

**People v Poulson**

2021 NY Slip Op 33916(U)

November 22, 2021

County Court, Broome County

Docket Number: Indictment No. 21-299

Judge: Kevin P. Dooley

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STATE OF NEW YORK  
COUNTY COURT :: COUNTY OF BROOME

THE PEOPLE OF THE STATE OF NEW YORK

-v-

KYLE A. POULSON,  
Defendant.

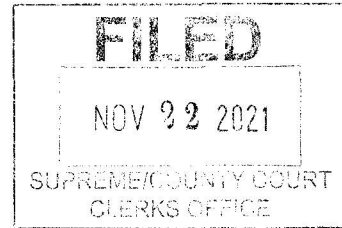
KEVIN P. DOOLEY, J.

On September 10, 2021, a Broome County Grand Jury handed up Indictment No. 21-299, charging the above-named defendant with Attempted Murder in the Second Degree, a class B felony, Assault in the First Degree, a class B felony, Criminal Possession of a Weapon in the Third Degree, a class D felony, and Criminal Contempt in the Second Degree, a class A misdemeanor. The indictment alleges that on May 25, 2021, the defendant, who has a prior felony conviction, intentionally attempted to cause the death of Leslie Simpson, intentionally caused serious physical injury to her with a blunt object and possessed a hammer with the intent to use if unlawfully against another person. The indictment also alleges that during the period between June 17, 2021, and August 29, 2021, the defendant intentionally disobeyed an Order of Protection issued on behalf of Leslie Simpson by placing approximately 127 telephone calls to her.

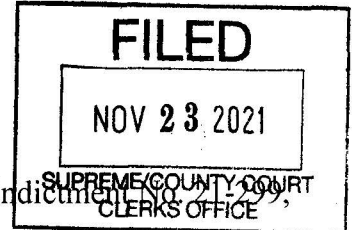
The defendant was arraigned in Broome County Court on September 15, 2021. On September 17, 2021, the defendant filed with the Court an Omnibus Motion seeking certain Orders and relief in connection with the indictment filed against him. The People's response was filed on October 28, 2021. The following constitutes the Decision and Order of the Court.

#### GRAND JURY MOTIONS

The defendant moves for an Order, pursuant to CPL 210.30, for inspection of the stenographic minutes of the grand jury proceeding for the Court to determine whether the evidence before the grand jury was legally sufficient to support the charges contained in the indictment, and whether the grand jury proceedings were defective within the meaning of CPL 210.35. The People have no objection to the Court examining the grand jury minutes and provided a copy of the same for the Court's review on October 28, 2021. Upon examination of



**DECISION AND ORDER**  
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the minutes, the Court finds that release of the minutes to the defense is not necessary to assist the Court in making its determination of the motion. Accordingly, the defendant's request for release of the grand jury minutes for this purpose is denied.

Under CPL Section 210.20 (1) (b), the Court may dismiss an indictment when the evidence before the Grand Jury was not legally sufficient to establish the offense charged or any lesser included offense. Evidence presented to a Grand Jury is legally sufficient when competent evidence, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof. Competent evidence means evidence not subject to an exclusionary rule, such as the prohibition against hearsay. *People v Swamp*, 84 NY2d 725, 730 (1995). The court may not examine the adequacy of the proof or determine whether there was reasonable cause to believe that the charged crimes were committed by the accused, since resolution of those questions is exclusively the province of the Grand Jury. *People v. Jennings*, 69 NY2d 103, 115 (1986).

The Court may also dismiss an indictment pursuant to CPL Section 210.20 (1) (c), when the Grand Jury proceeding was defective pursuant to CPL Section 210.35. Under subdivision (5) of that statute, a Grand Jury proceeding is defective when the proceeding fails to conform with the requirements of the statutes governing the Grand Jury to such a degree that the integrity of the proceeding is impaired and prejudice to the defendant may result. Not every improper comment, elicitation of inadmissible testimony, impermissible question or mistake renders an indictment defective. Isolated instances of misconduct will not necessarily impair the integrity of the proceedings or lead to the possibility of prejudice, and the submission of some inadmissible evidence will not be deemed fatal as long as the remaining evidence is sufficient to sustain the indictment. *People v. Huston*, 88 NY2d 400 (1996); *People v. Avant*, 33 NY2d 265 (1973). The exceptional remedy of dismissal is warranted only where a defect in the proceedings creates a possibility of prejudice. Actual prejudice, however, need not be shown, but where prosecutorial wrongdoing, fraudulent conduct, or errors potentially prejudice the ultimate decision reached by the Grand Jury, the indictment must be dismissed. *People v. Huston, supra*.

