COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

BARRY BROWN,

Defendant.

DECISION & ORDER
Indictment No. 21-00311-10

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MINIHAN, J.

Defendant, Barry Brown, is charged by Westchester County Indictment Number 21-00311 together, with codefendants Lavoy Shellman, Clifford Shellman, Raven Moses, Darien Caines, Daniel Zerbo, Sebrina McKelvey, Emmanuel Burgess, Darren Workman, and Jarrick Rogers with Conspiracy in the Second Degree (Penal Law §105.15) and charges defendant, individually, with Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16[1]) (six counts) and Criminal Sale of a Controlled Substance in the Third Degree (Penal Law § 220.39[1]) (six counts).

The indictment charges codefendants Lavoy Shellman and Clifford Shellman, individually, with Operating as a Major Trafficker (Penal Law § 220.77[3]) and charges them together, with Criminal Possession of a Controlled Substance in the First Degree (Penal Law § 220.21[1]) (three counts) and Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16[1]) (three counts).

The indictment charges codefendant Lavoy Shellman, individually, with Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16[1]) (three counts) and Criminal Sale of a Controlled Substance in the Third Degree (Penal Law § 220.39[1]) (three counts).

The indictment charges codefendants Lavoy Shellman and Darren Workman, together, with Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16[1]) (two counts) and Criminal Sale of a Controlled Substance in the Third Degree (Penal Law § 220.39[1]) (two counts).

The indictment charges codefendants Lavoy Shellman and Raven Moses, together, with Criminal Possession of a Controlled Substance in the Second Degree (Penal Law § 220.18[1]) and Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16[1]).

The indictment charges codefendant Darien Caines, individually, with Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16[1]) (four counts) and Criminal Sale of a Controlled Substance in the Third Degree (Penal Law § 220.39[1]) (four counts).

The indictment charges codefendant Daniel Zerbo, individually, with Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16[1]) (three counts).

The indictment charges codefendant Jarrick Rogers, individually, with Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16[1]) (five counts) and Criminal Sale of a Controlled Substance in the Third Degree (Penal Law § 220.39[1]) (two counts).

Defendant has filed an omnibus motion consisting of a Notice of Motion, an Affirmation in Support, and a Memorandum of Law. In response, the People filed an Affirmation in Opposition together with a Memorandum of Law.

I.

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

Defendant moves pursuant to CPL 210.20 to dismiss the indictment, or reduce the counts charged against him, on the grounds that the evidence before the Grand Jury was legally insufficient, and the Grand Jury proceeding was defective within the meaning of CPL 210.35. On consent of the People, the court has reviewed the minutes of the proceedings before the Grand Jury.

The court denies defendant's motion to dismiss or reduce the counts in the indictment for legally insufficient evidence because 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, *including that defendant conspired to possess narcotics weighing an aggregate of eight ounces or more* (*see* CPL 210.30 [2]). Pursuant to CPL 190.65(1), an indictment must be supported by legally sufficient evidence which establishes that the defendant committed the offenses charged. "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]). Here, the evidence presented, if accepted as true, is legally sufficient to establish every element of each offense charged (CPL 210.30[2]).

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 reveal that 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 Collier*, 72 NY2d 298 [1988]; *People v Calbud*, 49 NY2d 389 [1980]; *People v Valles*, 62 NY2d 36 [1984]; *People v Burch*, 108 AD3d 679 [2d Dept 2013]).

To the extent that defendant's motion seeks disclosure of portions of the Grand Jury minutes beyond the disclosure directed by CPL Article 245, such as the prosecutor's instructions and/or colloquies, the court denies that branch of the motion.

II.

MOTION for *SANDOVAL* and *VENTIMIGLIA* HEARINGS

Defendant has moved for a pre-trial hearing to permit the trial court to determine the extent, if at all, to which the People may inquire into defendant's prior criminal convictions, or prior uncharged criminal, vicious, or immoral conduct. On the People's consent, the court orders a pre-trial *Sandoval* hearing (*see People v Sandoval*, 34 NY2d 371[1974]). At said hearing, the People shall notify defendant, *in compliance with CPL Article 245*, of all specific instances of his criminal, prior uncharged criminal, vicious, or immoral conduct of which they have knowledge and which they intend to use in an attempt to impeach defendant's credibility if he elects to testify at trial, *and, in any event, not less than 15 days prior to the first scheduled trial date.* Defendant shall bear the burden of identifying any instances of his prior misconduct that he submits the People should not be permitted to use to impeach his credibility. The defendant shall be required to identify the basis of his belief that each event or incident may be unduly prejudicial to his ability to testify as a witness on his own behalf (*see People v Matthews*, 68 NY2d 118 [1986]; *People v Malphurs*, 111 AD2d 266 [2d Dept 1985]).

