People v Joseph Ogilvie
2019 NY Slip Op 33956(U)
May 10, 2019
County Court, Westchester County
Docket Number: Ind. No. 17-1136
Judge: George E. Fufidio
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COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

DECISION AND ORDER
Ind. No.17-1136

JOSEPH OGILVIE & TREMAINE GORDON,

Defendant.

----------X

FILED
MAY 13 2019
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

FUFIDIO, J.

The Defendant, Joseph Ogilvie, moves for an order pursuant to CPL 330.30 to set aside the jury trial verdict convicting him of one count of attempted assault in the first degree, one count of assault in the second degree and one count of criminal possession of a weapon in the fourth degree. The jury acquitted the Defendant of one count of attempted murder in the second degree.

By motion dated April 8, 2019, the Defendant argues that the guilty verdicts should be set aside pursuant to CPL 330.30. First because the Court erred by denying his request that the victim's testimony be stricken and that he be further precluded testifying, second because the Court should have granted the Defendant's request for a mistrial following testimony concerning the victim's mental health status, third, that the Court's *Sandoval* ruling was an abuse of discretion and fourth, that there is insufficient evidence of the Defendant's specific intent to cause serious physical harm as required for a conviction of assault in the first degree.

By Affirmation in Opposition, the People oppose the Defendant's claims and argue that the motion pursuant to CPL 330.30 (1) should be denied in its entirety since his arguments are insufficiently preserved or without merit.

After a verdict is rendered and before sentence is imposed, a defendant may move to set aside the verdict on "any ground appearing 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," (CPL 330.30[1]). Since the authority to set aside a verdict is limited to grounds which would require reversal or modification on appeal, only an error of

law which has been properly preserved for appellate review may serve as a basis for setting aside the verdict (*see People v Hines,* 97 NY2d 56 [2001]; *People v Josey*, 204 AD2d 571 [2d Dept 1994]; *People v Amato*, 238 AD2d 432, 433 [2d Dept 1997]; *People v Thomas*, 8 AD3d 303 [2d Dept 2004]). The Defendant's motion is denied for the following reasons:

A. STRIKING AND PRECLUDING THE VICTIM'S TESTIMONY

The Defendant's first claim is that the victim's testimony should have been stricken after he testified that at a meeting with Mount Vernon police officers, he was shown photographs of possible suspects. He asserts that this was, at a minimum, a violation of CPL 710.30 and that the proper remedy for that violation should have been the Court's disqualification of the victim's testimony and a declaration of mistrial. The Court agrees with the People who argue that the Defendant has not even shown that a violation of CPL 710.30 has occurred, much less that the remedy should have been a mistrial.

The plain language of the statute, in relevant part, requires that the People notify the defendant that they intend to offer testimony from a witness about the observation of the defendant at the time or place of the commission of the crime when that witness has previously identified the defendant from among other methods, being shown a photograph of him or her (CPL 710.30 [1][b]). Morever, the remedy for failing to notify the Defendant of such an identification and intent to offer such testimony of a contemporaneous viewing is that type of testimony may not be received against the defendant, unless he or she has had the opportunity, notice notwithstanding, to move to suppress that evidence (CPL 710.30 [3]). In this case, the victim never made a previous identification of the Defendant, nor did the People elicit testimony from the victim about his observation of the defendant contemporaneous to the commission of the crime, therefore, CPL 710.30 was not implicated at all and the Court made no error by ruling that the victim's testimony stands and by permitting his continued testimony.

The defendant next argues that the failure to notify the Defendant that the victim did not make *any* identification was a *Brady* violation. The Court agrees with the People's argument that this matter is unpreserved and, at their suggestion, for purposes of this decision, assumes *arguendo*, that the Defendant did preserve the matter for review.

Even if this were so, he has not shown that there is a reasonable possibility much less a

probability that the failure to disclose this information in any way contributed to the verdict (*People v Vilardi*, 76 NY2d 67 [1990]; *People v Thompson*, 54 AD3d 975 [2nd Dept. 2008]).

