

MEMORANDUM

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

THE PEOPLE OF THE STATE OF NEW YORK : BY: STEPHEN A. KNOFF
: :
: DATED: October 31, 2007
-against- :
: INDICTMENT NO. 2242/06
: :
MICHAEL MCGRUFF : SET ASIDE VERDICT
: Defendant :

The defendant, Michael McGriff, seeks an order of this Court setting aside his verdict of guilty in the above captioned indictment. The defendant seeks this relief based on four claims of error: first, the original photo array was not provided to defense counsel, second, there was a *Rosario* violation, third, the *Sandoval* ruling were unfair and fourth, the verdict was against the weight of the evidence. The People disagree, and oppose the defendant's application in its entirety.

This indictment arose out of an incident that took place on

August 5, 2006. On that date, the complainant was at a party, where he met the defendant, an individual who he recognized as having attended high school with him for over a year. The defendant provided the complainant with his cell phone number. The defendant, the complainant and another individual later left the party together. Walking home, the complainant was jumped by the defendant, physically attacked by him and robbed of his wallet and watch. The day after this incident, the complainant passed out at work and was taken to a nearby hospital.

The defendant proceeded to trial and was ultimately convicted of two counts of robbery in the second degree PL §160.10 (1)and(2A).

Criminal Procedure Law §330.30(1) specifies, in pertinent part, 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.”

After reviewing the facts of this case, this Court finds that the defendant’s challenge to the missing original photo array is without merit. It is clear from the evidence adduced at this trial that the complainant and defendant knew each other from high school and that the complainant remembered defendant’s name was “Mike”. This fact was further supported by the admission of certified records from the New York City Board of Education that showed that the two were in the same school at the same time for over a year. The defendant also provided the complainant with his cell phone number which lead the police to the verification of the defendant’s identity. As the identity of the perpetrator as the defendant was proven beyond a reasonable doubt at trial, the defendant cannot claim that his conviction is defective because he was not shown the original photo array. In fact, the photo array only confirmed his identity, leading to his arrest. Also, the evidence adduced at trial reflected that no differences between the original array and the copy of the array which was provided to defense counsel were

ever highlighted by defense counsel on her cross-examination. As such, this complaint is without merit.

This Court finds that the defendant's claim that he was prejudiced by the People's delayed disclosure and production of police witnesses' memo book entries is also without merit. The Court recollects that the items at issue were turned over to counsel before cross-examination of any police witness. This Court notes that in his motion, the defendant has failed to demonstrate any substantial prejudice, as required by law. See *People v Bostic*, 258 AD2d 467 (2d Dept 1999); see also, *People v Loper*, 275 AD2d 801 (2d Dept 2000).

"Under the circumstances, the defendant was not substantially prejudiced by the People's delayed disclosure... The defendant had adequate opportunity to prepare for...cross-examination. Additionally, the terse entries contained in the memo book did not disclose any new information...." see *Bostic*, *supra* at 468. "Since the *Rosario material* was turned over during trial and defense counsel was afforded the opportunity to review the material... it

cannot be said that the prosecution delayed production until after the material was no longer of any value to the defense. When, as here, the disclosure occurs during trial before both sides have rested, the material has been disclosed when it is still useful to the defense..." *People v Jacob*, 287 AD2d 740 at 740-741 (2d Dept, 2001). Accordingly the defendant's claim is without merit.

The defendant's claim that this Court abused its discretion in rendering its Sandoval decision is also without merit. It is well settled that a determination to allow cross-examination of prior criminal conduct, merely deters, but does not prevent a defendant from testifying. See *Ohler v United States*, 529 US 753 (2000). See, also *People v Grant*, 7 NY3d 421 (2006). "The nature and extent of cross-examination has always been subject to the sound discretion of the trial judge..." *People v Lopez*, 37 AD3d 496, 497 (2d Dept 2007); see also *People v Mackey*, 49 NY2d 274 (1980). After a review of the facts relevant to this case, this Court concludes that it "...struck an appropriate balance between the probative value of allowing inquiry about defendant's one prior felony conviction (not even

permitting questioning about the charge to wit: robbery in the first degree or as to the underlying incident)... against the potential prejudice to the defendant." *People v Stewartson*, 25 AD3d 629,630 (2d Dept. 2006); see also *People v Long*, 269 AD2d 694 (3rd Dept. 2000); lv denied 94 NY2d 950 (2000). The Court did not permit any questioning of the defendant related to the underlying conduct resulting in three Youthful Offender adjudications. Furthermore, the Court's ruling permitted questioning of the defendant regarding use of an alias as to defendant's felony case was proper. See *People v Walker*, 83 NY2d 455, 461-462 (1994). As such, this claim is without merit.

Finally, the defendant claims that the verdict was against the weight of the evidence and the evidence was insufficient as a matter of law to have warranted a conviction.

The defendant's contention that the jury's verdict was against the weight of the evidence is not the proper subject of a CPL § 330.30 motion such as the defendant made before the court.

CPL § 470.15 (5), in dealing with the scope of review by

intermediate appellate courts, states in pertinent part:

“The kinds of determinations of reversal or modification deemed to be on the facts include, but are not limited to, a determination that a verdict of conviction resulting in a judgement was, in whole or in part, against the weight of the evidence”.

A motion to set aside a verdict as against the weight of the evidence is only proper on an appeal to a higher court after a judgement of conviction, not to the state court that heard the case. See *People v. Alam*, 180 AD2d 689 (2d Dept. 1992). The Appellate Division has the exclusive authority to review the weight of the evidence in criminal cases. See *People v Bleakley*, 69 NY2d 490 (1989).

It is this Court's obligation to determine whether or not legally sufficient evidence was presented to establish defendant's guilt beyond a reasonable doubt. In determining the legal sufficiency of the evidence this Court"... must determine whether there is any valid line of reasoning and permissible inferences

which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial". *People v Bleakly, supra at p495*. The applicable standard of review for the trial court is to view the evidence in a light most favorable to the People. *People v Alam, supra*. "Resolution of issues of credibility is primarily and appropriately determined by the jurors, who saw and heard the witness". *People v Phillips, 11 AD3d 406 (1st Dept. 2004)*.

In this case, there is no support for any argument on behalf of the defendant that the evidence was legally insufficient as a matter of law and therefore, this Court sees no basis to disturb the jury's verdict.

In sum, the defendant's motion to set aside the verdict of guilty as to both counts of robbery in the second degree is denied for the reasons discussed herein.

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

STEPHEN A. KNOFF, J.S.C.