

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D19114
Y/prt

_____AD3d_____

Argued - March 20, 2008

WILLIAM F. MASTRO, J.P.
FRED T. SANTUCCI
RANDALL T. ENG
ARIEL E. BELEN, JJ.

2006-03820

DECISION & ORDER

The People, etc., respondent,
v Cory Sanders, appellant.

(Ind. No. 93/03)

Lynn W. L. Fahey, New York, N.Y. (Sarah J. Berger of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano and Karen Wigle Weiss of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Cooperman, J.), rendered March 30, 2006, convicting him of murder in the second degree and criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant was indicted on charges of murder in the second degree and criminal possession of a weapon in the second degree for the shooting death of the victim. The defendant's first trial ended in a mistrial when the jury became deadlocked. At the conclusion of the second trial, the defendant was convicted of both murder in the second degree and criminal possession of a weapon in the second degree.

Contrary to the defendant's contention, his retrial did not violate the constitutional prohibition against double jeopardy. A retrial is not barred by the double jeopardy clause if it is granted after a trial judge discharges a genuinely deadlocked jury. "Generally, the declaration of a mistrial due to a deadlocked jury is a matter of discretion for the Trial Judge, who is in the best position to determine whether a mistrial is required under the circumstances of the case, and this decision must be accorded great deference" (*Matter of Jeffrey v Firetog*, 45 AD3d 770, citing *Matter*

May 13, 2008

PEOPLE v SANDERS, CORY

Page 1.

of *Martin v Hynes*, 259 AD2d 547, 548; see *Matter of Plummer v Rothwax*, 63 NY2d 243). Here, the jury in the defendant's first trial deliberated for three days, and reported its inability to reach a verdict a total of four times. After receiving the jury's third note indicating their inability to reach a unanimous verdict, the trial court provided an *Allen* instruction (see *Allen v United States*, 164 US 492). Only after the jury sent its fourth note stating that the jurors were resolute in their decisions and remained deadlocked did the court declare a mistrial. Under these circumstances, the jury appeared to be genuinely deadlocked, and it would have served no purpose to require it to continue deliberations (see CPL 310.60[1][a]; *Matter of Plummer v Rothwax*, 63 NY2d 243; *Matter of Smith v Marrus*, 33 AD3d 708, 709; *Matter of Brown v Brown*, 263 AD2d 455; *Matter of Martin v Hynes*, 259 AD2d 547). Accordingly, the court providently exercised its discretion in declaring a mistrial, and no bar to the defendant's retrial existed.

We reject the defendant's contention that the court should have declared a mistrial during his second trial because a witness was identified as a "Corrections Counselor," and thereafter made a brief reference to "inmates." Although the defendant alleges that this evidence implied that he had a criminal record, any prejudice was alleviated by the court's prompt curative instructions (see *People v Young*, 48 NY2d 995; *People v Smith*, 299 AD2d 500; *People v Carillo*, 297 AD2d 288; *People v Boston*, 296 AD2d 576).

The defendant received the effective assistance of counsel at his second trial (see *People v Benevento*, 91 NY2d 708, 712; *People v Baldi*, 54 NY2d 137, 147).

MASTRO, J.P., SANTUCCI, ENG and BELEN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court