

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

NO. 02-P-3

WORCESTER COUNTY

COMMONWEALTH OF MASSACHUSETTS,

APPELLANT

v.

MICHAEL G. ELBERY

APPELLEE,

ON APPEAL FROM A JUDGMENT BY THE
WORCESTER DIVISION OF THE SUPERIOR
COURT DEPARTMENT

Brief for the Commonwealth

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TABLE OF CONTENTS.

Table of Authorities	ii
Question Presented	
Prior Proceedings	
Statement of Facts	3
Argument	20
The Motion Judge Properly Denied Defendant's Motion for New Trial Without a Hearing, Where Defendant Did Not Raise a Substantial Issue With an Adequate Factual Basis to Show that a Substantial Risk of a Miscarriage of Justice Occurred.	
Conclusion	44
Addendum	follows conclusion

Table of Authorities

Cases

- Commonwealth v. Adams,
374 Mass. 722 (1978)
- Commonwealth v. Amirault,
424 Mass. 618 (1997)
- Commonwealth v. Baldwin,
24 Mass. App. Ct. 200,
rev. denied, 400 Mass. 1102 (1987)
- Commonwealth v. Brobkins,
33 Mass. App. Ct. 626 (1992),
rev'd on other grounds, 416 Mass.
- Commonwealth v. Claiborne,
423 Mass. 275 (1996)
- Commonwealth v. Collins,
386 Mass. 1
- Commonwealth v. Curtis,
417 Mass. 619 (1994)
- Commonwealth v. Degro,
432 Mass. 319 (2000)
- Commonwealth v. DeVincent,
421 Mass. 64 (1995)
- Commonwealth v. Elberry,
38 Mass. App. Ct. 912,
rev. denied, 419 Mass. 1107 (1995)
- Commonwealth v. Gagliardi,
418 Mass. 562 (1994),
cert, denied, 115 S.Ct. 753 (1995)
- Commonwealth v. Harris,
11 Mass. App. Ct. 165,
rev. denied, 383 Mass. 890 (1981)
- Commonwealth v. Klein,
372 Mass. 823 (1977)

Commonwealth v. Maynard,
436 Mass. 558, 570-71 (2002.)

Commonwealth v. McCormick,
48 Mass. App. Ct. 106 (1999),
rev. denied, 430 Mass. 1113 (2000)

Commonwealth v. McGann,
20 Mass. App. Ct. 59,
rev. denied, 395 Mass. 1102 (1985)

Commonwealth v. McLeod,
39 Mass. App. Ct. 461 (1995),
rev. denied, 422 Mass. 1101 (1996)

Commonwealth v. McLeod, 394 Mass. 7
cert, denied, 474 U.S. 919 (1985)

Commonwealth v. Montanez,
410 Mass. 290 (1991)

Commonwealth v. Pike,
52 Mass. App. Ct. 650 (2001)

Commonwealth v. Saferian,
366 Mass. 89 (1974)

Commonwealth v. Sarmanian,
426 Mass. 405 (1998)

Commonwealth v. Satterfield,
373 Mass. 109 (1977)

Commonwealth v. Sirois,
437 Mass. 845 (2002)

Commonwealth v. Sullivan,
410 Mass. 521 (1991)

Commonwealth v. White,
409 Mass. 266 (1991)

Commonwealth v. Young,
,56 Mass. App. Ct. 60 (2002)

Commonwealth v. Zuluaga,
43 Mass. App. Ct. 629 (1997)

Napue v. Illinois, 360 U.S. 264 (1959)	27
United States v. Agurs, 427 U.S. 97 (1976)	22, 27

Rules and Regulations

Mass. R. App. P. 16	42
Mass. R. Crim. P. 30	20

Statutes

G.L. c. 265, § 13A	1
G.L. c. 265, § 15	1
G.L. c. 265, § 15B	1
G.L. c. 272, § 53	1

Other Authorities

Model Penal Code § 250.2 (Proposed Official Draft)	7, 8
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Question Presented

Whether the motion judge properly denied defendant's motion for new trial without a hearing, where defendant did not raise a substantial issue with an adequate factual basis to show that a substantial risk of a miscarriage of justice occurred at his trial.

Prior Proceedings

The March 1993 sitting of the Worcester County Grand Jury returned indictments charging the defendant, Michael Elberry, with the following offenses: disorderly person (G.L. c. 272, § 53(1)) (Indictment No. 93-0135-1); assault and battery (G.L. c. 265, § 13A(2)) (Indictment No. 93-0135-2); assault and battery with a dangerous weapon (G.L. c. 265, § 15B(b)) (Indictment No. 93-0135-3); and assault with intent to maim or disfigure (G.L. c. 265, § 15(2)) (Indictment No. 93-0135-4) (R.A. 191-199)¹. A jury trial was held in Worcester Superior Court, Toomey, J., presiding, from June 28, 1993 to July 2, 1993.

¹ References to the Record Appendix will be indicated by (R.A. [page]). Notations to the Commonwealth's Appendix will be cited as (C.A. [page]). References to the Trial Transcripts will be cited as (Tr.I - Tr.V [page]). Citations to the Sentencing Hearing Transcript will be shown as (S.H. [page]). Notations to Defendant's Brief will be referenced as (D.Br. [page]). Notations to Defendant's Addendum will be referenced as (Def. Addendum [page]).

(Tr.I-V) . At the close of the Commonwealth's case, Judge Toomey allowed defendant's motion for a required finding of not guilty as to the assault by means of a dangerous weapon indictment (Indictment No. 93-0135-3). (Tr.IV 850). On July 2, 1993, the jury returned verdicts of guilty on all of the remaining indictments. (Tr.V 1296-1298). On July 15, 1993, Judge, Toomey sentenced defendant to a term of ten years confinement in the Massachusetts Correctional Institution at Concord on the assault with intent to maim indictment. (Indictment No. 93-0135-4. (S.H. 48) . With respect to the convictions for assault and battery (Indictment No. 93-0135-2) and disorderly person (Indictment No. 93-0135-1), the court ordered concurrent sentences of one year probation from and after the above prison sentence. (S.H. 49).

Defendant filed a notice of appeal on July 15, 1993, which was docketed in this Court on May 3, 1994. (R.A. 201). On March 3, 1995, this Court affirmed defendant's convictions. (R.A. 201) . Commonwealth v. Elberry, 38 Mass. App. Ct. 912, rev, denied, 419 Mass. 1107 (1995).

On July 6, 1999, defendant filed a motion for new trial and a request for an evidentiary hearing

thereon. (R.A. 202). On February 3, 2000, Judge Toomey recused himself from all further proceedings. (R.A. 202). On December 21, 2001, Judge Timothy Hillman denied defendant's motion and request for an evidentiary hearing. (R.A. 203). On January 28, 2002, defendant filed his notice of appeal.

Statement of Facts.²

The Commonwealth presented five witnesses at trial: Christina Mann, Westboro Police Detective Thomas King, Richard Taraskiewicz, Jeffrey Schlener, and Dennis O'Connor. The defense presented five witnesses: Mitchell DePasquale, John Hayes, Worcester Police Officer Gerald Perma, defendant, and Jeannette Elberry.

At some time after 11:00 P.M. on September 28, 1992, Christina Mann went to the "Winners Circle" bar on Shrewsbury Street in Worcester with a co-worker after completing her shift as a waitress at the Ground Round Restaurant in Shrewsbury. (Tr.I 139). Christina testified that 15 minutes after their arrival, an argument ensued between the bartender and another man (defendant) who was seated on a nearby bar stool.

² Additional facts will be set forth in the Commonwealth's argument.

(Tr.I 140-141). The argument appeared to have "cooled down a little bit", then screaming and yelling began.

(Tr.I 141-142) . Someone told defendant to sit down and be quiet. (Tr.I 142) . "It started getting louder." (Tr.I 142).

