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No. 8
The People &c.,
Respondent,
v.
Corey Gamble,
Appellant.

Submitted by appellant pro se.
Hannah E. C. Moore, for respondent.
Alan J. Pierce, amicus curiae.

CIPARICK, J.:

This appeal raises several questions for our review. The principal question we are called upon to determine is whether courtroom seating arrangements wherein court officers stationed themselves directly behind defendant during the course of his trial deprived him of his constitutional right to communicate

confidentially with his attorney and prejudicially conveyed to the jury that he was dangerous. We conclude that the positioning of the court officers in this case did not infringe upon defendant's constitutional right to counsel or deprive him of a fair trial.

The other significant question we are asked to consider is whether Supreme Court abused its discretion when it permitted the People under Molineux to introduce certain evidence of defendant's uncharged crimes and whether the People's evidence elicited at trial exceeded the scope of such ruling. We conclude that Supreme Court's decision to admit this evidence was appropriate.

I.

A Bronx County grand jury charged defendant with three counts of murder in the first degree (Penal Law § 125.27 [1] [a] [viii]) and three counts of murder in the second degree (Penal Law § 125.25 [1]). The indictment alleged that on March 15, 2003, defendant killed Eunice Younger and her two adult children, Ricky Younger and Gloria Watson (the Youngers), by shooting them in the head inside their apartment. Prior to trial, defendant moved to suppress, as relevant here, his identification in a lineup by two eyewitnesses. Defendant contended that counsel represented him on a related matter and that, therefore, law enforcement violated his right to counsel when they conducted a lineup without notifying his attorney. Supreme Court denied the

motion, reasoning that "[a] defendant who is not represented on a case for which he is in custody, but who is represented by an attorney on an unrelated case, has no right to the presence of that attorney at a lineup relating to the case in which he is not represented."

Also before trial, the People moved for the admission of certain uncharged crimes and prior bad acts allegedly committed by defendant, maintaining that the proffered testimony was relevant on the issues of "identity of the perpetrator, intent, motive and background." According to the People, their theory of the case was "that these homicides were the culmination of approximately a year-long series of incidents between defendant" and the Youngers, defendant's upstairs neighbors. In support of this theory, the People sought permission to elicit testimony from Cortina Watson, decedent Gloria Watson's daughter, and Marvin Ford, Gloria's boyfriend. The gravamen of the proposed testimony would be that defendant assaulted and threatened them and the Youngers on several occasions in the year prior to the shootings.

Following an initial hearing, written submissions by the parties and a subsequent reargument motion on the matter, Supreme Court limited Cortina Watson's testimony at trial as follows: on the evening of April 13, 2002, 11 months before the shootings, she was inside the Youngers' apartment with Ricky. At some time during Cortina's visit, defendant began kicking the

door to the family apartment. Cortina answered the door at which time defendant, who was in an agitated state, told her that he was "sick and tired of you people using all the hot water." Cortina responded by informing defendant that no one in the apartment was utilizing the hot water. Defendant, in turn, threatened to kill her and Ricky. Fearing for their safety, they filed a complaint with the police and received a temporary order of protection forbidding defendant from having any contact with them.¹

Supreme Court also allowed Marvin Ford to testify, limiting his testimony to the following: on January 18, 2003, less than two months before the shooting, Ford was inside the Youngers' apartment with Ricky. During Ford's visit, defendant came to the door and a verbal altercation between Ricky and defendant ensued. Ford overheard defendant threaten to kill Ricky and observed defendant display a knife. After defendant left the premises, Ford saw him from the apartment window. Defendant, again displaying what appeared to be a handgun, shouted to Ford that "I've got something for you." Based on this incident, the police arrested defendant and charged him with criminal contempt and a second order of protection was issued,

¹ Supreme Court precluded Cortina Watson from testifying that defendant had also threatened to kill Eunice Younger and her two children that evening. Supreme Court also prohibited Cortina from testifying that defendant displayed what appeared to be a handgun during the course of the incident.

barring defendant from having any contact with either Ford or Ricky.²

Toward the beginning of jury selection, defense counsel objected to the physical proximity of court officers who sat "directly behind defendant." She complained that their positioning prevented her from freely communicating with her client and signaled to the prospective jurors that defendant had "to be guarded so closely." As such, counsel requested that the officers "sit at the rail where their seats are normally positioned." Supreme Court disagreed with defense counsel's perception, but informed her that it would ask the officers "to sit back a little further."