#### *Evidence Presented to the Grand Jury*

Broome County Emergency Service dispatcher Steven Grinnell testified that on May 25, 2021, at approximately 4:30 a.m., he received a brief "hang-up" call from an unidentified male

requesting an ambulance at 101 Murray Street, Apt. 122. The caller advised the door to the apartment was open. Mr. Grinnell was able to confirm through computer records that the call was made from a telephone number associated with that address and dispatched Binghamton Police (BPD) officers to respond to the call.<sup>1</sup>

BPD Officer Jeremiah Terwilliger was one of the first officers to respond. He testified that he observed the complaining witness, Leslie Simpson, waving him down in the parking lot of the Speedway convenience store, which is near the apartment building. Officer Terwilliger testified that Simpson was “covered with blood” and distraught. Simpson advised Officer Terwilliger and other responding officers that she lived at 101 Murray Street, Apt. 122, with the defendant, who is her boyfriend. Simpson advised the officers that she had been alone with the defendant at the apartment that night and that they had an argument about her smoking in the apartment and allegedly cheating on the defendant. Simpson advised the officers that she went to bed and fell asleep and that the next thing she remembered was being outside the apartment building, calling for help.

Simpson was treated at the scene by BFD Medic Shawn Skinner and then transported to Wilson ER, where she was eventually seen by a trauma surgeon, Dr. Therese Fedorowicz. The doctor testified that Simpson suffered from blunt force trauma to the head, resulting in a depressed skull fracture.

BPD Officer Zachary Clement testified that he interviewed Simpson while she was being treated at the hospital and obtained a supporting deposition from her. In her deposition, Simpson again advised that she did not remember what happened after she fell asleep, but did remember that a few weeks before, the defendant stated that if she cheated on him, he would hurt her with a hammer.<sup>2</sup>

BPD Officer Anthony Wood testified that while other officers were with Simpson at the Speedway parking lot, he responded to 101 Murray Street, Apt. 122. Officer Wood testified that he subsequently secured the apartment and observed what appeared to be blood on the handle of the closed apartment door and could hear a television playing inside.

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<sup>1</sup> Property manager Sandra Woolfolk testified that Simpson and the defendant were the tenants of that apartment and described how the apartment could be accessed from outside.

<sup>2</sup>The foundation laid outside the presence of the grand jury by the prosecutor for introduction of the supporting deposition is described below.



BPD Inv. Amanda Miller testified that on the morning of May 25, 2021, she and other officers executed a search warrant at the apartment. Inv. Miller testified that blood smears were located in the bedroom, but no weapon was found, and the television was not playing. Inv. Miller was permitted to testify that the defendant was the only suspect in the police investigation.

Simpson's mother Nancy Bosworth testified that Simpson and the defendant had been living together for "the past couple of years." She described the relationship as "quite volatile," and the defendant as very "controlling." Bosworth testified that during their relationship, Simpson kept trying to get away from the defendant but always went back to him. Bosworth testified that on May 25, 2021, Simpson called her from the hospital and told Bosworth she didn't know what had happened. Bosworth testified that after the incident, Simpson suffered from headaches, and required numerous follow-up visits with her counselor and the brain trauma unit.

Bosworth further testified that she tried unsuccessfully to contact the defendant and left him at least one message. Testimony was elicited from Bosworth that in her message, she told the defendant that he would go to jail and "be put away" for what he has done, Bosworth was also permitted to testify about why she believed or suspected that the defendant was the person who had assaulted Simpson.

City Court Clerk Noelle Rivera testified that at the defendant's arraignment in Binghamton City Court on June 4, 2021, a "no contact" OOP was issued on behalf of Leslie Simpson by a City Court judge.

