

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

D36209
C/kmb

_____AD3d_____

Argued - September 13, 2012

MARK C. DILLON, J.P.
RUTH C. BALKIN
LEONARD B. AUSTIN
JEFFREY A. COHEN, JJ.

2010-01418

DECISION & ORDER

The People, etc., respondent,
v Rafael Cosme, appellant.

(Ind. No. 8307/08)

Lynn W. L. Fahey, New York, N.Y. (Reyna E. Marder of counsel), for appellant, and appellant pro se.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Jodi L. Mandel, Anthea H. Bruffee, and Shannon Hanson [Clifford Chance US, LLP], of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Tomei, J.), rendered February 4, 2010, convicting him of robbery in the first degree, upon a jury verdict, and imposing sentence upon his adjudication as a second violent felony offender.

ORDERED that the judgment is modified, as a matter of discretion in the interest of justice, by vacating the defendant's adjudication as a second violent felony offender and the sentence imposed thereon; as so modified, the judgment is affirmed, and the matter is remitted to the Supreme Court, Kings County for resentencing in accordance herewith.

The defendant's challenge to the trial court's *Sandoval* ruling (*see People v Sandoval*, 34 NY2d 371) is without merit. The defendant failed to meet his burden of demonstrating that the prejudicial effect of cross-examination regarding certain prior convictions so outweighed the probative worth of that evidence that exclusion was warranted (*see id.* at 378; *People v Harris*, 74 AD3d 984, 984-985). The trial court's "*Sandoval* compromise" (*People v Smith*, 18 NY3d 588, 597-599 [Pigott, J., concurring]), therefore, was not an improvident exercise of discretion (*see People v Harris*, 74 AD3d at 984-985; *People v White*, 60 AD3d 1095, 1096).

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The defendant's claim of error regarding the trial court's handling of a jury note, raised in his pro se supplemental brief, does not constitute a mode of proceedings error (*see People v Starling*, 85 NY2d 509, 516), and therefore requires preservation as a question of law (*see* CPL 470.05[2]; *People v Gerrara*, 88 AD3d 811, 812-813; *cf. People v O'Rama*, 78 NY2d 270). The defendant failed to preserve his claim for appellate review (*see People v Gerrara*, 88 AD3d at 813), and we decline to review it in the exercise of our interest of justice jurisdiction (*id.*).

As the People correctly concede, the defendant's prior conviction under the federal bank robbery statute (*see* 18 USC § 2113), does not constitute a predicate violent felony conviction (*see* Penal Law § 70.04[1][b][i]; *People v Walker*, 185 AD2d 951, 952; *People v Sellers*, 168 AD2d 583, 583-584). Although the defendant did not preserve for appellate review his contention that he was improperly adjudicated as a second violent felony offender based upon that federal conviction, we review his present claim as a matter of discretion in the interest of justice (*see People v Horvath*, 81 AD3d 850, 851). In so doing, we vacate the defendant's adjudication as a second violent felony offender and the sentence imposed thereon, and remit the matter for resentencing (*see id.*; Penal Law § 70.06[1][b][i]).

DILLON, J.P., BALKIN, AUSTIN and COHEN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court