

*Commonwealth v. Barros*, Slip Copy, 2013 WL 68371 (Table) (Mass.App.Ct.)

**Unpublished Disposition** Only the Westlaw citation is currently available.

NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

\*2 “An expert may rely on hearsay as long as it is independently admissible and a permissible basis for an expert to use in formulating an opinion.”

NOTICE: Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

Appeals Court of Massachusetts.  
COMMONWEALTH  
v.  
Casimiro BARROS.

No. 10–P–2104. Jan. 8, 2013.

By the Court (CYPHER, BERRY & [AGNES](#), Peter JJ.).

*MEMORANDUM AND ORDER PURSUANT TO RULE 1:28*

\*1 The defendant, Casimiro Barros, appeals from his convictions of voluntary manslaughter, assault and battery by means of a dangerous weapon, and possession of a firearm without a license.

1. *Admission of gang evidence.* A. *Undue prejudice.* Evidence of a gang feud and the defendant's gang affiliation was admitted over the defendant's objection. We review for prejudicial error. [Commonwealth v. Smith](#), 450 Mass. 395, 398, cert. denied, 129 S.Ct. 202 (2008). “[G]ang affiliation evidence is admissible to show motive.” [Commonwealth v. John](#), 442 Mass. 329, 337 (2004). “[T]hat [the] gang affiliation was not the only possible motive does not require exclusion of the gang evidence.” [Commonwealth v. Phim](#), 462 Mass. 470, 477 (2012). The Commonwealth pursued a theory of murder in the first degree, which required proof of deliberate premeditation. The gang evidence was relevant to show that the defendant was motivated by something other than heat of passion upon adequate provocation. In order to meet its burden of proof with respect to murder, the Commonwealth was entitled to offer evidence to show that the defendant engaged in the street shootout with Spank not so much out of loyalty to Barbosa, but rather due to a sense of self-affirmation and bravado as a gang member. **The question is whether the probative value of the evidence presented was substantially outweighed by the danger of unfair prejudice.** See [Commonwealth v. Robidoux](#), 450 Mass. 144, 158 (2007), and cases cited. Without the gang evidence, the jury would not have had the whole picture of the events that led to the shooting. In particular, they would have had difficulty understanding why Spank referred to Roxbury when insulting the group to

which the defendant belonged. The jury also might have been puzzled about Nunez's testimony that the defendant parked on a side street to hide his vehicle because of the "drama" in the area. Finally, they would not fully have understood the defendant's relationship with Barbosa.<sup>FN1</sup> The judge acted in an exemplary manner in taking steps to minimize the prejudice. She conducted a voir dire of the prospective jurors, gave a strong and detailed limiting instruction immediately after the expert's testimony, and repeated this instruction when fully charging the jury. See [Commonwealth v. Maldonado, 429 Mass. 502, 505 \(1999\)](#); *Smith, supra* at 400. She also strictly limited the gang expert's testimony, excluding all references to the gang-related violence. Essentially, all the jury could infer from the expert testimony was that the defendant belonged to the Woodward Street gang called "Purple City," that Barbosa also was affiliated with the gang, and that the gang was engaged in a feud with the Dorchester gang. In these circumstances, the probative value of the evidence far outweighed the danger of unfair prejudice. There was no error.

<sup>FN1</sup>. There was no evidence that Spank was a member of a rival gang, or that Dorchester gang members wore black hats or hoodies (from which the jury could infer Spank's gang affiliation). However, Spank's words and conduct revealed that he indeed was a Dorchester gang member, as he referred to the Roxbury group as not being on their turf; and without the evidence that the defendant and Barbosa belonged to a rival gang, the jury could not have understood Spank's conduct.

**B. Qualifications of gang expert.** Although the judge did not expressly qualify Detective O'Malley as an expert, such a ruling is implied. See [Commonwealth v. Calderon, 65 Mass.App.Ct. 590, 593 \(2006\)](#), citing [Commonwealth v. Boyd, 367 Mass. 169, 183 \(1975\)](#). Here, the prosecutor laid a sufficient foundation to qualify O'Malley. The judge referred to O'Malley's qualifications as being relevant during the hearing on the motions in limine. Defense counsel referred to O'Malley as an expert during his closing argument. The judge gave instructions on expert testimony. Contrast [Commonwealth v. Wolcott, 28 Mass.App.Ct. 200, 207 \(1990\)](#). There was no error.<sup>FN2</sup>

<sup>FN2</sup>. Even if error, there was no substantial risk of miscarriage of justice. While O'Malley's testimony was admitted to show that the gang affiliation bore on the defendant's premeditation to kill Spank, the jury returned a verdict of voluntary manslaughter.