Christina noticed that defendant was standing, gripping a beer bottle by its neck at his side. (Tr.I 142-143, 180) . As she and her friend got up to move, defendant swung the bottle "backhanded" into a pole. (Tr.I 143-144, 180). Glass flew, cutting Christina in the eye area. (Tr.I 144, 147-148). "[B]eer was everywhere." (Tr.I 144) . At that time, there were approximately eight to ten people in the bar. (Tr.I 146). Screaming, Christina covered her eye and noticed, blood. (Tr.I 144) . The bartender and some of the patrons in the bar came to her assistance. (Tr.I 144-145, 170) . When she looked again, only a few people were left in the bar. (Tr.I 145) . Christina's co-worker, Alice, immediately took her to the University of Massachusetts Hospital, where she received stitches both above and below the eye. (Tr.I 147-148).

Westboro Police Detective Thomas King testified that he worked the 3:00 p.m. to 11:00 p.m. shift on

September 28, 1992. (Tr.II 185-186). On his way home he was paged and told to go to the University of Massachusetts to retrieve evidence. (Tr.II 187). He then went to the Winners Circle, where he knew the bartender, Jeff Schlener. (Tr.II 187). He arrived at approximately 12:30 a.m. and had "almost" two vodka and grapefruit cocktails that evening. (Tr.II 188).

Shortly after his arrival, King saw Schlener having a "heated discussion" with defendant. (Tr.II 188-189). Defendant was cursing at Schlener. (Tr.II 189). King got up from his seat and started to walk towards defendant but another patron, Mitch DePasquale, stopped him. (Tr.II 189). Defendant swore at King and asked him to step outside. (Tr.II 190). King walked away, told defendant he would not waste his time, and sat down. (Tr.II 190). The bar quieted down a bit. (Tr.II 190).

At some point later in the evening, defendant jumped up, yelled something, and smashed a beer bottle. (Tr.II 191). King closed his eyes as "glass went flying everywhere." (Tr.II 191). Holding the neck of the beer bottle with the broken, jagged edges upright, defendant waved the bottle in the direction of Schlener and the patrons. (Tr.II 191-192). King

noticed that one woman had her hand to her face and was bleeding (Tr.II 194) . Defendant made gestures at everyone in the bar with the bottle for approximately 30 seconds. (Tr.II 194-195). He then threw the bottle and ran out of the bar, down Shrewsbury Street. (Tr.II 195) . King ran after him and yelled for someone to call the police. (Tr.II 195).

King chased defendant east on Shrewsbury Street, towards East Park, for approximately 50 to 60 yards. (Tr.II 197). Defendant then stopped and turned. (Tr.II 199) . King told him that he had hurt a woman in the bar and "wasn't going anywhere until the police arrived." (Tr.II 199). Defendant "took a few swings" at King with both fists closed. (Tr.II 200) . King blocked all of the punches, except for one punch to his cheek. (Tr.II 200) . At that point, King grabbed defendant and tried to restrain his arms to prevent him from swinging. (Tr.II 201) . King put both arms around defendant while face-to-face with him. (Tr.II 201) . Defendant struggled and managed to get one arm free. (Tr.II 201). He then "took his thumb and jammed it into [King's left] eye." (Tr.II 201). Defendant "kept pushing the thumb in real hard." (Tr.II 201) . King was in a great deal of pain and, at that point,

blinded in that eye. (Tr.II 201). King finally managed to get defendant's thumb out of his eye. (Tr.II 201-202). He then knocked defendant to the ground and got on top of him, attempting to restrain him. (Tr.II 202) .

Defendant managed to get a hand free and again jammed his thumb "back into [King's] eye on the inside of [his] eye and kept pushing the thumb into [his] eye." (Tr.II 202) . King managed to get the thumb out of his eye and "somewhat subdue" defendant. (Tr.II 202) . At that point, King became aware that some people were behind him. (Tr.II 202) . He asked that someone hold defendant until the police arrived because he was hurt. (Tr.II 202) . King rolled off defendant and put his hand to his eye. (Tr.II 202) . Sticky, vitreous fluid and blood was coming out of the injured eye. (Tr.II 202-203). At that point, King was blinded in that eye, and his other eye was watering. (Tr.II 203) . Someone flagged a passing motorist on Shrewsbury Street to immediately transport King to the hospital, where he was treated for a laceration on the eyeball. (Tr.II 203, 381). King continued to have eyesight problems with the injured eye on the date of the trial. (Tr.II 204).

Richard Taraskiewicz, a bartender, testified that he was also a patron at the Winners Circle on September 28th (Tr.III 492-493). At some point during the evening, he saw defendant giving the bartender "a hard time." (Tr.III 493-494). Taraskiewicz, who was seated next to King, commented to King about the argument. (Tr.III 494). While in the restroom, Taraskiewicz heard King tell defendant that he should leave the bar. (Tr.III 494). Defendant responded that they should go outside so he could beat King. (Tr. III 494). When Taraskiewicz emerged from the restroom, King returned to his seat. (Tr.II 494).

Defendant later became loud and broke a bottle against a mirrored pole. (Tr.III 495). The glass flew and hit a girl below the eye. (Tr.III 504). Defendant backed out of the bar holding the neck of the bottle. (Tr.III 495). King, followed by Taraskiewicz and others, went outside. (Tr.III 495). Taraskiewicz saw King and defendant paired off, jogging back and forth at least 50 yards down Shrewsbury Street. (Tr.III 497). After defendant "threw the first punch", King and defendant began wrestling. (Tr.III 498). King grabbed defendant in a "bear hug" type of hold. (Tr.III 499-500). Taraskiewicz advanced closer to the

fight and saw defendant put his finger in King's left eye. (Tr.III 500) . The fight then began to turn in defendant's favor because he had his fingers in King's eye. (Tr.III 501). Taraskiewicz and the others jumped in to stop the fight. (Tr.III 501). As King stood up, Taraskiewicz saw blood coming out of his eye. (Tr.III 501). While King was taken to the hospital by passing motorists, Taraskiewicz, DePasquale, and Dennis O'Connor restrained defendant until the Worcester Police arrived. (Tr.III 501-502).

Jeffrey Schlener was the bartender at the Winner's Circle on September 28th, (Tr.III 580). At approximately 12:50 a.m., defendant came into the bar. (Tr.III 581). Schlener served him a beer. (Tr.III 582) . After noticing that defendant was talking with someone and "acting up a little bit", Schlener went over to defendant and told him that he was very opinionated. (Tr.III 582-583) . Defendant became extremely upset, and began arguing with, and eventually yelling and swearing at, Schlener. (Tr.III 583-585). King got out of his seat and advised defendant to leave the bar. (Tr.III 585) . Defendant swore at King and stated, "Why don't I just take you outside and beat the whatever out of you." (Tr.III

585-586) . As it appeared that defendant was "calming down a little bit" , King returned to his seat at Schlener's request. (Tr.III 586) .

Three or four minutes later, Schlener heard a crash and saw glass flying everywhere. (Tr.III 587) . Defendant had taken a beer bottle and smashed it. (Tr.III 587) . He was still holding the bottle by its neck, waving the jagged edges in Schlener's direction. (Tr.III 587, 589) . One of the women in the bar yelled that her eye was cut. (Tr.III 588) . She was bleeding from her eye. (Tr.III 588) . King yelled, "Call the police." (Tr.III 588) . Defendant ran out the door. (Tr.III 588) . Schlener ran around the bar and tended to the injured girl with the assistance of a patron, Steve Sawyer. (Tr.III 591) . King went out the door, followed within 20 seconds by Donnie Wyme, Richard Taraskiewicz, and Dennis O'Connor. (Tr.III 592-593) . Three other patrons who had left the bar were around the street. (Tr.III 594) . When Schlener went out to the front entrance and looked down the street, he saw King going after defendant with his arms extended like he was going to tackle him. (Tr. Ill 594) . Defendant threw a punch at King. (Tr.III 594) . Suddenly, Donnie Wyme ran back to the bar and told Schlener to call the

police, that King had hurt his eye. (Tr.III 595) . At that time, Schlener called the police and reported that a police officer had been badly hurt. (Tr.III 595) . Schlener went down the street to where the assault took place. (Tr.III 596) . Defendant was held face down on the ground, by Taraskiewicz and O'Connor, until the police arrived. (Tr.III 596-597).

