." *Clemmey*, 447 Mass. at 130. Accordingly, dismissal is not warranted based on this argument.

Nor is dismissal warranted based on the defendant's argument that the Commonwealth failed to impeach Julie Albert with her prior inconsistent statement regarding how she found out about O'Keefe's death. Julie Albert testified before the grand jury that on the morning of January 29, 2022, she woke up at 5:50am and saw she had a missed call from Jennifer McCabe. She "didn't think obviously anything bad," got out of bed, changed her clothes, and headed over to the Albert residence to drop off a gift for her nephew's birthday. See GJT at 000521-000522. Upon arriving at the Albert residence, she learned of O'Keefe's death. Sergeant Bukhenik read his report memorializing his interview with Julie Albert on February 10, 2022 in which she gave

⁸ The defendant refers to the report as "Exhibit G" to her motion, however, the defendant has only submitted to the Court Exhibits A through F.

a different account of the morning. She told Sergeant Bukhenik that “she was asleep at 4:55am on January 29th, 2022, when her phone woke her up and there was Jen’s missed call, and that is how she found out about [O’Keefe] dying.” See GJT at 000840.

The Court does not agree with the defendant that the Commonwealth’s failure to impeach Julie Albert warrants dismissal. First, the Commonwealth did not withhold Julie Albert’s inconsistent testimony from the grand jury. Contrast *O’Dell*, 392 Mass. at 448. Both her testimony and the statement she gave Sergeant Bukhenik were before the grand jury. It is therefore not the case that the Commonwealth “carefully script[ed]” the testimony in order to “hide the ball” on the grand jury regarding Julie Albert’s inconsistent statements. See *Commonwealth v. Hunt*, 84 Mass. App. Ct. 643, 654-655 (2013) (prosecutor presented witness’s identification of defendant but omitted witness’s prior statement that she could not identify the perpetrators).

Moreover, even assuming Julie Albert falsely recounted how she found out about O’Keefe’s death during her grand jury testimony, “the defendant must show not only that the evidence was material to the question of probable cause but, on the entire grand jury record, the false or deceptive testimony probably ‘would have affected the decision to indict.’” *Id.* at 657, quoting *Silva*, 455 Mass. at 508. The Court does not agree with the defendant’s assertion that the difference in testimony clearly “inculcates Julie Albert, and exculpates Ms. Read.” Defendant’s Memorandum at 26. It is more than an inferential leap to conclude, as the defendant does, that Julie Albert’s statement to Sergeant Bukhenik suggests that she and Jennifer McCabe knew O’Keefe was dead before his body was discovered that morning. Highlighting the discrepancy in Julie Albert’s testimony “would not likely have undermined the value of other evidence tending to show that the defendant[] committed the crime.” *Hunt*, 84 Mass. App. Ct. at 658.

IV. Introduction of Propensity and Bad Character Evidence

The defendant argues that the Commonwealth improperly presented the grand jury with prejudicial propensity and bad character evidence for the purpose of obtaining the indictment. Specifically, the defendant objects to: (1) the Commonwealth's presentation of evidence from a trip to Aruba that occurred a month before O'Keefe's death where the defendant accused O'Keefe of having an affair; and (2) the Commonwealth's presentation of hearsay evidence regarding the state of the defendant and O'Keefe's relationship. The Court concludes that the presentation of this evidence did not impair the grand jury proceedings.

There is no evidence before the Court that the Commonwealth presented any false testimony with respect to the events that transpired in Aruba or the defendant and O'Keefe's relationship leading up to January 29, 2022. Nor does the Court find such evidence to be improper propensity evidence. Prior bad act evidence may be relevant in a grand jury presentation to show something other than propensity. See *Commonwealth v. Hall*, 485 Mass. 145, 159-160 (2020) (no error in presentation of certain evidence to grand jury where evidence was relevant to show intent and motive). In particular, prior bad act evidence is relevant to show a hostile relationship between a defendant and a victim and to show state of mind and motive. See *Commonwealth v. Bianchi*, 435 Mass. 316, 322 (2001). The evidence presented here was relevant to the defendant's state of mind on the night of the incident and her motive to commit the crime. Additionally, where other evidence before the grand jury demonstrated the strained and hostile nature of the defendant and O'Keefe's relationship leading up January 29, 2022, it is unlikely that the events in Aruba were presented for the purpose of obtaining an indictment.⁹