**\*2 C. Gang expert's use of hearsay.** O'Malley based his knowledge of the relevant gangs, in part, on the intelligence he collected from conversations with neighborhood people, police reports, and field interrogation reports. An expert may rely on hearsay as long as it is independently admissible and a permissible basis for an expert to use in formulating an opinion. See [Department of Youth Servs. v. A Juvenile, 398 Mass. 516, 531 \(1986\)](#). See also Mass. G. Evid. § 703 (2012). Statements are independently admissible if they potentially would be admissible through appropriate witnesses, who need not be immediately available in court to testify. See [Commonwealth v. Markvart, 437 Mass. 331, 337–338 \(2002\)](#). See also Mass. G. Evid. § 703 & Note (2012). **An expert's reliance on hearsay to form an opinion does not violate the defendant's right of confrontation as long as the witness does not testify to the hearsay statements.** [Commonwealth v. Barbosa, 457 Mass. 773, 786–787 & n. 12 \(2010\)](#). **O'Malley did not relay the substance of any hearsay to the jury.**<sup>FN3</sup> **The intelligence he used in educating himself about the gang activity was the type of information reasonably relied upon by experts in group characteristics.**

<sup>FN3</sup>. The statements O'Malley did relay were not hearsay or were independently admissible. They were the defendant's statements and other statements not offered for their truth (for example, the defendant's own statement to O'Malley that

he was “not part of that snitch bastards,” referring to the Dorchester gang; an insult by a Dorchester gang member that the defendant was a “rat snitch bastard”; and a directive from a gang member to the defendant, “[D]on't even look at me”).

2. *Admission of autopsy photographs and bloody clothing.* The defendant objected to the admission of five autopsy photographs (out of a total of more than forty) of the victim and the admission of her bloody clothing as unfairly prejudicial.<sup>FN4</sup> We review for prejudicial error. See [Commonwealth v. Vinnie, 428 Mass. 161, 163 \(1998\)](#). There was no abuse of discretion.<sup>FN5</sup> Evidence is not to be excluded merely because it is prejudicial, but only if it is unfairly so. See [Commonwealth v. Delong, 60 Mass.App.Ct. 528, 535 \(2004\)](#). “[I]f the photographs possess evidential value on a material matter, they ‘are not rendered inadmissible solely because they are gruesome [or duplicative] or may have an inflammatory effect on the jury.’” [Commonwealth v. Urrea, 443 Mass. 530, 545 \(2005\)](#), quoting from [Commonwealth v. Benson, 419 Mass. 114, 118 \(1994\)](#). Although the defendant did not dispute the injuries or the cause of death, he did not offer to stipulate to them. The Commonwealth therefore bore a burden of proof as to these issues.

<sup>FN4</sup>. We requested the photographs and reviewed them in connection with this appeal.

<sup>FN5</sup>. The prosecutor described the five autopsy photographs he was offering and the judge examined each of them. One photograph showed the “pseudo-stippling” on the victim's hand caused by flying glass, two showed the exit wound, and two showed the entrance wound. The judge who examined each of these five photographs specifically noted that none was a “full body shot,” and that they did not depict the scalp peeled back showing the path of the bullet through the skull.

3. *Prosecutor's closing remarks.* The defendant argues that certain of the prosecutor's statements constituted improper appeal to the jury's conscience and duty: “[T]his case is not just about [the victim]. It is about much more. When those men opened fire on that street, they opened fire on Geneva Avenue.... Geneva Avenue is our street.” The defendant objected to the remarks but did not request a curative instruction. We view the statements in the context of the closing argument as a whole and in the context of the trial as a whole. [Commonwealth v. Szerlong, 457 Mass. 858, 870–871 \(2010\)](#), cert. denied, [131 S.Ct. 1494 \(2011\)](#). The prosecutor did not suggest in his closing that it was the jury's duty to find the defendant guilty or that the jury could not go home with a clean conscience without doing so. Contrast [Commonwealth v. Awad, 47 Mass.App.Ct. 139, 145–146 \(1999\)](#). It is instructive to examine the rationale of this section of the closing:

**\*3** “When you take a dispute like this into the street and you open fire and you put everyone's life in danger, ... the law does not excuse you if you miss your intended target and you hit somebody else.... [T]he articulation in the law of that outrage is the law of transferred intent.”

In context, it is clear that the remarks related to the doctrine of transferred intent, and there is no basis to conclude that they improperly influenced the jury's verdict. See generally [Commonwealth v. Kozec, 399 Mass. 514, 516–524 \(1987\)](#).

*Judgments affirmed.*