COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

ERIC WERNER,

Defendant.

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DECISION & ORDER
Indictment No.: 19-0782

FUFIDIO, J.

Defendant, ERIC WERNER, having been indicted on or about July 30, 2019, for leaving the scene of an accident without reporting (Vehicle and Traffic Law § 60.00 (2)(a)), tampering with physical evidence (Penal Law § 215.40 (2)) and two counts of speeding (Vehicle and Traffic Law § 1180 (a) and (d)) has by filed an omnibus motion which consists of a Notice of Motion, an Affirmation in Support, an affidavit from Investigator Paula Desjardins and a Memorandum of Law. 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:

A. MOTION TO INSPECT AND THE GRAND JURY MINUTES AND TO DISMISS AND/OR REDUCE THE INDICTMENT

Defendant moves pursuant to CPL §§210.20(1)(b) and (c) to dismiss the indictment, or counts thereof, on the grounds that the evidence before the Grand Jury was legally insufficient and that the Grand Jury proceeding was defective within the meaning of CPL §210.35. The Court has reviewed the minutes of the proceedings before the Grand Jury.

Pursuant to CPL §190.65(1), an indictment must be supported by legally sufficient evidence which establishes that the defendant committed the offenses charged. Legally sufficient evidence is competent evidence which, if accepted as true, would establish each and every element of the offense charged and the defendant's commission thereof (CPL §70.10[1]); *People v Jennings*, 69 NY2d 103 [1986]). "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 523 (1998); *People v Ackies*, 79 AD3d 1050 (2nd Dept 2010). In rendering a determination, "[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 each element of the charged crimes and whether the grand jury could rationally have drawn the inference of guilt." *Bello, supra*, quoting *People v Boampong*, 57 AD3d 794 (2nd Dept 2008-- internal quotations omitted).

A review of the minutes reveals that the evidence presented, if accepted as true, would be legally sufficient to establish every element of the offenses charged (see CPL §210.30[2]). Accordingly, Defendant's motion to dismiss or reduce for lack of sufficient evidence is denied.

With respect to Defendant's claim that the Grand Jury proceeding was defective within the meaning of CPL §210.35, a review of the minutes supports a finding that a quorum of the grand jurors was present during the presentation of evidence and at the time the district attorney instructed the Grand

Jury on the law, that the grand jurors who voted to indict heard all the "essential and critical evidence" (*see People v Collier*, 72 NY2d 298 [1988]; *People v Julius*, 300 AD2d 167 [1st Dept 2002], *lv den* 99 NY2d 655 [2003]), and that the Grand Jury was properly instructed (*see People v Calbud*, 49 NY2d 389 [1980] and *People v. Valles*, 62 NY2d 36 [1984]).

In making this determination, the Court does not find that release of such portions of the Grand Jury minutes as have not already been disclosed pursuant to CPL Article 245 to the parties was necessary to assist the Court.

B. MOTION TO SUPPRESS STATEMENTS

The Court grants the Defendant's motion to the extent that a *Huntley* hearing shall be held prior to trial to determine whether any statements allegedly made by the Defendant, which have been noticed by the People pursuant to CPL 710.30 (1)(a) were involuntarily made by the Defendant within the meaning of CPL 60.45 (*see* CPL 710.20 (3); CPL 710.60 [3][b]; *People v Weaver*, 49 NY2d 1012 [1980]), obtained in violation of Defendant's Sixth Amendment right to counsel, and/or obtained in violation of the Defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

C. MOTION TO SUPPRESS PHYSICAL EVIDENCE

With respect to any evidence taken from the defendant's person, the Court grants the Defendant's motion solely to the extent that *Mapp* and *Dunaway* hearings are directed to be held prior to trial to determine the propriety of any search resulting in the seizure of property (*see*, *Mapp v Ohio*, 367 US 643 [1961]) and whether any evidence was obtained in violation of the defendant's Fourth Amendment rights (*see*, *Dunaway v New York*, 442 US 200 [1979]).

Regarding the challenge to the search warrants, this Court signed the search warrants and based on the information that was presented to it at the time determined there to be probable cause that a crime was committed and that evidence of the crime would be found at the location to be searched (*People v Bigelow*, 66 NY2d 417 [1985]).

