COUNTY COURT-NASSAU COUNTY

#5

Present: HON. TAMMY S. ROBBINS
County Court Judge and
Acting Supreme Court Justice

Part 71
Indictment No: [redacted]

PEOPLE OF THE STATE OF NEW YORK

-against-

[redacted]

Defendants.

KATHLEEN RICE DEFENSE COUNSEL:
District Attorney — Rovshan Sharifov,Esq.
Nassau County — 50 Main Street
Assistant District Attorney — Hempstead, NY 11550
Joshua R. Kahn [redacted]

Douglas M. Reda, Esq. [redacted]
180 Froehlich Farm Blvd. — 11 Clinton Avenue
Woodbury, NY 11797 — RC, NY 11570
[redacted] [redacted]

The Defendant moves this court to examine the stenographic minutes of the Grand Jury proceeding resulting in the indictment for the purpose of determining whether the evidence before the Grand Jury was legally sufficient to support the charge or charges contained therein CPL § 210.30 [2]. The Defendants' Motion to Inspect the Minutes of the Grand Jury proceedings *in camera* is granted. CPL § 210.30 [3].

"[A] Grand Jury may indict a person for an offense when (a) the evidence before it is legally sufficient to establish that such a person committed such offense provided, however, such evidence is not legally sufficient when corroboration that would be required, as a matter of law, to sustain a conviction for such an offense is absent, and (b) competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense." CPL § 190.65 [1]. "In the context of the authority for a Grand Jury to indict, 'reasonable cause' must be based upon 'competent and admissible evidence'", unless otherwise specified in CPL § 190.30 (Presier, 2004 Practice Commentaries, McKinney's Cons. Laws of N.Y. CPL § 190.65 [1], CPL § 190.30). Reasonable cause to believe that a person has committed an offense

exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is likely that such offense was committed and that such person committed it. CPL § 70.10 [2].

CPL §70.10[1] defines legally sufficient as "competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof ...." (Preiser, 2004 Practice Commentaries, McKinney's Cons. Laws of N.Y. CPL § 70.10 *see also* CPL § 190.65[1]). "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 N.Y.2d at 526, 683 N.Y.S.2d 168, 705 N.E.2d 1209). "[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 every element of the charged crimes,' and whether 'the Grand Jury could rationally have drawn the guilty inference'" (*id.* quoting *People v. Deegan*, 69 N.Y.2d 976, 516 N.Y.S.2d 651, 509 N.E.2d 345). In contrast, a Grand Jury's indictment will be dismissed, or a charge reduced, if the reviewing court determines the evidence before that body was not "legally sufficient" to support every element of the charge alleged in the accusatory instrument or indictment. CPL § 210.20.

Based upon the record herein, this court finds the evidence legally insufficient to affirm the Grand Jury's indictment against the Defendant on the two counts of Grand Larceny in the Fourth Degree in violation of section 150.30(1) of the Penal Law, a Class E felony, however, since the record demonstrates proof likely to be established beyond the scope of reasonable doubt of the commission of larceny by the Defendant, even in absence of proof of value of the property stolen, the evidence supports the indictment of the lesser included offenses of Petit Larceny. CPL § 210.20 [1] (b) subd 1-a.. Therefore, Defendants' Motion to Reduce or Dismiss, which has been made in accordance with CPL § 210. 45, is granted insofar as the indictment is reduced to reflect the lesser included charges of Petit Larceny in violation of Penal Law section 155.25, a Class A misdemeanor.

The only issue raised by Defendants in their motion is whether or not there was sufficient proof of value in the record to sustain the two charges of Grand Larceny in the Fourth Degree. This court finds that there is not.

