COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOAQUIN THATCHER

DECISION & ORDER
Indictment No. 22-71742

Defendant.

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MINIHAN, J.

Defendant, Joaquin Thatcher, charged by Westchester County Indictment Number 22-71742 with Attempted Murder in the Second Degree (Penal Law § 110/125.25[1], Assault in the First Degree (Penal Law § 120.10[1]), Assault in the Second Degree (Penal Law § 120.05[1]), Assault in the Second Degree (Penal Law § 120.05[2]), and Criminal Possession of a Weapon in the Third Degree (Penal Law § 265.02[1]),[1] has filed an omnibus motion consisting of a Notice of Motion, an Affirmation in Support, and an attached exhibit consisting of defendant's *pro se* motion, adopted by counsel, for dismissal of the Indictment pursuant to CPL 190.50(5)(c).[2] In response, the People filed an Affirmation in Opposition together with a Memorandum of Law.

I.

MOTION to DISMISS for FACIAL INSUFFICIENCY

Defendant moves to dismiss the indictment pursuant to CPL 210.25(1) on the ground that it is facially insufficient. This motion is denied.

The indictment contains a plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of the offenses charged and defendant's commission thereof with sufficient precision as to clearly apprise him of the conduct which is the subject of the indictment (CPL 200.50). The indictment charges each and every element of the crimes, and alleges that defendant committed the acts which constitute the crimes at a specified place during a specified time period and, therefore, is sufficient on its face (*People v Cohen*, 52 NY2d 584 [1981]; *People v Iannone*, 45 NY2d 589 [1978]).

[1] By Special Information attached to the indictment, defendant is alleged to have been previously convicted of the crimes of Criminal Possession of a Controlled Substance in the Fourth Degree (Penal Law § 220.09[1]), Reckless Endangerment in the First Degree (Penal Law § 120.25), Assault in the Third Degree (Penal Law § 120.00[1]) (2 counts), and Resisting Arrest (Penal Law § 205.30) on or about January 28, 2016 in the Supreme Court, County of Westchester, State of New York.

[2] Counsel filed an omnibus motion on November 28, 2022 and later that evening filed an amended omnibus motion, attaching defendant's *pro se* motion to it and adopting said motion.

II.

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

Defense counsel adopts defendant's *pro se* motion seeking dismissal of the indictment based upon the alleged denial of defendant's right to testify before the Grand Jury as a witness on his own behalf in this matter. The Court received defendant's *pro se* motion on August 19, 2022 and provided a copy to defense counsel who did not adopt it at that time. The motion, however, was notarized on August 2, 2022, within 5 days of defendant's arraignment held on July 29, 2022. As such, pursuant to CPL 190.50(5)(c), the Court entertains the motion, although not adopted by counsel until now.

According to defendant's *pro se* motion, when he appeared on June 17, 2022 in the City Court of Yonkers, he requested a felony hearing and stated that he was not waiving his CPL 180.80 rights or his right to testify before the Grand Jury. Defendant claims that on June 27, 2022 he was brought before the Grand Jury but was "not allowed" to testify on his own behalf and was not indicted on that day. On June 29, 2022, defendant claims he was brought to the Grand Jury again but again was "not allowed" to testify on his own behalf. On June 30, 2022, defendant said he appeared in the City Court of Yonkers and a Certificate of Indictment was filed, having been indicted the day before. Defendant claims his right to testify before the Grand Jury was violated since he had stated on the record at his June 17, 2022 court appearance that he was not waiving his right to testify before the Grand Jury. Notably, in counsel's affirmation, he indicates that he spoke to previous counsel for defendant, Rosalie Leslie, Esq., who advised him that defendant had in fact waived his right to testify before the Grand Jury.

The People indicate that they served written Grand Jury notice on the Legal Aid Society on June 24, 2022 for June 27, 2022. On June 27, 2022, the People produced defendant to testify in the Grand Jury but had not heard from counsel regarding defendant's desire to testify. As such, the Assistant District Attorney (hereinafter "ADA") telephoned the Legal Aid Society who informed the ADA that the Legal Aid Society had been relieved and attorney Rosalie Leslie was counsel of record. Ms. Leslie adjourned defendant's case in the City of Yonkers and waived CPL 180.80 time until Thursday, June 30, 2022. The People ceased their Grand Jury presentation. On June 28, 2022, the People served Grand Jury notice on Ms. Leslie for June 29, 2022. On June 29, 2022, the People again produced defendant to testify in the Grand Jury and concluded their presentation but refrained from charging the jury having not heard from Ms. Leslie as to defendant's position on testifying before it. The ADA then spoke with Ms. Leslie on the phone who acknowledged having received and reviewed the discovery on the case and said, having discussed testifying in the Grand Jury with defendant, he *would not* be testifying before the Grand Jury. Following this phone conversation, the People concluded their Grand Jury presentation, which returned a true bill.

