

then subtracts the improper evidence from the case presented before the grand jury and determines whether the remaining evidence would be legally sufficient to support the indictment.¹ Even if the Court finds that the evidence is sufficient to support the indictment, it must then determine whether “the probative force of that admissible evidence was so weak and the unfair prejudice so strong that it appears likely that the improper evidence was the decisive factor in the grand jury’s decision to indict.”²

B. Hearsay:

Criminal Rule 6(r) generally states that evidence that would be admissible at trial shall be admissible at grand jury. The rule continues that in “in appropriate cases,” witnesses may be presented to “summarize admissible evidence.” However, in the very next sentence, and for the first time in the passage, the rule specifically addresses hearsay evidence and warns that “hearsay evidence shall not be presented to the grand jury *absent compelling justification* for its introduction.”³ The rule goes on to say that the reasons for presenting hearsay evidence shall be stated on the record. A plain and simple reading of the law is that the reasons for presenting hearsay evidence shall be stated on the record at the grand jury, and not at some later point in time. That did not happen in this case and the near entirety of the evidence heard by the grand jury did not comply with Alaska law.

¹ *Stearns v. State*, 827 P.2d 442, 446 (Alaska App. 1992), *citing Oxereok v. State*, 611 P.2d 913, 916 (Alaska 1980).

² *Id.*

³ Emphasis added.

C. Sufficiency of the Evidence:

In evaluating the sufficiency of the evidence before the grand jury, the court must draw all legitimate inferences in favor of the indictment, and view the evidence in the light most favorable to upholding the indictment.⁴ The evidence is legally sufficient to support an indictment “when all evidence taken together, if unexplained or uncontradicted, would warrant a conviction of a defendant.”⁵

III. DISCUSSION

A. The Grand Jury:

PFD Investigator Shawn Stendevad was the only witness at the grand jury. Mr. Maw was not interviewed by the investigator. Rather, the entirety of the grand jury record is essentially 481 pages of eight exhibits gathered from a variety of sources and covering a period of several years. A records custodian or someone associated with the exhibits did not testify at the grand jury.

A transcript of the grand jury proceedings was provided by Mr. Maw. In addition, the State introduced eight exhibits referenced above. The exhibits included the following: Exhibit #1, PFD records; Exhibit #2, Alaska Airline records; Exhibit #3, a short letter or summary by Special Agent Tim Brady of voluminous records of the Department of Homeland Security; Exhibit #4, employment records for the United Cook Drift Association (which Mr. Maw does not contest); Exhibit #5, records of the Montana Fish and Wildlife Department; Exhibit #6, a

⁴ *State v. Ison*, 744 P.2d 416, 418 (Alaska App. 1987); *Gustafson v. State*, 845 P.2d 751, 759 (Alaska App. 1993).

⁵ Alaska Rules of Crim. 6(q).

single page jury questionnaire, contained in the PFD records, allegedly completed by Mr. Maw. The remaining two exhibits, Exhibits #7 and #8, are summaries of exhibits and other information from Investigator Stendevad; in other words, hearsay on hearsay. Copies of the exhibits were later reduced to a CD and submitted with the grand jury transcript and Mr. Maw's motion to dismiss. Further, the State filed an opposition to Mr. Maw's motion that included three documents entitled "certification of records" purported to reference PFD records and Alaska Airlines records for Mr. Maw. The "certifications" were submitted almost nine months after Mr. Maw was indicted and after he filed his motion to dismiss the indictment. There is no explanation for the tardy submission other than Mr. Maw's motion to dismiss.

B. Mr. Maw's Objections:

1. The exhibits contain hearsay and they were admitted without proper foundation or authentication.

Mr. Maw objects that the indictment was based on exhibits that were hearsay and not properly authenticated. The State opposes, citing Criminal Rule 6(r), and stating that evidence which is legally admissible at trial is admissible at the grand jury. In addition, the State asserts witnesses may be presented to summarize evidence that will later be admissible at trial.

Mr. Maw and the State disagree on whether all or some of the records are business records or public records. But that is not the issue; the issue is whether or not the exhibits were properly presented to the grand jury. The court finds that they were not and the indictment should be dismissed because of the prejudice suffered by Mr. Maw as a result.

The State argues the exhibits are admissible hearsay because they are either business records or public records. Mr. Maw opposes and states the exhibits were improperly admitted,

because they were presented through a witness who had insufficient knowledge to lay a foundation for their admission. In addition, Mr. Maw contends that they were not properly authenticated.

First, the exhibits are clearly hearsay, and while they may be either business or public records and fall within a hearsay exception, the necessary procedures were not followed at the grand jury that would provide the necessary foundation for their admissibility. That is, there was no foundation presented that would permit the State to benefit from either of these two exceptions of business and public records. The exhibits were introduced by Investigator Stendevad (and the prosecutor) and there was no showing at the grand jury that she was qualified to provide the necessary foundation for the admission of the exhibits. Because the exhibits were introduced absent proper foundation, the admission was improper.

