

People v Rosario

2017 NY Slip Op 32990(U)

December 15, 2017

County Court, Westchester County

Docket Number: 16-1115

Judge: Barbara G. Zambelli

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This opinion is uncorrected and not selected for official publication.

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
THE PEOPLE OF THE STATE OF NEW YORK

- against -

DECISION & ORDER

FILED

Indictment No.: 16-1115

DUERY ROSARIO,

DEC 18 2017

TIMOTHY C. IDONI
County Clerk
COUNTY OF WESTCHESTER
-----X

ZAMBELLI, J.

The following papers numbered 1 to 5 were read on this motion to set aside the verdict pursuant to CPL Article 330.30:

PAPERS NUMBERED

Notice of Motion, Rita Affirmation in Support & Exhibits A-G	1-3
Affirmation in Opposition & Memorandum of Law	4-5

Upon the foregoing papers it is ordered that this motion is denied.

On October 24, 2017, the defendant was convicted, after a jury trial in this Court (Zambelli, J.) of attempted assault in the first degree, criminal possession of a weapon in the second degree, reckless endangerment in the second degree and obstructing governmental administration in the second degree. The defendant now moves to set aside the verdict and for a new trial pursuant to CPL §330.30. He argues that the verdict should be set aside and a new trial granted on several grounds. Specifically, defendant alleges that the People committed prosecutorial misconduct. Defendant alleges misconduct due to the People's alleged failure to timely disclose trial witness "JA"¹ to the defense; because

¹The witness' name has been reduced to initials in order to protect the witness' identity.

he submits that the People improperly alleged at trial that defendant was a member of a "group" which led to him being the victim of a prior shooting, and because the People allegedly improperly cross-examined defendant as to the contents of an affirmation made by a prior attorney when defendant had been previously subject of a CPL §730 examination and found by a psychologist to be unfit to proceed; defendant further submits that the People committed misconduct by offering three of defendant's mug shots into evidence. In addition to his allegations of prosecutorial misconduct, defendant further argues that the verdict herein should be set aside on the grounds of newly discovered evidence, in that he alleges that one of the People's witnesses, Det. Didio (who was off duty but present at the bar where the incident occurred and was a witness to it), retired on January 13, 2017, and as this witness had claimed an injury to his knee in dealing with defendant, defendant submits that "in the event" that Det. Didio received enhanced benefits as a result of his injury, this information should have been disclosed as Brady material. Defendant also argues that the verdict should be set aside on grounds of juror misconduct, in that he submits that Juror #10 allegedly "failed to disclose his pronounced identification with police officers as well as contacts with Yonker's [sic] Uniformed Service Officers", and because another juror ("HG") called in to say his wife was sick and "seemingly excused himself from trial." Lastly, defendant argues that there was legally insufficient evidence to support his conviction for criminal possession of a weapon in the second degree. The People oppose the motion and argue that it should be summarily denied.

Pursuant to CPL §330.30(1), a trial court's authority to set aside a verdict is limited to grounds which, if raised on appeal, would require reversal as a matter of law. Thus, only

a claim that is properly preserved for appellate review may serve as a basis to set aside a verdict (People v. Josey, 204 A.D.2d 571 (2d Dept. 1994)).