In reference to the first count of Grand Larceny which allegedly took place on March 17th, 2008 at a Macy's department store, located in Nassau County at 400 Sunrise Mall, Massapequa, New York, the

evidence is found to be inadequate to accurately sustain the value of the property stolen. The only proof offered by the People relating to the value of the jeans taken as a result of this incident came from testimony elicited from Henery Sorto, the store's security supervisor. The record indicates that Mr. Sorto became involved in the investigation of a larceny that occurred at the aforementioned Macy's at approximately 2:00 pm. As a result, Mr. Sorto reported to the camera room of the department store and reviewed video surveillance of the incident. He then observed four individuals enter the store, each grab a stack of jeans, and then run out with them. Though, Mr. Sorto states he was working from 7:45 a.m. to 3:45 p.m. that day, it is never asserted or shown within the record that he was present to witness the incident as it actually transpired. His only direct knowledge of the event was established from reviewing a videotape recording of the incident which took place at some unspecified time before 2:00 p.m., and as such, there is no conclusive way to infer he could accurately determine the number of jeans that were on the table at the time in question.

In assessing sufficiency when the evidence before the Grand Jury is wholly circumstantial, a reviewing court's inquiry is limited to "whether the facts if proven and the inferences that logically flow from those facts support proof of each element of the crimes charged." *People v. Deegan*, 69 N.Y.2d 976, 979 (1987). "[T]he Appellate Divisions in all four Departments have uniformly concluded that a victim must provide a basis of knowledge for his statement of value before it can be accepted as legally sufficient evidence of such value." *People v. Lopez*, 79 N.Y. 2d 402 (1992). Moreover, the victim of a theft may provide expert testimony concerning the value of the stolen property provided that the victim is properly qualified as an expert. *People v. Massaro*, 32 A.D.3d 1223 (4th Dep't 2006). The Third Department has held that because property valuation is not strictly the subject of expert testimony, opinion testimony by a lay witness is competent to establish the value of property if they are "acquainted with the value of similar property" and "have a reasonable basis for inferring rather than speculating that the value of the property exceeded the statutory threshold." Richard T. Farrell, Richardson on Evidence (11th ed. 2008). Likewise, a rough estimate without evidence of its basis is insufficient." *People v. Gonzalez*, 221 A.D.2d 203, 204 (1st Dep't 1995). When property is stolen from a store in which it is offered for sale, the price tag on the property is admissible evidence of its value. *People v. Giordano*, 50 A.D.3d 467 (1st Dep't 2008)(concluding that tags constituted circumstantial evidence of the price a shopper was would have been excepted to pay for jackets and were essentially verbal acts by the store, stating an offer to sell at a particular price). Further, in *Lopez*, *supra*, the Court of Appeals found that such a basis of knowledge must be supplied

even in an affidavit submitted to a Grand Jury pursuant to N.Y. Crim. Pro. Law § 190.30(3)(c), which permits an owner of property to attest to its value in such an affidavit. *People v. Lopez*, 79 N.Y.2d 402 (1992).

Here, no such evidence or affidavit is offered. Mr. Sorto is not a sales representative, sales department manager or the owner of Macy's. He is the department store's security supervisor. It then follows that his job responsibilities do not allow themselves to conclusively determine the number of jeans that are stacked on the display table each morning. Therefore, his testimony can only be speculation arrived at by an outsider's perspective and or observation made during the daily course of business. Further, Mr. Sorto's expertise or knowledge of the merchandise has not, and likely cannot, be established through testimony, nor could the basis for the value of the jeans presented to the Grand Jury be substantiated absent some sort of documented proof. Additionally, it is unlikely to conclude that a Macy's security supervisor, amidst other pressing responsibilities, would be well versed as to daily practice of retail salesmen. His appraisal based upon review of the videotape, without more, provides an unsupported approximation that was then used by People in an attempt to satisfy the statutory threshold for Grand Larceny in the Fourth Degree. Based upon the record herein, the conclusion reached by the grand jury was not within the range of permissible inferences to be drawn from the evidence presented. Since there is no determinative way to conclude the actual number of jeans stolen from the record, and because no additional evidence has been presented to support the price of jeans as being $34.99, this court reduces the first count of Grand Larceny in the Fourth Degree to the lesser count of Petit Larceny.