Second, the exhibits were not properly authenticated. The prosecutor's comment that certified copies of the exhibits would be available for trial does not remedy the issue. The subsequent availability of authenticating evidence is not justification for the submission of improper evidence at the grand jury. Such an abbreviated and causal process denies the grand jury the opportunity to consider the worth of the evidence and equally denies Mr. Maw a fair hearing on evidence that goes to the heart of the prosecution. Because the exhibits were introduced absent proper authentication, they were improperly introduced.

Finally, and more important, hearsay is only admissible before the grand jury if there is a “compelling justification.”⁶ Such findings are not extraordinary.⁷ However, when hearsay is admitted before a grand jury based on compelling justification, the reasons for its admission must be stated on the record.⁸ Here, not only was no compelling justification placed on the record, the grand jury was instructed to accept as face value that additional evidence would be provided to establish the accuracy of the exhibits sometime in the future. It is important to note the grand jury was instructed, to accept what was offered and make a decision on that information without additional facts. That is, the grand jury was prevented from hearing evidence critical to their evaluation of the weight to be assigned the exhibit. That said, the grand jury was not even told that the near entirety of the case at the grand jury was based on evidence that was hearsay. Instead, the grand jury was instructed to accept that Mr. Maw was the source of all information contained in the exhibits.⁹

As noted above, when improper evidence is presented before the grand jury, the court must subtract the improper evidence from the case presented to the grand jury and determine

⁶ Criminal Rule 6(r)(1).

⁷ *Preston v. State*, 615 P.594, 598 (Alaska 1980).

⁸ *State v. Skan*, 511 P.1296 (Alaska 1973); Criminal Rule 6(r)(1).

⁹ Mr. Maw also contends the failure to produce the actual copies of any of the specific questions was a violation of the best evidence rule, as provided in Evidence Rule 1002. The rule states that to prove the content of a writing, the original writing is required. Mr. Maw argued the failure to produce the actual question is a violation of the rule. Arguably, Mr. Maw is correct, but Investigator Stendevad testified to her experience regarding PFD applications and, as to this specific issue present in this case, provided the grand jury with the necessary information as to the context of the question. That said, the court remains troubled as to the manner in which hearsay evidence was submitted and the failure of the State to properly address the issue at the grand jury. As noted above, the great mass of evidence heard by the grand jury was hearsay, admitted without exception or evidentiary support.

whether the remaining evidence would be legally sufficient to support the indictment. Even if the court finds the remaining evidence is sufficient to support the indictment, it must then determine whether the probative force of the admissible evidence was so weak and the unfair prejudice so strong that it appears likely that the improper evidence was the decisive factor in the grand jury's decision to indict. Here, the very great majority of evidence was hearsay evidence improperly admitted without exception or evidentiary support. The case against Mr. Maw at the grand jury was all about the admission of hearsay documents, offered for the truth of the matter. It is as simple as that. At grand jury there is no judge present; there is no defense attorney to object. Instead, there are rules of law that require the admission of legal evidence based on the law of foundation and authentication. However, in this case, time after time, inadmissible evidence was presented to the grand jury on a promise that more complete evidence was on the way. Much more is required when so much is at stake, when nearly an entire case is based solely on hundreds of pages of dated documents, assembled by others, and later used to subject a citizen to multiple felony convictions and a loss of freedom. Essentially, there was no other evidence on which the grand jury was asked to conclude that it was Mr. Maw "who was sitting in the chair clicking the mouse."¹⁰ A grand jury may lack the same detail and formality as a trial presentation, but the process still requires sufficient attention and respect to require a proper foundation for its evidence just as it would at trial. Failing to do so discredits the process. Thus, the court finds the remaining evidence would not be legally sufficient to support the indictment. Further, even if the court were so to find the remaining evidence is

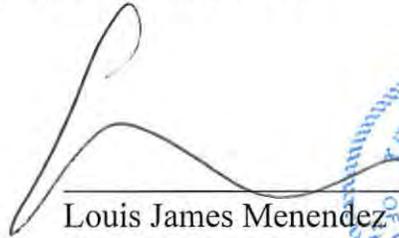
¹⁰ Grand Jury Transcript, p. 40, lines 20-22.

sufficient to support the indictment, the probative force of the admissible evidence is so weak and the unfair prejudice to Mr. Maw is so strong that it appears very likely that the improper evidence was a factor in the grand jury's decision to indict.

IV. CONCLUSION

Therefore, based on the above-referenced findings, Mr. Maw's motion to dismiss the indictment is GRANTED.

Entered at Juneau, Alaska this 3 day of January, 2017.



Louis James Menendez
Superior Court Judge



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