

**MEMORANDUM**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS: CRIMINAL TERM: PART K-19**

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THE PEOPLE OF THE STATE OF NEW YORK : BY: STEPHEN A. KNOPF  
: :  
: DATED: December 8, 2008  
-against- : :  
: INDICTMENT NO. 2169/2007  
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: :  
GREGORY SPANN : :  
: :  
Defendant : :  
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The defendant moves this Court for an order setting aside the verdict of guilty in the above-captioned indictment, pursuant to CPL §330.30 (1). After a jury trial, the defendant was found guilty of criminal possession of a weapon in the second degree. The defendant specifically claims that the verdict should be set aside because the prosecutor made improper remarks and committed misconduct during his closing arguments to the jury, resulting in the defendant being deprived of a fair trial in violation of the defendant's 14<sup>th</sup> Amendment right to due process. In this application, the defendant

submits that there were five categories of error committed by the prosecutor during his summation that deprived the defendant of a fair trial, to wit: (1)the prosecutor made improper remarks about the defendant's explanation for his physical appearance at the time of his arrest, (2)the prosecutor made improper reference to the defendant's false and/or tailored testimony, (3)the prosecutor engaged in burden shifting, (4)the prosecutor commented inappropriately on the defendant's criminal history, and (5)the prosecutor intentionally mischaracterized evidence. The People disagree.

CPL §330.30 provides that: "At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds: "(1) Any ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court."

This Court is well aware that: "Reversal for prosecutorial

misconduct 'is properly shunned when the misconduct has not substantially prejudiced a defendant's trial. Reversal is an ill-suited remedy for prosecutorial misconduct; it does not affect the prosecutor directly, but rather imposes upon society the cost of retrying an individual who was fairly convicted'." *People v Roopchand*, 107 AD2d 35,36 (2d Dept 1985), citing *People v Galloway*, 54 NY2d 396, 401 (1981). This Court must consider whether the alleged misconduct deprived the defendant of a fair trial. See *Roopchand*, *supra* at 36. An alleged improper summation should be assessed for its prejudicial effect. "In determining whether the prosecutor's remarks amounted to misconduct, his summation must be examined in the context of the summation delivered by the defense counsel...". *People v Herrera*, 289 AD2d 592 (2d Dept 2001). Often remarks are found to be fair comment in response to a defendant's summation. An allegation of misconduct must be evaluated in light of a defendant's summation. See *People v Gibbs*, 166 AD2d 454 (2d Dept 1990). Above all, a Court must gear its analysis to determine whether there was a significant probability that but for the

prosecutor's remarks, an acquittal would have resulted. See *People v Sherwood*, 160 AD2d 1203 (3d Dept 1990).

The defendant's first claim is that the People improperly commented on his physical appearance at the time of his arrest and that the prosecutor in his summation repeatedly characterized his defense as a "smokescreen" and "smoke and mirrors". The defendant testified at trial and in his own testimony as well as in the testimony of defendant's medical witness, placed his physical appearance in issue claiming that any symptoms he was exhibiting were due to his high blood pressure. Indeed, defense counsel argued in her summation that defendant's physical appearance at the time of his arrest was due to his high blood pressure, that his presence in the car was temporary and that he was only arrested for possession of a firearm due to his medical symptoms. As a result it was not inappropriate for the prosecutor, in his summation, to comment on the defendant's physical appearance at the time of his arrest and argue what inference the jury should draw from that.

The prosecutor's characterization of the defendant's case as a

"smoke screen" and "smoke and mirrors" did not deprive the defendant of a fair trial. A review of the trial record and motion papers submitted reflect that while perhaps such were not the most appropriate statements that could have been made by a prosecutor in a summation, the prosecutor's statements do not warrant a new trial. This Court also notes that while initially there was an objection to the comment, the objection was withdrawn by the defendant.

The defendant's second claim, related to the prosecutor making improper references to defendant's whereabouts in the hours prior to his entering the vehicle, is without merit. This was fair comment on the testimony.

The defendant's third claim, that the prosecutor shifted the burden of proof by commenting on the defendant's choice of doctors is without merit. See, eg *People v Grice*, 100 AD2d 419 (4<sup>th</sup> Dept 1984). The People did not suggest that the defendant had any obligation to call any other experts. The People merely stated that the defendant had testified as to other doctors who had treated him and called one who had not. Moreover, the People's comments were a

fair response to the defendant's summation.

As to the defendant's fourth claim, this Court determines that the prosecutor did not go beyond the scope of the Court's Sandoval ruling. References to his criminal history were made by the defendant in his direct examination. In his summation, the prosecutor made proper comment that the defendant's appearance of sweating, and appearing panicked and stressed was related to the fact that he was carrying a gun and he knew he had a criminal record. Such comments related to his credibility rather than his propensity to commit the crime.

The defendant's fifth claim that the prosecutor mischaracterized Antoine Nance's testimony insofar as arguing that it failed to support or corroborate defendant's testimony that he was inside the car briefly for a ride to the hospital is belied by the record. The defendant has no basis for this claim.

In sum, the defendant's motion to set aside the verdict based upon the prosecutor's misconduct during his summation is denied in all respects.

The foregoing constitutes the order, opinion and decision of  
this court.

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STEPHEN A. KNOPF, J.S.C.