| **People v Freeman** |
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| 2014 NY Slip Op 32208(U) |
| May 27, 2014 |
| Sup Ct, Kings County |
| Docket Number: 2406/2011 |
| Judge: Albert Tomei |
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**DECISION and ORDER**

SUPREME COURT KINGS COUNTY (CRIMINAL TERM, PART 2)

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THE PEOPLE OF THE STATE OF NEW YORK BY: TOMEI, J.

v. DATED: MAY 19, 2014

ROGER FREEMAN, INDICTMENT NO. 2406/2011

Defendant.

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The defendant, Roger Freeman, was convicted following a jury trial of attempted murder in the first degree, conspiracy in the second degree, intimidating a victim or witness in the first degree (two counts) and criminal possession of a weapon in the second degree. Before sentence, the defendant filed a motion pursuant to CPL §330.30 to set aside the verdict, alleging that the court had erred 1) in denying the defense mistrial motion when the prosecution mistakenly played for the jury a portion of a recorded telephone call made by the defendant which included an admission of guilt, and for which the People had not obtained a pre-trial ruling regarding admissibility, 2) by granting a protective order, *ex parte*, regarding the name of the only witness who identified the defendant at trial, and 3) due to alleged prosecutorial misconduct in summation.

Criminal Procedure Law Section 330.30(1) provides that a court may set aside a verdict upon "[a]ny ground appearing in the record which, if raised on appeal from a prospective judgment of conviction, would require a reversal . . . of the judgment as a matter of law by an appellate court." In order for a court to set aside the verdict upon an alleged error committed at trial, the error must have been preserved for review by alerting the court to the issue at trial and by raising during trial the identical legal ground asserted in the motion to set aside the verdict. *See People v. Lawrence*, 85 NY2d 1002 (1995); *People v. Padro*, 75 NY2d 820 (1990); *People v. Carter*, 63 NY2d 530 (1984); *People v. Josey*, 204 AD2d 571 (2d Dept. 1994); *People v. Silas*, 308 AD2d 465 (2d

Dept. 2003); *People v. Patino*, 259 AD2d 502 (2d Dept. 1999). Trial courts have no authority to consider unpreserved issues on a motion to set aside the verdict (*Id.*), unless the issue constitutes a violation of a fundamental right. *See People v. Antommarchi*, 80 NY2d 247, 250 (1992). Moreover, even if an error is fully preserved, it does not require reversal as a matter of law when the error is harmless in light of the overwhelming evidence of guilt. *See People v. Levy,* 194 AD2d 319 (1st Dept. 1993); *People v. D'Alessandro*, 184 AD2d 114 (1st Dept. 1992).

The Recorded Statement

During trial, the court permitted the People to introduce several recorded telephone calls that defendant Freeman made from Rikers Island after his arrest on an unrelated matter in which he discussed this case and reached out to several persons to attempt to ensure that neither his then-girlfriend, her mother, or her family would tell the police that they knew him. While playing the tape for the jury, a transcript of the admitted portions was presented to the jury to use as an aid in understanding the conversations. In the gap between two telephone calls, but while the recording was ongoing, the defendant stated that he was never going home. This constituted an admission, but had not been included in the People's pre-trial motion to admit the defendant's statements. It was played by error for the jury twice. Defendant Freeman objected and moved for a mistrial on the grounds of prejudice. Therefore, his present claim is preserved for review.

The court ruled that the statement was precluded and gave a curative instruction to the jury that "[A]fter the close of the 9:20 a.m. call, you might have hear there was a pause and then you might have heard a male voice say something, all right. I don't know if you heard it or not, but if you did hear it, I am telling you now to disregard the statement made by that male voice. And do not speculate as to who the male voice belonged to. And further, when I say to disregard it, it has no

evidentiary value at all. Okay?" The court also ordered the People to prepare a new tape of the admitted conversations to replace the original exhibit which contained the precluded statement. Therefore, the court's actions were sufficient to cure the error which was, in any event, harmless in light of the overwhelming evidence of defendant Freeman's guilt.

The court admitted five telephone calls by defendant Freeman in which the defendant said he "fucked up" and "this shit is crazy" after being told that the victim of the shooting had survived and that the police were going to start looking for people once the victim was able to speak. He also expressed that it was "terrible" that the victim did not die and that he did not "do it right." Defendant Freeman also admitted being in the hallway at his girlfriend's apartment - - the location of the shooting - - and instructed both of his girlfriends not to tell the police that they know him and specifically to make sure that no one in the family of the girlfriend who lived at the shooting location was to reveal that they knew him. These properly admitted admissions of guilt preclude any prejudice from the stricken statement.