Defense witness Mitchell DePasquale,³ a nursing assistant, testified that he had been employed as a doorman at the Winners Circle during the year preceding September of 1992. (Tr.III 679) . On September 28th, DePasquale arrived at the bar as a patron at approximately 9:00 p.m. (Tr.III 682) . There was no doorman on duty on that particular night. (Tr.III 684) . DePasquale had four or five beers throughout the course of the night. (Tr.III 697) . At some point later in the night, a yelling match occurred between King and defendant. (Tr.III 697) . When the yelling began, DePasquale was not certain who defendant was yelling at, but assumed it was King. (Tr.III 698) . King walked around the bar toward defendant, then stopped. (Tr.III 700-701) . DePasquale

³ Defense witness Mitchell DePasquale was called out of order to accommodate his personal schedule (Tr.III 677) .

stood in front of King and told him to go back to his seat. (Tr.III 701).

Approximately 15 minutes later, DePasquale heard a beer bottle being broken on the bar or pole. (Tr.III 703-704) . He saw defendant standing next to the bar "yelling, screaming something." (Tr.III 704) . Schlener was behind the bar. (Tr.III 705). DePasquale then saw a girl stand up and hold her bleeding face. (Tr.III 706). The girl standing next to her screamed,. "She's been cut." (Tr.III 706). Defendant backed up, then turned, dropped the bottle, and left the bar. (Tr.III 706-707, 721) . DePasquale and Steve Sawyer attended to the injured girl for a few minutes, then DePasquale ran outside. (Tr.III 707).

As he turned to the left, DePasquale saw King and defendant engaged in what appeared to be a wrestling match in the street approximately 50 yards away. (Tr.III 709-710) . Defendant and King were in a "bear hug" position, then pushed away from each other, talked back and forth, and then wrestled to the ground. (Tr.III 711) . After a few minutes, King got up and backed away. (Tr.III 712) . DePasquale screamed, "Let's hold him down." (Tr.III 714) . Taraskiewicz and DePasquale assisted O'Connor, who was

already physically touching defendant, in restraining defendant until the police arrived. (Tr.III 715-716) . During that time, King approached DePasquale and told him that he was hurt. (Tr.III 715). DePasquale looked up and saw blood pouring from King's eye. (Tr.III 715) . As DePasquale yelled for someone to call an ambulance, a car pulled up and the occupants identified themselves as House of Correction employees. (Tr.III 717) . King got into their car and went to the hospital. (Tr.III 718).

Dennis O'Connor, a radiographic technologist at Memorial Hospital, testified that he was at the Winners Circle on September 28th when defendant came into the bar and started an argument with the bartender. (Tr.III 747-748). O'Connor went to the bar after finishing his 3:00 p.m. to 11:30 p.m. shift at the hospital. (Tr.III 749) . At some time during the argument, King got up and approached defendant and asked him to calm down. (Tr.III 750) . King then sat back down. (Tr.III 750) . Defendant later stood up, took a beer bottle, and smashed it across one of the poles. (Tr.III 750) . Everyone stood up in shock at the incident. (Tr.III 753) . Steven Sawyer went over to assist one of the girls in the bar who had her hand

to her face. (Tr.III 753) . Defendant left the bar, with King following directly behind him. (Tr.III 753). Donnie Wyme and O'Connor soon followed. (Tr.III 754) . Approximately fifty yards up the street, King and defendant were involved in a heated argument. (Tr.III 755). As they wrestled to the ground, O'Connor sprinted down the street. (Tr.III 756) . By the time he reached the scene, King was holding his eye with his hand. (Tr.III 756). O'Connor observed that the lower auricle of King's eye was full of blood, and there was blood coming out of the eye itself. (Tr.III 756) . O'Connor told defendant, "Stay right where you are. Something is going to happen. The police will be notified for this. . . . Just hold on right where you are." (Tr.III 794) . Defendant responded, "Yeah, I'm getting out of here", and made a gesture to leave. (Tr.III 794). At that point, O'Connor restrained defendant, with the assistance of DePasquale and Taraskiewicz, until the police arrived. (Tr.III 756-758) .

Defense witness John Hayes, who was employed in the carpet cleaning business, testified that he and his friend, Mark Pinkham, a correctional officer at the House of Correction, drove to Winners Circle for

last call at approximately 1:10 a.m. on September 29th" (Tr.IV 858-905). As they were driving down Shrewsbury Street, Hayes saw one person on the ground with "maybe ,three guys holding him down" , and another person standing up against the glass of Harpie's Auto Parts. (Tr.IV 906-907). Pinkham drove past the altercation and pulled his car in front of the Winners Circle. (Tr.IV 907-908). A doorman at the bar, who knew Pinkham, ran out to the car and spoke to him. (Tr.IV 909-910) . The doorman then helped the man who was standing against the building at Harpie's - King -- into the front seat. (Tr.IV 910) . King had his hand over his left eye. (Tr.IV 912) . Hayes told King not to rub the eye. (Tr.IV 913). King's right eye appeared fine, neither bloodshot nor tearing. (Tr.IV 913).

While Pinkham drove King to the emergency room of Memorial Hospital, King expressed concern that "all of the fluid from his eye was rushing out." (Tr.IV 915) . Hayes did not see any fluid or blood dripping from King's eye. (Tr.IV 916) . King seemed to be intoxicated and told Pinkham that he "must have got poked in the eye." (Tr.IV 917-918).

On cross-examination, Hayes acknowledged that his father frequented "Mulcahy's Bar." (Tr.IV 950). Although Hayes testified that it "wouldn't surprise [him]" to learn that Mulcahy's Bar was owned by the defendant prior to its closure, (Tr.IV 950), Hayes maintained that he did not know defendant, and that he had never heard defendant's name mentioned. (Tr.IV 949-950).

Worcester Police Officer Gerald Perma testified that he was on patrol duty during the 11:00 p.m. to 7:00 a.m. shift on September 28-29, 1992. (Tr.IV 969). At 1:47 a.m., he received a radio communication to go to the area of the Winners Circle bar. (Tr.IV 969). The dispatcher stated that a Westboro off duty police officer had been injured. (Tr.IV 970). Other police officers also responded, and arrived in their cruisers at the same time. (Tr.IV 973). Perma saw defendant on the ground with three people around him attempting to hold him down. (Tr.IV 974). Defendant was handcuffed by several officers. (Tr.IV 976). Defendant had some scratches and bruises from rolling around on the ground. (Tr.IV 988). Perma interviewed King in the emergency room of Memorial Hospital. (Tr.IV 995).

King was not intoxicated, and his left eye was bleeding. (Tr.IV 995-996).

Defendant testified that he was 42 years old, married, and previously employed as a CPA prior to owning Mulcahy's bar in Worcester for nine years. (Tr.IV 1007-1008). Mulcahy's bar closed three months prior to the September 29, 1992 incident. (Tr.IV 1008). Defendant arrived at the Winners Circle at the last call at approximately 1:30 a.m. on September 29th, (Tr.IV 1012). He ordered "the cheapest item on the menu", a Rolling Rock beer which was the dollar special. (Tr.IV 1024). Schlener made fun at him for ordering the cheap beer. (Tr.IV 1026). Schlener later ridiculed defendant that Mulcahy's bar was closed while the Winners Circle remained open. (Tr.IV 1029). When defendant similarly responded to Schlener's comments, Schlener became "very upset and turned red." (Tr.IV 1032). Schlener then had a conversation with King. (Tr.IV 1032). King, and the two men on either side of King, got up out of their bar chairs. (Tr.IV 1033). King began yelling that he was going to beat defendant. (Tr.IV 1035). As King and the two persons at his side began quickly moving towards him, defendant got off of his bar stool. (Tr.IV 1036).