Defendant's motion to dismiss the indictment based on the ground that he was denied an opportunity to testify before the Grand Jury is denied. The People satisfied their obligation to notify defendant of the Grand Jury proceeding by their June 24, 2022 and June 28, 2022 written notice to defendant's attorneys (*see People v Alfano*, 75 AD2d 584 [2d Dept 1980]; *People v Malik*, 6 AD3d 313 [1st Dept 2004]). The People even produced defendant twice for purposes of testifying before the Grand Jury if he so desired. Indeed, defendant's own papers do not expressly allege any failure

on the People's behalf. Moreover, in his affirmation, current defense counsel, Mr. Scully, stated that he spoke with Ms. Leslie and she confirmed that defendant waived his right to testify before the Grand Jury, consistent with the ADA's conversation with Ms. Leslie on June 29, 2022. It is clear that defendant's failure to testify in this case was not attributable to any actions or lack of action on the People's behalf (*see People v Evans*, 79 NY2d 407, 415 [1992]; *People v Duran*, 266 AD2d 230, 231 [2d Dept 1999]). The People fulfilled their obligations under CPL § 190.50 by giving timely notice of the presentation and making reasonable efforts to have the defendant testify before the Grand Jury.

"Whether to exercise [the statutory right to testify before the Grand Jury] is a decision that requires 'the expert judgment of counsel' because it 'involves weighing the possibility of a dismissal, which, in counsel's judgment may be remote, against the potential disadvantages of providing the prosecution with discovery and impeachment material, making damaging admissions, and prematurely narrowing the scope of possible defenses'" (*People v Hogan*, 26 NY3d 779 [2016], citing *People v Colville*, 20 NY3d 20 [2012]; *People v Brown*, 116 AD3d 568 [1st Dept 2014]). Since a defendant's right to testify at the Grand Jury stage is within the discretion of trial counsel, whether or not Ms. Leslie made the ultimate decision that defendant should not testify, in consultation with defendant, is not dispositive of defendant's motion. For the foregoing reasons, defendant's motion is denied.

Defendant also 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 he engaged in conduct tending to effect the commission of Murder in the Second Degree and that he caused serious physical injury to the victim* (*see* CPL 210.30 [2]). The intent of defendant can be inferred from the evidence presented to the Grand Jury including the video footage of the incident depicting the conduct and surrounding circumstances (*see People v Bracey*, 41 NY2d 296 [1977]). Defendant's argument that the evidence presented with respect to the victim's injury was against the weight of the evidence is premature since this Court can only evaluate the sufficiency of the evidence and not the weight it should be afforded (*People v Carroll*, 93 NY2d 564, 568 [1999]).

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 reveals 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.

Defendant also argues that counts 3 and 4 of the indictment are duplicitous in violation of CPL 200.30. Each count of an indictment may charge only one offense (CPL 200.30[1]) and if a count charges more than one offense, the count is duplicitous (*see People v Smith*, 113 AD2d 905 [2d Dept 1985]). Although counts 3 and 4 both charge Assault in the Second Degree, they are charged under different subsections of that statute requiring different elements, one requiring *serious* physical injury (PL § 120.05[1]) and the other requiring physical injury by means of a dangerous instrument (PL § 120.05[2]). These counts are not duplicitous since the facts of one would not support a conviction under the other.

Lastly, while defendant moves to dismiss the indictment on the ground of an arrest without probable cause in paragraph 12 of his Affirmation, he offers no sworn allegations of fact in support of the conclusory statement and thus, his motion is summarily denied on this ground (*see People v France*, 12 NY3d 790 [2009]; *People v Jones*, 95 NY2d 721 [2001]; CPL 710.60[3][b]; *see also People v Scully*, 14 NY3d 861 [2010]). In any event, a motion to dismiss an indictment based upon an illegal arrest is not supported by the law as proper relief pursuant to CPL 210.20 as grounds for dismissal of an indictment are purely statutory (CPL 210.20, et seq).