Later that day, defense counsel renewed her objection to the positioning of court officers behind defendant. She argued that, because the court officers have their feet on defendant's chair, "it is impossible to have a confidential communication with [him]." Supreme Court placed on the record that defendant had been charged with a disciplinary infraction while incarcerated at Rikers Island for allegedly assaulting a corrections officer and that this incident was the basis for the heightened security measures -- i.e., the placement of the court

²Supreme Court precluded Ford from testifying about an incident that allegedly took place on March 14, 2003, the day before the shootings. On that day, Ford observed that decedent Gloria Watson's face was swollen and bruised. Watson told Ford that defendant had struck her in the face.

officers' toes against the bottom of defendant's chair. Supreme Court also indicated that there were prior incidents before a different judge where defendant acted aggressively in the courtroom. With respect to defense counsel's remarks concerning defendant's constitutional right to confidential communication with his attorney, Supreme Court noted that the court officers were only sitting approximately two or three inches closer to defendant from their normal position at the rail. The court further stated to counsel:

"[T]he notion that there is greater confidentiality in the communications between you when the officers are two inches further away I think is farfetched. You have as much confidentiality as you would have if they were back at the railing . . . so I don't see a difference there."

In any event, Supreme Court offered to arrange opportunities for defendant and counsel to speak in a more private setting.

Defense counsel also reiterated her view that the physical proximity of the court officers "has prejudiced the defendant terribly in the eyes of this jury because it telegraphs to them very directly this is a very dangerous man." Supreme Court rejected this argument, countering that it was "satisfied" that defendant was not prejudiced in the eyes of the jury.

After jury selection, the People presented comprehensive, albeit circumstantial, evidence linking defendant to the shootings. The jury, for example, heard testimony from Monica Killebrew who lived in an apartment opposite the Youngers. On the date of the shootings, at around 4:00 P.M., Killebrew was

home when she heard loud banging noises coming from outside her apartment. As she approached her front door, Killebrew testified that the noises she heard sounded like "a fight," "like people . . . getting thrown up against the wall." A short time thereafter, Killebrew heard defendant, whose voice she was positive that she recognized, say, "I am tired of you people bothering me." Immediately thereafter, Killebrew heard a "popping sound" that sounded like a gunshot. Moments later, she heard three more shots. At this point, Killebrew was standing by her apartment window in hysterics, speaking to a woman on the street, when she saw defendant walking out of the building. Killebrew testified that after defendant left, the apartment building was completely still inside and that nobody else entered or exited the building. Killebrew identified defendant in a lineup the following day and in court during the trial.

In addition to Killebrew, two other witnesses who were located at a business adjacent to the apartment building at the time of the shooting testified. They both corroborated Killebrew's testimony about the timing of the gunshots and identified defendant as the individual who exited the apartment building after the shots were heard. They also confirmed that nobody else entered or exited the building after defendant walked through the front entrance.

Once the police arrived, they discovered the Youngers in their apartment; all three had gunshot wounds to the head, and

according to medical evidence, died instantly. During the police investigation, they recovered nine latent fingerprints, one of which conclusively proved to be a print of defendant's left ring finger.

As noted earlier, the People also elicited background testimony from Cortina Watson and Marvin Ford concerning defendant's contentious relationship with the Youngers. During Cortina's cross-examination, defense counsel asked her about an October 2001 incident in which Ricky Younger was the victim of a beating inside his apartment. The People objected to this question on relevance grounds. Defendant proffered that this beating was related to Ricky's involvement with illegal drug activity and that it was his intention to establish that Ricky had many enemies who had a motive to commit these murders. Supreme Court sustained the objection, reasoning that defense counsel failed to establish a connection between the October 2001 incident and the March 2003 shootings.³

At the close of the People's proof, defendant elected to interpose a defense, testifying on his own behalf and calling numerous other witnesses. Defendant testified that, prior to the

³During defense counsel's cross-examination of Killebrew, she asked whether Killebrew had used drugs with Ricky. After Supreme Court sustained the People's objection to the question, defense counsel renewed her argument that this evidence was relevant to show that Ricky had enemies with a motive to kill him. Supreme Court adhered to its ruling, concluding that the proposed line of questioning was entirely speculative.

shootings, he had several disputes with the Youngers and Marvin Ford mainly because Ricky Younger had been selling drugs outside of defendant's apartment. Defendant explained that he called the police about once a month not only to complain about the drug selling but also about Ricky slashing the tires on his vehicle and excessive noise coming from the Youngers' apartment.