According to defendant, a "heated yelling match" between defendant and King took place. (Tr.IV 1038) . Defendant told King that if he wanted to fight, they should go outside and fight one-on-one. (Tr.IV 1038-1039) . As other patrons intervened, one of the men who had been beside King grabbed defendant's shirt and pushed him into the moveable bar chairs. (Tr.IV 1039) . As defendant wrestled with him, a bottle broke. (Tr.IV 1039-1040) . Defendant was then able to free himself and get out of the bar. (Tr.IV 1040) . Defendant ran, "back pedaling", towards his house, located around the corner from the bar, with people following right behind him. (Tr.IV 1012, 1043-1044). He was eventually "football tackled", and a punching and wrestling match ensued. (Tr.IV 1049). Several people got on top of him. (Tr.IV 1049) . Defendant used his hands, legs, "anything the] could to escape." (Tr.IV 1050). Within a minute, he was completely subdued. (Tr.IV 1050) . Taraskiewicz put his boot on defendant's neck and applied significant pressure. (Tr.IV 1052-1053) . King then came over and gouged defendant's right eye with his finger. (Tr.IV 1056) . Taraskiewicz stopped King. (Tr.IV 1056) .

When the police finally arrived, defendant told Officer Perma that he had been beaten on the street. (Tr.IV 1058). Defendant asked why he was being arrested since he was the victim. (Tr.IV 1058). After being taken to the Worcester Police Station, defendant was taken in police custody to Hahnemann Hospital where he remained for approximately 30 minutes. (Tr.IV 1058-1059). After defendant was released from custody, he returned to the hospital later that evening. (Tr.IV 1062).

Jeannette Elberry testified that she was a teacher in the Worcester Public Schools and married to defendant for fourteen years. (Tr.V 1157-1158). On the afternoon of September 29, 1992, she posted defendant's bail at the Worcester County Courthouse. (Tr.V 1159). She saw that defendant had an elbow injury, bruised nose, and a heel mark on his neck. (Tr.V 1160). Later that evening, she took photographs of defendant's injuries with a Polaroid camera. (Tr.V 1161).

Argument.

The Motion Judge Properly Denied Defendant's Motion for New Trial Without a Hearing, Where Defendant Did Not Raise a Substantial Issue With an Adequate Factual Basis to Show that a Substantial Risk of a Miscarriage of Justice Occurred.

Proceeding pro se, defendant moved for a new trial under Mass. R. Crim. P. 30(b). In his motion defendant asserted, inter alia, that the trial prosecutor engaged in misconduct, that the jury charge was inadequate, and his trial and appellate counsel were ineffective. (R.A. 1-115). The motion judge denied this motion, ruling that defendant's claims of prosecutorial misconduct and inadequate jury instructions were waived and that defendant did not present adequate evidence entitling him to a hearing on his ineffective assistance of counsel claims. (Def. Addendum 1-18). On appeal, defendant claims that the motion judge erroneously denied his motion without a hearing because his claims were not waived and they evinced a substantial risk of a miscarriage of justice. Because defendant's claims could have been raised in his direct appeal, the motion judge correctly determined that they were waived. Because defendant provided no factual basis to show that a substantial risk of a miscarriage of justice occurred,

the motion judge properly denied defendant's motion without a hearing.

^U'A motion for new trial may not be used as a vehicle to compel . . . review and [consideration of] questions of law, ' on which a defendant has had his day in an appellate court, or [on which he has] foregone that opportunity." Commonwealth v. Gagliardi, 418 Mass. 562, 565 (1994), cert. denied, _____U.S._____, 115 S.Ct. 753 (1995) (quoting Commonwealth v. Watson, 409 Mass. 110, 114 (1991)). This rule of waiver "applies equally to constitutional claims which could have been raised but were not raised on direct appeal Commonwealth v. Amirault, 424 Mass. 618, 641 (1997) (citations omitted). Where, as here, "there has been appellate review of a conviction . . . a judge considering a motion for new trial should first exercise discretion to deal with the substance of any issue presented." Commonwealth v. Curtis, 417 Mass. 619, 634 n.14 (1994). "The trial judge's discretionary power to give relief . . . should be exercised only in those extraordinary cases where, upon sober reflection, it appears that a miscarriage of justice might otherwise result." Id. at 626. Defendant has advanced no

reasons to circumvent the waiver rule.

First, the motion judge properly determined that defendant's claim of prosecutorial misconduct was waived. Defendant's assertions that the prosecutor withheld information and allowed perjury rest on defendant's comparison of the trial testimony with the probable cause and grand jury testimony and the medical records submitted into evidence. (D.Br. 15-49) . Because this evidence was clearly available to defendant and the law in this regard had been clearly established, see United States v. Agurs, 427 U.S. 97 (1976) and its progeny, this claim should have been raised on direct appeal. See Amirault, 424 Mass. at 642. Failure to do so constitutes waiver, and, as discussed below, see part A. infra, defendant has not demonstrated a miscarriage of justice, which would justify relief from the waiver doctrine.

Second, defendant asserts errors in the trial judge's instructions on consciousness of guilt and assault with intent to maim. (D.Br. 32) . Defendant raised the adequacy of these instructions in his direct appeal and this Court correctly determined that these unobjected-to instructions were not erroneous and did not create a substantial risk of a miscarriage

of justice. Commonwealth v. Elberry, 38 Mass. App. Ct. 912, 912 (1995). Thus, the motion judge correctly exercised his discretion to decline to consider these claims. See Gagliardi, 418 Mass. 562, 565-67 (1994).

Third, in his motion for new trial, defendant asserted that his appellate counsel was ineffective for failure to raise certain claims of ineffective assistance of trial counsel. The motion judge did not deem these claims waived and assessed whether appellate counsel's decisions not to make certain arguments amounted to ineffective assistance of counsel. (Def. Addendum 6-18). Regardless of whether these ineffective assistance claims are waived, the same standard effectively applies, "because, ¹if an omission of counsel does not present a substantial risk of a miscarriage of justice . . . there is no basis for an ineffective assistance of counsel claim under either the Federal or the State Constitution." Commonwealth v. Young, 56 Mass. App. Ct. 60, 62 (2002) (quoting Curtis, 417 Mass. at 624 n.4)).⁴ Based on

⁴ To prevail on a motion for a new trial which alleges ineffective assistance of counsel, a defendant bears the burden of demonstrating that his trial attorney's conduct fell "measurably below that which might be expected from an ordinary fallible lawyer--and, if that is found, [that] it has deprived [him] of an

these standards, the motion judge properly denied defendant's new trial motion without a hearing because defendant did not show that a substantial risk of a miscarriage of justice occurred.

"Whether to hold a hearing on a motion for post-conviction relief or to consider it solely on the basis of affidavits and other supporting material is a decision which rests in the sound discretion of the judge, based on a determination whether the motion and affidavits raise a substantial issue." Commonwealth v. McGann, 20 Mass. App. Ct. 59, 62, rev, denied, 395 Mass. 1102 (1985). "In determining whether a 'substantial issue' meriting an evidentiary hearing .

otherwise available, substantial defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). Such proof requires the defendant to show that "better work might have accomplished something material for the defense." Commonwealth v. Satterfield, 373 Mass. 109, 115 (1977). "Where the defendant challenges counsel's tactical or strategic decisions, he must establish that such decisions are not merely unreasonable, but 'manifestly unreasonable.'" Commonwealth v. Adams, 374 Mass. 722, 728 (1978) (citation omitted). The "defendant bears a heavy burden in establishing ineffective assistance of such magnitude as to entitle him to a new trial," Commonwealth v. Brookins, 33 Mass. App. Ct. 626, 631 (1992), rev-'d on other grounds, 416 Mass. 97 (1993), and will not be permitted to "characterize as unreasonable a defense that was merely unsuccessful." Commonwealth v. Montanez, 410 Mass. 290, 295 (1991). See also Commonwealth v. White, 409 Mass. 266, 272 (1991).