The defendant testified in his own behalf at the grand jury proceeding. He testified that on May 25, 2021, at approximately 3:15 a.m., he left the Murray Street apartment he shared with Simpson after having an argument with her, and when he returned he discovered that she had been injured and was covered with blood. The defendant testified that while he was calling "911" for an ambulance, Simpson left the apartment. The defendant testified that he did not wait at the apartment for the ambulance and police to arrive because he had problems with the police in the past. While being questioned by the prosecutor about the fact that the police located him a few days or so after the incident, the prosecutor established that the defendant voluntarily accompanied the police to the police station. She then inexplicably asked, "[a]nd when they sat you down, you decided you didn't want to talk to them?" The defendant was also questioned by the prosecutor about telephone conversations he had with Simpson after he was remanded to the

Broome County Jail. Simpson was using the alias of Alycia Appoline, and although the defendant acknowledged having numerous conversations with her, he denied asking for her help in getting the charges dropped or reduced.<sup>3</sup>

BPD Inv. Gary Laskowsky testified that “at some point,” the defendant called the Binghamton Police station and spoke to him. The defendant told the investigator that he would come in with Simpson to talk about what happened, but the defendant never appeared at the station. Inv. Laskowsky testified that he observed the defendant “a few days later” walking on Hawley Street, approached him and asked him to come to the station, which the defendant agreed to do. Inv. Laskowsky testified that once he advised the defendant of his *Miranda* rights, the defendant asked for a lawyer. Inv. Laskowsky was also permitted to testify that during his investigation, he began to suspect that no one other than the defendant assaulted and injured Simpson.

At grand jury, the prosecutor offered Simpson’s supporting deposition obtained by Officer Clement and the other verbal statements she made to him and Officer Terwilliger concerning the alleged assault. The prosecutor advised the grand jury as follows, concerning the admissibility of the supporting deposition of Simpson and the other statements she made to the officers:

So, you guys did hear we had a witness that was recalled and another patrolman who was present on scene who talked about things that Leslie Simpson said to them while they were investigating this incident, and you are – you do have the ability to use that evidence as direct evidence in this case without – *based off things that happened outside the record today. (Emphasis added)* Any other hearsay evidence that was presented to you you’re to disregard, but the statements that they made in reference to what Leslie Simpson said to them on scene and in the hospital, that statement that was admitted for you to look at today, those are things that you can use as direct evidence in today’s case should you find it to be credible. Obviously, your consideration of credibility is yours to make, and you guys can make that with every witness in the statements that were elicited as you could with any witness who appeared here in person.

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<sup>3</sup> A CD containing all the recorded calls and text messages communications between the defendant and Simpson, as well as copies the print-out of the text messages and the records of the Broome County Sheriff’s Office concerning those communications, were submitted to the grand jury.

The prosecutor was referring to the fact that midway through the grand jury proceeding, a “*Sirois*,” or “Forfeiture by Wrongdoing,” hearing was conducted outside the presence of the grand jurors by Senior Assistant District Attorney Christopher A. Ganz.<sup>4</sup> At the hearing, Inv. Deb Phelps of the District Attorney’s Office testified that on the afternoon of September 9, 2021, which was the day of the presentation, she went to Bosworth’s residence at 47 Riverside Drive with Senior ADA Ganz and made contact with Simpson. Inv. Phelps testified that Simpson told her that she was not coming to grand jury because she had a sore throat and headache and may have COVID. Simpson also stated that even if she felt better in the future, she was not going to testify at grand jury. Inv. Phelps testified that Simpson complained that the District Attorney’s Office and Crime Victims Assistance Center had “let her down,” and that she would not feel any safer putting someone in jail for twenty or more years.

Inv. Jeff Wagner of the District Attorney’s Office testified that on September 7, 2021, he met with Simpson, served her with a grand jury subpoena and advised her that she was required to appear to testify on that date. He further testified that on September 9, 2021, he responded to 47 Riverside Drive to assist Inv. Phelps, who was talking with Simpson. Inv. Wagner testified that Simpson “was concerned about testifying in grand jury. She was scared. She wanted – she wanted a new home to live in.” When asked whether Simpson indicated what was causing her fear, Inv. Wagner testified that it was the thought that the defendant “might get out of jail.”