⁹ The Court acknowledges that the Commonwealth's presentation of prior bad act testimony with respect to the Aruba trip may have been excessive and as a result, some of the evidence may have been more prejudicial than probative. However, looking at the evidence in its totality and keeping in mind the Commonwealth's relatively low burden of proof to obtain an indictment and the defendant's heavy burden to show impairment of the grand jury

The presentation of hearsay evidence regarding the defendant's relationship with O'Keefe was also not improper. It is well-established that "an indictment may be based, in whole or in part, on hearsay." *Commonwealth v. Kater*, 432 Mass. 404, 412 (2000). The defendant has not directed this Court to any instance where hearsay testimony was used to deceive the grand jury. Cf. *Mayfield*, 398 Mass. at 620 (noting that "if a prosecutor were to deceive grand jurors by presenting remote hearsay in the guise of direct testimony" it may result impair the integrity of the proceedings). Accordingly, the presentation of hearsay testimony does not warrant dismissal.

V. Introduction of Lay Witness and Expert Opinion

The defendant contends that the Commonwealth introduced incriminating lay and expert opinion testimony and rank speculation for the purpose of obtaining the indictment. The defendant cites three specific examples which she contends impaired the grand jury process.

i. State Police Officer David Diccio

First, the defendant contends that the Commonwealth elicited improper hearsay testimony from State Police Officer David Diccio. Officer Diccio testified that O'Keefe's brother stated that he "went to the hospital to view [O'Keefe's] body and it looked like [he] had been hit by a car." GJT at 000464. According to the defendant, such testimony improperly served as expert testimony and was intended to substitute for the absence of testimony as to the manner of death. This argument is wholly without merit. Nothing about the testimony would lead the grand jury to believe the statement was an opinion based on scientific, technical, or

proceeding, "[i]t is not evident that, absent the prior bad act evidence, the jury likely would not have decided to indict." *Brown*, 490 Mass. at 186 ("where the grand jury were presented with sufficient probable cause to issue the indictments, the prior bad act evidence did not sufficiently influence the grand jury's decision to indict to require dismissal of the indictments"). See *Clemmey*, 447 Mass. at 133 (there was "little chance that the grand jury could have been led to indict [defendant] on the basis of an apparent propensity to commit such crimes, rather than on the direct and overwhelming evidence that he had [committed the crime]").

some other specialized knowledge. Thus, the testimony was neither false nor deceptive. Even if such a statement would be inadmissible at trial, given the context of the statement and its relative unimportance in comparison to the other evidence before the grand jury, it is also highly unlikely that it was elicited for the purpose of obtaining the indictment or that it probably influenced the grand jury's decision.

ii. Testimony from the McCabes

Second, the defendant argues that the Commonwealth elicited speculative testimony from Jennifer McCabe and her husband Matthew McCabe. With respect to Matthew, the defendant contends that the Commonwealth asked him to speculate as to the reason the defendant's car was parked outside the Albert residence for a period of time but neither O'Keefe nor the defendant entered the residence.¹⁰ However, the question posed by the prosecutor was about how long the defendant's car was in front of the house, not the reason it was there. See GJT at 002125 ("So a fairly significant amount of time, is that correct?"). Thus, contrary to the defendant's contention, the Commonwealth did not elicit speculative testimony from Matthew McCabe to "fill [a] gaping hole[] in the Commonwealth's case." See Defendant's Memorandum at 39.

Moreover, Matthew's response made it clear that he had no idea as to why the vehicle was parked out front for so long.

"Yes. The car was out there. We just thought it was weird, you know, in hindsight were they having a disagreement in the car, I don't know. You know, I don't know why the car was out there. Why it was parked there. It wasn't as if they pulled up and I looked outside and the next thing you know they were gone. They

¹⁰ The grand jury heard testimony from Jennifer McCabe that after arriving at the Albert residence from the Waterfall, she was looking out the window when she saw the defendant's vehicle pull up to the front of the house. Over the next fifteen minutes, the vehicle remained outside the residence. Jennifer McCabe noticed that at some point, the vehicle moved to a different spot on the road. During this time, Jennifer McCabe texted O'Keefe and accidentally called him but he did not answer. She further testified that at some point, the vehicle was no longer there and she assumed that the defendant and O'Keefe had left and gone home

definitely moved the car and for some reason never came in the house.”

