

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-21

THE PEOPLE OF THE STATE OF NEW YORK : BY: DARRELL L. GAVRIN, J.S.C.
: :
: DATED: March 3, 2008
-against- : :
: INDICTMENT NO. 1160/07
: :
GREGORY CIANCA a/k/a VELO : :
Defendant :

The defendant has moved for re-inspection of the Grand Jury minutes and reduction of the first and second counts of the indictment to misdemeanor charges, pursuant to CPL 210.20 (1- a).

The first count of the indictment accuses the defendant of Criminal Mischief in the Second Degree (Penal Law 145.10), in that the defendant “did damage property of Nicholas Droukas to wit: a wall in an amount exceeding one thousand five hundred dollars.” The second count of the indictment accuses the defendant of Criminal Mischief in the Third Degree [Penal Law 145.05 (2)]. That count alleges that the defendant “damaged property of Robert Santini for Amtrak to wit: a wall and track in an amount exceeding two hundred and fifty dollars.” Both counts allege that the property was damaged due to graffiti placed on it by the defendant.

The defendant avers that in response to a discovery request for inspection of any paperwork concerning graffiti removal costs, the assistant district attorney affirmed: “To date, the People are unaware of the existence of any such paperwork.” Based on the absence of documentation as to the cost of removing the graffiti, the defendant contends that the Grand Jury was not presented with legally sufficient evidence of the monetary damages to sustain the two felony counts of criminal mischief.

It is well settled that:

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 People, if unexplained and uncontradicted would warrant conviction by a petit jury” (*People v. Jennings*, 69 NY2d 103, 114; *People v. Swamp* 84 NY2d 725, 730). Legally sufficient evidence is defined in CPL 70.10 (1) as “competent evidence which, if accepted as true, would establish every element of an offense charged.” 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. Mayo*, 36 NY2d 1002; *People v. Swamp*, *supra*). (*People v. Bello*, 92 NY2d 523, 525-6; *accord People v. Banks*, 42 AD3d 574- 5.)

In the case at bar, the first count of the indictment, requires the Grand Jury to find that the damage to the property exceeded \$1,500.00. The People relied on the testimony of the owner of the damaged building, Nicholas Droukas, that the cost of removing graffiti placed by the defendant on a brick wall of the building would be approximately \$1,500.00 to \$1,800.00. At the Grand Jury the owner testified that hot steam and chemicals would have to be applied to the entire wall and that the cost of repair was based on a rough estimate he had received. Photographs of the damage were marked in evidence and received as exhibits at the Grand Jury proceeding. However, these photographs were not provided to the Court until after this re-argument motion had been submitted and their existence made known to the Court, and then only after the Court requested them.

CPL 190.30 (3) (b) provides that property owners can furnish a written or oral statement, made under a oath, to establish the monetary amount of any damage to the person’s property, before a Grand Jury. However, in *People v. Lopez*, (79 NY2d 402), the Court of Appeals found that the purpose of the statute was to

eliminate the need for complainants to personally appear before the Grand Jury. The Legislature did not intend “ to effect a substantive change in New York law by conferring legally sufficient status upon a lay witness’ unsupported statement of value.” The Court agreed with the Appellate Division rulings in all four departments that a victim must provide “a basis of knowledge for the witness’ statement as to value so that the Grand Jury can reasonably infer, rather than merely speculate, that the property, or damage to property, has the requisite value to satisfy the statutory threshold.” (Id at 405).

In a criminal mischief case, the amount of damage is “the reasonable cost of repairing the damaged property, providing it can be repaired.” People v. Garcia, 29 AD3d 255,263, lv denied, 7 NY3d 789; also see People v. Katovich, 238 AD2d 751; People v. Simpson, 132 AD2d 894, lv denied, 70 NY2d 937) The repair cost may be established by expert testimony or by the complainant’s testimony, if it is supported by documentation. However, the complainant’s testimony as to the cost of repair, unsupported by documentation or other evidence, is insufficient. (People v. Garcia, supra at 263; also see People v. Deolall, 7 AD 3d 635, lv denied, 3 NY3d 658; People v. Wilson,284 AD2d 420), lv denied, 96 NY2d 926.) Testimony of the complainant about repair estimates is hearsay, but photographs which demonstrate beyond a reasonable doubt that the damage to the property exceeds the statutory limit can provide the requisite evidentiary support. (People v. Garcia, supra at 263-4; also see People v. Hoppe, 184 AD 2d 582).