Assistant District Attorney (ADA) Caila Cleary, the prosecutor presenting the case to the grand jury, testified at the *Sirois* hearing concerning her contacts with Simpson, and described, in conclusory fashion, the nature of the jail communications between the defendant and Simpson based on her review of the recorded jail calls and text messages. In one of the recorded jail calls (for which the date and time was not provided), ADA Cleary testified that the defendant offered to give Simpson \$50,000 of the \$100,000 he claimed he would be receiving. ADA Cleary testified that she believed the defendant was “guilting” Simpson into not cooperating with the

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<sup>4</sup> In a *Sirois* hearing, named after the defendant in *Matter of Holtzman v. Hellenbrand*, 92 A.D.2d 405 (2d Dept.1983), a trial court must determine whether the prosecution has established that the defendant's misconduct induced a witness's unlawful refusal to testify. Where the prosecution meets its burden, the defendant is “deemed to have waived any objection to the admissibility of the witness' prior Grand Jury testimony.” *People v. Smart*, 23 NY3d 213 (2014). The defendant has a right to be present at such a hearing, which constitutes a material stage of the trial. *People v. McCune*, 98AD3d 631 (2d Dept., 2012). Senior Assistant District Attorney Christopher Ganz conducted the *Sirois* hearing outside the presence of the grand jury and the defendant.



prosecutors, made “veiled threats” towards Simpson and that the defendant suggested an alternative, exculpatory version of the facts Simpson should provide if she did testify.

Broome County Sheriff Officer Benson Ulrich testified concerning the recorded jail calls and text message communications between the defendant and Simpson.<sup>5</sup> and Officers Clement and Terwilliger testified concerning the supporting deposition and other statements Simpson made to them on the night of the assault.

At the conclusion of the “hearing,” the prosecutor made the “finding” that due to the defendant’s misconduct, the defendant had wrongfully created the unavailability of Simpson and as a result of Simpson’s “ill-gotten unavailability, he has forfeited his ability to challenge any prior statement that Ms. Simpson has made about how she was injured that night.” For that reason, the prosecutor determined that Simpson’s supporting deposition and statements made to police officers after the incident could be admitted as evidence before the grand jury.

#### *Discussion of the Grand Jury Presentation*

The Court has identified numerous problems and areas of concern with this grand jury presentation which impaired the integrity of the proceeding, thereby prejudicing the defendant.

#### *Introduction of Simpson’s Supporting Deposition and Other Hearsay Statements*

At grand jury, the prosecutor offered the supporting deposition of the complaining witness after the witness failed to appear before the grand jury on September 9, 2021, in response to the grand jury subpoena served upon her on September 7, 2021. The prosecutor set forth that “based off (*sic*)” the “Forfeiture by Wrongdoing hearing” conducted by another prosecutor outside the presence of the grand jury, it was established by clear and convincing evidence that the defendant engaged in misconduct “aimed at preventing the witness from testifying” and that as a result of such misconduct, the complaining witness refused to appear and testify before the grand jury.<sup>6</sup>

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<sup>5</sup> A CD containing all the recorded calls and text messages communications between the defendant and Simpson, as well as copies the print-out of the text messages and the records of the Broome County Sheriff’s Office concerning those communications, were offered as exhibits at the hearing. The prosecutors did not identify which specific communications they believed constituted threats, “veiled threats” or other misconduct against Simpson.

<sup>6</sup> The Court would not characterize the presentation conducted outside the presence of the grand jury as a “hearing,” which requires the participation of the adverse party before an impartial judge. Rather, the Court considers the



The prosecutor has not provided any statutory provisions or other authority that permits the introduction at grand jury of a supporting deposition or other out-of-court statements of a witness. Instead, she relies on “(t)he body of case law surrounding the doctrine of Forfeiture by Wrongdoing,” which permits the prosecution to introduce as direct evidence *at trial* the prior court testimony, grand jury testimony, or other statements of a witness when a defendant’s action cause the witness to become unavailable or unwilling to testify.

