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FILED
AND ENTERED
ON 10-16-2019
WESTCHESTER

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER
Indictment No. 18-1251

LATONIA SHELECIA STEWART,

Defendant.

----------X

MINIHAN, J.

Defendant, charged by Westchester County Indictment Number 18-1251with Burglary in the Second Degree (Penal Law § 140.25[2]) (six counts), Grand Larceny in the Third Degree (Penal Law § 155.35[1]) (four counts), Criminal Mischief in the Fourth Degree (Penal Law § 145.00[1]) (five counts), Petit Larceny (Penal Law § 155.25), Grand Larceny in the Fourth Degree (Penal Law § 155.30[1]), Criminal Possession of Stolen Property in the Third Degree (Penal Law § 165.50), Possession of Burglar's Tools (Penal Law § 140.35), Unregistered Motor Vehicle (Vehicle & Traffic Law § 401), Improper Plates (Vehicle and Traffic Law § 402), and Unrestrained Back Seat Child Less Than Four Years (Vehicle and Traffic Law § 1229-C[1]), has filed an omnibus motion which consists of a Notice of Motion and an Affirmation in Support. In response, the People have filed an Affirmation in Opposition together with a Memorandum of Law.

Upon consideration of these papers, the stenographic transcript of the grand jury minutes and the Consent Discovery Order entered in this case, this court disposes of this motion as follows:

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TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

A.

MOTION for DISCOVERY, DISCLOSURE and INSPECTION
CPL ARTICLE 240

The parties have entered into a stipulation by way of a Consent Discovery Order consenting to the enumerated discovery in this case. Defendant's motion for discovery is granted to the extent provided for in Criminal Procedure Law Article 240. If there any further items discoverable pursuant to Criminal Procedure Law Article 240 which have not been provided to defendant pursuant to the Consent Discovery Order, they are to be provided forthwith.

As to defendant's demand for exculpatory material, the People have acknowledged their continuing duty to disclose exculpatory material at the earliest possible date upon its discovery (*see Brady v Maryland*, 373 US 83 [1963]; *Giglio v United States*, 405 US 150 [1972]). If the

People are or become aware of any material which is arguably exculpatory and they are not willing to consent to its disclosure to defendant, they are directed to immediately disclose such material to the Court to permit an *in camera* inspection and determination as to whether such material must be disclosed to defendant.

To the extent that defendant's motion seeks a further Bill of Particulars, that branch of the motion is denied. The Bill of Particulars set forth in the Consent Discovery Order provided to defendant adequately informs defendant of the substance of her alleged conduct and in all respects complies with CPL 200.95.

The People recognize their continuing duty to disclose the terms of any deal or agreement made between the People and any prosecution witness at the earliest possible date (*see People v Steadman*, 82 NY2d 1 [1993]; *Giglio v United States*, 405 US 150 [1972]; *Brady v Maryland*, 373 US 83 [1963]; *People v Wooley*, 200 AD2d 644 [2d Dept 1994]).

To the extent that defendant's motion seeks to compel the People to identify and produce any confidential informants, that branch of the motion is denied, as defendant has failed to demonstrate what relevant testimony any such witness would have on the issue of her innocence or guilt (*see People v Goggins*, 34 NY2d 163 [1974]; *People v Rivera,* 98 AD3d 529 [2d Dept 2012]). "[T]o compel production of a confidential informant, the defendant must demonstrate that the proposed testimony of the informant would tend to be exculpatory or would create a reasonable doubt as to the reliability of the prosecution's case either through direct examination or impeachment" (*People v Rivera*, 98 AD3d at 529-530). "Bare assertions or conclusory allegations by a defendant that a witness is needed to establish [her] innocence will not suffice" (*People v Pena*, 37 NY2d 642, 644 [1975]).

As to the defendant's demand for scientific related discovery, the People have acknowledged their continuing duty to disclose any written report or document concerning a physical or mental examination or test that the People intend to introduce, or the person who created them, at trial pursuant to CPL 240.20(1)(c).

With respect to defendant's request for the search warrants and supporting affidavits, the prosecution points out that the search warrants and supporting affidavits were provided to defendant and filed with the court as part of the consent discovery on August 13, 2019.

Except to the extent that the defendant's application has been specifically granted herein, it is otherwise denied as seeking material or information beyond the scope of discovery (*see People v Colavito*, 87 NY2d 423 [1996]; *Matter of Brown v Grosso*, 285 AD2d 642 [2d Dept 2001]; *Matter of Brown v Appelman*, 241 AD2d 279 [2d Dept 1998]; *Matter of Catterson v Jones*, 229 AD2d 435 [2d Dept 1996]; *Matter of Catterson v Rohl*, 202 AD2d 420 [2d Dept 1994]).

B.

