

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33201
O/kmb

_____AD3d_____

Argued - November 7, 2011

PETER B. SKELOS, J.P.
RUTH C. BALKIN
RANDALL T. ENG
SANDRA L. SGROI, JJ.

2011-01455
2011-01456

DECISION & ORDER

The People, etc., appellant,
v Cleveland Jessup, respondent.

(Ind. No. 1449/10)

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Grazia DiVincenzo of counsel),
for appellant.

Thomas J. Lavallee, Hauppauge, N.Y., for respondent.

Appeals by the People from (1) an order of the County Court, Suffolk County (Kahn, J.), dated October 21, 2010, which granted the defendant's motion pursuant to CPL 210.20 to dismiss the indictment charging him with sexual abuse in the first degree and endangering the welfare of a child, on the ground that the evidence before the grand jury was legally insufficient, and (2), as limited by their brief, from stated portions of an order of the same court dated December 20, 2010.

ORDERED that the order dated October 21, 2010, is reversed, on the law, the defendant's motion to dismiss the indictment is denied, the indictment is reinstated, and the matter is remitted to the County Court, Suffolk County, for further proceedings; and it is further,

ORDERED that the appeal from the order dated December 20, 2010, is dismissed as academic in light of our determination on the appeal from the order dated October 21, 2010.

"To dismiss an indictment on the basis of insufficient evidence before a Grand Jury, a reviewing court must consider 'whether the evidence viewed in the light most favorable to the

December 13, 2011

Page 1.

PEOPLE v JESSUP, CLEVELAND

People, if unexplained and uncontradicted, would warrant conviction by a petit jury” (*People v Bello*, 92 NY2d 523, 525, quoting *People v Jennings*, 69 NY2d 103, 114; see *People v Barabash*, 35 AD3d 873, 874). Legally sufficient evidence is defined as “competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant’s commission thereof” (CPL 70.10[1]; see *People v Deitsch*, 97 AD2d 327, 329). “In the context of a Grand Jury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt” (*People v Bello*, 92 NY2d at 526; see *People v Galatro*, 84 NY2d 160, 164). Thus, “[t]he reviewing court’s inquiry is limited to whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes, and whether the Grand Jury could rationally have drawn the guilty inference” (*People v Bello*, 92 NY2d at 526 [internal quotation marks omitted]).

Here, the evidence presented to the grand jury, viewed in the light most favorable to the People, was legally sufficient to establish the charges in the indictment. The evidence before the grand jury, if accepted as true, established that the defendant was alone with his four-year-old grand-nephew in the defendant’s bedroom with the door closed, that the child was on top of the defendant while the defendant’s penis was exposed, that the child touched the defendant’s penis, and that the defendant immediately pushed the child off of his lap when the bedroom door was unexpectedly opened by the child’s mother and great-aunt. Further, the grand jury could have reasonably inferred from the evidence that the touching constituted sexual contact because it was for the purpose of gratifying the sexual desire of the defendant, which is a required element of the crime of sexual abuse in the first degree (see Penal Law §§ 130.00[3], 130.65[3]). Since the grand jury could have rationally drawn such an inference, the fact that the evidence presented is susceptible of other inferences as to the touching that occurred is irrelevant (see *People v Campbell*, 69 AD3d 645, 646; see generally *People v Jensen*, 86 NY2d 248, 252). Thus, there was legally sufficient evidence to establish the charge of sexual abuse in the first degree (see Penal Law § 130.65[2]).

In addition, viewing this same evidence in the light most favorable to the People, such evidence, if found to be true, and its logical inferences would establish that the defendant knowingly acted in a manner likely to be injurious to the child’s physical, mental, or moral welfare. Thus, it was legally sufficient to establish the charge of endangering the welfare of a child (see Penal Law § 260.10[1]).

Accordingly, the County Court erred in granting the defendant’s motion pursuant to CPL 210.20 to dismiss the indictment.

SKELOS, J.P., BALKIN, ENG and SGROI, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court