State of New York
Court of Appeals

MEMORANDUM

No. 77
The People &c.,
Respondent,
v.
Omar Deleon,
Appellant.

Andrea Yacka-Bible, for appellant.
David A. Slott, for respondent.

MEMORANDUM:

The order of the Appellate Division should be modified in accordance with this memorandum and, as so modified, affirmed.

When considering a motion to dismiss an indictment for legal insufficiency of the evidence before the grand jury under CPL 210.20 (1) (b), a court is limited to determining whether there was "competent evidence which, if accepted as true, would establish every element of an offense charged" or any lesser included offense and the defendant's commission thereof (CPL 70.10; CPL 190.65 [1]; see People v Swamp, 84 NY2d 725, 730 [1995]; People v Bello, 92 NY2d 523, 525-26 [1998]). In other words, evidence presented to the grand jury is legally sufficient if "viewed in the light most favorable to the People, [and] if unexplained and uncontradicted, [it] would warrant conviction by a petit jury" (see People v Jennings, 69 NY2d 103, 114 [1986]). The attempted third- and fourth-degree larcenies with which defendant was charged required proof that defendant came "dangerously near commission of the completed crime" (People v McGee, 20 NY3d 513, 519 [2013]; see Penal Law § 110.00).

Viewed in the light most favorable to the People, the evidence presented to the grand jury was insufficient to demonstrate that defendant came dangerously close to taking property valued in excess of $3,000 or $1,000. There was no evidence that the items attached to defendant's mailbox fishing apparatus had any monetary value, no evidence of the volume of the mail contained in the mailbox or whether it was physically possible for defendant to procure the two money orders deposited in the mailbox by the government investigators amidst the other mail, no evidence as to whether the fishing device was immediately reusable, and no evidence that defendant intended to make successive attempts at fishing out the contents of the mailbox in question. Furthermore, the fact that defendant stated he would be paid $100 for each mailbox fished does not establish that he

came dangerously close to stealing property valued at more than $3,000 or $1,000. Accordingly, the Appellate Division erred in reversing the Supreme Court order entered upon reargument, which dismissed the attempted third-degree larceny count and reduced the attempted fourth-degree larceny count to the lesser included offense of attempted petit larceny (see Penal Law § 155.20).[1]

* * * * * * * * * * * * * * * * *

Order modified in accordance with the memorandum herein and, as so modified, affirmed. Chief Judge DiFiore and Judges Rivera, Stein, Fahey, Garcia, Wilson and Feinman concur.

Decided October 22, 2019

[1] The Appellate Division properly dismissed the appeal from the superseded Supreme Court order.