COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

MATTHEW McGOWAN,

Defendant.

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DECISION & ORDER
Indictment No.: 22-71169

FUFIDIO, J.

Defendant, MATTHEW McGOWAN, having been indicted on or about May 16, 2022 on four counts of grand larceny in the third degree (Penal Law § 155.35[1]) and one count of scheme to defraud (Penal Law § 190.65) has filed an omnibus motion which consists of a Notice of Motion, an Affirmation in Support and a Memorandum of Law. In response, the People have filed an Affirmation in Opposition together with a Memorandum of Law and the Defendant has filed a reply thereto. Upon consideration of these papers, the stenographic transcript of the grand jury minutes this Court disposes of this motion as follows:

A & B. 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]) with the exception of the count which pertains to Deborah Schmidt as victim which is, from what the Court can discern from the indictment, Count 3. 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]). The Grand Jury was properly instructed (*see People v Calbud*, 49 NY2d 389 [1980] and *People v. Valles*, 62 NY2d 36 [1984]). However, the Defendant moves, specifically, to dismiss the entire indictment or at the very least, the Count 3 of the indictment that is predicated upon the testimony of Deborah Schimdt. He argues that her entire testimony consisted of inadmissible hearsay and double hearsay so that she did not present any sufficient evidence to the crime that impacted her (*see generally*, *People v Gordon*, 101 AD3d 1473 [3rd Dept. 2012]). He further argues that because such testimony was elicited, the entire grand jury presentation was impaired so as to render it defective (*People v Darby*, 75 NY2d 449 [1990]). The Court does not completely disagree with the Defendant's characterization that some of Ms. Schmidt's testimony was inadmissible hearsay. In addition, although the Court is supposed to construe all inferences in favor of the People, here the inferential chain is so insufficient so as to prevent the Court from being able to do so. In this case, after the People were informed pursuant to *People v Coleman*, 131 AD3d 705 [2nd Dept. 2015] that the Court had concerns about the sufficiency of their proof before the grand jury with respect to the criminal behavior contained in County 3, on the part of this Defendant (Court's Exhibit 1), the People and the Defendant offered submissions on that point (Court's Exhibit 2). The basis of the Count 3, is that the Defendant withheld from victim Ms. Schmidt, money that she was owed as the result of a lawsuit settlement for her deceased mother. From what the Court can tell, the only, non-hearsay evidence that there was ever supposed to be any money coming to Ms. Schmidt comes in this exchange from a question prompted by a grand juror:

Q: Ms. Schmidt, do you know what check was supposed to be for when you had the conversation with Mr. McGowan, that he was going to give you?
A: He said he was going to give a check for $37,500.
Q: What was it for?
A: For the lawsuit he said.

The lawsuit that Ms. Schmidt references is based upon an injury that her mother supposedly sustained at "the Empire." This piece testimony is problematic for a few reasons. First, Ms. Schmidt was not the person who was injured. The person who was supposedly injured was her mother. As far as the Court can tell, her testimony to the grand jury about her mother being injured is nothing more than hearsay that an injury occurred and may be used to show why her mother hired the Defendant as an attorney, but cannot be received for the fact that her mother was injured at "the Empire." Next, even if that wasn't inadmissible hearsay, there is no explanation about what "the Empire" is. The grand jury was left to speculate about what "the Empire" might be. This becomes problematic because during forensic investigator Michael Fenza's testimony the grand jury was presented with the Defendant's bank records and were told by him that based on an interview with Ms. Schmidt there was, "supposed to be a settlement for her mother who is now deceased and the funds from the settlement were supposed to be distributed to Ms. Schmidt's mother, so funds that were payable to Ms. Schmidt's mother total fifteen thousand dollars from Philadelphia Indemnity Insurance Company and...there was a second statement check from Merchant's Mutual Insurance Company for fifteen hundred dollars and this was deposited in the Citibank account for Mr. McGowan..." This whole line of testimony is inadmissible hearsay also. Mr. Frenza was not designated as an expert and the

grand jury was not instructed on expert testimony, which may, in certain circumstances contain hearsay, "if it 'is of a kind accepted in the profession as reliable in forming a professional opinion" (*State v Floyd Y.*, 22 NY3d 95 [2013]). Furthermore, the Checks themselves are from two insurance companies not, "the Empire". One of the checks is from Philadelphia Indemnity Insurance Company and designates the insured as the Yonkers Racing Corp. There is no correlation explained between the Yonkers Racing Corp and "the Empire" and because there was never any explanation about what "the Empire" is, the grand jury was simply left to surmise that perhaps "the Empire" is also the casino on the grounds of the Yonkers Raceway and that they were both owned and by the Yonkers Racing Corp. Only then they would be entitled to infer that "the Empire" was owned by the Yonkers Racing Corp.[1] The other check from the Merchants Mutual Insurance Company does not even reference the Yonkers Racing Corp. Both checks were made out to the Defendant in favor of a Georgianna Krisch . Who she is, again, the grand jury was just left to speculate because there was never any explanation of who Georgianna Krisch is.