Although defendant admitted that he had a verbal altercation with the Youngers on April 13, 2002, he disputed Cortina's version of the events. Defendant stated that the dispute on that day originated when he observed Ricky bending down near the side of his car with a knife. After defendant saw that his driver's side tire was flat, he confronted Ricky. Defendant denied that he threatened anyone or that he was in possession of a gun.

Defendant's version of the events that transpired on January 18, 2003 was also different. Defendant testified that at around 11:00 A.M. he left his apartment and noticed that Ricky and Ford stood near his car, drinking a beer. Defendant went back inside and when he returned to his vehicle approximately five minutes later, he observed that there was a broken bottle near his tire and that the tire was leaking air. Defendant explained that he went to the Youngers to confront both Ricky and Ford, but that he did not possess a knife or threaten to kill or stab Ricky. Defendant also maintained that he did not display a handgun to Ford.

With respect to the shootings, defendant denied that he

was the perpetrator. In fact, defendant testified that on March 15, 2003, at around 5:00 P.M., he first learned of the shootings and that he was the suspect while watching a television news program at his mother's house. Defendant stated that he had left his apartment that day in the late morning and, before going to his mother's house, made a purchase at a Radio Shack and filled out a job application at a Home Depot. Defendant also denied setting foot inside the Youngers' apartment and said that the fingerprint the police had recovered from a window pane therein could not be his.

The jury convicted defendant on one count of first-degree murder and one count of second-degree murder. Supreme Court sentenced defendant to concurrent sentences of life imprisonment without parole and 25 years to life. The Appellate Division unanimously modified the judgment of conviction and sentence to the extent of vacating the DNA databank fee imposed by Supreme Court and, as so modified, affirmed (see People v Gamble, 72 AD3d 544, 545 [1st Dept 2010]). A Judge of this Court granted defendant leave to appeal (15 NY3d 920 [2010]) and we now affirm.

II.

We begin our analysis with defendant's constitutional argument that the positioning of court officers directly behind him during the course of the trial deprived him of his right to communicate confidentially with his attorney. It is well settled

that the fundamental right to counsel in a criminal case includes "the right to consult counsel in private, without fear or danger that the People, in a criminal prosecution, will have access to what has been said" (People v Cooper, 307 NY 253, 259 [1954]). "Intrusion upon a client-lawyer conference, whether in the privacy of an office or at the counsel table in court, contravenes our sense of traditional fair play and due process" (id.; see also Coplton v United States, 191 F2d 749, 759 [DC Cir 1951] [the Fifth and Sixth Amendments "guarantee to persons accused of crime the right privately to consult with counsel both before and during trial. This is a fundamental right which cannot be abridged, interfered with, or impinged upon in any manner"]).

In Cooper, we recognized that it is defendant's burden to establish that confidential communications with his attorney have been compromised (see 307 NY at 260). Here, we conclude that defendant did not meet his burden in showing that the positioning of the court officers directly behind him impeded his ability to converse privately with his attorney. Supreme Court found that the relief sought by defense counsel -- a request that the court officers sit in their normal places two inches farther away from defendant -- would not have made counsel's communications with defendant any more confidential, and nothing in the record suggests that the finding was incorrect.

Defendant also maintains that, in any event, the close

positioning of the court officers directly behind him prejudiced him in the eyes of the jury in that it conveyed to them that he was dangerous. We reject this contention. It is axiomatic that "[t]rial courts must retain appropriate discretion to control their courtrooms and trial proceedings generally" (People v Vargas, 88 NY2d 363, 377 [1996]). This discretion afforded to trial courts necessarily includes decisions pertaining to courtroom security. As the United States Supreme Court has held, "[i]t is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country" (Illinois v Allen, 397 US 337, 343 [1970]). The Court further observed that "[n]o one formula for maintaining the appropriate courtroom atmosphere will be best in all situations" (id.).

