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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER

CYNTHIA ARCE,

Indictment No.: 18-00564

Defendants.

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FUFIDIO, J.

Defendant, CYNTHIA ARCE, having been indicted on or about September 6, 2018 for one count of murder in the second degree, two counts of attempted aggravated murder, two counts of attempted aggravated assault on a police officer and two counts of assault in the second degree 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 have cross moved for permission to amend count three of the indictment and file a special information alleging the required prior conviction. Upon consideration of these papers, the stenographic transcript of the grand jury minutes and the Consent Discovery Order entered in this case, this Court disposes of this motion as follows:

A. MOTION TO INSPECT, DISMISS AND/OR REDUCE

The court grants the defendant's motion to the limited extent that the court has conducted, with the consent of the People, an *in camera* inspection of the stenographic transcription of the grand jury proceedings. Upon such review, the court finds no basis upon which to grant defendant's application to dismiss or reduce the indictment.

The grand jury was properly instructed (*see People v Calbud*, 49 NY2d 389 [1980]; *People v Valles*, 62 NY2d 36 [1984]; *People v Burch*, 108 AD3d 679 [2nd Dept 2013]). The evidence presented, if accepted as true, is legally sufficient to establish every element of each offense charged (CPL 210.30[2]). "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 [2nd 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 [2nd 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]).

The Defendant, in her motion urges the dismissal of Count 1, murder in the second degree, because, she argues, that Dr. Asher had to have relied on inadmissible hearsay in reaching her opinion that the manner of death was a homicide. Initially, the Defendant appears to confuse cause of death and manner of death in this context. Dr. Asher's testimony before the Grand Jury made it clear that she could not pinpoint what exactly caused Gabriella to die, although she was able to narrow it down to a few different causes. However, she was able to testify and opine that based upon all of the information that was available to her that whatever caused Gabriella to die was effectuated by another person, thus the manner of death was a homicide (*People v Ramsaran*, 154 AD3d 1051 [3rd Dept. 2017]). Importantly, she did not testify that the Defendant committed the homicide, simply that the manner of death was a homicide. Experts are allowed to rely on information that they have not personally observed when they formulate their opinions (*People v Sugden*, 35 NY2d 453 [1974]) and may even testify to such hearsay if the hearsay is used for the purpose of showing the basis of that experts opinion (*People v Wright*, 266 AD2d 246 [2nd Dept. 1999]). In evaluating Dr. Asher's testimony in the context of the entire Grand Jury presentation the Court does not find any fault with the opinion offered by Dr. Asher (*DeLong v Erie Cty.*, 60 NY2d 296 [1983]).

Moreover, although the Defendant asserts that, "none of the evidence presented to the Grand Jury can conclusively link Ms. Arce to the death of Gabriella...," conclusiveness is not the standard by which the People must prove their case at the Grand Jury phase and accordingly is not the standard by which this Court must evaluate the evidence before the Grand Jury. The Court finds that the People, have met their burden by presenting legally sufficient evidence for each of the elements of each of the charges in the indictment and that there is legally sufficient evidence for the Grand Jury to have concluded that the Defendant intended to and did in fact cause her daughter's death. Whether or not the People can prove that beyond a reasonable doubt at trial is not an issue for this Court to resolve. This prong of the Defendant's motion is denied.

Additionally, the Court finds that the Defendant has not met his high burden of demonstrating that the integrity of the grand jury proceedings was impaired by any error, let alone one that would render the proceedings defective and prejudicial to the Defendant (*People v Darby*, 75 NY2d 449 [1990], *People v Thompson*, 22 NY3d 687 [2014]), nor does the Court find that there was any such error. Among other things the minutes reveal a quorum of the grand jurors was present during the presentation of evidence, that the Assistant District Attorney presented the evidence fairly and properly instructed the grand jury on the law and only permitted those grand jurors who heard all the evidence to vote the matter. Accordingly, this prong of the defendant's motion is also denied.

Based upon the *in camera* review, since this court does not find release of the grand jury minutes or any portion thereof necessary to assist it in making any determinations and as the defendant has not set forth a compelling or particularized need for the production of the grand jury minutes, defendant's application for a copy of the grand jury minutes is denied (*People v Jang*, 17 AD3d 693 [2d Dept 2005]; CPL 190.25[4][a]).

B & C. MOTION TO SUPPRESS PHYSICAL EVIDENCE

Upon the Court's review of the four corners of the search warrant affidavit and order, the court finds that the warrant was adequately supported by probable cause to believe that evidence at the location could tend to show that the offense was committed and that the defendant was the one who committed it (*see People v Keves*, 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]).