MOTION to SUPPRESS NOTICED STATEMENTS

The People noticed pursuant to CPL 710.30(1)(a) a statement allegedly made by defendant on or about May 1, 2018, to members of law enforcement, at the Town of Greenburgh Police Department. Defendant moves to suppress the noticed statement as involuntary, the product of an unlawful arrest, and made without *Miranda* warnings and in violation of her right to counsel. The People argue that defendant voluntarily made the statement after the police lawfully stopped her vehicle and defendant voluntarily went to the police station and agreed to be interviewed. The People note that defendant was advised of, and waived, her *Miranda* rights but argue that, in any event, defendant was not in custody at the time of the statement. As for her Sixth Amendment right to counsel, the People argue that it had not attached at the time of the statement and that the interview stopped once defendant asked for a lawyer. Defendant's motion to suppress is granted to the extent that a pre-trial *Huntley* hearing shall be held, on consent of the People, to determine whether the alleged statement was involuntarily made within the meaning of CPL 60.45 (*see* CPL 710.20(3); CPL 710.60[3][b]; *People v Weaver*, 49 NY2d 1012 [1980]). The hearing will also address whether the alleged statement was obtained in violation of defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]), or her Sixth Amendment right to counsel.

C.

MOTION to INSPECT, DISMISS and/or REDUCE
CPL ARTICLE 190

The court grants the defendant's motion to the limited extent that the court has conducted, with the consent of the People, an *in camera* inspection of the stenographic transcription of the grand jury proceedings. Upon such review, the court finds no basis upon which to grant defendant's application to dismiss or reduce the indictment.

The defendant, who bears the burden of refuting with substantial evidence the presumption of regularity which attaches to official court proceedings (*People v Pichardo*, 168 AD2d 577 [2d Dept 1990]), has offered no sworn factual allegations in support of her argument that the grand jury proceedings were defective. The minutes reveal a quorum of the grand jurors was present during the presentation of evidence, and that the Assistant District Attorney properly instructed the grand jury on the law and only permitted those grand jurors who heard all the evidence to vote the matter (*see People v Calbud*, 49 NY2d 389 [1980]; *People v Valles*, 62 NY2d 36 [1984]; *People v Burch*, 108 AD3d 679 [2d Dept 2013]). Contrary to defendant's conclusory allegation, the prosecutor's instructions to the grand jury were not "incomplete and misleading."

The evidence presented, if accepted as true, is legally sufficient to establish every element of the offense charged (CPL 210.30[2]). "Courts assessing the sufficiency of the evidence before a grand jury must evaluate whether the evidence, viewed most favorably to the People, if unexplained and uncontradicted--and deferring all questions as to the weight or quality of the evidence--would warrant conviction" (*People v Mills*, 1 NY3d 269, 274-275 [2002]). Legally sufficient evidence means 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 Flowers*, 138 AD3d 1138, 1139 [2d Dept 2016]). "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 Jessup*, 90 AD3d 782, 783 [2d Dept 2011]). "The 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. That other, innocent inferences could possibly be drawn from those facts is irrelevant to the sufficiency inquiry as long as the Grand Jury could rationally have drawn the guilty inference" (*People v Bello*, 92 NY2d 523, 526 [1998]).

Contrary to defendant's contention, and as discussed further herein, the instant charges were properly joined in the same indictment pursuant to CPL 200.20(2)(b), since proof of one offense "would be material and admissible as evidence in chief upon a trial of the second." As such, the presentment of all of the charges to the grand jury did not deprive defendant of due process. Defendant's reliance on *People v Pinkas* (156 AD2d 485 [2d Dept 1989]) is misplaced as that case, unlike the present one, involved separate and distinct crimes with no unique modus operandi.

Based upon the *in camera* review, since this court does not find release of the grand jury minutes or any portion thereof necessary to assist it in making any determinations and as the defendant has not set forth a compelling or particularized need for the production of the grand jury minutes, defendant's application for a copy of the grand jury minutes is denied (*see People v Jang*, 17 AD3d 693 [2d Dept 2005]; CPL 190.25[4][a]).

D.

MOTION for *SANDOVAL* and *VENTIMIGLIA* HEARINGS

On defendant's motion, and the People's consent, the court orders a pre-trial *Sandoval* hearing to determine the extent, if at all, to which the People may inquire into defendant's prior criminal convictions, and prior uncharged criminal, vicious or immoral conduct (*see People v Sandoval* (34 NY2d 371 [1974]). At said hearing, the People shall be required to notify defendant of all specific instances of her criminal, prior uncharged criminal, vicious or immoral conduct of which they have knowledge and which they intend to use to impeach defendant's credibility if she elects to testify at trial (CPL 240.43). Defendant shall bear the burden of identifying any instances of her prior misconduct that she submits the People should not be

permitted to use to impeach her credibility. The defendant shall be required to identify the basis of her belief that each event or incident may be unduly prejudicial to her ability to testify as a witness on her own behalf (*see People v Matthews*, 68 NY2d 118 [1986]; *People v Malphurs*, 111 AD2d 266 [2d Dept 1985]).

To the extent that defendant is seeking a hearing pursuant to *People v Ventimiglia* (52 NY2d 350 [1981]) that branch of the motion is denied since the People have not indicated an intention to use evidence of any prior bad act or uncharged crimes of the defendant during its case in chief (*see People v Molineaux*, 168 NY2d 264 [1901]). If the People move to introduce such evidence, the defendant may renew this aspect of her motion.

