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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
NO. SUCR2016-00242

COMMONWEALTH

v.

YERRI PEREZ

**MEMORANDUM OF DECISION AND ORDER ON
DEFENDANT'S RENEWED MOTION FOR
REQUIRED FINDING OF NOT GUILTY**

Having previously reserved decision on the Defendant's Motion for Required Finding of Not Guilty in accordance with Mass. R. Crim. P. 25(b)(1), it is the conclusion of the Court that the jury's April 27, 2017 verdict adjudging Defendant Yerri Perez guilty of Unlawful Possession of a Firearm cannot stand. Even viewed in the light most favorable to the Commonwealth, as it must be, the trial evidence permitted no rational trier of fact to find the essential elements of this offense beyond a reasonable doubt. Commonwealth v. Marshall, 434 Mass. 358, 361 (1001); Commonwealth v. Latimore, 378 Mass. 671, 677 (1979).

The undersigned has re-read the entire trial transcript in this case, and is unable to locate *any* evidence upon which a jury could rest a finding beyond a reasonable doubt that the Defendant possessed a firearm on the night of March 31, 2013. The few shards of evidence cited by the

Commonwealth in its Opposition do not remotely satisfy this standard. Shorn of speculation and conjecture, the prosecution's case against the Defendant reduces to no more than the following:

(1) A person loosely fitting Perez's general physical description (but whom *no* witness at trial was prepared to identify as Perez himself) was observed at the scene of the shooting of Edward Villalona; (2) a cell-phone registered to Perez's mother (but which un-refuted evidence revealed was utilized by multiple members of her family) was used to place calls reasonably near the time and site of the subject shooting; (3) a Ford Flex vehicle rented by a childhood friend of Perez was witnessed circling the area, letting out and then retrieving a passenger, and ultimately leaving the scene of the Villalona homicide; and (4) cell site location information shows the phone registered to Perez's mother to have traveled in the same directional path as the Ford Flex automobile on the night of the shooting.¹

The foregoing evidence, no matter how generously construed in favor of the Commonwealth, cannot sustain a finding beyond a reasonable doubt that the Defendant

¹At a hearing on the instant motion, the Commonwealth additionally argued that the jury's permissible disbelief of the trial testimony proffered by two eyewitnesses who could not identify Perez as the shooter, and of testimony by the Defendant's mother that she could not recall Perez specifically utilizing her cell-phone, was *itself* evidence sufficient to prove Perez's guilt beyond a reasonable doubt. The Court does not agree. As a threshold matter, the jury's decision to acquit this Defendant of first-degree Murder strongly belies the notion that the three witnesses who testified in Perez's favor at trial were deemed unworthy of credence. More to the point, while the jury may have been entitled to find that these witnesses had a favorable bias toward Perez and were therefore lying, "[d]isbelief of testimony is not the equivalent of proof of facts contrary to that testimony." Commonwealth v. Nattoo, 452 Mass. 826, 828 n.1 (2009) (quoting Commonwealth v. Haggerty, 400 Mass. 437, 442 (1987)). Beyond a reasonable doubt or otherwise. Accordingly, jury disbelief of two eyewitnesses' testimony that Perez was not the shooter would not constitute probative evidence that Perez *was* the shooter; and, by the same token, the jury's possible disbelief of the testimony of Perez's mother that other family members could have used her cell-phone would not constitute evidence that *Perez* in fact used her phone to place calls on the night of the homicide.

unlawfully possessed a firearm. Consistent with the jury's Not Guilty verdict on the Murder charge, there was no eye-witness identification of Perez as the shooter.² There was no physical or forensic evidence linking Perez to a firearm. There was no evidence that Perez was possessed of any motive to commit the Villalona shooting or to possess a firearm for any other purpose. If Perez did place cell-phone calls at the time and near the scene of the Villalona shooting (and this requires speculation), it would still not evidence unlawful firearm possession on his part. Likewise, even if the Defendant had been present in the Ford Flex vehicle that was used to transport the shooter from the Villalona homicide (and this, too, requires constructing a pyramid of speculative inferences), it would still not show that Perez himself unlawfully possessed a firearm. There were no fewer than three (and potentially more) individuals who occupied this automobile, any one of whom could have been Villalona's shooter. Inasmuch as the Defendant was not tried on a joint venture theory, ascribing actual or constructive possession of a firearm to him in these circumstances would be altogether conjectural.

²One witness who had observed the shooting (Yomaira Gonzalez) described a perpetrator who in many (but not all) respects matched the physical description of the Defendant; but Ms. Gonzalez testified unequivocally that Perez was *not* the shooter she saw that night. A second witness (Celida Rodriguez) had previously testified before the grand jury that the man whom she observed running from the backyard parking lot where Villalona was shot matched a very general physical description of Perez, and had further testified that the similarities between this individual and an Instagram photograph of Perez she saw not long thereafter were "jaw-dropping." At trial, however, Ms. Rodriguez made clear that she could *not* be certain that the individual she saw at the time of the shooting was Perez, that she had *not* intended to suggest that the person she had seen was in fact the same individual who appeared in the Instagram photograph, and that she had conveyed this uncertainty to a police detective (Melvin Ruiz) prior to her grand jury appearance. Indeed, Ms. Rodriguez testified at trial that she was familiar with Perez (because he had once dated a friend of hers); so, had she seen Perez on the evening in question, she would have recognized him and identified him to the police as Villalona's killer. Villalona was, after all, a close friend of Rodriguez and his death had upset her. Ms. Rodriguez did not make such an identification when interviewed by police on the night of the homicide, however, and testified that she could not do so when faced with Perez in open court.

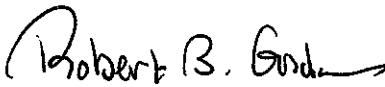
It is, of course, well settled that Perez cannot be found guilty of unlawful firearm possession based on no more than the fact that he was present in an automobile that (theoretically) transported an unregistered weapon. Physical presence or proximity, shared premises (or conveyances), and even association with a person known to control contraband will not, without more, suffice to prove knowing possession. See Commonwealth v. Booker, 31 Mass. App. Ct. 435, 437-38 (1991). At the very most, such is the state of the evidence in the case at bar.

In the final analysis, the Commonwealth has proven by circumstantial evidence no more than that the Defendant *may* have been involved in some way in the Villalona shooting. Such a possibility, however, falls far short of the proof beyond a reasonable doubt required to sustain a guilty verdict on the firearm charge. See Commonwealth v. Walsh, 407 Mass. 740, 745 (1990).

ORDER

For the foregoing reasons, and in accordance with Mass. R. Crim. P. 25(b), the jury verdict finding the Defendant Guilty of Unlawful Possession of a Firearm is hereby **VACATED**, and a required finding of Not Guilty on this charge shall enter forthwith.

SO ORDERED.


Robert B. Gordon
Justice of the Superior Court

Dated: June 19, 2017