The sum total of the evidence underpinning the charge concerning Ms. Schmidt, as the Court finds it, is that the Defendant's mother hired the Defendant because of an injury she sustained, the Defendant told Ms. Schmidt that she, herself, would be getting a check in her name for $37,000 for the lawsuit, two checks were deposited in two of the Defendant's bank accounts, one for $15,000 dollars from the Philadelphia Indemnity Insurance Company on behalf of the Yonkers Racing Corp in favor of Georgianna Krisch and the other for $1,500 from the Merchant's Mutual Insurance Company in favor of Georgianna Krisch and that as far as forensic investigator Michael Frenza can tell, based on the Defendant's bank account records, Ms. Schmidt never received $37,000. While there is no prohibition against stacking inferences in order to reach an ultimate conclusion, evidentiarily "The rule in this state is 'that *inference* may be based on *inference*, but that inference may not be based on *conjecture*, nor conjecture upon inference to prove a fact or to serve an ultimate conclusion…'" (*Pollack v Rapid Indus. Plastics Co., Inc.*, 113 AD2d 520 [2nd Dept. 1985]). The Court finds that there was too much room for conjecture and not enough proven fact to sufficiently draw any inferences that would lead to the ultimate conclusion that there was sufficient evidence to charge the Defendant with stealing money from Deborah Schmidt. Accordingly, the charge in which she is the victim, Count 3 of the indictment, is dismissed. The Court grants the People leave to re-present Count 3 to the grand jury should they decide to do so.

That said, the Court does not find that the evidence presented for the dismissed charge somehow tainted the evidence of the other charges. Each of the remaining charges and the evidence supporting them is amply independent from the others, so that they are insulated from the taint of the dismissed charge and the integrity of the rest of the process resulting in the grand jury's findings was not impaired and was not prejudicial for the Defendant (*People v Thompson*, 22 NY3d 687 [2014]).

Finally, the portion of the defendant's motion requesting dismissal of the indictment for facial insufficiency under CPL 200.50(7)(a) is also denied. The indictment contains a plain and concise factual statement in each count which, without allegations of an evidentiary nature,

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[1] This line of reasoning, of course, puts aside the fact that the Court finds that there was never any factual proof that Ms.Schmidt's mother was ever at "the Empire" to begin with.

asserts facts supporting every element of the offense charged and the defendant's commission thereof with sufficient precision as to clearly apprise the defendant of the conduct which is the subject of the indictment (CPL 200.50). In reading the language of the indictment on its own and in conjunction with the voluminous discovery that the Defendant has received, it is clear that the indictment charges each and every element of the crimes and further meets the requirement that the defendant be given notice of the charges against him with respect to the time, place and manner in which the People allege the crimes were committed (*People v Albanese*, 45 AD3d 691 [2d Dept 2007], *People v Iannone*, 45 NY2d 589 [1978]).

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. DISCOVERY ORDER

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, 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 statement, written or oral;

(iii) a witness's prior convictions and uncharged criminal conduct;

(iv) information that tends to sow 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 scupport 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 245. 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 Article 245. 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 further

ORDERED, notwithstanding the foregoing, that a prosecutor may apply for a protective order, which may be issued for good cause, and CPL Article 245 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 the 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 this 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 advise 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.) as to the 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]). In the event that the People are, or become, aware of any material which is arguably exculpatory and they are not willing to consent to its disclosure to the defendant, they are directed to immediately disclose such material to the court to permit an *in camera* inspection and determination as to whether the material must be disclosed to the defendant. Similarly, the People acknowledge their *Rosario* obligations and understand that such material is required to be disclosed to the extent required under CPL article 245.

D. 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:

I. 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

II. 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]).

E. 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.

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

Dated: White Plains, New York
December 1, 2022

Honorable George E. Fufidio
Westchester County Court Justice

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