E.

MOTION to SEVER COUNTS

The defendant moves to sever the counts related to each of the seven burglaries, and the vehicle and traffic infractions, creating, in effect, eight separate indictments. The motion is denied, as the counts were properly joined (*see* CPL 200.20[2][b]). Pursuant to CPL 200.20(2)(b), even though based on separate and distinct criminal transactions, offenses may be joined in the discretion of the trial court if they are of such a nature that proof of either offense would be material and admissible as evidence-in-chief upon the trial of the other (*see People v Bongarzone*, 69 NY2d 892, 895 [1987]). Here, the alleged burglaries were marked by a sufficiently unique modus operandi to demonstrate a distinctive pattern and support joinder under CPL 200.20(2)(b). "[E]vidence of other crimes using the same distinctive modus operandi may be used to prove identity" (*People v Hussain*, 35 AD3d 504, 505 [2d Dept 2006] *lv. denied* 8 NY3d 946 [2007] [joinder proper under CPL 200.20(2)(b), distinctive modus operandi]). Since the herein offenses were properly joined pursuant to CPL 200.20(2)(b), they are not severable (*see* CPL 200.20[3]; People v Bongarzone, 69 NY2d at 895; *People v Robbins*, 239 AD2d 526 [2d Dept 1997]; *People v Lewis*, 175 AD2d 885, 86 [2d Dept 1991]). Thus, the motion to sever is denied on that basis.

Furthermore, the court notes that joinder of the offenses is also proper under CPL 200.20(2)(c), since the charges, while based on different criminal transactions, are defined by the same or similar statutory provisions and consequently are the same or similar in law. Severance of charges joined pursuant to CP 200.20(2)(c) requires a showing of good cause, and defendant has failed to make that showing (*see* CPL 200.20[3]). Thus, the motion to sever is equally unwarranted on this basis.

F.

MOTION TO SUPPRESS PHYSICAL EVIDENCE

Defendant moves to suppress any physical evidence seized by the police, including from her vehicle, home, and cellular devices, on the basis that such evidence constitutes the fruits of her unlawful arrest without probable cause. With respect to any evidence which was retrieved pursuant to a search warrant, the motion to suppress is denied. The results of a search conducted pursuant to a facially sufficient search warrant are not subject to a suppression hearing (*People v Arnau*, 58 NY2d 27 [1982]). Upon review of the four corners of the search warrant affidavits, provided to defendant and filed with the court as part of the consent discovery, the warrants were adequately supported by probable cause (*see People v Keves*, 291 AD2d 571 [2d Dept 2002]; *see generally People v Badilla*, 130 AD3d 744 [2d Dept 2015]; *People v Elysee*, 49 AD3d 33 [2d Dept 2007]).

Defendant's motion to suppress physical evidence is granted only to the extent of ordering a pre-trial *Mapp* hearing to determine the propriety of any search, not conducted pursuant to a search warrant, resulting in the seizure of evidence (*see Mapp v Ohio*, 367 US 643[1961]). The hearing will also address whether defendant consented to the search of her vehicle, and whether any evidence was obtained in violation of the defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

As for defendant's request to unseal the search warrants and their supporting affidavits, the People point out that the search warrants and supporting affidavits were never sealed and were turned over to defendant with the consent discovery on August 13, 2019.

G.

MOTION FOR *FRYE* HEARING

Defendant moves for a *Frye* hearing "to determine if the examination of all electronic devices in this case meets acceptable scientific standards." "The long-recognized rule of *Frye v United States* [293 F 1013 (DC Cir 1923)] is that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has 'gained general acceptance' in its specified field" (*People v Wesley*, 83 NY2d 417, 422 [1994]). "When the People seek to present 'novel scientific evidence' the court is required to conduct a hearing to determine its reliability" (*People v Persaud*, 244 AD2d 577, 578 [2d Dept 1997], *citing People v Wesley*, 83 NY2d at 422; *People v Magri*, 3 NY2d 562, 565-566 [1958]). Here, there is no indication that the People are seeking to introduce "a novel scientific theory, technique, or procedure" (*see People v Littlejohn*, 112 AD3d 67, 73 [2d Dept 2013] *lv. denied* 22 NY3d 1140 [2014] [court properly denied request for *Frye* hearing as to cellular phone tracking evidence])

To the extent that defendant's motion seeks to challenge the People's use of cell site or cell phone data, such evidence is not novel and has, to the contrary, been relied upon previously by the courts (*see People v Arafet*, 13 NY3d 460, 463-464 [2009]; *People v Cahill*, 2 NY3d 14, 37 [2003] [People's proof included data retrieved from defendant's computer as to internet searches]; *People v Littlejohn*, 112 AD3d at 73). Thus, the motion for a *Frye* hearing is denied.

Dated: White Plains, New York
October 16, 2019

Honorable Anne E. Minihan
A.J.S.C.

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