With respect to the Defendant's motion to controvert the search warrants, he has not specifically asked for a *Franks* hearing, but has obliquely raised the veracity of the affidavit as an issue, therefore a hearing will be held to determine how the Defendant's Jeep was initially discovered within the Friendly Lawn Care, Inc. trailer and depending on the outcome of that hearing, the impact on whether or not probable cause existed to sustain the warrant in the absence of evidence about the actual discovery of the jeep within the trailer (*see, People v. Brown*, 96 NY2d 80 [2001]). The Defendant has created a sufficient factual dispute over this issue. The warrant was issued upon the police affidavit that simply states, "Sergeant Bosan observed that the rear door (of one of the trailers) was not fully closed and could see what appeared to be a grey colored vehicle within the same," and testimony adduced before the grand jury elaborates on that statement by describing the manner in which the trailer was backed into the "carport" against a mound of debris which forced the door ajar and it was also testified to that a flashlight was used to illuminate the interior of the trailer to determine what it contained.

The Defendant has offered an affidavit from Investigator Paula Desjardins disputing the People's version of events based on her investigation of the trailer and where it was located on the Friendly Lawn Care, Inc. office grounds. Investigator Desjardins describes the latching mechanisms and other mechanical features of the rear door/ramp that call into question whether the door could have been ajar as the police claim and thereby calling into question the factual accuracy of the police affidavit describing the discovery of the Defendant's Jeep.

The only issue the Court can find with respect to the warrant issued for the search of the Jeep is whether the Jeep was properly seized in the first place, *supra.* If the determination is that it was, then the search of the Jeep and the electronic data recorder was sufficiently supported by probable cause (*Bigelow*).

Finally, the Court finds no issue with the warrant for the search of the Defendant's cell phone because it was un-reliant upon any evidence derived from the disputed search of the trailer and depended upon more than simply, "a general sense of practicality." The timing of the various communications coupled with who the Defendant communicated and about what, taken against the undisputed aspects of the investigation go beyond a mere common sense consideration and amount to probable cause (*People v Jemmott*, 164 AD3d 953 [3rd Dept. 2018]).

D. MOTION TO SUPPRESS IDENTIFICATION TESTIMONY CPL ARTICLE 710

With respect to the noticed identifications made of the Defendant, his motion is granted to the extent that *Rodriguez* hearing shall be held to determine whether, as the People allege, each of the people who made an identification had a sufficient prior familiarity with the Defendant so as to render them impervious to suggestion (*People v Rodriguez*, 79 NY2d 445 [1992]). Should they not have a sufficient prior familiarity, a hearing shall be held to consider whether or not the noticed identifications were unduly suggestive (*United States v Wade*, 388 US 218 [1967]). In the event that identifications are found to be unduly suggestive, the court shall then go on to consider whether the People have proven by clear and convincing evidence that an independent source exists for such victim's proposed in-court identification *(People v Adelman*, 36 AD3d 926 [2nd Dept. 2007]).

E. MOTION FOR *SANDOVAL/VENTIMIGLIA/MOLINEUX* HEARING

Granted, solely to the extent that *Sandoval/Ventimiglia/Molineux* hearings, as the case may be, shall be held immediately prior to trial, as follows:

A. Pursuant to CPL §245.20, the People must notify the Defendant, not less than fifteen days prior to the first scheduled date for trial, of all specific instances of Defendant's uncharged misconduct and criminal acts of which the People have knowledge and which the People intend to use at trial for purposes of impeaching the credibility of the Defendant, or as substantive proof of any material issue in the case, designating, as the case may be for each act or acts, the intended use (impeachment or substantive proof) for which the act or acts will be offered; and

B. Defendant, at the ordered hearing, must then sustain his burden of informing the Court of the prior misconduct which might unfairly affect him as a witness in his own behalf (*see*, *People v. Malphurs*, 111 AD2d 266 [2nd Dept. 1985]).

F. MOTION RESERVING THE RIGHT TO FILE ADDITIONAL MOTIONS

Defendant's motion reserving the right to file additional motions is denied. Should the Defendant file any other motions that were not raised in his *Omnibus* motion, then they will need to be in compliance with CPL 255.20(2).

The foregoing constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York
January 13, 2020

Honorable George E. Fufidio
Westchester County Court Justice

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