It is pure speculation on the Defendant's part that his picture was shown to the victim in the first place, but in any event informing the jury that the victim was unable or unwilling to identify the Defendant from a photograph is largely irrelevant because the victim never, at any point during the life of this case, even came close to going on record as identifying anyone as having attacked him. Moreover, the Defendant, who is somewhat unique looking, was depicted in what was a remarkably clear video of the crime, which was received in evidence.

There is no reasonable possibility that had the jury heard that the victim was unable to identify the Defendant that the verdict would have been different. Indeed, they did hear that the victim was shown pictures of suspects and that the victim did not select any of the people depicted and yet they still convicted him.

B. TESTIMONY REGARDING THE VICTIM'S MENTAL HEALTH STATUS

The second argument that the Defendant puts forth is that the Court abused its discretion by denying a mistrial following the People's questioning of the victim's mother concerning the victim's mental health problems. He argues that somehow this testimony concerning the victim's mental health was so prejudicial to him that even striking the testimony and giving a curative instruction could not cure the supposed defect and additionally that the People's question after the sustained objection, about the same subject matter, amounted to prosecutorial misconduct.

A criminal defendant is only guaranteed a fair trial, not a perfect one (*People v Mack*, 111 AD2d 266 [2nd Dept. 1985]). It is in the trial court's sound discretion to grant or deny a mistrial because the trial court is in the best position to determine whether or not an error was so egregious that the drastic remedy of a mistrial is necessary in order to protect the defendant's right to a fair trial (*People v Ortiz*, 54 NY2d 288 [1981]; *People v Williams*, 264 AD2d 745 [2nd Dept. 1999]). Thus it is incumbent upon the defendant to demonstrate that the court abused such discretion (*Ortiz* at 292). Generally, an application for mistrial is properly denied when there is a less drastic remedy available to cure the defect (*People v Young*, 48 NY2d 995 [1980]), such as, in this case, where a prompt and adequate curative instruction was given and when the defect

objected to is inadmissible testimony and improper questioning (*People v Santiago*, 52 NY2d 865 [1981]).

This Court is having trouble classifying the victim's mental health status as somehow prejudicial to the Defendant at all. At worst it is neutral evidence and at best, given how his Co-Defendant actually opened this particular evidentiary door by eliciting such information from the doctor that treated the victim's wounds it may have actually been helpful evidence for the defense.

At the time that this testimony was given there was still an issue as to whether or not the victim was going to testify and the evidence was being brought forth by the People in order to show why the victim may not testify. This issue was put to rest when, the next day, the victim did in fact come to court and testified. Regardless, in this particular context the status of the victim's mental health is certainly not the "powerfully incriminating" evidence it would have to be in order to negate a prompt and appropriately worded curative instruction (*People v Stone*, 29 NY3d 166 [2017]).

The Defendant's second contention under this ground is that the People engaged in misconduct by continuing to question the victim's mother about her son's mental health status after the Court sustained the defendant's objection. The Court finds this issue unpreserved for review (*People v Amato*, 238 AD2d 432 [2nd Dept. 1997]). Nevertheless, the Defendant has also not shown that the People's actions were flagrant and pervasive or egregious (*People v McCombs*, 18 AD3d 888 [3rd Dept. 2005]) nor in light of the discussion above, that anything the People did with respect to continued questioning of the victim's mother substantially prejudiced him (*People v Galloway*, 54 NY2d 396 [1981]).

C. THE COURT'S *SANDOVAL* RULING

The third ground set forth by the Defendant concerns the Court's *Sandoval* ruling. He alleges that the ruling prevented him from testifying on his own behalf, which he claims he wanted to do, and charges that had he not been prevented from testifying, that his testimony would have acquitted him.

As a preliminary matter the Court finds that the matter is not preserved for review; the Defendant having failed to raise this specific issue at the time of the ruling or at a later time when the Court is in a position to change its initial ruling (*People v Jackson*, 29 NY3d 18 [2017]). However, the Defendant has also not shown that the Court abused its discretion as a matter of

law (*People v Walker*, 83 NY2d 455 [1994]) in that its ruling was arbitrary or unreasonable (*People v Harrison*, 27 NY3d 281 [2016]).

