6COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER
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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER

OMARI MOORE,

Ind. No.: 2020-0050

Defendant.
----------X

ZUCKERMAN, J.

Defendant stands accused under Indictment No. 2020-0050 of Robbery in the First Degree (Penal Law §160.15[4]), Robbery in the Second Degree (Penal Law §160.10[2a]), and two counts of Robbery the in Third Degree (Penal Law §160.05. As set forth in the Indictment, it is alleged that, on or about December 6, 2019, in Westchester County, Defendant forcibly stole property from another, and in the course or commission thereof, or immediate flight therefrom, displayed what appeared to be a firearm, and caused physical injury to another who was not a participant in the crime. As set also forth in the Indictment, it is alleged that, on or about June 14, 2019 and December 10, 2019, in Westchester County, Defendant forcibly stole property from another. By Notice of Motion dated June 24, 2020, with accompanying Affirmation, Defendant moves for omnibus relief. In response, the People have submitted an Affirmation in Opposition dated July 15, 2020.

The motion is disposed of as follows:

A. DISCOVERY AND INSPECTION

Defendant's motion for discovery is granted to the extent provided for in Criminal Procedure Law Article 245 and/or already provided by the People. If any items set forth in CPL Article 245 have not already been provided to Defendant pursuant to that Article, said items are to be provided forthwith. Any party is granted leave, if required, to apply for a Protective Order in compliance with CPL Article 245, upon notice to the opposing party and any party affected by said Protective Order. The People are directed to file a Certificate of Compliance with CPL Article 245 and the instant Order upon completion of their obligations thereunder, if they have not already done so. The People's cross-motion for reciprocal discovery is likewise granted to the extent provided for in Criminal Procedure Law Article 245, and/or already provided to the People. Further, the People's response to Defendant's demand for a bill of particulars is that said demand is untimely. Defendant's motion for a Bill of Particulars is granted to the extent that the people are directed to provide a Bill of Particulars to Defendant which adequately informs Defendant of the substance of the alleged conduct, and in all respects complies with CPL Article 245 and §200.95, within 15 days of the date of the instant Order.

In addition, pursuant to Administrative Order 393/19, it is

ORDERED that the District Attorney and the Assistant District Attorney responsible for the case, are required to make timely disclosure of information favorable to the defense as required by *Brady v Maryland*, 373 US 83 [1963]; *Giglio v United States*, 405 US 150 [1972]; *People v Geaslen*, 54 NY2d 510 [1981]; and their progeny under the United States and New York State Constitutions and by Rule 3.8(b) of the New York State Rules of Professional Conduct; and it is further

ORDERED, that the District Attorney and the Assistant District Attorney responsible for the case or, if the matter is not being prosecuted by the District Attorney, the prosecuting agency and its assigned representatives, have a duty to learn of such favorable information that is known to others acting on the government's behalf in the case, including the police, and are therefore expected to confer with investigative and prosecutorial personnel who acted in the case and to review all files which are directly related to the prosecution or investigation of this case. For purposes of this Order, favorable information can include but is not limited to:

a) Information that impeaches the credibility of a testifying prosecution witness,

including (I) benefits, promises, or inducements, express or tacit, made to a

witness by a law enforcement official or law enforcement victim services

agency in connection with giving testimony or cooperating in the case; (ii) a

witness's prior inconsistent statements, written or oral; (iii) a witness's prior

convictions and uncharged criminal conduct; (iv) information that tends to

show that a witness has a motive to lie to inculpate the defendant, or a bias

against the defendant or in favor of the complainant or the prosecution; and (v)

information that tends to show impairment of a witness's ability to perceive,

recall, or recount relevant events, including impairment resulting from mental

or physical illness or substance abuse;

b) Information that tends to exculpate, reduce the degree of an offense, or

support a potential defense to a charged offense;

c) Information that tends to mitigate the degree of the defendant's culpability as