In the instant case, the knowledge of the owner, Nicholas Droukas, as to the cost of repairing his building was based on a “rough estimate” from a third party, and not on the actual cost of repairs incurred by him. Cf. People v. White, 29 AD3d 329, lv. denied, 7 NY3d 996; People v. Daniels, 180 AD2d 567). Moreover, a written estimate was not produced by the witness at the Grand Jury proceeding. Further, he did not identify or testify as to the qualifications of the party who gave him the estimate. Mr. Droukas, testified that he owned and operated a Greek

bakery, and as such clearly was not qualified as an expert to assess the cost of repairing the damage to his property.

In addition to the complainant's testimony, the only evidence in support of the first count of the indictment were the photographs that were marked and received as exhibits at the Grand Jury. Although it would be speculation to conclude, without other competent evidence of the cost, that removal of the graffiti would exceed \$1,500.00, these photographs supported a finding that the cost to repair the damage however would exceed \$250.00 (See, People v. Garcia, supra at 264; People v. Hoppe, supra.) The Court has carefully reviewed these photographs. Said photographs depict a brick wall with the large letters "VELO" spray painted across it and confirm the complainant's testimony that the entire brick wall would need to be cleaned in order to properly repair it. As in People v. Garcia (supra), the photographs establish that the cost of removal of the graffiti would be far from trivial and common sense dictates that they cannot be made in New York City for under \$250.00. Therefore, while the evidence presented to the Grand Jury in support of the first count of the indictment was legally insufficient to sustain the charge of Criminal Mischief in the Second Degree, it was sufficient to support a reduced felony charge of Criminal Mischief in the Third Degree in violation of Penal Law Section 145.05 (2).

The second count of the indictment charges the defendant with Criminal Mischief in the Third Degree. Pursuant to the law, the Grand Jury was required to find that the damage to the property exceeded \$250.00. The property damaged was a wall and track belonging to Amtrak, upon which the defendant was accused of spray painting with the name, "VELO". Robert Santini, who testified before the Grand Jury, was the assistant facility manager of Amtrak of New York, in charge of maintaining the Amtrak facility from New Rochelle down to Pennsylvania. Mr. Santini testified that it would cost between \$1,000.00 and \$2,000.00 to repair the damage to the abutment wall, divider and tracks, caused by defendant's spray painting. The witness explained that he would have to send out two men and a

foreman to repair the damage, as well as a track foreman to stop trains from running on the track while the repairs were being made, at a cost of approximately \$500.00 a day per man.

In his position as assistant facility manager, Santini was required to maintain the Amtrak property that was damaged and was qualified to testify as an expert to the cost to repair the damage caused by the defendant. (See, People v. Mu-Min, 172 AD2d 1022, lv denied, 78 NY2d 924; People v. Woodward, 148 AD2d 997, lv denied, 74 NY2d 749). The photographs received as exhibits in the Grand Jury supported his testimony that the damage to the Amtrak property exceeded \$250.00. Therefore, the evidence in support of the second count of the indictment was legally sufficient to establish the felony charge of Criminal Mischief in the Third Degree, and reduction of the second count of the indictment to a misdemeanor charge is denied.

Accordingly, the defendant's motion to re-inspect the Grand Jury minutes is granted. Upon re-inspection, pursuant to CPL 210.20(1-a), the first count of the indictment is reduced to Criminal Mischief in the Third Degree [Penal Law 145.05(2)]. Further, the People are directed to provide the defendant with copies of the photographs of the damage to the property, alleged in the first and second counts, that were marked as exhibits in the Grand Jury proceeding [CPL 240.20 (1) (d)] , within seven days from the date of this decision. In all other respects, the defendant's motion for reargument is denied.

Order entered accordingly.

The Clerk is directed to forward copies of this Decision and the accompanying Order to the attorney for the defendant and to the People.

Darrell L. Gavrin, J.S.C.