In particular, the Defendant complains that by allowing the People to question him about a 2009 youthful offender adjudication for possessing a gun and a large amount of marijuana, the Court improperly authorized the People to potentially introduce propensity evidence. He asserts this case and the 2009 YO adjudication are too factually similar. The Court disagrees.

The facts underlying the youthful offender adjudication, as the Court found them, were a passive possession of a gun and a large quantity of marijuana, sufficiently dissimilar from the facts presented in this case which was the active possession, and use on another person, of a knife or other sharp object. The former is more likely indicative of a narcotics offense, such as drug dealing, while the latter is, as this case was, indicative of an assault. Even if it was sufficiently similar, that would not necessarily shield the defendant from cross-examination (*People v Rahman*, 46 NY2d 882 [1979]; *People v Adams*, 174 AD2d 626 [2nd Dept. 1991][a defendant will not be shielded from cross-examination simply because he specializes in a certain type of crime]). The probative value of the youthful offender adjudication was that it is evidence of the Defendant putting his own self interest above that of the community at large (*People v Keener*, 152 AD3d 1073 [3rd Dept. 2017]). Critically, in reaching this compromise, the Court precluded the People from inquiring about the majority of the Defendant's convictions, youthful offender adjudications and open cases.

Finally, the Defendant again offers no support for his claim that had he testified he would have been acquitted. The evidence against the Defendant was extraordinarily strong and consisted of, at a minimum, an extremely clear video recording of the assault. Although there was no direct testimony about the Defendant possessing a knife or other sharp object, the circumstantial evidence and the evidence captured on the video recording comprising of among other things, his Co-Defendant's actions that were consistent with handling a knife, his own actions that were consistent with handling and using a knife and the wounds sustained by the victim, all pointed to the Defendant possessing a weapon. Which is what the jury found.

D. SUFFICIENCY OF THE EVIDENCE

The Defendant's last contention is that the People did not present sufficient evidence to sustain the conviction for attempted assault in the first degree, specifically that they were unable to show that the Defendant possessed the requisite intent. He argues that the location and

severity of the injuries, coupled with an acquittal for attempted murder in the second degree, demonstrates that the People could not have proven that the Defendant possessed the intent to cause serious physical injury. This claim is also without merit.

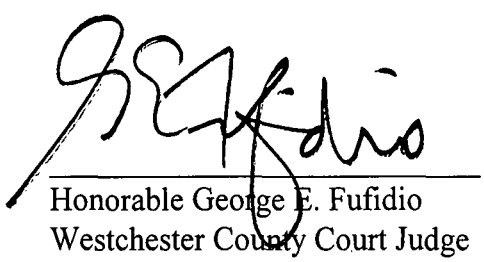
The standard for setting aside a verdict under CPL 330.30 is, after viewing the evidence and the reasonable inferences drawn from it, in the light most favorable to the People, could *any* rational juror have found that the People proved the essential elements of the charged crime beyond a reasonable doubt (*People v Contes* 60 NY2d 620 [1983]).

It is evident that when applying the law to even the barest recitation of facts presented; that is that the Defendant who was armed with a sharp object, repeatedly stabbed the victim in and around his chest and heart, that this standard has been met, regardless of the actual extent of the injuries the victim sustained (*see; People v Gilford*, 65 AD3d 840 [1st Dept. 2009]; *People v Elliot*, 299 AD2d 731 [3rd Dept. 2002]; *Matter of Carlton P.*, 143 AD2d 833 [2nd Dept. 1988][the "mere fortuity" that physical injury was not inflicted does not preclude a conviction for attempted assault]; *People v Mazariego*, 117 AD3d 1082 [2nd Dept. 2014][sustaining an attempt conviction even though the victim did not sustain serious physical injury; the evidence demonstrated that the defendant came dangerously close to completing the crime which required the infliction of serious physical injury]).

Based on the foregoing, it is hereby ordered that the motion is DENIED in its entirety.

The foregoing constitutes the opinion, decision and order of this court.

Dated: White Plains, New York
May 10, 2019



Honorable George E. Fufidio
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