

People v Norman

2007 NY Slip Op 31242(U)

May 15, 2007

Supreme Court, Kings County

Docket Number: 0007189/2003

Judge: Martin Marcus

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS : PART 7

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

Indictment No.

CLARENCE NORMAN, JR.,

7189/03

Defendant.

-----X

Marcus, J.:

On February 23, 2007, following a trial by jury, the defendant was found guilty of Grand Larceny in the Third Degree by Extortion [Penal Law §155.35], Attempted Grand Larceny in the Fourth Degree by Extortion [Penal Law §§110.00/155.30(6)], and Coercion in the Second Degree [Penal Law §135.60(9)]. Before he was to be sentenced, the defendant moved pursuant to CPL §330.30(1) for an order setting aside the verdict. On April 16, 2007, following submission by the People of papers in opposition to the defendant's motion, I denied the motion and sentenced the defendant. My reasons for denying the motion are set forth below.

Subdivision one of CPL §330.30 provides that the court may, upon the defendant's motion, set aside a verdict upon "[a]ny ground appearing in the record which, if raised upon 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." In his motion, the defendant contends that the verdict should be set aside on four grounds: first, because the People withheld Brady and Rosario material from him; second, because there was a variance between the verdict sheet and the Court's instructions to the jury that undermined the unanimity of the verdict; third, because the evidence adduced at trial was legally insufficient

to establish that he had “instilled fear” in his victim; and fourth, because the People improperly placed his character into issue. The People oppose all of the defendant’s claims.

ALLEGED ROSARIO AND BRADY MATERIAL

The defendant’s first claim is rooted in his allegation that the prosecutor allowed a witness, former Assemblywoman Adele Cohen, to testify falsely that she “had no fiscal outlay for primary day expenses,” even though the People had in their possession financial disclosure records indicating that, in fact, she had incurred “such expenses and costs.” The significance of the alleged discrepancy arises from a \$1000 check drawn on the account of Karen Yellen’s campaign committee and payable to Ms. Cohen’s committee, which was, along with another check for \$9000, issued by the campaign committee to William H. Boone, III, the subject matter of the extortion and coercion charges of which the defendant was convicted. The defense claimed at trial that, although the check was recorded by Ms. Cohen’s campaign committee as a contribution to the Cohen campaign,¹ it constituted instead a legitimate pro rata payment for the expense incurred in paying campaign workers employed by the Cohen campaign on primary day to distribute palm cards that bore not only Ms. Cohen’s name, but the name of other candidates, including Karen Yellen. The defendant argues that the financial disclosure records constituted Rosario material because they were signed by the witness, and Brady material because they were exculpatory. The defendant also maintains that the prosecutor compounded the prejudice by utilizing Ms. Cohen’s testimony during his summation, “arguing that she had an all volunteer army on primary day.”

¹ Such a contribution would have been prohibited by the Rules of the Chief Administrator of the Courts, 22 NYCRR 100.5(e), which prohibits a judge or a candidate for elective judicial office from “making a contribution to a political organization or candidate.”

Because the defendant made no objection concerning any such alleged misconduct at trial, this claim does not provide a ground for setting aside the verdict, since it would not, based upon “[a]ny ground appearing in the record ... require a reversal or modification of the judgment as a matter of law by an appellate court.” CPL §330.30(1). An issue is preserved for review by an appellate court “as a matter of law” only if the defendant raised his claim during the trial. CPL §470.05(2); People v. Gray, 86 N.Y.2d 10, 19 (1995), citing People v. Cona, 49 N.Y.2d 26, 33, n. 2 (1979); People v. Thomas, 242 A.D. 2d 281 (2d Dept. 1997). Accordingly, a trial court may properly consider the issue on a motion to set aside the verdict only if it has been preserved for appeal. People v. Gray, *supra*, 86 N.Y.2d at 19; People v. Hines, 97 N.Y.2d 56, 61 (2001); see People v. Padro, 75 N.Y.2d 820 (1990). In order to be preserved for either purpose, the defendant’s “argument [must] be ‘specifically directed’ at the alleged error.” People v. Gray, *supra*, 86 N.Y.2d at 19. This preservation requirement applies even to alleged Brady violations. People v. Thomas, 8 A.D.2d 303 (2d Dept. 2004).