Defendant's motion pursuant to CPL 330.30(1) is denied. As to defendant's claim of prosecutorial misconduct regarding the purportedly untimely disclosure of witness "JA", while defendant makes much of the fact that the People did not provide the statement of this witness until after the jury was sworn, the People allege that they did not learn of this witness' existence until that same day. In any event, the People's disclosure of this material was in accordance with CPL §240.45, which requires the prosecutor to make such disclosure to the defense "[a]fter the jury has been sworn and before the prosecutor's opening address...." As to his allegation that the People insinuated that defendant was "a member of a group or groups" in regard to a prior shooting in 2003 where defendant was the victim, as an initial matter, it is noted that defendant fails to attach any trial transcripts to his motion, or make any explicit reference thereto in support of his summarization and characterization of this testimony at trial. In any event, defendant had alleged in his trial testimony that he had no knowledge of violence or guns in the area where the current incident occurred, and that he had not previously been involved with any such activity. Based upon this testimony, the People properly inquired about the 2003 shooting, which occurred on the same street where the restaurant where the current shooting occurred while defendant was with a group of people. As defendant opened the door to this line of inquiry, the People asking him about the circumstances of his 2003 shooting was not improper (see People v. Wise, 46 N.Y.2d 321 (1978)). Defendant's allegation that he was somehow prejudiced by a reference to a group of people is speculative and conclusory. As to the fact that the People used an affirmation from defendant's former Legal Aid

attorney to impeach him, while in his motion defendant makes much over the fact that he was subject to a CPL Article 730 psychological evaluation, at trial (held, of course, after defendant was found fit for trial), defendant testified that he had assisted this prior counsel in the preparation of his defense. As defendant testified that he had been in a fight at the front of the restaurant, and as his prior counsel's affirmation had stated that defendant was on the dance floor (which is in the rear of the restaurant), given defendant's admission that he assisted his counsel in preparing his defense, the People were appropriately allowed to question defendant regarding the discrepancy between the two statements (see People v. Coleman, 195 A.D.2d 475 (2d Dept. 1993)). As to the contention that the People inappropriately introduced defendant's "mug shots" at trial (Defendant's Exhibit D), as conceded by defendant, this trial was largely based upon testimonial evidence, as the security cameras at the restaurant were not operational. Identity of the perpetrator was therefore a key issue, as the shooter was described by witnesses as a man with braided, dreadlocked hair wearing a gray t-shirt, which coincided with defendant's appearance upon arrest and in the photos. Moreover, unlike the situation in the case relied upon by defendant, People v. Mercado, 120 A.D.2d 619 (2d Dept. 1986), wherein it was held that defendant Mercado was prejudiced by the admission of photos depicting him posing with guns, there is nothing incriminating about the photos herein themselves, as they are merely "head shot" photos of defendant and there is nothing in the photos themselves which suggests illegal activity or involvement in the criminal justice system, despite the reference to the same as "mug shots". Given that the photos depicting defendant are directly relevant to issue of the identity, they were appropriately offered by the People for that purpose and admitted into evidence by the Court (People v. Aguilar, 79 A.D.3d 899 (2d

Dept. 2010)).

Defendant's motion on the ground of newly discovered evidence is also denied. To begin with, this evidence fails to meet the definition of newly discovered evidence. Defendant admits to receiving discovery from the People prior to trial which contained a supplemental report which reflected that Det. Didio claimed to injure his knee in the incident with defendant. Moreover, Det. Didio testified at trial held in October 2017 that he was retired and defendant offers no reason why, with due diligence, he could not have discerned this information prior to then, given that Det. Didio retired in January, 2017 according to information provided by defendant which was gleaned from a publically accessible web site (Defendant's Exhibit F). Thus, neither Det. Didio's knee injury nor his status as retired is "newly discovered evidence" as defined by the statute (CPL §330.30(3)). In any event, defendant's allegation that "it is an issue whether Mr. Didio had a motive to embellish his testimony in regard to securing and/or enhancing his retirement benefits" is pure, unsupported speculation on defendant's behalf, and he has further failed to establish in any way that the People were actually in possession of any such evidence so as to make it Brady material. Furthermore, defendant's argument makes no logical sense in regard to the convictions for attempted assault in the first degree, criminal possession of a weapon in the second degree and reckless endangerment in the second degree, convictions which are based upon observed behavior by defendant prior to Det. Didio's intervention in the matter and which also involved the testimony of civilian witnesses.

