COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER
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THE PEOPLE OF THE STATE OF NEW YORK

-against-

ADAN LEON VILLANO
JORGE ARCE VILLANO
FELICIANO "FELIX" PEREZ BAUTISTA,

Defendant.
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DECISION & ORDER
Ind No.: 19-0944



MINIHAN, J.

Defendant FELICIANO "FELIX" PEREZ BAUTISTA, charged by Westchester County Indictment No. 19-0944 with Gang Assault in the Second Degree (Penal Law § 120.06), has filed an omnibus motion consisting of a Notice of Motion, an Affirmation, and a Memorandum of Law. In response thereto, the People have filed an Affirmation in Opposition together with a Memorandum of Law. Upon consideration of these papers, the stenographic transcript of the Grand Jury minutes and the Consent Discovery Order, entered in this case, the court disposes of the motion as follows:

I.

MOTION to INSPECT and DISMISS
CPL ARTICLE 190

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.

Contrary to defendant's claim, a review of the Grand Jury minutes reveals that the evidence presented, if accepted as true, is legally sufficient to establish every element of each offense charged (CPL 210.30[2]); thus, defendant's motion to dismiss on this basis is denied. 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]).

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]).

In making this determination, the Court does not find it necessary to release to the parties portions of the Grand Jury minutes as are not subject to disclosure pursuant to CPL Article 245.

II.

MOTION for DISCOVERY, DISCLOSURE and INSPECTION
CPL Article 245

To whatever extent material that is discoverable under Criminal Procedure Law Article 245 has not already been provided to the defense by the People, the defendant's motion is granted and such discovery, including both *Brady* material[1] and *Rosario* material, shall be provided forthwith. Leave is granted for either party to seek a protective order (CPL Article 245). If the defense has a particularized reason to believe that there remains outstanding discovery with which he has not been provided, he is directed to contact the assigned Assistant District Attorney upon receipt of this order. If the issue remains unresolved within two days of receipt of this order, counsel for the defendant shall contact the court to request an immediate compliance conference.

If the People have fulfilled their discovery obligations but have not yet filed a Certificate of Compliance, they are directed to do so forthwith and they are reminded of their continuing

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[1] 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]). 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 the defendant.

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.

To the extent the People cross-move for reciprocal discovery, it is likewise granted to the extent provided for in CPL Article 245. Further, the Bill of Particulars set forth in the voluntary disclosure form provided to defendant has adequately informed defendant of the substance of the alleged conduct and in all respects complies with CPL Article 245 and Section 200.95.

The People recognize their continuing duty to 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]).

III.

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 the defendant's prior criminal convictions, prior uncharged criminal, vicious or immoral conduct. On the People's consent, the court orders a pre-trial hearing pursuant to *People v Sandoval* (34 NY2d 371[1974]). At said hearing, the People shall notify the defendant, *in compliance with CPL Article 245, and in any event not less than 15 days prior to the first scheduled trial date,* of all specific instances of defendant's criminal, prior uncharged criminal, vicious or immoral conduct of which they have knowledge and which they intend to use to impeach defendant's credibility if he elects to testify at trial.

At the hearing, the 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 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]).

Upon the consent of the People, if the People determine that they will seek to introduce at trial evidence in their case-in-chief of any prior uncharged misconduct and criminal acts of the defendant, the People shall 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 any such evidence may be used by the People to prove their case-in-chief. 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 any other hearings ordered herein.

IV.

MOTION to PRECLUDE IDENTIFICATION TESTIMONY
CPL 710

The People served CPL 710.30(1)(b) notice of three identifications of defendant at the Yonkers Police Department, two on July 9, 2019 - - one at approximately 10:00 p.m. from a video and one at approximately 10:30 p.m. from a single photo, and one on July 12, 2019 at approximately 1:22 a.m. from a photographic array. Defendant's motion to suppress identification testimony 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, the defendant bears the ultimate burden of proving that the procedure was unduly suggestive. Where suggestiveness is shown, the People must show the existence of an independent source by clear and convincing evidence.