III.

MOTION for DISCOVERY, DISCLOSURE, and INSPECTION
CPL ARTICLE 245

To whatever extent material that is discoverable under CPL Article 245 has not already been provided to the defense by the People,[3] and is not subject to the protective order in this matter,

[3] Specifically, in his motion, defendant claims that the People have not provided the RAP sheets of Michael McIntosh and Christine Alverado (*see* Defendant's Affirmation, page 19).

defendant's motion is granted and such discovery, including both *Brady* material[4] and *Rosario* material, shall be provided forthwith.

The People filed a Certificate of Compliance on or about November 22, 2022 and they are reminded of their continuing obligation to remain in compliance with the discovery mandates set forth in CPL Article 245 and to file supplemental Certificates of Compliance as the need arises.

The People must 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]).

IV.

MOTION for a BILL OF PARTICULARS

Defendant's request for a Bill of Particulars is denied as untimely (CPL 200.95). Moreover, in accordance with CPL Article 245, defendant has a large amount of discovery which will allow him to prepare and conduct a defense. This case involved the execution of two search warrants which contain an affidavit detailing the facts of the case as well as videos which captured the incident and individuals involved. Additionally, defendant is entitled to and has, or will have, a copy of the Grand Jury minutes and exhibits. The People have also provided specific facts of the case in their Affirmation in Opposition. As such, defendant's motion for a Bill of Particulars is denied.

V.

BRADY MATERIAL

The People acknowledge their continuing duty to disclose exculpatory material (*Brady v Maryland*, 373 US 83 [1963]; *see Giglio v United States*, 405 US 150 [1971]). The People must also comply with their obligations under CPL 245.20(1) (k), (l), and (p). Again, if the People are or become aware of any such material which is arguably subject to disclosure under *Brady* and its progeny and Criminal Procedure Law Article 245 which they are unwilling to consent to disclose, they are directed to bring it to the immediate attention of the Court and to submit it for the Court's in camera inspection and determination as to whether it constitutes *Brady* material discoverable by defendant.

The Court has served a *Brady* Order on the People, dated August 2, 2022, which details the time period their disclosure must be made in accordance with the standards set forth in the United States and New York State Constitutions and CPL Article 245.

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[4] The People have a continuing duty to disclose exculpatory material (*Brady v Maryland*, 373 US 83 [1963]; *see Giglio v United States*, 405 US 150 [1971]). If the People are or become aware of any such material which is arguably subject to disclosure under *Brady* and its progeny and CPL Article 245 which they are unwilling to consent to disclose, they are directed to bring it to the immediate attention of the Court and to submit it for an in-camera inspection by the Court and determination as to whether it constitutes *Brady* material discoverable by defendant.

VI.

MOTION to PRECLUDE UNNOTICED STATEMENTS and
UNNOTICED IDENTIFICATIONS

The motion to preclude the People from introducing statements and identifications at trial that were not noticed is denied as premature. The People acknowledge the statutory requirements of CPL 710.30. To the extent the People choose to cross-examine defendant, should he elect to testify, the People are instructed to obtain a ruling from the trial court should they seek to impeach him with any unnoticed statements.

VII.

MOTION to SUPPRESS NOTICED STATEMENT

The People, pursuant to CPL 710.30(1)(a), noticed one statement allegedly made by defendant to members of the Yonkers Police Department on June 3, 2022 at approximately 4:45 P.M. while at the Yonkers Police Department. Defendant moves to suppress this noticed statement as involuntary, the product of an unlawful arrest, made without *Miranda* warnings, and in violation of defendant's right to counsel. 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 statements were obtained in violation of defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]), or his Sixth Amendment right to counsel.

VIII.

MOTION to PRECLUDE NOTICED IDENTIFICATION TESTIMONY
CPL 710

Pursuant to CPL § 710.30(1)(b), the People served defendant with notice of three alleged identifications of defendant made by witnesses. Defendant's motion to suppress testimony of the noticed identifications is granted to the limited extent of ordering a pre-trial *Wade* hearing (*see United States v Wade*, 388 US 218 [1967]). At the hearing, the People bear the initial burden of establishing the reasonableness of the police conduct and the lack of any undue suggestiveness (*see People v Chipp*, 75 NY2d 327, 335 [1990] *cert. denied* 498 US 833 [1990]; *People v Berrios*, 28 NY2d 361 [1971]). Once that burden is met, defendant bears the ultimate burden of proving that the procedures were unduly suggestive. Where suggestiveness is shown, the People must show the existence of an independent source by clear and convincing evidence. The hearing will address the People's claim that identifying witnesses had a sufficient prior familiarity with defendant as to render the witnesses impervious to police suggestion (*see People v Rodriguez*, 79 NY2d 445 [1992]).