to a charged offense. or to mitigate punishment;

d) Information that tends to undermine evidence of the defendant's identity as a

perpetrator of a charged crime, such as a non-identification of the defendant

by a witness to a charged crime or an identification or other evidence

implicating another person in a manner that tends to cast doubt on the

defendant's guilt; and

e) Information that could affect in the defendant's favor the ultimate decision on

a suppression motion; and it is further

ORDERED, that the District Attorney and the Assistant District Attorney responsible for the case or any other agent prosecuting the case is hereby advised of his/her duty to disclose favorable information whether or not such information is recorded in tangible form and irrespective of whether the prosecutor credits the information; and it is further

ORDERED, that the District Attorney and the Assistant District Attorney responsible for the case or any other agent responsible for the prosecution of the case is directed that favorable information must be timely disclosed in accordance with the United States and New York State constitutional standards, as well as CPL Article 240. Disclosures are presumptively "timely"

if they are completed no later than 30 days before commencement of trial in a felony case and 15 days before commencement of trial in a misdemeanor case. Records of a judgment of conviction or a pending criminal action ordinarily are discoverable within the time frame provided in CPL sections 240.44 or 240.45[1]. Disclosures that pertain to a suppression hearing are presumptively "timely" if they are made no later than 15 days before the scheduled hearing date; and it is further

ORDERED, that the District Attorney and the Assistant District Attorney responsible for the case or any other agent responsible for the prosecution of the case is hereby reminded and informed that his/her obligation to disclose is a continuing one; and it is further

ORDERED, notwithstanding the foregoing, that a prosecutor may apply for a protective order, which may be issued for good cause, and CPL Section 240.50 shall be deemed to apply, with respect to disclosures required under this Order. Moreover, the prosecutor may request a ruling from the court on the need for disclosure. Only willful and deliberate conduct will constitute a violation of this Order or be eligible to result in personal sanctions against a prosecutor; and it is further

ORDERED, that counsel for the defendant is required to:

a) confer with the defendant about his/her case and is required to keep the defendant informed about all significant developments in the case; and

b) timely communicate any and all plea offers to the defendant and to provide him/her with reasonable advice about the advantages and disadvantages of any such plea offer including the potential sentencing ranges that apply in the case;

c) where applicable, insure the defendant receives competent advice concerning immigration consequences as required under *Padilla v Kentucky*, 559 US 356 [2010];

d) perform a reasonable investigation of the facts and the law pertinent to the case (including, as applicable, visiting the scene, interviewing witnesses, subpoenaing pertinent materials, consulting experts; inspecting exhibits, reviewing all discovery materials obtained from the prosecution, researching legal issues, etc.) or, as appropriate, making a reasonable professional judgment not to investigate a particular matter;

e) comply with the requirements of the New York State Rules of Professional Conduct regarding conflicts of interest, and when appropriate, timely notify the court of a possible conflict so that an inquiry may be undertaken or a ruling made;

f) possess or acquire a reasonable knowledge and familiarity with criminal procedural and evidentiary law to ensure constitutionally effective representation in the case; and

g) in accordance with statute, provide notices as specified in CPL sections 250.10, 250.20 and 250.30. (e.g., a demand, intent to introduce the evidence, etc.)

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

Defendant moves pursuant to CPL §§210.20(1)(b) and © 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.

C. 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]).

D. MOTION TO SEVER COUNTS

Defendant moves to sever Indictment Counts Three and Four, both from each other and from Counts One and Two, asserting that they are not properly joinable and that inclusion of the counts would result in undue prejudice to him.

CPL §200.20 provides

1. An indictment must charge at least one crime and may, in addition, charge in separate counts one or more other offenses, including petty offenses, provided that all such offenses are joinable pursuant to the principles prescribed in subdivision two.