V.

MOTION FOR a SEVERANCE and
FOR a SEPARATE TRIAL

The defendant moves for a severance from his co-defendants and for a separate trial. The 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. 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]).

Defendant's speculation that a codefendant would pursue an antagonistic defense is an insufficient basis to proceed with separate trials (*People v Chaplin*, 181 AD2d 828 [2d Dept 1992]). Defendant's argument that he could potentially be prejudiced by a *Sandoval* ruling is denied as premature, with leave to renew after a *Sandoval* ruling, and upon a showing that a joint trial will result in unfair prejudice to him and substantially impair his defense. Notably, a limiting instruction at trial would properly direct the jury to separately consider the proof as to each crime charged, thereby eliminating any prejudice to the defendant (*see People v Veeny*, 215 AD2d 605 [2d Dept 1995]).

Defendant's claim that severance is necessary because the statements of his codefendants could inculpate him and may ultimately result in a *Bruton* violation is premature. In *Bruton v United States*, 391 US 123 [1968], the Supreme Court held that the admission of a confession made by one defendant, who does not testify, and which contains references implicating his codefendant, violates the latter's right of cross-examination under the Confrontation Clause. The

court noted that there is a substantial risk that the jury, even with limiting instructions, may consider the implicating references in determining the codefendant's guilt. Unless the implicating references can be effectively deleted, the statement is not admissible unless separate trials are had. However, the New York Court of Appeals has defined certain instances where the *Bruton* rule would not be violated including where the confessing defendant testifies at the trial, thus affording the codefendant an opportunity to cross-examine him (*see People v Anthony*, 24 NY2d 696 [1969]) and where the codefendant has himself confessed substantially to the same effect as the confessing defendant (*People v McNeil*, 24 NY2d 550 [1969]). Defendant's motion is denied as premature, with leave to renew.

VI.

MOTION to PRECLUDE STATEMENT TESTIMONY
CPL 710

The People served CPL 710.30(1)(a) notice of statements allegedly made by defendant to detectives at the Yonkers Police Department on July 11, 2019 at approximately 8:00 p.m. and on July 12, 2019 at approximately 2:00 p.m. The motion to suppress is granted to the extent of ordering a pretrial *Huntley* hearing to determine whether the statements were involuntarily made by 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]), and/or obtained in violation of defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

VII.

MOTION to SUPPRESS PHYSICAL EVIDENCE

Defendant moves to suppress all physical evidence on the basis that his arrest was unlawful. Alternatively, defendant moves for a *Mapp/Dunaway* hearing. To the extent that defendant moves to suppress any evidence obtained pursuant to the July 12, 2019 search warrant order pertaining to his home, that branch of the motion is denied. 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]). Upon review of the four corners of the supporting search warrant affidavit, the warrant was adequately supported by probable cause (*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]).

Defendant's motion to suppress physical evidence is granted solely to the extent of ordering a pre-trial *Mapp* hearing to determine the propriety of any search, not pursuant to a search warrant, which resulted in the seizure of property (*see Mapp v Ohio*, 367 US 643 [1961]). The hearing will address whether defendant consented to a search of his phone. 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]).

VIII.

MOTION to PRECLUDE UNNOTICED STATEMENTS and
UNNOTICED IDENTIFICATION TESTIMONY

The motion to preclude unnoticed statements and identification testimony is denied as premature. The People acknowledge the statutory requirements of CPL 710.30.

IX.

MOTION for LEAVE to FILE FUTURE MOTIONS

This motion is denied. Any future motion must be brought by way of order to show cause setting forth reasons as to why said motion was not brought in conformity with CPL 255.20.

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

Dated: White Plains, New York
February 4, 2020

Honorable Anne E. Minihan
Acting Supreme Court Justice

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