

MASSACHUSETTS SUPREME JUDICIAL COURT

Commonwealth v. Senior

454 Mass. 12 (2009) · Decided May 28, 2009

SUMMARY

The Massachusetts Supreme Judicial Court affirmed the defendant’s convictions for attempted subornation of perjury and making a false report to police officers. The court held that the indictment was sufficient because, under the applicable statute, the attempted subornation and overt act were the same, and it found sufficient evidence supporting the conviction. The court also rejected challenges concerning cross-examination of a defense witness and alleged prosecutorial vouching.

CASE DETAILS

COURT	Massachusetts Supreme Judicial Court
WRITING FOR THE COURT	Ireland, J.
JURISDICTION	Massachusetts
DECIDED	May 28, 2009
DISPOSITION	affirmed
PROCEDURAL POSTURE	The defendant appealed convictions for attempted subornation of perjury and making a false report to police officers. The Massachusetts Supreme Judicial Court transferred the case from the Appeals Court on its own motion and reviewed the defendant's claims concerning the indictment, sufficiency of the evidence, cross-examination, and closing argument.
STANDARD OF REVIEW	For the sufficiency challenge, the court reviewed whether, viewing the evidence in the light most favorable to the Commonwealth, the evidence was sufficient to permit the jury to infer the essential elements of the crime beyond a reasonable doubt. The preserved or properly raised claims were reviewed for prejudicial error; the untimely objection to cross-examination was reviewed for a substantial risk of a miscarriage of justice.
PRECEDENTIAL VALUE	published precedential opinion of the Massachusetts Supreme Judicial Court
PARTIES	Senior v. Commonwealth

TOPICS

criminal procedure

statutory interpretation

evidence

impeachment

prosecutorial misconduct

PRACTICE AREAS

criminal law

criminal procedure

evidence

appellate practice

QUESTIONS PRESENTED

1. Whether the indictment for attempted subornation of perjury was insufficient because it did not separately allege an overt act.
2. Whether the evidence was sufficient to support the conviction for attempted subornation of perjury.
3. Whether the prosecutor improperly impeached a defense witness with her pretrial silence without first laying the required foundation.
4. Whether the prosecutor improperly vouched for Bragg's credibility during closing argument.

HOLDINGS

1. An indictment charging attempted subornation of perjury is sufficient when it tracks the statutory language and the crime itself constitutes the overt act; a separate overt-act allegation is not required in those circumstances.
2. The evidence was sufficient to support the conviction for attempted subornation of perjury.
3. The defendant was not entitled to relief from the prosecutor's question concerning the defense witness's failure to report exculpatory information because the objection was untimely and the judge's instruction cured any potential problem, eliminating a substantial risk of a miscarriage of justice.
4. The prosecutor did not improperly vouch for Bragg's credibility by arguing, based on the trial evidence and in response to the defense attack, that Bragg had testified truthfully.

KEY QUOTATIONS

“There is no merit to the defendant’s argument that the indictment failed to allege an overt act, because attempted subornation of perjury, in violation of G. L. c. 268, § 3, is a type of attempt crime where the crime itself and the overt act are one and the same.” (454 Mass. at 15)

“A prosecutor may not assert his or her personal opinion as to the credibility of a witness or the guilt of an accused.” (454 Mass. at 18)

“However, the prosecutor may comment on evidence developed at trial and draw inferences from such evidence.” (454 Mass. at 18)

FACTUAL BACKGROUND

The defendant reported to police that John Borghese had thrown a brick through the defendant's car window, although the defendant's associate, Noah Bragg, testified that the defendant had thrown the brick through his own window and staged the resulting injuries and evidence. Before Borghese's trial, the defendant had several

conversations with Bragg in which he asked Bragg to corroborate the defendant's account, including a conversation outside the courthouse on the day of Borghese's trial. The defendant was subsequently convicted of attempting to procure Bragg to commit perjury and of making a false report to police officers.

PROCEDURAL HISTORY

After the defendant was indicted and tried, a jury convicted him of attempted subornation of perjury and making a false report to police officers. He appealed, and the Supreme Judicial Court transferred the case from the Appeals Court on its own motion. The court rejected all claims of error and affirmed the convictions.

DISPOSITION

affirmed

CASES CITED

- Commonwealth v. Cantres, 405 Mass. 238, 239-240 (1989)
- Commonwealth v. Sholley, 432 Mass. 721, 724-725 (2000), cert. denied, 532 U.S. 980 (2001)
- Commonwealth v. Barsell, 424 Mass. 737, 738 (1997)
- Commonwealth v. Green, 399 Mass. 565, 566 (1987)
- Commonwealth v. Gosselin, 365 Mass. 116, 121 (1974)
- Commonwealth v. Peaslee, 177 Mass. 267, 274 (1901)
- Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979)
- Commonwealth v. Sandler, 368 Mass. 729, 740 (1975)
- Commonwealth v. Ortega, 441 Mass. 170, 174 (2004)
- Commonwealth v. Martino, 412 Mass. 267, 272 (1992)
- Commonwealth v. Roberts, 433 Mass. 45, 50 n.6 (2000)
- Commonwealth v. Brown, 11 Mass. App. Ct. 288, 296-297 (1981)
- Commonwealth v. Gregory, 401 Mass. 437, 444-445 (1987)
- Commonwealth v. Robinson, 444 Mass. 102, 105 (2005)
- Commonwealth v. Chavis, 415 Mass. 703, 713 (1993)
- Commonwealth v. Disler, 451 Mass. 216, 222 (2008)
- Commonwealth v. Brown, 431 Mass. 772, 775 (2000)