. has been raised, [appellate courts] look not only to the seriousness of the issue asserted, but also to the adequacy of the defendant's showing on the issue raised." Commonwealth v. DeVincent, 421 Mass. 64, 68 (1995). The motion judge exercised proper discretion when he declined defendant's request for a hearing because defendant did not meet his burden of establishing an adequate factual basis to support his allegations.

A. The motion judge properly denied defendant's motion for new trial without a hearing, where defendant did not present any evidence to show that the prosecutor deliberately deceived the jury in any manner or that trial counsel was ineffective.

Citing to discrepancies between the trial testimony of the victim and the other witnesses, as well as to the victim's and witnesses' trial testimony as compared to their probable cause and grand jury testimonies and statements in medical records, defendant asserts that the prosecutor knowingly and deliberately allowed the introduction of false testimony at trial, thereby violating defendant's constitutional right to due process of the law.⁵

⁵ Defendant's claims are numerous in this regard: by comparing the victim's trial testimony to that of the other witnesses and the medical records, which were

(D.Br. 15-25, 35-49). He further asserts that his trial counsel was ineffective for failure to address these issues at trial. (Id.). Because defendant provided no evidence to demonstrate that the prosecutor deliberately withheld evidence and knowingly allowed perjured testimony, the motion judge properly denied defendant's motion for new trial without a hearing on this matter.

It is true that where the prosecutor intentionally introduces false testimony or remains silent when he or she should have known of the perjured testimony that a defendant's constitutional rights to due process are violated. Agurs, 427 U.S.

admitted into evidence by the prosecutor, defendant asserts that the prosecutor allowed the victim to falsely testify regarding the extent of his eye injury (D.Br. 15-25); by comparing the victim's trial testimony and probable cause testimony, defendant argues that the prosecutor knowingly allowed the victim to falsely testify that defendant had waved the jagged bottle at the bartender and the rest of the patrons (D.Br. 35-40); by taking the prosecutor's statement out of context, defendant states that the prosecutor knew King was drinking on duty and allowed King to testify to the contrary (D.Br. 41-43); by comparing various witnesses' testimony at the probable cause hearing to their testimony at trial, defendant asserts that the prosecutor knowingly allowed perjury (D.Br. 44-49); and defendant asserts that knowing that King's purported citizen's arrest of defendant was unlawful, the prosecutor improperly introduced evidence that there was a valid citizen's arrest (D.Br. 25-35).

(D.Br. 15-25, 35-49) . He further asserts that his trial counsel was ineffective for failure to address these issues at trial. (Id.). Because defendant provided no evidence to demonstrate that the prosecutor deliberately withheld evidence and knowingly allowed perjured testimony, the motion judge properly denied defendant's motion for new trial without a hearing on this matter.

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at 103; Napue v. Illinois, 360 U.S. 264 (1959);
Commonwealth v. Collins, 386 Mass. 1, (1982).
Nevertheless, that discrepancies exist between the
witnesses' testimonies, without more, does not
demonstrate such prosecutorial misconduct.
Commonwealth v. Sullivan, 410 Mass. 521, 532 (1991) .
Particularly, where as here, the alleged discrepancies
were placed before the jury by both the prosecutor and
defense counsel, defendant did not meet his burden to
show that there was any deception on the part of the
prosecutor. See Sullivan, 410 Mass. at 521 ("'simply
because a witness alters some portion of his testimony
at the time of trial is not sufficient reason to
conclude that the new testimony was false, or that the
Commonwealth knew or had reason to know that it was
false.'") (quoting Commonwealth v. McLeod, 394 Mass.
727, 743, cert. denied, 474 U.S. 919 (1985)).

First, there is no evidence that the prosecutor
acted improperly. With respect to King's eye injury,
King testified at trial that he felt blood and
vitreous fluid coming from his left eye after
defendant had twice jammed his thumbnail into King's
eye. (Tr.II 201-03). King testified that as a result
he received a laceration or cut on his eyeball.

(Tr.II 203-04) . The prosecutor introduced into evidence King's medical records, which show that King did suffer a laceration. (R.A. 120) . Thus, the records validate King's testimony.

Second, at trial, defendant's counsel argues that that the medical records indicated that King suffered from a "superficial abrasion,". (Tr.V 1224-25), and that if defendant had gouged at King's eye in the way he claimed, then King would not have an eye. (Id.) . Thus, any discrepancy in the evidence as to the extent of King's eye injury was before the jury; the prosecutor did not deceive them, and trial counsel did not sit by passively. Rather, the jury was left to its fact-finding function to determine whether defendant did commit assault with intent to maim by trying to gouge out Mr. King's eye. See Sullivan, 410 Mass. at 532 ("a prosecutor may marshal the evidence for or against the credibility of the witness, and allow the jury to determine whether the witness is telling the truth.") . There is no evidence that the prosecutor acted improperly in this regard.

Similarly, the prosecutor did not improperly elicit false testimony that defendant assaulted King and the other bar patrons with the jagged edge of a

bottle, and counsel was not ineffective for failure to bring this matter to the jury's attention. At trial, Mr. King testified that after smashing the bottle, defendant waved the jagged edge of it at the bartender and the other patrons. (Tr.I 192) . Any discrepancies between this and other testimony were highlighted by both the prosecutor and defense counsel . (See e.g., Tr.I 301-03, 308-10). Defendant presented no evidence to show that the prosecutor knew King's trial testimony was false and the prosecutor was not required to independently assess King's credibility on that score. Sullivan, 410 Mass. at 532; Commonwealth v. Zuluaga, 43 Mass. App. Ct. 629, 646 (1997) ("[t]hat a prosecution witness contradicted herself is insufficient to show that the Commonwealth knowingly used perjured testimony."). Furthermore, defense counsel also elicited testimony from King that he was not placed in fear by defendant's display of the bottle because defendant could not have reached him. (Tr.II 310) . Counsel's examination was so successful that the trial judge directed a verdict of not guilty on the assault with a dangerous weapon charge. (Tr.IV 850) . There being no prosecutorial misconduct or

ineffective assistance in this regard, defendant's claims fail.

Likewise, defendant's comparison of every miniscule discrepancy between the various witnesses' trial and probable cause testimony (D.Br. 15-25, 35-49), does not show that the prosecutor elicited false trial testimony from them or deliberately presented an incorrect theory of the case. Sullivan, 410 Mass. at 532; Zuluaga, supra.

Next, by taking a passage of the trial transcript out of context, defendant asserts that the prosecutor deliberately deceived the jury by allowing Thomas King to testify that he was not drinking on duty. (D.Br. 41-43). He further asserts that his trial counsel was ineffective as he sat by passively during this conduct. (Id.). Because defendant's version of events simply did not occur, his claim fails.

The prosecutor did not state that he believed Thomas King was drinking on duty. Rather he stated, in essence, that defense counsel was making this allegation and he wanted to rebut it. Through cross-examination, trial counsel attempted to imply that the reason King had not identified himself as a police officer that night was because he was inebriated and

drinking on duty. (Tr.II 235-237, 285-86, 395, 406-09) . To rebut this claim, the prosecutor sought to introduce King's statement contained in the medical records to hospital personnel that he was a police officer. (Tr.II 448-452) . Trial counsel opposed this and the following transpired at side bar:

The Court: I don't understand how the identification of himself as a police officer is corroboration or that the memorial hospital [record] is pertinent to this at all.

[The Prosecutor]: Because of the allegation that was made by --

The Court: He didn't identify himself at the scene.

[The prosecutor}: Reason he didn't do that is because he was drinking on duty.

The Court: He already said that he told them at the hospital that he was [a police officer].

(Tr.II 452) . As is evident from the transcript, the judge interrupted the prosecutor midstatement; after this interruption, the prosecutor continued his assertion that he wanted in evidence King's statement to hospital personnel that he was a police officer in order to rebut trial counsel's implication that King did not identify himself as such because he was drinking on duty.