Id. Therefore, even if the question invited speculative testimony, given the other evidence before the grand jury that the defendant and O’Keefe had a strained relationship and were arguing that night, Matthew’s testimony that he did not know if they were having a disagreement would not have made a difference.

With respect to Jennifer McCabe, the defendant contends that the Commonwealth elicited speculative testimony as to why O’Keefe’s niece described the defendant as acting “crazy” on the morning of January 29, 2022.¹¹ However, this testimony was prompted by a question from a grand juror, not the prosecutor. See GJT at 002197-002198 (Grand Juror: “... [O’Keefe’s niece] when you spoke to her said [the defendant] was acting crazy. Do you know how long, you know, or any information from your conversation with [the niece], like how long [the defendant] was there speaking to her or what she means by quite crazy?”). Thus, even if the response was speculative, it was not elicited by the Commonwealth for the purpose of obtaining the indictment. See *Brown*, 490 Mass. at 185 (quotation and citation omitted) (“Evidence submitted in response to a question by a grand juror . . . is less problematic than evidence submitted by the prosecutor’s design”); *Commonwealth v. Mathews*, 450 Mass. 858, 876-877 (2008) (where testimony was “not offered gratuitously by the police officer or by the prosecutor” but made in response to a question from a grand juror, the context suggested it was not presented to the grand jury in bad faith).¹²

¹¹ Jennifer McCabe testified that on the morning of January 29, 2022, when she and the defendant went back to O’Keefe’s residence before going out to look for him, she talked to O’Keefe’s niece who said the defendant “was acting crazy.” GJT at 002177.

¹² The Court’s notes that after the grand juror posed the question, the prosecutor said to McCabe, “If you know?” See GJT at 002198. This interjection does not change the Court’s analysis as the question originated from the grand juror and it appears to the Court that the prosecutor was attempting to minimize the possibility of speculation in the answer.

iii. State Police Computer Forensics Expert Trooper Guarino's Reports

Finally, the defendant contends that the Commonwealth put improper expert opinion before the grand jury when Trooper Proctor read reports from the State Police Computer Forensics Expert, Trooper Guarino, to the grand jury. Pursuant to search warrants, Trooper Guarino seized an infotainment system and a telematics system from the defendant's vehicle. Trooper Proctor read Trooper Guarino's report to the grand jury:

On Saturday, January 29, 2022, Trooper Michael Proctor and Sergeant Yuri Bukhenik of the Norfolk District Attorney's Office responded to the unattended death of John O'Keefe, date of birth 12/8/1975, at 34 Fairview Road in Canton. *Through my investigation it was found that O'Keefe was a victim of motor vehicle homicide.* Sergeant Bukhenik and myself responded to 345 Country Hill Drive in Dighton, Mass., and secured Massachusetts Reg. 3GC684, a 2021, Lexus GX570, SUV belonging to Karen Read, date of birth, 2/26/1980, who is a suspect in this case. The vehicle was towed to Canton Police Department as evidence. On Wednesday, February 2, 2022, the vehicle was towed from Canton Police Department to the H7 Milton barracks. I supplied search warrant number 2255SW0010, issued out of the Stoughton District Court. . . the evidence was secured as follows: one, infotainment system . . .one, telematics system. . . At this time, we are unable to access the data and analyze it. Both systems are secured at the Norfolk DA's Office for future analysis.

GJT at 002334-002335 (emphasis added). State Police also seized the defendant's cell phone and performed a cell phone extraction and forensic analysis. Trooper Proctor read Trooper Guarino's report concerning the defendant's cell phone to the grand jury. It also stated that through his investigation "it was found that O'Keefe was a victim of a motor vehicle homicide" and concluded "[a]t this time, we are unable to access the data on the phone. . ." *Id.* at 002337-002338.

