COUNTY COURT: STATE OF NEW YORK

COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

DECISION and ORDER

-against-

Indictment No.: 17-0769-01-02

SIDNEY LANE and GARY JENNINGS,

Defendant

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Defendant, GARY JENNINGS, has been indicted by the Westchester County Grand Jury and is charged with acting in concert with his co-defendant SIDNEY LANE, with the crimes of burglary in the first degree (PL §140.30[02]) (two counts), burglary in the first degree (PL §140.30[03]) (two counts), burglary in the first degree (PL §140.30[04]) (two counts), attempted robbery in the first degree (PL §110/160.15[3]), attempted robbery in the first degree (PL §110/160.15[4]), and assault in the second degree (PL §1120.05[6]) (two counts). GARY JENNINGS is charged with an additional count of tampering with physical evidence (PL §215.40[2]) individually. The defendant has filed a notice of motion, along with a supporting affirmation and memorandum of law seeking omnibus relief. The People have responded by filing an affirmation in opposition and a memorandum of law. Upon consideration of the aforementioned submissions, along with a review of the grand jury minutes and exhibits and the consent discovery order entered in this case, the motion is disposed of as follows:

I. Motion to Inspect and Dismiss

The People have provided the grand jury minutes to the court and the court has reviewed those minutes *in camera.* After doing so, the court finds that the evidence offered to the grand jury was legally sufficient in accordance with section 70.10 of the Criminal Procedure Law. "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]). Moreover, "[c]ourts 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 N.Y.3d 269, 274–275, 804 N.E.2d 392 [2003], quoting People v. Carroll, 93 N.Y.2d 564, 568, 715 N.E.2d 500 [1999]; see also, People v. Wisey, 133 A.D.3d 799, 21 N.Y.S.3d 111 [2015]). The court finds that the evidence presented to the grand jury, in its entirety, met this burden.

Additionally, the court finds that the grand jury was properly instructed as to the law, that there was nothing defective about the proceedings, (see, People v. Calbud, 49 N.Y.2d 398, 402 N.E.2d 1140 [1980]) and that a quorum was present.

However, after reviewing the grand jury minutes, as well as the indictment and the bill of particulars, the court finds that counts one and two of the indictment are multiplicitous, as they charge the same crime, that is, that the defendant unlawfully entered a dwelling with intent to commit a crime therein, and while in the dwelling, caused physical injury to a non-participant in the crime (PL §14030[2]). "Where . . . there is but one unlawful entry and the indictment charges two counts of burglary in the first degree under the same subdivision of the statute,

defendant may be convicted on only one count of burglary," (People v. Griswold, 174 A.D.2d 1038, 1038, 572 N.Y.S.2d 202 [4th Dept. 1991]; see also, People v. Perrin, 56 A.D.2d 957, 392 N.Y.S.2d 723 [3d Dept. 1977]). As such, count two of the indictment is dismissed.

Similarly, counts three and four of the indictment both charge the defendant with entering unlawfully in a dwelling with intent to commit a crime therein, and while in the dwelling, using or threatening the immediate use of a dangerous instrument (PL §14030[3]). Once again, these two counts are multiplicitous as they charge the defendant with the same crime (see, People v. Aarons, 296 A.D.2d 508, 745 N.Y.S.2d 487 [2d Dept. 2002]). Accordingly, count four of the indictment is dismissed.

Finally, counts five and six of the indictment charge the defendant with entering unlawfully in a dwelling with intent to commit a crime therein, and while in the dwelling, being armed with a deadly weapon (PL §140.30[1]). Since both counts charge the defendant with the same unlawful entry, the defendant can be charged with only one count under this particular subdivision of section 140.30 of the Penal Law (Id.). Therefore, count six of the indictment is dismissed.

The court notes that the People consent to the dismissal of counts two, four, and six of the indictment.

The court does not find that the release of the grand jury minutes or any portion thereof to the defendant is necessary, nor has the defendant set forth any compelling or particularized need for the production of the grand jury minutes. Therefore, the defendant's application for the release of said minutes is denied (see, CPL §190.25[4][a]).

II. Motion for Bill of Particulars

The defendant's motion for a further Bill of Particulars is denied, as the Bill of Particulars that has been provided by the People in the consent discovery order adequately informs the defendant of the substance of all alleged conduct and complies with CPL §200.95 in all respects.

III. Motion for Discovery and Inspection

The consent discovery order entered in this case indicates that the parties have agreed to enumerated discovery, disclosure, and inspection in accordance with Article 240 of the Criminal Procedure Law. The defendant's motion for discovery is granted to the extent that the People are ordered to provide him with any material specified in CPL §240.20 that has not already been provided.

With respect to the defendant's demand for exculpatory information, the People acknowledge their continuing obligations pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct 1194 (1963) and Giglio v. United States, 405 U.S. 150, 92 S.Ct 763 (1972). If a question exists as to the potentially exculpatory nature of a particular item, or if the People are not willing to consent to an item's disclosure, the People are ordered to provide such item to the court forthwith for an *in camera* inspection and determination.

As to the defendant's request for material enumerated in CPL §§240.44 and 240.45, such motion is denied at this time. The People recognize their duty to comply with People v. Rosario, (9 N.Y.2d 286, 173 N.E.2d 881 [1961]), and are hereby ordered to do so in accordance with the time-frame set forth in the statute.