Furthermore, trial counsel vigorously pursued the idea that Mr. King was drinking on duty and inebriated. Counsel cross-examined Mr. King at length on this point, (Tr.II 234-38, 386, 406-09), and called John Hayes who testified that Mr. King was intoxicated when he entered the car to go to the hospital. (Tr.IV 917). Trial counsel also argued in summation that King was drinking on duty and that he did not reveal his position because he was inebriated. (Tr.V 1208-1211). Thus, contrary to defendant's arguments, the prosecutor never stated that Mr. King was on duty when he was drinking at the bar, and trial counsel did pursue this point.

In sum, defendant did not raise a substantial issue with an adequate factual basis to show that the prosecutor engaged in deliberate deception or that trial counsel was ineffective for allowing this deception. Accordingly, the motion judge properly denied defendant's motion without an evidentiary hearing.

B. Counsel rendered effective assistance when he opposed the giving of a citizen's arrest instruction to the jury, where the evidence did not warrant such an instruction.

Defendant next argues that his counsel was ineffective for failure to request a so-called "citizen's arrest" instruction, on the theory that Mr. King, an off-duty police officer out of his jurisdiction, used force to effectuate an arrest of defendant. (D.Br. 25-35)⁶ As the trial judge and defense counsel determined, the instruction was not warranted, therefore, counsel was not ineffective for failure to request the instruction.

A prerequisite to an instruction on citizen's arrest is that the "citizen" use force to effectuate the arrest. See Model Jury Instructions for Use in Superior Court, §3.16.2 (1999) (citing Commonwealth v. Klein, 372 Mass. 823, 830-31 (1977)). No view of the evidence established that King used force to effectuate an arrest.

⁶ The prosecutor did pursue this theory at trial on the basis that King could have effectuated a valid citizen's arrest of defendant because King witnessed an assault and battery with a dangerous weapon on Ms. Mann, and defendant assaulted Mr. King and the other people in the bar with a dangerous weapon. The trial judge directed a verdict on the assault with a dangerous weapon charge. (Tr.IV 850). Defendant was not indicted for assault and battery with a dangerous weapon as Ms. Mann's identity and whereabouts were unknown until one month before the trial of this matter. (Tr.I 248-254).

The Commonwealth's evidence showed that defendant threw at least one punch at King and then King wrestled with defendant. (Tr.II 200-01) . Knowing that he was out of his jurisdiction, King never intended to physically touch, arrest, or restrain defendant but instead followed him in order to inform the police of defendant's whereabouts. (Tr.II 213, 386-93) . King simply told defendant that he was not going anywhere until the Worcester Police arrived because defendant had hurt a woman in a bar. (Tr.II 199, 219) . King used no force on defendant. (Tr.II 200-01, 213, 393) . At this point, defendant threw several punches at King, one of which connected. (Tr.II 200) . King then put his arms around defendant in an effort to stop defendant from continuing his assault. (Tr.II 201) . Defendant jammed his thumb into King's eye. (Id.) . Mr. King eventually pulled the thumb out and tackled defendant to the ground in an effort to stop the assault. (Tr.II 201-02) . Defendant then stuck his thumb back into Mr. King's eye. (Tr.II 202) . Mr. King pulled defendant's thumb out and rolled away from defendant. (T.II 202) . Because King did not use force on defendant to

effectuate an arrest, the instruction on citizen's arrest was not warranted.

By contrast, defendant testified that King decided he was going to give defendant "a whooping" when he saw defendant yell at Jeff Schlener. (Tr.IV 1035) . King, with two individuals "flanking" him, then approached defendant. (Tr.IV 1036-37) . One of the individuals then started wrestling with defendant, who accidentally broke a beer bottle in the affray. (Tr.IV 1039-40). Defendant then ran out of the bar with a "gang" pursuing him. (Tr.IV 1044-45) . King and another then tackled defendant and a tussle ensued. (Tr.IV 1048). When defendant was subdued and on the ground, King went over to defendant and gouged him in the eye. (Tr.IV 1056) . Thus, defendant's version of events does not establish that King was trying to make a citizen's arrest, but, if believed, simply established King as the initiator of combat.

Accordingly, the trial judge correctly labeled this a "classic self-defense" case. (Tr.II 216) . A citizen's arrest instruction not being warranted, counsel was not ineffective for failure to ask for one. See Commonwealth v. McCormick, 48 Mass. App. Ct. 106, 109-10 (1999) (counsel not ineffective for

failure to request limiting- instruction, where instruction would have been inappropriate or the request for one denied), rev, denied, 430 Mass. 1113 (2000).

Even if the evidence supported a citizen's arrest instruction, defendant's cause would not have been aided if the judge had given it. Defendant asserts that as a matter of law, King's citizen's arrest was unlawful because defendant had not in fact been convicted of a felony. (D.Br. 25-35). Defendant is incorrect.

"A private citizen may lawfully arrest someone who has in fact committed a felony. (Generally the 'in fact committed' element must be satisfied by a conviction.)" Commonwealth v. Claiborne, 423 Mass. 275, 280 (1996) (parenthetical in original). This requirement, however, is relaxed in the case of a police officer acting out of his jurisdiction. Id. at 280-81. In that case, only probable cause is required to arrest. Id. The evidence clearly established that Mr. King, a Westboro Detective, had probable cause to arrest defendant for the commission of a felony, either assault and battery with a dangerous weapon or assault with a dangerous weapon. See Model Jury

Instructions for Use in Superior Court, (1999), §§ 2.20, 2.22.2 (outlining the elements of these offenses).

Mr. King witnessed defendant smash a beer bottle up against a pole or on the bar with patrons in the vicinity. Pieces of flying glass cut Ms. Mann above and below her eye, causing her to bleed and receive butterfly stitches in that area. After shattering the base of the bottle, defendant held the bottle in a jabbing manner toward the bartender and other patrons. This evidence "was 'sufficient to warrant a person of reasonable caution in believing that the defendant had committed . . . a crime.'" ⁷ Claiborne, 423 Mass. at 281 (quoting Commonwealth v. Gullick, 386 Mass. 278, 283 (1982)). Because the evidence established that probable cause existed for Mr. King to arrest defendant, the omission of the citizen's arrest instruction had a minimal effect, if any, upon the jury, and counsel was not ineffective for failing to seek the instruction.

⁷The jury's verdict makes clear that they rejected defendant's version of events that he did not commit any crime in the bar and was attacked by Mr. King and his alleged cohorts. See Commonwealth v. Sirois, 437 Mass. 845, __ n.13 (2002) (verdict showed that jury rejected defendant's version of events).

Defendant also claims that his counsel was ineffective for failure to move to suppress all the evidence gained as a result of the purported unlawful citizen's arrest. Because a citizen's arrest did not occur and, in any event, Mr. King had probable cause to arrest defendant, such a motion would not have been successful. See Commonwealth v. Harris, 11 Mass. App. Ct. 165, 172, rev. denied, 383 Mass. 890 (1981). Accordingly, counsel was not ineffective for failure to file such a motion. Commonwealth v. Pike, 52 Mass. App. Ct. 650, 656 (2001).

C. Counsel rendered effective assistance when he permitted the introduction of the victim's medical records in lieu of eliciting expert opinion interpreting the records and attempted to use the records to show that the victim exaggerated his injuries.

In one breath defendant claims that his counsel was ineffective for failure to call a medical expert to decipher the purportedly illegible medical records because they assisted his claim that the victim exaggerated his eye injury to the jury. (D.Br. 21) . In the next breath, defendant claims that his counsel was ineffective for failure to oppose the admissibility of these medical records. (D.Br. 16-20) . Because there is no evidence that the medical

records were illegible and no indication that there were inadmissible, and counsel's decision to agree to their admission was strategically sound, defendant has not shown that counsel's assistance was ineffective.

