

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

D33301
O/kmb

_____AD3d_____

Argued - November 17, 2011

MARK C. DILLON, J.P.
RANDALL T. ENG
ARIEL E. BELEN
LEONARD B. AUSTIN, JJ.

2010-07147

DECISION & ORDER

The People, etc., respondent,
v Al Elias, appellant.

(Ind. No. 2253/09)

Lynn W. L. Fahey, New York, N.Y. (Steven R. Bernhard of counsel), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Amy Appelbaum, and Terrence F. Heller of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Carroll, J.), rendered July 19, 2010, convicting him of attempted assault in the first degree, criminal possession of a controlled substance in the third degree, and criminal possession of a weapon in the fourth degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

After the second day of testimony at the defendant's trial, an alternate juror reported to a court officer that other jurors had made comments indicating they were discussing the case and had begun deliberating on the outcome. The trial court then conducted in camera interviews of every juror and alternate juror in the presence of the prosecutor, defense counsel, and the defendant, resulting in the dismissal of Juror Three on consent. However, Juror Twelve and Alternate Juror One, who denied commenting on the proceedings or did not remember hearing others discuss the case, and assured the court that they had not reached a conclusion as to the defendant's guilt and would deliberate based on all the evidence, were retained over defense objection. The trial court retained these jurors despite the fact that other jurors indicated that these jurors had been in the presence of Juror Three when he commented about the case.

December 20, 2011

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If a court finds that a juror is grossly unqualified to serve in a case, or has engaged in misconduct of a substantial nature, the court must discharge such juror (*see* CPL 270.35; *People v Buford*, 69 NY2d 290, 299-300). In making a determination of whether a juror is grossly unqualified, the trial court must conduct a probing, tactful inquiry into the specific circumstances, and must question each allegedly unqualified juror individually in camera in the presence of the attorneys and the defendant (*see People v Gibian*, 76 AD3d 583; *People v Arena*, 70 AD3d 1044; *People v Foddrell*, 65 AD3d 1375, 1377; *People v Littebrant*, 55 AD3d 1151; *People v Dombroff*, 44 AD3d 785, 787; *People v Stephens*, 22 AD3d 691; *People v Simon*, 224 AD2d 458; *People v Mack*, 224 AD2d 448, 449; *People v Horney*, 112 AD2d 841, 843). Where this has occurred, the Supreme Court's determination will be accorded latitude and great deference, and should be set aside only where the error is manifest (*see People v Littebrant*, 55 AD3d 1151).

Here, the record supports the Supreme Court's determination to retain Juror Twelve and Alternate Juror One in light of their professed ability to keep an open mind and to base their decisions on the evidence and the law as instructed by the court (*see People v Foddrell*, 65 AD3d 1375; *People v Dombroff*, 44 AD3d 785; *People v Stephens*, 22 AD3d 691; *People v Simon*, 224 AD2d 458).

The sentence imposed was not excessive (*see People v Farrar*, 52 NY2d 302, 305; *People v Suitte*, 90 AD2d 80, 83-86).

DILLON, J.P., ENG, BELEN and AUSTIN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court