Any requests made by the defendant with respect to the discovery of items beyond the scope of Article 240 of the Criminal Procedure Law are denied (see, Pirro v. LaCava, 230 A.D.2d 909, 646 N.Y.S.2d 866 [1996]; Matter of Catterson v. Rohl, 202 A.D.2d 420, 673 N.Y.S.2d 1005 [1994]).

IV. Motion to Preclude Use of Unnoticed Statements and Identification Testimony

The defendant moves to preclude the People from offering at trial evidence of any unnoticed statements or identifications. In response, the People acknowledge the limitations placed upon them by section 710.30 of the Criminal Procedure Law. Furthermore, they indicate no intention of using any unnoticed statements or identification testimony, nor do they evince an intention of serving late notice. As such, the motion is denied as moot.

V. Motion to Suppress Statements

The defendant moves to suppress his noticed statements on the grounds that they were obtained in violation of his constitutional rights. Specifically, he argues that the statements were made involuntarily as the result of an illegal detention and that he made them without being given Miranda warnings or waiving them.

The People consent to a hearing and contend that after the hearing, the court will find that the defendant's pre-arrests statements were made in response to preliminary, investigative questioning by the police. Furthermore, they argue that the custodial statements were made after the defendant knowingly, voluntarily, and intelligently waived his Miranda rights.

The motion is granted to the extent that a Huntley hearing shall be held prior to trial to determine whether the statements allegedly made by the defendant, which have been noticed by the People pursuant to CPL §710.30(1)(a), were made involuntarily within the meaning of CPL

§60.45 (see, CPL §710.20[3];CPL §710.60[3][b]; People v. Weaver, 49 N.Y.2d 1012, 406 N.E.2d 1335 [1980]).

VI. Motion to Suppress Evidence

The defendant moves to suppress all physical evidence obtained by the police in this case, arguing that the police lacked probable cause to arrest the defendant and seize any of his property incident to that arrest.

The People argue that the defendant's motion should be denied because the police possessed the requisite probable cause to stop and arrest the defendant. Furthermore, the People argue that to the extent that the defendant moves to suppress any evidence recovered from his co-defendant's person, or home, the his place of employment, or his father's vehicle, he lacks standing to do so. Finally, the People contend that the defendant voluntarily consented to the search of his cell phone.

The defendant's motion is granted to the extent that a hearing will be held to determine whether the police seized the defendant in violation of his Fourth Amendment rights (see, Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 [1979]) and whether the search and seizure of any property, including his cell phone, subsequent to that arrest was lawful (see, Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 [1961]). With respect to any property recovered from inside of the defendant's father's vehicle, the court will first determine whether or not the defendant can establish standing to challenge the search (see, People v. Ramirez-Portoreal, 88 N.Y.2d 99, 666 N.E.2d 207 [1996]).

VII. Motion for Severance

The defendant moves for a severance from his co-defendant. The defendant and his co-defendant, who is alleged to have acted in concert, are properly joined in the same indictment (see, CPL §200.40 [1]). Where the proof against all defendants is supplied by the same evidence, "only the most cogent reasons warrant a severance," (see, People v. Bornholdt, 33 NY2d 75, 87, 305 N.E.2d 461, cert. denied 416 US 95; see also, People v. Watts, 159 AD2d 740, 553 N.Y.S.2d 213 [1990]). Further, public policy strongly "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, 544 N.Y.S.769 [1989]).

Nevertheless, for good cause shown, such as the fact that a defendant will be "unduly prejudiced by a joint trial," a defendant may be entitled to a severance from his co-defendant (see, CPL §200.40 [1]). In order to fairly evaluate whether the defendant will or will not be unduly prejudiced before a joint trial occurs, decisions must be rendered regarding the admissibility of any statement by the defendant's co-defendants as well as, if admissible, whether any such statement can be redacted. Further, consideration must be given as to whether the co-defendants intend to testify and whether the co-defendants' defenses are antagonistic to that of the within defendant.

Accordingly, as the court has yet to reach and resolve the above addressed matters, the defendant's motion for a severance is denied as premature with leave to renew and for the defendant to demonstrate, after the above matters have been resolved, that a joint trial will result in unfair prejudice to him and substantially impair his defense.

VIII. Motion to Suppress Prior Bad Acts

The defendant requests a hearing to determine whether the prosecution should be permitted to use any criminal convictions, or bad acts of the defendant at trial. The defendant's motion is granted to the extent that prior to jury selection, the People are ordered to disclose to the defendant all specific instances of his prior uncharged crimes and bad acts they expect to introduce at trial for impeachment purposes in accordance with CPL §240.43. In response, the defendant must sustain his burden of showing the prior convictions and bad acts which will unduly prejudice him as a witness on his own behalf (People v. Matthews, 68 N.Y.2d 118, 506 N.Y.S.2d 149 [1986]). In the event that the People seek to use any such conduct in their direct case against the defendant, they are ordered to request a hearing to determine the admissibility of such evidence pursuant to People v. Ventimiglia, 52 N.Y.2d 350, 420 N.E.2d 59 (1981).

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

Dated: White Plains, New York
December 20, 2017

HON. HELEN M. BLACKWOOD
Westchester County Court

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