2. Two offenses are "joinable" when:

(a) They are based upon the same act or upon the same criminal transaction, as that term is defined in subdivision two of section 40.10; or

(b) Even though based upon different criminal transactions, such offenses, or the criminal transactions underlying them, are of such nature that either proof of the first offense would be material and admissible as evidence in chief upon a trial of the second, or proof of the second would be material and admissible as evidence in chief upon a trial of the first; or

(c) Even though based upon different criminal transactions, and even though not joinable pursuant to paragraph (b), such offenses are defined by the same or similar statutory

provisions and consequently are the same or similar in law; or

(d) Though not directly joinable with each other pursuant to paragraph (a), (b) or (c), each is so joinable with a third offense contained in the indictment. In such case, each of the three offenses may properly be joined not only with each of the other two but also with any further offense joinable with either of the other two, and the chain of joinder may be further extended accordingly.

3. In any case where two or more offenses or groups of offenses charged in an indictment are based upon different criminal transactions, and where their joinability rests solely upon the fact that such offenses, or as the case may be at least one offense of each group, are the same or similar in law, as prescribed in paragraph (c) of subdivision two, the court, in the interest of justice and for good cause shown, may, upon application of either a defendant or the people, in its discretion, order that any such offenses be tried separately from the other or others thereof.

> Good cause shall include but not be limited to situations where there is:
>
> (a) Substantially more proof on one or more such joinable offenses than on others and there is a substantial likelihood that the jury would be unable to consider separately the proof as it relates to each offense.

In order to effect a severance of counts of an indictment, a defendant "must either demonstrate that the counts were not joinable under the statutory criteria ... or seek a discretionary severance under CPL 200.20(subd. 3)." *People v. Lane*, 56 NY2d 1, 9 (1982). Where (like here) the crimes charged in the indictment are joined because they are the same or similar in law, applications for severance are addressed to the sound discretion of the Court. *Lane, supra; People v. Jenkins*, 50 NY2d 981 (1980); *People v. Barnett*, 125 AD3d 878 (2nd Dept 2015); CPL §200.20(3). Where counts are properly joined, a trial court lacks authority to sever them. *People v Dobbins*, 123 AD3d 1140 (2nd Dept 2014).

The crimes alleged in Counts Three and Four of the instant indictment, two separate counts of Robbery in the Third Degree (Penal Law §160.05), relate to forcible thefts by Defendant on June 14, 2019 and December 10, 2019. The latter is just four

days after the acts charged in Counts One and Two of the Indictment (Robbery in the First Degree and Robbery in the Second Degree). Defendant alleges that Counts Three and Four were improperly joined with Counts One and Two because Counts Three and Four are based on different criminal transactions than the other Counts; that proof of Counts Three and Four is not material and admissible regarding the other counts, and vice versa; and no other joinder rule permits the four counts to be joined.

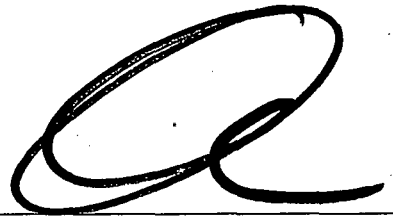
The People argue that the counts are properly joinable because "such offenses...are the same or similar in law." In this case, the People appear to be correct. The counts all involve forcible theft from another person. Consequently, Defendant having failed to demonstrate that the counts were not properly joinable under CPL §200.20, the court has no choice but to deny severance of Counts Three and Four from the balance of the indictment for the purposes of trial.

E. MOTION FOR A *WADE* HEARING

Defendant moves to suppress noticed identification procedures pursuant to CPL §710.20(3). The People, in their Affirmation in Opposition, state that there was no impropriety in the identification procedure herein, namely a photo-array, and consent to a hearing. Consequently, the motion to suppress a noticed identification procedure is granted to the extent that a pre-trial *Wade* hearing is ordered.

All other motions are denied.

Dated: White Plains, New York
August 19, 2020



HON. DAVID S. ZUCKERMAN, A.J.S.C.

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