In reference to the second count of Grand Larceny in the Fourth Degree arising from the incident that took place on March 28th, 2008 at T-Mobile retail store, located in Nassau County at 1050 Sunrise Hwy, Massapequa, New York, this court finds that the evidence before the Grand Jury was insufficient to sustain a charge of grand Larceny in the Fourth Degree. The only proof offered by the People of the aggregate value of the four display model cellular phones came from testimony elicited from James Cusimano, a sales representative. The record indicates that Mr. Cusimano was working from 9:00 a.m. to 5:00 p.m. the day the alleged incident took place. It also provides that he was an eyewitness to the commission of the larcenous act at approximately 1:30 p.m. that afternoon. Mr. Cusimano's testified that he saw four black youths enter the T-Mobile retail store and very quickly separate to position themselves in front of four assorted display model cell phones. At or around that time, one of the youths yelled, "Go." and collectively they all "ripped

them out of the wall" and then "ran out quickly." Given that there is direct evidence to support the contention that each of the stolen items was a "display" cellular phone, this court rejects the Defendants' argument that the price of the cell phones should be calculated as part of an "associated service package"; yet finds insufficient evidence to support the People's determination that the cell phones aggregate "market value" reaches the threshold required to establish Grand Larceny.

Generally, value means the "market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, value means the cost of the replacement of the property within a reasonable time thereafter." N.Y. Penal Law § 115.20(1). If the property stolen was not being held for sale, but was merely property in the possession or for the use of the owner, it may still have market value if the sales of such used property occur "within some regularity and uniformity." *People v. Harold*, 22 N.Y.2d 443 (1968). When the value of the property cannot be satisfactorily ascertained, "its value is deemed to be an amount less than two hundred and fifty dollars," thus rendering its theft a Petit Larceny. N.Y. Penal Law § 115.20(4); *see also People v. Jenkins*, 61 A.D.2d 705 (2d Dep't 1978).

Here, the evidence indicates that Mr. Cusimano is a sales representative. However, the record fails to establish, with regard to the same, Mr. Cusimano's experience or familiarity with the stolen items, the length of his tenure as a sales representative for T-Mobile or how the price of the display model cellular phones are calculated. Furthermore, by Mr. Cusimano's own admission he denotes that at best "most" of the display model phones were functioning products. Furthermore, the record never addresses whether or not it is in the normal course of business for these display models to be offered to the public for sale. Therefore, the condition of the phones themselves and their intended purpose is subject to question, which is likely to result in serious implications pertaining to their value. Since, there is nothing offered in the record to substantiate either position, the evidence as to the value of the display model cellular phones at the time of the incident is insufficient. Moreover, the text within the Grand Jury Minutes referenced in People's Affirmation in Opposition to Defendant's motion are found to be leading and insufficient as to establish value. At no time does Mr. Cusimano provide the Grand Jury with any of the models or values of the cell phones or reasoning behind any such claim. Mr. Cusimano simply provides the Assistant District Attorney with a brief affirmation to claims asserted within the questions presented to him. No further testimony or explanation by Mr. Cusimano is offered in respect to the same. Here, as in the first count, no affidavit in support of the testimony offered in regard to value is provided nor are any receipts, price tags, marketing invoices, or

further evidence justifying the value of the display model cellular phones offered to the Grand Jury . In light of the lack of supporting evidence of the value of the property stolen, "its value is deemed to be an amount less than two hundred and fifty dollars," thus rendering its theft a Petit Larceny. *Id.* This court reduces the first count of Grand Larceny in the Fourth Degree to the lesser count of Petit Larceny.

For all the foregoing reasons, Defendants' Motion to Reduce or Dismiss is granted insofar as the two counts of Grand Larceny in the Fourth Degree are reduced to the lesser counts of Petit Larceny.

Dated: June 16, 2009
Mineola, New York

Hon. Tammy S. Robbins
County Court Judge

ENTERED
AND
FILED
JUN 22 2009
CLERK'S OFFICE
COUNTY COURT
NASSAU COUNTY