First, the victim's medical records were admissible. While it is true that illegible portions of medical records (either due to abbreviations and technical jargon or indecipherability) should be redacted, "[i]llegibility is a relative matter and there must be broad discretion in the trial judge to determine in a particular case whether writing in a hospital record can be read and decoded." Commonwealth v. Baldwin, 24 Mass. App. Ct. 200, 203, rev, denied, 400 Mass. 1102 (1987). The judge did not abuse his discretion when he admitted the records into evidence, because they were legible.

During the victim's testimony the prosecutor sought to introduce the victim's medical records. (Tr.II 446-53). During the lengthy sidebar on this matter, it is clear that the prosecutor, trial counsel, and the judge had no problems deciphering the records. (Id.). Counsel succeeded in convincing the judge to redact certain portions of the records, including the victim's report that he had vitreous

fluid coming from his eye. (Tr.II 450, 452) . While looking at the records, the judge also redacted other portions that were hearsay not falling within any exception that would render them admissible. (Tr.II 450-52). Implicit in this discussion about the content of the records is the judge's opinion that the records were legible. As the motion judge found, defendant forwarded no evidence in his motion for new trial that they were otherwise. (Def. Addendum 11) . Accordingly, the trial judge did not abuse his discretion when he admitted the medical records into evidence and trial counsel was not ineffective for failure to object to their admissibility. See Commonwealth v. McLeod, 39 Mass. App. Ct. 461, 463-64 (1995) (counsel not ineffective for failure to object to admission of evidence that was not "clearly objectionable"), rev, denied, 422 Mass. 1101 (1996).

Similarly, counsel was not ineffective for failure to call an expert witness to interpret the medical records, as any information to which he would have testified was cumulative of that before the jury, and his testimony would not have been dispositive of whether defendant had the intent to gouge out Mr. King's eye.

In his motion for new trial, defendant provided the affidavit of Dr. Joseph Hull. (R.A. 126-27). Dr. Hull averred that King's medical records revealed that King suffered from a superficial abrasion to the lids and a small laceration to the conjunctiva and that there was no bleeding and the injuries were consistent with being poked in the eye. (R.A. 126-27). The laceration and abrasion information, however, was contained in the medical records before the jury. Trial counsel also presented John Hayes, who, unlike Dr. Hull, saw Mr. King right after the incident, and testified that he did not see any blood or fluid coming from King's eye and that his injury did not look serious. (Tr.IV 916-18). He further testified that Mr. King stated that he must have gotten "poked in the eye." (Tr.IV 918). Based on this information, trial counsel argued that King greatly exaggerated his eye injury. (Tr.V 1224-25). Because the additional testimony would have been cumulative of the evidence counsel had already presented at trial and not as convincing given the Dr. Hull did not see King after the incident, defendant has not shown how his counsel's performance was deficient or deprived him of a substantial ground of defense. See

Commonwealth v. Sarmanian, 426 Mass. 405, 407 (1998) (counsel not ineffective for failure to present additional witnesses that would have been cumulative of evidence already presented at trial). Accordingly, defendant's assertion that his counsel was ineffective for failure to object to the admission of the medical records or call an expert to interpret the records for the jury, fails.

D. The prosecutor properly commented on the evidence in his summation.

Lastly, defendant asserts that the motion judge erroneously denied his motion for new trial because the prosecutor's opening statement and closing argument were purportedly rife with every type of prosecutorial error. (D.Br. 49-50). Defendant's claim is frivolous.

First, defendant attempts to incorporate into his brief those portions of his motion for new trial alleging prosecutorial error in this regard. (D.Br. 49-50). Those issues not directly addressed in his brief are waived and should not be addressed by this Court. Mass. R. App. P. 16(a)(4).

Second, in his brief, defendant addresses one claim, namely, that the prosecutor referred to facts

not in evidence when he stated in his closing argument that defendant admitted/testified that he gouged Mr. King in the eye. (D.Br. 50). Viewing the closing argument in its entirety, Commonwealth v. Degro, 432 Mass. 319, 325-26 (2000), the prosecutor did not misstate the evidence.

The prosecutor stated as follows:

And then [defendant] takes the stand and he tells you this story. **Remember when he said he gouged King's eye? Did that make any sense to anybody? I'm sorry, he said. King gouged his eye.** Does that make sense to anybody? That King came over to him while he was on the ground and gouged his eye. Those were his words, 'He gouged my eye.'

(Tr.V 1234 (emphasis added)). As is demonstrated above, the prosecutor immediately recognized his misstatement, apologized for it and corrected it. This correction, in conjunction with the judge's repeated instructions that closing arguments and statements of counsel are not evidence, ensured that the prosecutor's argument did not create a substantial risk of a miscarriage of justice. Commonwealth v. Maynard, 436 Mass. 558, 570-71 (2002). Accordingly, the motion judge correctly rejected this claim.

Conclusion.

For the reasons set forth above, the denial of defendant's motion for new trial should be affirmed.

Respectfully Submitted,

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OCTOBER 2 002

Addendum.

MASSACHUSETTS GENERAL LAWS.

265:13A. Assault or assault and battery; punishment.

Section 13A. Whoever commits an assault or an assault and battery upon another shall be punished by imprisonment for not more than two and one half years in a house of correction or by a fine of not more than five hundred dollars. 1
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A summons may be issued instead of a warrant for the arrest of any person upon a complaint for a violation of any provision of this section if in the judgment of the court or justice receiving the complaint there is reason to believe that he will appear upon a summons. 5
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265:14. Mayhem; punishment.

Section 14. Whoever, with malicious intent to maim or disfigure, cuts out or maims the tongue, puts out or destroys an eye, cuts or tears off an ear, cuts, slits or mutilates the nose or lip, or cuts off or disables a limb or member, of another person, and whoever is privy to such intent, or is present and aids in the commission of such crime, or whoever, with intent to maim or disfigure, assaults another person with a dangerous weapon, substance or chemical, and by such assault disfigures, cripples or inflicts serious or permanent physical injury upon such person, and whoever is privy to such intent, or is present and aids in the commission of such crime, shall be punished by imprisonment in the state prison for not more than twenty years or by a fine of not more than one thousand dollars and imprisonment in jail for not more than two and one half years. 1
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265:15. Assault; intent to murder or maim; penalty.

Section 15. Whoever assaults another with intent to commit murder, or to maim or disfigure his person in any way described in the preceding section, shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than one thousand dollars and imprisonment in jail for not more than two and one half years. 1
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269:10. Carrying dangerous weapons; possession of machine gun or sawed-off shotguns.

Section 10. (a) Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:

(h) Whoever owns, possesses or transfers possession of a firearm, rifle, shotgun, or ammunition without complying with the requirements relating to the firearm identification card provided for in section one hundred and twenty-nine C of chapter one hundred and forty shall be punished by imprisonment in a jail or house of correction for not more than one year or by a fine of not more than five hundred dollars. A second violation of this subsection shall be punished by imprisonment in a jail or house of correction for not more than two years or by a fine of not more than one thousand dollars or both. A violation of this subsection shall not be considered a lesser included offense to a violation of subsection (a), nor shall any one prosecute as a violation of this subsection the mere possession of a firearm, rifle, or shotgun by an unlicensed person not being present in or on his residence or place of business, nor shall the court allow an attempt to so prosecute.

272:53. Penalty for certain offenses.

Section 53. Common night walkers, common street walkers, both male and female, common railers and brawlers, persons who with offensive and disorderly acts or language accost or annoy persons of the opposite sex, lewd, wanton and lascivious persons in speech or behavior, idle and disorderly persons, disturbers of the peace, keepers of noisy and disorderly houses, and persons guilty of indecent exposure may be punished by imprisonment in a jail or house of correction for not more than six months, or by a fine of not more than two hundred dollars, or by both such fine and imprisonment.

Massachusetts Rules of Criminal Procedure

Rule 30. Post Conviction Relief

(Applicable to District Court and Superior Court)

(a) Unlawful Restraint. Whoever is imprisoned or restrained of his liberty pursuant to a criminal conviction may at any time, as of right, file a written motion requesting the trial judge to release him or to correct the sentence which he is then serving upon the ground that his confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts.