Defendant's motion based upon alleged juror misconduct is also unavailing. CPL §330.30 (2) provides that at any time after a guilty verdict and before sentence, a court

may set aside or modify the verdict on the grounds that “during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict.” CPL §330.40(2)(a) requires that the moving papers in support of such a motion “must contain sworn allegations, whether by the defendant or by another person or persons, of the occurrence or existence of all facts essential to support the motion. Such sworn allegations may be based upon personal knowledge of the affiant or upon information or belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief.” Moreover, proof of juror misconduct or improper conduct by another person in relation to a juror does not entitle a defendant to a new trial absent a showing of prejudice to a substantial right (People v. Rodriguez, 100 N.Y.2d 30, 35 (2003), citing People v. Irizarry, 83 N.Y.2d 557, 561 (1994); see People v. Cabrera, 305 A.D.2d 263 (1st Dept. 2003)).

Here, defendant alleges misconduct on the part of Juror #10 because the juror’s public Facebook posts contains photos of members of the Yonkers Fire Department, a photograph entitled “Thank you Det. Lemm” with an NYPD badge with a black band, and a photo of a non-uniformed person taking a cell phone photo with the caption “I stand behind the heroes who protect this line.” (Defendant’s Exhibit G). Based upon these photos, defendant concludes that the juror failed to disclose his “pronounced identification with police officers as well as contacts with Yonker’s [sic] Uniformed Service Officers”, which defendant argues should have been disclosed as a basis as why the juror could not be fair and impartial in dealing with police officer testimony.

Defendant's argument is without merit and is denied. As an initial matter, defendant's contention is that, essentially, Juror #10 lied during voir dire by failing to advise of his contacts with public service personnel. However, given this occurred during voir dire, this is not conduct which occurred outside of the presence of the Court and thus defendant fails to establish a legal basis for his motion (People v. Thomas, 24 A.D.3d 1242 (4th Dept. 2005), lv. denied, 6 N.Y.3d 819 (2006)). In any event, defendant fails to in any way to establish, and indeed, does not even allege, that by the mere presence of these posts on the juror's Facebook page, the juror could not be fair and impartial in defendant's case and there is nothing in the posts themselves that supports that conclusion.

Defendant's claim regarding sworn juror "HG" is even more speculative, as his only allegation herein is that HG called in to say his wife was sick and then "seemingly excused himself from trial." Defendant again fails to establish that any juror misconduct occurred which may affected any of his substantial rights (CPL §330.30(2)). To the extent that HG became unavailable for trial, he was replaced by an alternate juror and defendant fails to establish how he was prejudiced thereby.


Lastly, as to defendant's claim that there was legally insufficient evidence for his conviction for criminal possession of a weapon in the second degree, defendant's claim is without merit. A court reviewing legal sufficiency of the trial evidence must determine "whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the fact finder on the basis of the evidence at trial, viewed in the light most favorable to the People" (People v. Williams, 84 N.Y.2d 925, 926 (1994)). Applying that test to the evidence adduced at trial, the Court finds that the evidence was legally sufficient to establish that defendant was in possession of the

weapon. While the defendant couches his argument in terms of legal sufficiency, it is clear from the substance of his motion that what he seeks is for this Court to conduct a weight of the evidence review, as he submits essentially that factual discrepancies undermined the credibility of the People's case and that certain witnesses were not credible (such as the bouncer, whom defendant describes as a child rapist); however, weight of the evidence review is not permitted pursuant to CPL §330.30(1) (People v. Garcia, 272 A.D.2d 189 (1st Dept. 2000), lv. denied, 95 N.Y.2d 889 (2000)). It is also noted that in support of his argument, defendant cherry picks certain portions of the evidence which he submits supports his position, but chooses to ignore significant portions of the evidence which does not, which also supports the determination that defendant ultimately seeks an impermissible weight of the evidence review.

Defendant's motion to set aside the verdict is summarily denied in its entirety.

This Decision constitutes the Order of the Court.

Dated: White Plains, New York
December 15 2017



BARBARA G. ZAMBELLI
COUNTY COURT JUDGE

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