The defendant argues that through this testimony, the Commonwealth elicited "improper 'expert opinion' that Mr. O'Keefe was the victim of a vehicular homicide, falsely insinuating to

the grand jury that he must have reviewed electronic evidence in this case suggesting O'Keefe was struck by a vehicle." Defendant's Memorandum at 42. The Court does not agree with defendant's characterization of the testimony. Although it may have been misleading for the report to state "[t]hrough [Trooper Guarino's] investigation it was found that O'Keefe was a victim of motor vehicle homicide," the report thereafter clearly states that the police were unable to access the data from the defendant's vehicle or phone. Therefore, it is unlikely that the testimony deceived grand jurors into believing that Trooper Guarino reviewed electronic evidence in this case suggesting O'Keefe was struck by a vehicle. Even if, as suggested by the defendant, the opening sentence of the report may have led the grand jury to believe that the police had conclusively determined that O'Keefe was killed by a car, given all the evidence before the grand jury suggesting that the defendant's vehicle struck O'Keefe, this testimony probably did not influence the grand jury's decision to indict.

VI. Time of Jennifer McCabe's Google Search

In her supplemental memorandum, the defendant argues that the Commonwealth "intentionally and recklessly deceived the grand jury by presenting an incomplete extraction of Jennifer McCabe's cell phone as an exhibit before the grand jury." See Defendant's Supplemental Memorandum at 13. According to the defendant, this grand jury exhibit (No. 49) purposely left off a Google search Jennifer McCabe made at 2:27am, before O'Keefe's body was discovered, stating "hos (sic) long to die in cold." The defendant has not shown that the Commonwealth improperly withheld this evidence.

The grand jury exhibit referred to by the defendant is a Cellebrite cell phone extraction report from Jennifer McCabe's cell phone containing the call log, contacts, instant messages, and tags in her cell phone. A more recent Cellebrite report obtained during the federal investigation

provides the web history of the phone including the aforementioned Google search at 2:27am and a search for “how long ti (sic) die in cikd (sic)” at 6:23am and 6:24am.¹³ There is no evidence that the more recent report was available to the Commonwealth at the time of the grand jury proceedings. Indeed, based on an examination of the two reports, it appears that the more recent report used an updated version of software which included web history, data files, and activity sensor data that the previous software did not extract. Because the Commonwealth could not have withheld information it did not have and was not aware existed at the time of the grand jury, the defendant has not established that the Commonwealth withheld exculpatory evidence from the grand jury for the purpose of obtaining the indictment.

VII. Collusion between Jennifer McCabe and Kerry Roberts

Finally, the defendant contends that the Commonwealth withheld from the grand jury that prior to their grand jury testimony, Jennifer McCabe and Kerry Roberts wrote a timeline of events that occurred on January 29, 2022, and they showed that timeline to the state prosecutor. According to the defendant, by not eliciting testimony from these witnesses regarding the timeline, the Commonwealth improperly misled the grand jury into believing that Jennifer McCabe and Kerry Roberts testified to their own independent recollection of events that occurred on January 29, 2022. The Court does not agree with the defendant that the failure to elicit such testimony undermined the witnesses’ credibility and impaired the integrity of the proceedings. That two witnesses who are friends and who were with the defendant on the morning in question discussed the timeline of events that occurred before their testimony before the grand jury does not seriously undermine their credibility. Even if it may have been a better

¹³ The Court notes that the time or times of the Google search is a hotly disputed issue.

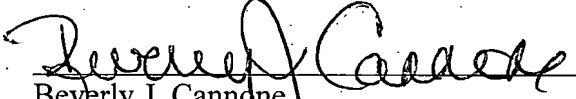
practice for the prosecutor to elicit testimony about their written timeline, the failure to do so did not “seriously taint[]” the grand jury proceedings. *Clemmey*, 447 Mass. at 130.

CONCLUSION AND ORDER

For the foregoing reasons, the Court concludes that the Commonwealth’s presentation of the evidence before the grand jury did not impair the integrity of the proceedings.

Defendant’s Motion to Dismiss is therefore **DENIED**.

Date: March 26, 2024


Beverly J. Cannone
Justice of the Superior Court