(b) New Trial. The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done. Upon the motion the trial judge shall make such findings of fact as are necessary to resolve the defendant's allegations of error of law.

(c) Post Conviction Procedure.

(1) Service and Notice. The moving party shall serve the District Attorney with a copy of any motion filed under this rule; the moving party shall serve the Attorney General with a copy of any motion filed under subdivision '(a)' of this rule.

(2) Waiver. All grounds for relief claimed by a defendant under subdivisions (a) and (b) of this rule shall be raised by the defendant in his original or amended motion. Any grounds not so raised are waived unless the judge in his discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion.

(3) Affidavits. Each moving party shall file and serve and each party opposing a motion may file and serve affidavits where appropriate in support of his respective position. The judge may rule on the issue or issues presented by such motion on the basis of the facts alleged in the affidavits without further

hearing if no substantial issue is raised by the motion or affidavits.

(4) Discovery. Where affidavits filed by the moving party under subdivision (c)(3) establish a prima facie case for relief, the judge on motion of any party may authorize such discovery as is deemed appropriate and as would be available in civil cases, subject to appropriate protective order.

(5) Counsel. The judge in his discretion may assign or appoint counsel in accordance with the provisions of these rules to represent a defendant in the preparation and presentation of motions filed under subdivisions (a) and (b) of this rule.

(6) Presence of Moving Party. A judge may entertain and determine a motion under subdivisions (a) and (b) of this rule without requiring the presence of the moving party at the hearing.

(7) Place of Hearing. All motions under subdivisions (a) and (b) of this rule may be heard by the trial judge wherever he is then sitting.

(8) Appeal. An appeal from a final order under this rule may be taken to the Appeals Court by either party.

(A) If an appeal is taken, the defendant shall not be discharged from custody pending final decision upon the appeal; provided, however, that the defendant may, in the discretion of the judge, be admitted to bail pending decision of the appeal.

(B) If an appeal or application therefor is taken by the Commonwealth, upon written motion supported by affidavit, the Appeals Court or the Supreme Judicial Court may determine and approve payment to the defendant of . his costs of appeal together with reasonable attorney's fees, if any, to be paid on the order of the trial court after entry of the rescript or the denial of the application. If the final order grants relief other than a discharge from custody, the trial court or the court in which the appeal is pending may, upon application by the Commonwealth, in

its discretion, and upon such conditions as it deems just, stay the execution of the order pending final determination of the matter.

(9) Appeal Under G.L. c. 278, § 33E. If an appeal or application for leave to appeal is taken by the Commonwealth under the provisions of Chapter 278, Section 33E, upon written notice supported by affidavit, the Supreme Judicial Court may determine and approve payment to the defendant of his costs of appeal together with reasonable attorney's fees to be paid on order of the trial court after entry of the rescript or the denial of the application.

MASSACHUSETTS RULES OF APPELLATE PROCEDURE.

Rule 16 BRIEFS

(a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) In all briefs of twenty pages or more, a table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(2) A statement of the issues presented for review.

(3) A statement of the case, which shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).

(4) The argument, which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. In a brief with more than twenty-four pages of argument, there shall be a short summary of argument, suitably paragraphed and with page references to later material in the brief dealing with the same subject matter, which should be a condensation of the argument actually made in the body

of the brief, and not a mere repetition of the headings under which the argument is arranged. The appellate court need not pass upon questions or issues not argued in the brief. Nothing argued in the brief shall be deemed to be waived by a failure to argue orally.

(5) A short conclusion stating the precise relief sought.

(6) In cases where geographical facts are of importance, unless appropriate plans are reproduced in the printed record or record appendix, an outline plan or chalk (preferably based on exhibits in evidence) shall be included. This outline plan should be suitable for reproduction on one page of the printed law reports.

(7) The printed, names, addresses, and telephone numbers of individual counsel, and, if an individual counsel is affiliated with a firm, the firm name.

(b) Brief of the Appellee. The brief of the appellee shall conform to the requirements of subdivision (a) (1) -(4) , except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(c) Reply Brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross appeal. No further briefs may be filed except with leave of the appellate court. Reply briefs shall comply with the requirements of Rule 16(a)(1).

(d) References in Briefs to Parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court, or the actual names of the parties, or descriptive term such as "the employee," "the injured person," "the taxpayer," "the landlord," etc.

(e). References in Briefs to the Record. References in the briefs to parts of the record reproduced in an appendix filed with a brief (see Rule 18(a)) shall be to the pages of the appendix at which those parts appear. If the appendix is prepared after the briefs are filed, references in the briefs to the record shall be made by one of the methods allowed by Rule 18(c). If the record is reproduced in accordance with the provisions of Rule 18(f), or if references are made in the briefs to parts of the record not reproduced, the references shall be to the pages of the parts of the record involved; e.g., Answer p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected. No statement of a fact of the case shall be made in any part of the brief without an appropriate and accurate record reference.

(f) Reproduction of Statutes, Rules, Regulations, Etc. If .determination of the issues presented requires consideration of constitutional provisions, statutes, rules, regulations, etc. or relevant parts thereof, they shall be reproduced in the brief or in an addendum at the end.

(g) Massachusetts Citations. Massachusetts Reports between 17 Massachusetts and 97 Massachusetts shall be cited by the name of the reporter. Any other citation shall include, wherever reasonably possible, a reference to any official report of the case or to the official publication containing statutory or similar material. References to decisions and other authorities should include, in addition to the page at which the decision or section begins, a page reference to the particular material therein upon which reliance is placed, and the year of the decision; as, for example: > 334 Mass. 593, 597-598 (1956). Quotations of Massachusetts statutory material shall include a citation to either the Acts and Resolves of Massachusetts or to the current edition of the General Laws published pursuant to Chapter 4 of the Resolves of 1984.

(h) Length of Briefs. Except by permission of the court, principal briefs shall not exceed fifty pages of standard typographic printing, or seventy pages of reproduction by any other process of duplicating or copying, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc. Except by permission of the court, reply briefs shall not exceed twenty-five pages of standard typographic printing or thirty-five pages of reproduction by any other process of duplicating or copying.

(i) Briefs in Cases Involving Cross Appeals. If a cross appeal is filed, the plaintiff in the court below shall be deemed the appellant for the purposes of this rule and Rules 18 and 19, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall contain the issues and argument involved in his appeal as well as the answer to the brief of the appellant.

(j) Briefs in Cases Involving Multiple Appellants or Appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(k) No-Complying Briefs. A brief not complying with this rule may be struck from the files by the appellate court or a single justice.

(l) Citation of Supplemental Authorities. When pertinent and significant authorities come to the attention of a party after his brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

265:15A. Assault and battery with dangerous weapon; punishment; victim sixty-five or older; minimum sentence for repeat offenders.

Section 15A. (a) Whoever commits assault and battery upon a person sixty-five years or older by means of a dangerous weapon shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than one thousand dollars or imprisonment in jail for not more than two and one-half years.

Whoever, after having been convicted of the crime of assault and battery upon a person sixty-five years or older, by means of a dangerous weapon, commits a second or subsequent such crime, shall be punished by imprisonment for not less than two years. Said sentence shall not be reduced until two years of said sentence have been served nor shall the person convicted be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct until he shall have served two years of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to said offender a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of next of kin or spouse; to visit a critically ill close relative or spouse; or to obtain emergency medical services unavailable at said institution. The provisions of section eighty-seven of chapter two hundred and seventy-six relating to the power of the court to place certain offenders on probation shall not apply to any person seventeen years of age or over charged with a violation of this subsection.

(b) Whoever commits assault and battery upon another by means of a dangerous weapon shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than one thousand dollars or imprisonment in jail for not more than two and one-half years.

265:15B. Assault with dangerous weapon; punishment; victim sixty-five or older; minimum sentence for repeat offenders.

(b) Whoever, by means of a dangerous weapon, commits an assault upon another shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than one thousand dollars or imprisonment in jail for not more than two and one-half years.