The Court grants the Defendant's motion solely to the extent that *Mapp* and *Dunaway* hearings are directed to be held prior to trial to determine the propriety of any search resulting in the seizure of property (*see*, *Mapp v Ohio*, 367 US 643 [1961]) and whether any evidence was obtained in violation of the defendant's Fourth Amendment rights (*see*, *Dunaway v New York*, 442 US 200 [1979]), otherwise as the motion stands now, the Defendant's motion to suppress physical evidence is denied.

D. MOTION FOR THE DISCLOSURE OF INFORMANTS

The Defendant's motion for the disclosure of any informants used in this case is denied. The disclosure of informants is only required when the question of a defendant's guilt or innocence turns on an informants testimony (*People v Goggins*, 34 NY2d 163 [1974]). The Defendant has not made any showing that an informant was even used in this case, much less the requisite showing that an informant's testimony would have any bearing on his guilt or innocence (*id.).* Moreover, disclosure would not be required even if an informant had been instrumental in making the introduction between the defendant and law enforcement (*People v Vega*, 23 AD3d 504 [2nd Dept. 2005]).

E. MOTION TO SUPPRESS NOTICED STATEMENTS

The branch of the Defendant's motion seeking to suppress statements on the grounds that they were unconstitutionally obtained is granted to the extent that a *Huntley* hearing shall be held prior to trial to determine whether any statements allegedly made by the Defendant, which have been noticed by the People pursuant to CPL 710.30 (1)(a) were involuntarily made by the Defendant within the meaning of CPL 60.45 (*see* CPL 710.20 (3); CPL 710.60 [3][b]; *People v Weaver*, 49 NY2d 1012 [1980]), obtained in violation of Defendant's Sixth Amendment right to counsel, and/or obtained in violation of the Defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

F. MOTION FOR *SANDOVAL* AND *VENTIMIGLIA* HEARINGS

The 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 the Defendant's prior criminal convictions, prior uncharged criminal act, and vicious or immoral conduct (see, *People v Sandoval,* 34 NY2d 371[1974]). The People have consented to, and it is now ordered that immediately prior to trial the court will conduct a *Sandoval* hearing.

At the hearing, the People are required to notify the Defendant of all specific instances of his criminal, prior uncharged criminal acts and vicious or immoral conduct of which they have knowledge and which they intend to use in an attempt to impeach the Defendant's credibility if he elects to testify at trial (CPL 240.43). The Defendant shall then 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 him should he decide testify as a witness on his own behalf and thereby prevent him from exercising this right (*see*, *People v Matthews*, 68 NY2d 118 [1986]; *People v Malphurs*, 111 AD2d 266 [2d Dept 1985]).

The Defendant's application for a *Ventimiglia* hearing is denied as premature, because the People have not indicated an intention to use any evidence of prior bad act or uncharged crimes of the Defendant in its case in chief (*see, People v Molineaux*, 168 NY2d 264 [1901]; *People v Ventimiglia*, 52 NY2d 350 [1981]). The People have stated that if they do intend to use any *Molineaux* evidence that they will inform the defense and the court of their intention and at that point the Defendant may renew this aspect of his motion.

G. MOTION FOR DISCOVERY, DISCLOSURE AND INSPECTION
CPL ARTICLE 240

Except where the People have already disclosed or consented to the inspection and discovery of certain evidence, the Defendant's motion for discovery is granted to the extent provided for in CPL 240. If there any further items discoverable pursuant to Criminal Procedure Law Article 240 which have not been provided to defendant pursuant to this Order, they are to be provided forthwith or the People shall seek a protective order explaining to the Court why certain items have not been provided to the Defendant pursuant to CPL 240.

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.

Except to the extent that the defendant's application has been specifically granted herein, it is otherwise denied as seeking material or information beyond the scope of discovery (*see*, *People v Colavito*, 87 NY2d 423 [1996]; *Matter of Brown v Grosso*, 285 AD2d 642 [2d Dept 2001]; *Matter of Brown v Appelman*, 241 AD2d 279 [2d Dept 1998]; *Matter of Catterson v Jones*, 229 AD2d 435 [2d Dept 1996]; *Matter of Catterson v Rohl*, 202 AD2d 420 [2d Dept 1994]).

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

Dated: White Plains, New York
December 17, 2018

Honorable George E. Fufidio
Westchester County Court Judge

To:

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