In *People v. Geraci*, 85 NY2d 359 (1995), the Court of Appeals held that an out-of-court statement, including grand jury testimony, could be admitted as direct evidence where the witness was unavailable to testify *at trial* and clear and convincing evidence established that the witness’s unavailability was procured and the result of misconduct by the defendant. The Court held that in such situations, as a matter of public policy, a defendant may forfeit his or her constitutional right to confront a prosecution witness or object to introduction of the witness’ out-of-court statements. In *People v. Mahar*, 89 NY2d 456 (1997), the Court explained that:

In *Geraci*, we recognized an exception to the defendant's constitutional right of confrontation as well as to the evidentiary rule against the admission of hearsay evidence upon a showing that a witness had been rendered unavailable to testify in court through the misconduct of the defendant personally, or of others on his or her behalf with the defendant's knowing acquiescence (85 NY2d at 366, *supra*). We emphasized in *Geraci* that the exception is not based upon the inherent reliability of this class of hearsay evidence, but is essentially a rule “necessitated by the defendant's misconduct” (*id.*, at 367–368). That is, it is a rule of necessity to preserve the integrity of the adversary process by “reducing the incentive [of a criminal defendant] to tamper with witnesses” (*id.*, at 368).

Because of the weighty countervailing interests, that is, the constitutional right of confrontation and the strong New York policy for narrow treatment of exceptions to the hearsay rule (see *People v. Nieves*, 67 NY2d 125, *supra*), we imposed a clear and convincing evidentiary standard of proof for the establishment of the factual basis for admitting out-of-court statements of a declarant whose unavailability was caused by the defendant. (*People v. Geraci*, 85 NY2d at 368, *supra*).

The prosecutor argues that in this case, the defendant has “waived his right to confront the witness against him by his own actions and interference” and therefore, requests that this

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“hearing” to be an offer of proof by the prosecutor for the introduction at grand jury of the supporting deposition and other hearsay statements of the complaining witness.

Court “uphold this public policy” exception to the rule against hearsay by permitting the introduction at grand jury of the supporting deposition and other hearsay statements of the complaining witness.

A grand jury proceeding is not an adversarial proceeding, but rather is “properly an investigation.” *People v. Ianniello*, 21 NY2d 418, 424 (1968). Unlike the trial of an indictment, neither the defendant nor defense counsel is present during the grand jury proceedings (except when the defendant appears and testifies on his or her own behalf) and the defendant does not have the right to confront witnesses during the proceeding. And, unlike a trial, the grand jury presentation is conducted in secret for compelling public policy considerations, including to prevent the subornation of perjury and tampering with prospective witnesses and to assure prospective witnesses that their testimony before the grand jury will be kept secret so they will be willing to testify freely. *People v. DiNapoli*, 27 NY2d 229, 235 (1970). For that reason, the “public policy” rationale for permitting the introduction of out-of-court statements of a witness, based on the defendant’s forfeiture of his constitutional rights, is not implicated at a grand jury stage of the criminal proceedings.

CPL 670.20 (2) provides for the use of testimony at a grand jury proceeding given by an unavailable witness at a prior proceeding when that witness’ attendance is precluded for reasons specified in CPL 670.10. Pursuant to CPL 670.20 (2), without obtaining any court order or authorization, a prosecutor may introduce testimony at grand jury of a witness that was given at a related preliminary hearing, a prior trial or conditional examination, provided a foundation for such testimony is laid by other evidence demonstrating that personal attendance of such witness is precluded because of the death, illness, or incapacity of the witness, or because the witness cannot be found with due diligence.

Here, the complaining witness did not testify at a preliminary hearing or at a conditional examination. Even if the provisions of the statute could be extended to permit the introduction of a supporting deposition of witness, however, the complaining witness in this case was not missing. When, on the day of the grand jury presentation, the complaining witness advised the prosecutor and District Attorney investigator that she “was not coming to testify under any circumstances no matter what,” the prosecutor could have and should have immediately sought from the Court a material witness order, pursuant to CPL 620.20, to secure her attendance at the grand jury proceeding.

Further, the prosecutor's offer of proof, made outside the presence of the grand jury, failed to provide clear and convincing evidence that the complaining witness's refusal to appear or testify at grand jury was the result of the defendant's "wrongdoing and interference." On the day of the grand jury presentation, the prosecutor and two investigators spoke to the complaining witness on the porch of her mother's home. The complaining witness advised the prosecutor and investigators that she was not coming to grand jury because she was sick, and that even when she felt better, she was not going to testify at grand jury. Inv. Phelps testified that Simpson complained that the District Attorney's Office and Crime Victims Assistance Center had "let her down," and that she would not feel any safer putting someone in jail for twenty or more years. Inv. Wagner testified that the complaining witness said she was afraid the defendant "might get out of jail," although she never advised Inv. Wagner, Inv. Phelps or the prosecutor that the defendant had threatened to harm her if she cooperated with the police and prosecutors or testified against him.