Defendant also moves to admit expert testimony at trial with respect to the identifications made in this matter, but does not name the expert he would call or discuss what the expert would say. The motion is therefore premature and should be made to the trial court by Order to Show Cause.

IX.

MOTION to SUPPRESS PHYSICAL EVIDENCE
and MOTION to CONTROVERT SEARCH WARRANTS

Defendant moves to suppress physical evidence on the ground that such evidence was seized pursuant to an illegal arrest not supported by probable cause. Defendant's motion is granted solely to the extent of conducting a *Mapp* hearing prior to trial to determine the propriety of any search resulting in the seizure of property (*see Mapp v Ohio*, 367 US 643 [1961]). The hearing will also address whether any evidence was obtained in violation of defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

Insofar as defendant challenges the seizure of evidence not obtained from his person, the pre-trial hearing will address whether defendant had a reasonable expectation of privacy in any of the locations searched to constitute standing to challenge the seizure of any physical evidence (*see Rakas v Illinois*, 439 US 128 [1978]; *People v Ramirez-Portoreal*, 88 NY2d 99 [1996]; *People v Ponder*, 54 NY2d 160 [1981]; *People v White, 153* AD3d 1369 [2d Dept 2017]; *People v Hawkins*, 262 AD2d 423 [2d Dept 1999]). If it is determined that defendant has standing, then the *Mapp* hearing will also determine the propriety of the subject search and seizure.

To the extent that defendant has standing to contest any property seized pursuant to the search warrants, and to the extent that defendant challenges the sufficiency of the search warrants, that argument fails. 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]). The Fourth Amendment to the United States Constitution provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Article I § 12 of the New York State Constitution contains identical language. Consistent with these constitutional provisions, CPL 690.45(4) requires that when a search warrant authorizes the seizure of property, the warrant must include "[a] description of the property which is the subject of the search." "To meet the particularity requirement, the warrant must be specific enough to leave no discretion to the police" (*People v Cahill*, 2 NY3d 14, 41 [2003]). Upon review of the four corners of the search warrant affidavit, the warrants were adequately supported by probable cause, and sufficiently particular as to the places to be searched and the things to be seized (*see People v Keyes*, 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 has failed to make a substantial preliminary showing of cause for a *Franks-Alfinito* hearing (*Franks v Delaware*, 438 US 154 [1978]; *People v Alfinito*, 16 NY2d 181 [1965]; *People v Novick*, 293 AD2d 692 [2d Dept 2002]). Defendant fails to demonstrate that the warrant was based upon an affidavit containing false statements made knowingly or intentionally, or with reckless disregard for the truth (*People v McGeachy*, 74 AD3d 989 [2d Dept 2010]). Again, the Court has reviewed the affidavit in support of the search warrants and finds that it provided the requisite probable cause.

For the above reasons, the Court denies defendant's motion to controvert the search warrants and to suppress the evidence seized therefrom.

X.

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. 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.

Pursuant to CPL § 160.40(2), defendant has asked the Court to provide him with a copy of his Division of Criminal Justice Services report ("RAP sheet") to enable him to prepare for a *Sandoval* hearing. The Court does not have defendant's RAP sheet and therefore directs the People to provide a copy to defendant, as required pursuant to CPL § 245.20(1)(p).

XI.

HEARINGS CONDUCTED PRIOR to TRIAL

Defendant requests that pre-trial hearings be scheduled no less than twenty days before trial. The hearings will be scheduled at a time that is convenient to the court, upon due consideration of all of its other cases and obligations.

XII.

LEAVE TO MAKE ADDITIONAL MOTIONS

Defendant's motion for leave to make additional motions is denied. Defendant must demonstrate good cause for any further pre-trial motion for omnibus relief, in accordance with CPL

255.20(3).

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
December 20, 2022

Honorable Anne E. Minihan
Acting Justice of the Supreme Court

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