If the People determine that they will seek to introduce evidence at trial of any prior uncharged misconduct and criminal acts of defendant, including acts sought to be used in their case in chief, they shall so notify the court and defense counsel, *in compliance with CPL Article 245, and, in any event, not less than 15 days prior to the first scheduled trial date*, and a *Ventimiglia/Molineux* hearing (*see People v Ventimiglia*, 52 NY2d 350 [1981]; *People v Molineux*, 168 NY 264 [1901]) shall be held immediately prior to trial to determine whether or not any evidence of uncharged crimes may be so used by the People. The People are urged to make an appropriate decision in this regard sufficiently in advance of trial to allow any *Ventimiglia/Molineux* hearing to be consolidated and held with the other hearings herein.

III.

MOTION for a MINIMIZATION HEARING

Contrary to defendant's contention, the court does not find that a hearing is required to determine whether the People complied with the minimization requirement (*see People v DiStefano*, 38 NY 2d 640 [1976]). CPL 700.30(7) requires that an eavesdropping warrant contain a provision that the authorization to intercept shall be conducted in such a way as to minimize the interception of

communications not otherwise subject to eavesdropping under the CPL (CPL 700.30[7]). Minimization has been defined as a good faith and reasonable effort to keep the number of non-pertinent calls intercepted to the smallest practicable number (*United States v Turner*, 528 F2d 143 [9th Cir 1975]). The determination whether minimization has been achieved is made on a case-by-case basis with regard to the scope and circumstances of the particular investigation (*see United States v Turner*, 528 F2d at 156). It is well settled that in narcotics investigations, "crime-related conversations may be prefaced by innocent 'chatter' and, thus, in such cases, some minor degree of intrusion must take place before a determination of pertinency can be made" (*People v Floyd*, 41 NY2d 245, 249 [1976]).

Defendant's allegations that the telephone calls were not properly minimized in accordance with CPL 700.30(7) are conclusory and lack specificity (*see People v Edelstein*, 98 Misc.2d 1018 [Sup Ct, New York County, March 30, 1979]). The People have made a prima facie showing of compliance with the minimization requirement. Included in the People's affidavits in support of the eavesdropping were the limitations and boundaries of the interceptions and how the interceptions would be monitored in order to minimize non-pertinent communications.[1] The People have indicated that they instructed members of law enforcement intercepting the communications accordingly and they have provided their minimization procedures to defendant.

The Court is satisfied that the People have demonstrated that appropriate procedures were established to minimize interception of non-pertinent communications, that a conscientious effort was made to follow such procedures, and that defendant has failed to show that there was an unreasonable interception of non-pertinent communications. As such, defendant's motion for a minimization hearing is denied.

IV.

MOTION for SEVERANCE and for a SEPARATE TRIAL

Defendant's motion to sever and for a separate trial is denied. Defendant was properly joined in the indictment (CPL 200.40[1][d]). While the court may, in its discretion, and for good cause shown, order that defendant be tried separately, defendant failed to demonstrate good cause for severance. Good cause includes a showing that defendant would be "unduly prejudiced by a joint trial" (CPL 200.40[1]). Where the proof against all defendants is supplied by the same evidence, "only the most cogent reasons warrant a severance" (*People v Bornholdt*, 33 NY2d 75, 87 [1973]; *People v Kevin Watts*, 159 AD2d 740 [2d Dept 1990]). "[A] strong public policy favors joinder, because it expedites the judicial process, reduces court congestion, and avoids the necessity of recalling witnesses..." (*People v Mahboubian*, 74 NY2d 174, 183 [1989]).

Here, defendant claims that a severance is warranted because he did not participate in the alleged conspiracy, and, given the nature and quantity of charges against his codefendants, there is a risk that the jury will find him guilty by association. However, a limiting instruction at trial

[1] The court has examined all the eavesdropping warrants pertaining to the instant case and the affidavits in support.

would properly direct the jury to separately consider the proof as to each crime charged, thereby eliminating any prejudice to defendant (*see People v Veeny*, 215 AD2d 605 [2d Dept 1995]). The court finds defendant's contentions unconvincing and denies the motion to sever (CPL 200.40 [1]).

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
January 7, 2022

Honorable Anne E. Minihan
Acting Justice of the Supreme Court

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