The only other evidence concerning any alleged threats or other interference by the defendant presented during the offer of proof consisted of the testimony of one of the prosecutors who had met in person with the complaining witness on one occasion and spoke with her by telephone on three or four occasions. The prosecutor testified that during their in-person meeting, the complaining witness offered a "potential alternative" theory for the assault against her – that she was assaulted by one of the drug dealers to whom she and the defendant owed money. The prosecutor testified that when she later listened to the recorded jail calls between the defendant and complaining witness, she heard the defendant suggest to the complaining witness that it may have been a drug dealer, and not him, who had assaulted her.

The prosecutor also testified that she reviewed all the recorded jail calls and text messages between the defendant and complaining witness, and based on that review, concluded that the defendant was "guilting" the complaining witness, making "veiled threats" against her and attempting to bribe her to into not cooperating with the police and prosecutors. The prosecutor did not, however, offer or identify the specific communications that, in her opinion, constituted threats, "veiled threats," attempted bribes or other misconduct designed to induce the complaining witness from appearing or testifying before the grand jury.<sup>7</sup>

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<sup>7</sup> The Court notes that the grand jury was not asked to consider charging the defendant with Tampering with a Witness in the Third Degree or Bribing a Witness.



For all these reasons, the Court finds that the supporting deposition and hearsay statements of the complaining witness were improperly introduced at grand jury. The hearsay allegations contained in the supporting deposition, particularly the fact that complaining witness was alone with the defendant on the night of May 25, 2021, that they had argued about their relationship and that a few weeks prior, the defendant has threatened to hurt her with a hammer if she cheated on him, clearly impaired the integrity of the presentation and resulted in prejudice to the defendant.

*Testimony Concerning the Defendant's Exercise of His Constitutional Rights*

At grand jury, Inv. Laskowsky testified that after the defendant called the Binghamton Police station and advised the investigator that he would come to the station with the complaining witness at some point to talk about what had happened, he never appeared. Inv. Laskowsky also testified concerning his interview of the defendant on or about June 4, 2021.<sup>8</sup> When asked what occurred once the defendant was brought to the police station, the investigator replied:

He went into an interview room. I came in with my partner after, started to read him Miranda rights. He asked me if he was going to be arrested. I told him, yes, and he said he wanted a lawyer.

During the defendant's appearance before the grand jury, he was asked the following questions by the prosecutor and gave the following answers concerning his initial telephone contact with Inv. Laskowsky:

Q. And you told that officer that you wouldn't come into the station to talk to him, is that right?

A. No, I did not say that. I said that I didn't know what was taking place. I spoke with Leslie prior, and she told me to wait, that we would go in together.

Q. But you told him you wouldn't get (*sic*) onto the station without Leslie?

A. Because I didn't know anything else.

The prosecutor also questioned the defendant as follows, concerning his encounter with Inv. Laskowsky on June 4, 2021, after the defendant had been observed near Bosworth's car:

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<sup>8</sup>The investigator did not testify, nor was he asked, about the date on which he interviewed the defendant, but the Court is aware the defendant was arrested on June 4, 2021.



- Q. And you didn't stay to talk to the police, right?
- A. I reached – I turned myself in after that.
- Q. Well, the police found you, didn't they, walking on Hawley Street?
- A. It was a coincidence that we bumped into each other at the same time in front of the precinct. I was walking to the precinct.
- Q. And you agreed to go into the station at that point, right?
- A. Yes ma'am. They didn't cuff me. They said that it was voluntary.
- Q. Yep.
- A. Yes, ma'am.
- Q. And when they sat you down, you decided you didn't want to talk to them?
- A. Well, again, I was advised not to.
- Q. Okay. So, you had an attorney at that point?
- A. Well, I reached out to an attorney, and he advised me not to talk.

The prosecution may not introduce testimony at grand jury concerning the invocation of a constitutional right by a defendant. *People v. VonWerne*, 41 NY2d 84 (1977); *People v. Murphy*, 51 AD3d 107 (3d Dept., 2008). The only conceivable purpose for eliciting testimony concerning the defendant's decisions to consult with an attorney and to refuse to speak with the investigator in this case would be to establish consciousness of guilt on the part of the defendant. It is clearly improper to do so when an individual is invoking a constitutionally protected right.

