SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-23

THE PEOPLE OF THE STATE OF NEW YORK X

-against-

HARRY DORVILIER
HARRY'S NURSES REGISTRY, INC.,

**Response to Defendants**
**CPL 330 Motion**
**Ind. #: 1709/2010**

Defendants,
X

State of New York )
ss.:
County of Queens )

I, Rosemary Buccheri, being an attorney at law admitted to practice in the Courts of this State and an Assistant District Attorney of the County of Queens, of Counsel to RICHARD A. BROWN, DISTRICT ATTORNEY of the County of Queens, attorney of record for the People of the State of New York, do hereby affirm the statements herein to be true under the penalties of perjury, except such as are made upon information and belief, which matters I believe to be true.

The defendants, acting in concert with each other, were convicted after a jury trial on May 10, 2012 of two counts each of Grand Larceny in the Third Degree and eleven counts of Grand Larceny in the Fourth Degree. The defendants now make this second motion pursuant to CPL § 330.30.

CPL § 330.30(1) authorizes a trial court to set aside a verdict if a ground appears in the record "which, if raised upon an appeal from a prospective judgment of conviction, would require

a reversal or modification of the judgment as a matter of law by an appellate court." In People v. Carter, 63 N.Y.2d 530 , the Court held that the section precluded a trial judge from re-weighing evidence. That is what the defendants are asking this Honorable Court to do at bar. Defendants motion lack merit and his supporting case law is not on point and therefore the motion must be denied.

The Court of Appeals has also held that "A court adjudicating a CPL § 330.30 motion may consider only issues of law which would require a reversal or modification of the judgment as a matter of law by an appellate court. (See CPL § 330.30[1] )." Under this section, a defendant who does not rest after the Court fails to grant a motion to dismiss at the close of the People's case, proceeds with the risk that she will supply a deficiency, if any, in the People's case. Thus, a defendant who presents evidence after a court has declined to grant a trial motion to dismiss made at the close of the People's case waives subsequent review of that determination. ( People v Hines, 97 NY2d 56, 61 [2001]).

Consistent with the overall truth-seeking function of a jury trial, the rationale underlying this rule is that a reviewing court should not disturb a guilty verdict by reversing a judgment based on insufficient evidence without taking into account all of the evidence the jury considered in reaching that verdict, including proof adduced by the defense. (Id).

At bar, the defendants did exactly that. They presented evidence in the form of a stipulation which contained evidence that the defendants had workers compensation insurance. Thus, defendants themselves proved that by having said insurance, that they stole the victims' monies.

Before the merits of defendant's arguments are refuted, the Court must be made aware of certain false statements proffered by counsel in his motion. He falsely claims that there was a trial conference in chambers where evidence was discussed. This is a blatent misrepresentation and must be dealt with accordingly. He also states that your Honor made certain remarks to trial counsel regarding that certain evidence should be presented to the jury. This is clearly also not true.

**Response to Defendant's Arguments as to Inconsistent Verdicts**

Defendant's reliance on People v. Muhammad 17 N.Y.3d 532, 959 N.E.2d 463, 935 N.Y.S.2d 526, 2011 N.Y. Slip Op. 07302 is clearly misplaced. First, it involves two other crimes than the one's the defendants were convicted at bar. In Muhammad, defendant was acquitted of murder but found guilty of assault. The Court of Appeals found that combination not to be repugnant.

At bar, the defendants convictions for two counts of Grand Larceny in the Third Degree and eleven counts of Grand Larceny in the Fourth Degree and the defendants acquittal on the charge of Scheme to Defraud in the First Degree are clearly not inconsistent or repugnant given the holding in Muhammad.

Defendant's motion must be denied as the Court of Appeals has held that a guilty verdict on one count should only be set aside as repugnant "if it is inherently inconsistent with a verdict of not guilty on another count and when the crimes charged in one count contain the same elements as the other count" (People v. LaPella, 135 A.D.2d 735, 522 N.Y.S.2d 637; see also, People v. Johnson, 70 N.Y.2d 819, 523 N.Y.S.2d 434, 517 N.E.2d 1320; People v. Tucker, 55 N.Y.2d 1, 447 N.Y.S.2d 132. "The critical concern is that an individual not be convicted for a crime on

which the jury has actually found that the defendant did not commit an essential element, whether it be one element or all. Allowing such a verdict to stand is not merely inconsistent with justice, but is repugnant to it." (People v Tucker, 55 NY2d 1, 6 (1981).

At bar, there is no element in scheme to defraud for which defendant was acquitted that is found in Grand Larceny, for which defendant was convicted. Defendants arguments lack merit as a conviction for grand larceny requires a jury to find that defendant intentionally stole property with a dollar amount and also by obtaining said property, in this case a sum of money in a single act as opposed to the scheme to defraud count that required an ongoing systematic course of conduct with an intent to defraud from ten or more persons but no specified dollar amount as is an essential element in the grand larceny counts. Therefore, the verdict was not inconsistent.

In addition, the Second Department, in a Queens County Case, has ruled in a case directly on point. In People v Lubarska, 143 AD2d 1048, 1049 (2d Dept 1988) specifically rejected a theory that an "acquittal on the charges of grand larceny and criminal possession of stolen property is inconsistent with her conviction of scheme to defraud. " ( Id.). As it did at bar, the charge in Lubarska accurately set forth the elements of the crimes charged. At bar, the element in both Grand Larceny in the Third Degree and Grand Larceny in the Fourth Degree is that the aggregate monetary value of the stolen property exceeds $3,000.00 in Grand Larceny in the Third Degree and the aggregate monetary value of the stolen property exceeds $1,000.00 in Grand Larceny in the Fourth Degree. However, monetary value is not an element of the charge of scheme to defraud in the first degree. Therefore the jury's verdict is not inconsistent or repugnant.

**Response to Defendant's Ineffective Assistance of Counsel**

Regarding defendant's second issue of ineffective assistance of the trial counsel, it is well settled that the trial's counsel's decision not to call a witness or witnesses is a strategic legal decision which does not amount to ineffective assistance of counsel (*see,* People v. Baldi, 54 N.Y.2d 137, 150–152, 444 N.Y.S.2d 893, 429 N.E.2d 400

In addition, the decision of the trial counsel to not call any witnesses was a trial strategy that he determined would be in the best interest of the defendants. Furthermore, the trial attorney cross examined witnesses and put on a defense which included a stipulation regarding the fact that the defendants had workers' compensation insurance with AIG. Finally, the jury deliberated for approximately two and half days before rendering their verdict.

For all the foregoing reasons, the People respectfully request that the defendants motion to set aside the jury verdict pursuant to CPL § 330.30 be denied in its entirety.

WHEREFORE, the People respectfully request the defendants motion be denied in all respects except as heretofore stated.

DATED: Kew Gardens, New York
September 26, 2012

Respectfully submitted,

RICHARD A. BROWN
DISTRICT ATTORNEY
QUEENS COUNTY

BY: _____

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TO: Clerk of the Court, Part K-23

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