

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

D36902
W/hu

_____AD3d_____

Argued - May 22, 2012

PETER B. SKELOS, J.P.
ANITA R. FLORIO
PLUMMER E. LOTT
ROBERT J. MILLER, JJ.

2010-05881

DECISION & ORDER ON MOTION

The People, etc., respondent,
v Jamel Walston, appellant.

(Ind. No. 10390/08)

Motion by the appellant for leave to reargue an appeal from a judgment of the Supreme Court, Kings County, rendered June 8, 2010, which was determined by decision and order of this Court dated July 5, 2012.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is,

ORDERED that the motion is granted, and upon reargument, the decision and order of this Court dated July 5, 2012 (*People v Walston*, 97 AD3d 609), is recalled and vacated and the following decision and order is substituted therefor:

Lynn W. L. Fahey, New York, N.Y. (Kendra L. Hutchinson of counsel), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Rhea A. Grob of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Firetog, J.), rendered June 8, 2010, convicting him of manslaughter in the first 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's contention that he was deprived of the effective assistance of counsel is without merit. The defendant's claim is based upon defense counsel's failure to request a charge

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of manslaughter in the second degree as a lesser-included offense of murder in the second degree. “What constitutes effective assistance is not and cannot be fixed with yardstick precision, but varies according to the unique circumstances of each representation” (*People v Baldi*, 54 NY2d 137, 146). The critical issue is whether, viewing the evidence, the law, and the circumstances of the case together as of the time of representation, defense counsel provided meaningful representation (*see People v Hobot*, 84 NY2d 1021; *People v Benn*, 68 NY2d 941; *People v Baldi*, 54 NY2d at 146). Moreover, under the federal standard, to prevail on a claim of ineffective assistance of counsel, a “defendant must show that counsel’s representation fell below an objective standard of reasonableness” and “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different” (*Strickland v Washington*, 466 US 668, 688, 694; *see People v Bodden*, 82 AD3d 781).

Here, defense counsel was correct in declining to ask for a charge on manslaughter in the second degree because there is no reasonable view of the evidence that would have supported a finding that the defendant acted recklessly in repeatedly shooting the victim (*see People v Henderson*, 41 NY2d 233, 235; *People v Etienne*, 250 AD2d 776). The defendant was provided with meaningful representation (*see People v Benevento*, 91 NY2d 708; *People v Wiggins*, 89 NY2d 872; *People v Hobot*, 84 NY2d at 1021; *People v Baldi*, 54 NY2d at 146; *People v Frye*, 210 AD2d 503; *People v Sullivan*, 153 AD2d 223).

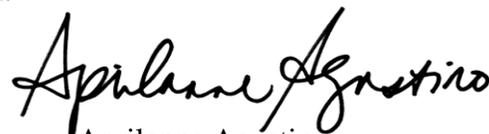
The defendant additionally contends, relying upon the United States Supreme Court’s decision in *Presley v Georgia* (558 US 209), that his right to a public trial was violated when the Supreme Court temporarily excluded observers from the courtroom during initial portions of the voir dire because there was seating available only for the prospective jurors. However, at no point during voir dire did the defendant raise any objection to the temporary closure of the courtroom. Accordingly, the defendant’s claim that his right to a public trial was violated is unpreserved for appellate review (*see People v Alvarez*, 20 NY3d 75), and we decline to review it in the exercise of our interest of justice jurisdiction (*see CPL 470.05[2]*).

The defendant’s contention that the Supreme Court’s procedure for handling a certain jury note violated the procedure set forth by the Court of Appeals in *People v O’Rama* (78 NY2d 270, 277-278) is unpreserved for appellate review (*see People v Ramirez*, 15 NY3d 824). Furthermore, the alleged error did not constitute a mode of proceedings error which would obviate the preservation requirement (*see People v Alcide*, 95 AD3d 897, 898, *lv granted* 19 NY3d 956; *People v Bryant*, 82 AD3d 1114, 1114; *cf. People v Lockley*, 84 AD3d 836), and we decline to review it in the exercise of our interest of justice jurisdiction (*see CPLR 470.05[2]*).

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80).

SKELOS, J.P., FLORIO, LOTT and MILLER, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court