

STATE OF NEW YORK
COUNTY COURT COUNTY OF RENSSELAER

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DECISION AND ORDER

DARNELL KELLUM,

Defendant.

Rensselaer County Court
Hon. Andrew G. Ceresia, County Judge
Indictment No. 15-1085 Index No. 251053

Appearances:

Hon. Joel E. Abelove
Rensselaer County District Attorney
(Gabriel M. Garcia, Esq., of Counsel)
For the People
Rensselaer County Courthouse
Troy, New York 12180

Matthew J. Swedick, Esq.
For the Defendant
P.O. Box 33
Voorheesville, New York 12186

Ceresia, J.:

The above-named defendant, Darnell Kellum, stands charged with four counts of Burglary in the Second Degree, a class C felony (Penal Law § 140.25 [2]), and one count of Conspiracy in the Fourth Degree, a class E felony (Penal Law § 105.10 [1]). Defendant filed an omnibus motion, and the People filed an affirmation in opposition.

The Court has made an in camera inspection of the grand jury minutes pursuant to CPL 210.30 and determines that release of the minutes is not necessary to assist the Court in determining the motion to dismiss the indictment on the ground of legally insufficient evidence.

The indictment must be dismissed based upon inadequate grand jury instructions. While the Court is mindful that the grand jury need not be instructed with the same degree of precision as a trial jury (see People v Calbud, Inc., 49 NY2d 389, 394 [1980]), the People's instructions may not be so incomplete or misleading as to undermine the integrity of the grand jury (see People v Caracciola, 78 NY2d 1021, 1022 [1991]; People v Malan-Pomeaeyna, 72 AD3d 988, 988 [2010]). With respect to cases where multiple codefendants are charged in a single indictment, the jury must be instructed to consider the evidence separately as to each codefendant (see CPL 300.10 [4]; People v Robinson, 262 AD2d 505, 506 [1999]; People v Forbes, 203 AD2d 609, 611 [1994]; People v Ortiz, 107 AD2d 824, 824-825 [1985]). This requirement applies to grand jury proceedings as well (see People v Darrett, 2 AD3d 16, 20 [2003]; People v Litzenberger, 234 AD2d 947, 947-948 [1996]; People v Perry, 199 AD2d 889, 89-894 [1993], lv denied 83 NY2d 856 [1994]; People v Williams, 1 Misc 3d 226, 237 [2003]; People v Day, 139 Misc 2d 222, 223 [1988]). Here, the People failed to instruct the grand jury to consider the evidence separately as to each codefendant. Accordingly, the indictment, as it pertains to defendant, must be and is hereby dismissed (see CPL 210.20 [1] [c]).

As an additional ground for dismissal of counts one through three, each of which charge Burglary in the Second Degree, these counts lack the requisite corroborative evidence. Testimony of an accomplice must be corroborated – that is, there must be additional evidence tending to connect the defendant with the commission of the crime – and this requirement is applicable to the grand jury (see People v Cilento, 2 NY2d 55, 62-63 [1956]; Matter of Ethan S., 28 AD3d 1165, 1166 [2006]; People v Amell, 277 AD2d 1052, 1052 [2000]). Further, the testimony of one accomplice cannot be used to corroborate another (see People v Pines, 170 AD2d 981, 981 [1991], lv denied 78 NY2d 972 [1991]). Here, the only evidence implicating defendant in the commission of these three burglaries was the testimony of an unindicted accomplice and the written statements of defendant's two codefendants. The unindicted accomplice and the codefendants were participants in the burglaries, such that their testimony and statements cannot be used to corroborate each other. No other evidence linked defendant to these crimes. Therefore, counts one through three must be dismissed on this ground (see CPL 210.20 [1] [c]).¹

As a further ground for dismissal of count six, which charges Conspiracy in the Fourth Degree, this count is not supported by legally sufficient evidence. This count requires that a defendant agree to commit a crime and commit some overt act, beyond the agreement itself, in furtherance of the conspiracy (see Penal Law § 105.10 [1]). Here, the indictment alleges that, on May 20, 2015, defendant conspired to commit Burglary in the Second Degree. However, there was no evidence showing that defendant either agreed to commit a crime on that date or committed any overt act in furtherance of such a crime. While the Court is mindful that the

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Count four, which also charges defendant with Burglary in the Second Degree, does not suffer from the same deficiency that affects counts one through three. During a controlled telephone call, defendant made admissions as to his participation in the burglary charged in count four. Defendant's admissions provided sufficient corroboration for this count (see People v Lind, 20 AD3d 765, 767 [2005], lv denied 5 NY3d 830 [2005]).

People introduced into evidence a recording of a controlled telephone call between defendant and a codefendant on that date, defendant only made reference to a previous burglary during that call. The call did not provide any evidence to indicate that defendant was conspiring to commit a future crime, as the indictment charges. Accordingly, count six must be dismissed on this ground (see CPL 210.20 [1] [b]).

This shall constitute the Decision and Order of the Court.

DATED: Troy, New York
February 29, 2016



Andrew G. Ceresia
County Judge