In addition, Nicole Williams, the mother of the girlfriend who lived at the shooting location, testified that defendant Freeman came to her apartment shortly before the shooting took place and that shortly after he left, she heard gunshots, looked out her window and saw the defendant and two other men getting into a vehicle parked outside which then drove off. The shooting victim was unable to identify defendant Freeman at trial, although he had identified him from a photo array immediately after the shooting. The victims' testimony regarding the sequence of events was corroborated by the cell phone records of defendant Freeman, his co-defendant Shamar Viera, and an unindicted accomplice, James Farmer, which placed each of them near the location in Coney Island where the victim was picked up prior to the shooting, near the shooting location in East New

York near the time of the shooting, and finally, back in Coney Island shortly after the shooting. In addition, a video tape of the location where the victim was picked up shows defendant Freeman inside the store with the victim, making a phone call, as reflected on the cell phone records . All of this evidence, taken together, overwhelmingly establishes the defendant's guilt. Therefore, the erroneous playing of the recorded statement by defendant Freeman that he was never going home is harmless.

Protective Order

The defendant objected to the court's having issued a protective order permitting the People to not disclose the name of Nicole Williams until she testified based on an *ex parte* application by the People. He argued that he should be permitted to review the motion papers and that he was prejudiced by the late disclosure of the witness. The defense is not entitled to a pre-trial disclosure of the identity of prosecution witnesses. *See* CPL § 250.20(2); *People v. Williams*, 243 AD 2d 833, 837 (3d Dept. 1997). Moreover, as New York law clearly permits the People to make *ex-parte* applications for protective orders, it was not error to do so in this case or to deny the defense request to review the motion papers. *See* CPL§§ 240.50, 240.90 (3); *People v. Contreras*, 12 NY3d 268, 273 (2009); *People v. Frost*, 100 NY 3d 129, 134-135 (2003); *People v. Boyd*, 164 AD2d 800, 802 (1st Dept. 1990). There is also no merit to the defendant's claim that he was prejudiced by the delayed disclosure of the name of the witness as she had made no prior statements or identification and there was no undisclosed *Rosario* material relating to her. In addition, the defendant was fully aware of the identity of this witness as she was his girlfriend's mother, he mentioned her in his admitted Rikers phone calls, and her telephone records had been turned over to the defense in discovery.

Finally, in this case, where the defendant was on trial for attempting to kill the only

identifying witness to a prior murder committed by his friend and co-defendant, Terell Viera, in order to prevent that witness from testifying at Terell Viera's trial, it was not an abuse of discretion to issue the protective order regarding the name of the only identifying witness in this case. Particularly where defendant Freeman knew the witness' name, address and telephone number and had made efforts prior to trial to ensure that she would not tell the police that she knew him. That defendant and his co-defendants were all incarcerated prior to trial was not a reason to deny the motion as co-defendant Terell Viera had also been incarcerated when the victim in this case was shot to prevent his testimony against Viera in the earlier trial.

Prosecutorial Misconduct in Summation

The defendant claims that the prosecutor committed misconduct in her summation by arguing that the defendant may have picked up the gun used to shoot the victim from the home of his girlfriend's mother, Nicole Williams, which he visited shortly before the shooting. The defendant did object to this argument, and moved for a mistrial. Although this claim is preserved for review, the court adheres to its earlier ruing that the argument was fair comment on the evidence. It is certainly not the type of comment that would require reversal as a matter of law on appeal.

The defendant's remaining claims of prosecutorial misconduct are not preserved for appellate review either because they were never advanced at trial or because the defendant failed to include them in his mistrial motion. See People v. Romero, 7 NY3d 911 (2006); *People v. Harris*, 98 NY32d 452 , 491 fn 18 (2004); *People v. Boyce*, 54 AD3d 1052 (2d Dept. 2008). The unpreserved claims may not be considered in a motion to set aside the verdict pursuant to CPL § 330.30. *See People v. Thomas*, 8 A.D.3d 303 (2d Dept. 2004); *People v. Amato*, 238 AD2d 432 (2d Dept. 1997).

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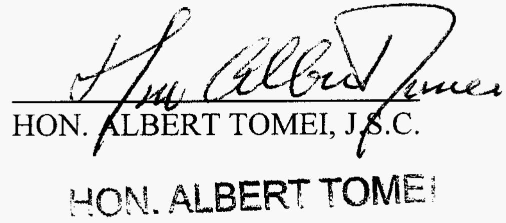
Therefore, and for the foregoing reasons, the defendant's motion to set aside the verdict pursuant to CPL § 330.30 is denied in all respects.

This constitutes the decision and order of the court.



HON. ALBERT TOMEI, J.S.C.

HON. ALBERT TOMEI

ENTERED

MAY 27 2014

NANCY T. SUNSHINE
COUNTY CLERK