In this case, the record is clear that defendant had been charged with a disciplinary infraction for allegedly assaulting a corrections officer at Rikers Island. Supreme Court placed this information on the record and further noted that defendant had acted aggressively in court during the pendency of this case before a different judge. We conclude that these record facts -- never disputed by defendant -- allowed the trial court in the exercise of its discretion to permit the court officers to sit directly behind defendant with their toes placed on the back of his chair. Nor is there a basis in the record for a finding that such security measure telegraphed to the jury that

defendant was a dangerous individual. In that regard, we note that additional security measures sanctioned by Supreme Court were, at most, only minimally intrusive. At no point, for example, was defendant physically restrained in the presence of the jury (see People v Clyde, 18 NY3d 145, 152 [2011] ["the Federal Constitution prohibits the use of physical restraints visible to the jury during a criminal trial, absent a court determination that they are justified by an essential state interest specific to the defendant on trial"] [internal quotation marks, ellipses and citation omitted]). Simply put, defendant's assertion that the positioning of the court officers deprived him of a fair trial has no merit.

We now turn to the trial court's Molineux ruling, allowing certain uncharged crimes of defendant into evidence. We have long "held that there are instances when evidence of uncharged crimes may be used to prove guilt of the offense charged" (People v Gillyard, 13 NY3d 351, 355 [2009]). We articulated that such evidence may be admitted in circumstances

"'when [the evidence] tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish others; [or] (5) the identity of the person charged with the commission of the crime on trial'" (id., quoting People v Molineux 168 NY 264, 293 [1901]).

We have repeatedly acknowledged that these categories are not exhaustive, but "merely illustrative" (People v Jackson, 39 NY2d 64, 68 [1976]). Thus, "we established the rule that evidence of

defendant's other crimes is admissible only if probative of some fact at issue other than the defendant's criminal propensity" (Gillyard, 13 NY3d at 355, citing People v Rojas, 97 NY2d 32, 37-40 [2001]). Of course, "[t]he balancing of probative value against potential prejudice is entrusted to the trial court's discretion" (Gillyard, 13 NY3d at 355, citing People v Ventimiglia, 52 NY2d 350, 359-360 [1981]).

In our view, Supreme Court exercised sound discretion in permitting Cortina Watson and Marvin Ford to testify about limited incidents of defendants' uncharged crimes leading to the shootings. While excluding certain testimony that it deemed overly prejudicial, Supreme Court correctly determined that their testimony that defendant had previously threatened to kill them and Ricky Younger was relevant in establishing a motive for the murders and the identity of the perpetrator in this circumstantial evidence case (see People v Dorm, 12 NY3d 16, 19 [2009]). Moreover, the trial court properly opined that the testimony it allowed the People to elicit "provided necessary background information on the nature of the relationship [between defendant and the Youngers] and placed the charged conduct in context" (id.; see e.g. People v O'Gara, 239 AD2d 215, 215 [1st Dept 1997] ["Evidence of defendant's prior bad acts was properly received . . . which provided background information necessary to explain the increasingly acrimonious relationship between defendant and the victim . . . and which was necessary and highly

relevant on the issues of motive and identity"]). Furthermore, our review of the record reveals that the People adhered to the scope of the trial court's Molineux ruling.

Defendant's further contention that he was denied the right to present a defense and his argument that Supreme Court erroneously shielded the jury from hearing evidence demonstrating that there were "other potential perpetrators who had a motive to do violence to Ricky" is without merit. Applying the standard articulated in People v Primo (96 NY2d 351, 356-357 [2001]), we agree with the lower courts that defendant failed to establish a nexus between an earlier shooting where Ricky Younger had been assaulted and the shooting here. Supreme Court's determination that this purported third-party culpability evidence would be entirely "speculative" and its subsequent preclusion was a proper exercise of its discretion. That the People introduced evidence establishing defendant's motive for the shootings does not, as the Appellate Division observed, "open the door to generalized, speculative evidence of possible motives by unidentifiable persons" (Gamble, 72 AD3d at 545).

Finally, contrary to defendant's assertion, the People did not shift the burden of proof at any point onto defendant to prove his innocence. Further, we have considered defendant's pro se contentions that his right to counsel attached during the viewing of the lineup and that he received ineffective assistance of counsel and find them to be without merit.

Accordingly, the order of the Appellate Division should be affirmed.

* * * * *

Order affirmed. Opinion by Judge Ciparick. Chief Judge Lippman and Judges Graffeo, Read, Smith, Pigott and Jones concur.

Decided February 9, 2012