The questioning of Inv. Laskowsky and the defendant by the prosecutor concerning the defendant's initial failure to meet with the investigator, his invocation of his right to remain silent, and his consultation with an attorney were not simply inadvertent errors. Had the references been inadvertent, the Court would expect that the prosecutor would have immediately provided a curative instruction that such testimony was improper, coupled with a direction to disregard such testimony. No such curative instructions were provided at the time the testimony was given or during the legal instructions to the grand jury at the end of the presentation, further prejudicing the defendant and impairing the integrity of the proceedings.

#### *Testimony Concerning the Suspicions of the Witnesses*

At grand jury, the mother of the complaining witness was permitted to testify that after learning of the assault, she called the defendant and left him a phone message, telling him that he would go to jail and "be put away" for what he has done. The mother was then asked the following questions by the prosecutor and gave the following answers:

Q. So, why did you think that Kyle Paulson was involved in this incident?

A. I just couldn't see any other reason. Leslie had actually told me that -- that she had said before it happened that she thought she should split up and she was going to come and stay with me and that he could go -- either keep his apartment or go back to the City, and then she said she fell asleep. They had an argument, and then the next thing I know she was -- had that injury. And I just can't -- I mean, who else could have done it, as far as I'm concerned? They had been -- they fought a lot, they really did, always arguing. And she has said that he -- he was -- she knew -- she thought he was very disturbed and was hearing voices. So, she was -- she told me that.

Q. Okay.

A. So, I suspected him. I don't know who else would have done this.

Similarly, the prosecutor asked Inv. Amanda Miller whether anyone other than the defendant was suspected of being present in the apartment with the complaining witness on the night of May 25, 2021, and whether she suspected that anyone other than the defendant inflicted the injuries on the complaining witness. Inv. Miller responded "no" to each question. The prosecutor also asked Inv. Laskowsky whether he had obtained any information during his investigation that suggested that anyone other than the defendant and the complaining witness were in the apartment that night or whether "[a]t any point during the course of your investigation, did you begin to suspect that anyone other than Kyle Poulson injured Leslie Simpson?" Inv. Laskowsky answered "no" to each question.

Generally, witnesses may only testify to facts and not to their opinions and conclusions drawn from those facts. Prince, *Richardson on Evidence*, §7-101 [Farrell, 11<sup>th</sup> Ed., 1995]. It is highly improper for the prosecutor to elicit testimony from these witnesses concerning their belief that the defendant was the person who assaulted the complaining witness and the reasons for their belief. The testimony, which served to usurp the role of the grand jurors as the exclusive finders of fact with respect to evidence presented, impaired the integrity of the grand jury proceedings, resulting in prejudice to the defendant.

### *Conclusion*

The Court finds that the improper use of the supporting deposition and other hearsay statements of the complaining witness, the testimony relating to the defendant's invocation of his constitutional rights, and the improper testimony concerning the opinions of the complaining

witness's mother and the investigators impaired the integrity of the grand jury, thereby prejudicing the defendant. Even if a reviewing court were to find that remaining admissible evidence was sufficient to establish the elements of the crimes charged, this Court would dismiss the entire indictment based upon the errors described above.

Broome County Indictment No. 21-299 is dismissed with leave to the District Attorney to present the case to another Broome County Grand Jury.


The defendant was remanded the Broome County to jail without bail. However, if the matter is not re-submitted to another Grand Jury within forty-five days of this Decision and Order, the defendant will be released on the felony charges, pursuant to CPL 210.45 (9), unless good cause is shown for an extension of time to provide the prosecution a reasonable opportunity to resubmit the case to a Grand Jury.<sup>9</sup>

Given this Decision and Order dismissing the indictment, it is not necessary for the Court to address the other motions raised by the defendant in his Omnibus Motion.

This constitutes the Decision and Order of the Court.

It is so Ordered.

Dated: November 22, 2021  
Binghamton, New York

  
HON. KEVIN P. DOOLEY  
Broome County Court Judge

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<sup>9</sup> Other than the time limitation concerning the bail, the Court does not impose any specific time frame within which the presentation must be made, but the District Attorney is subject to the limitations in CPL 30.30.