In any case, the claim is without merit. The People have represented that they did not come into possession of Ms. Cohen’s financial disclosure records until after the defendant filed this motion, a representation that the defendant has not disputed. Because the records were not in the People’s possession, and because records in the possession of the New York State Board of Elections cannot be said to be within their control, they did not constitute Rosario material. See People v. Washington, 86 N.Y.2d 189 (1995) (audiotape made by Associate Medical Examiner in possession of New York City Medical Examiner’s Office); People v. Johnson, 195 A.D.2d 481 (2d Dept. 1993) (memo books kept by private security guards). The records also cannot be said to be Rosario material because, contrary to the defendant’s contention, they bear no indication that Ms. Cohen signed them, verified them or even participated in their preparation. Similarly, because the records were not in the

People's possession or control, and because there is no factual basis upon which to conclude that the People were aware of their contents, they also do not constitute Brady material. People v. Hearns, 33 A.D.3d 722 (2d Dept. 2006) ("To be Brady material, the material must be exculpatory and within the possession, custody, or control of the prosecution"); People v. Johnson, *supra*.

Moreover, the records do not contradict the testimony of Ms. Cohen, who did not testify, as the defendant alleges, that she, "had no fiscal outlay for primary day expenses" in 2002. To the contrary, she testified that in that year she had literature produced for her campaign, including primary day palm cards with the names of candidates for judgeships that she supported, and that her campaign had paid for those cards, without charging any one else for his or her pro rata share of the cost of their production. Ms. Cohen also testified that, although she did have the cards and literature distributed, they were distributed by volunteers working for her on primary day, and she had no recollection of having paid anyone for working that day.

According to her testimony, during the primary race in 2002, she solicited contributions for her campaign, and the money she received from Karen Yellen was handled as such a contribution. She testified that the money was deposited in the account of the Adele Cohen for Assembly Committee, and that it was used to pay her campaign bills, and not to promote Ms. Yellen's candidacy. Ms. Cohen also testified that, although she had a "get out the vote" operation in place throughout her Assembly District on Primary Day, 2002, she had not coordinated with anyone to spend any of her campaign money on Ms. Yellen's behalf, nor had the defendant asked her to perform any primary day operations on Ms. Yellen's behalf.

Consistent with that testimony, the 2002 "10 Day Post-Primary Report" of the Adele

Cohen for Assembly Committee states that the Committee spent nearly \$39,000 during the time period from August 30, 2002, to September 13, 2002, for, inter alia, office expenses, literature, printing, postage, work from a consultant, dues, wireless telephone service, legal costs, and the wages of one staff member. The only expenditures listed in the report for on or about primary day were for checks issued to Ms. Cohen herself for office expenses, to suppliers for refreshments and literature, and to an individual for consultant fees. None of the expenditures listed were for the payment of primary day campaign workers. Also consistent with Ms. Cohen's testimony, in the 2002 "32 Day Pre-General Election Report," her committee reported as a contribution its receipt of a check in the amount of \$1,000, dated September 6, 2002, from the Committee to Re-Elect Karen Yellen.

Since the financial disclosure records of Ms. Cohen's campaign committee do not contradict Ms. Cohen's testimony, the defendant has failed to demonstrate, not only that the records constituted Brady material, but also that Ms. Cohen's testimony was in any way false, incorrect, or misleading. Thus, his arguments that the prosecutor relied on false testimony in his final arguments to the jury, or deprived the defendant of any rights, also fail.

THE VERDICT SHEET

The defendant next argues that the verdict must be set aside because the "jury verdict can not be clearly determined to have been based upon strict adherence to the court's instructions based upon the verdict sheet." The defendant's complaint concerns a notation on the verdict sheet as to the seventh count submitted to the jury, which charged the jury with Coercion in the Second Degree. That notation – "[Karen Yellen: Boone primary day operation and/or Cohen primary day operation]" – reminded the jury that this count concerned the \$9000 check written on the account of the Yellen campaign payable to Mr.

Boone, and the \$1000 check written on that same account payable to the campaign of Ms. Cohen. The defendant complains that the verdict sheet did not direct the jury to specify which of the payments it agreed unanimously that the defendant had coerced Ms. Yellen to make, and that, as a result, there is no way of determining that all twelve jurors returned a verdict based on the same check (or on both checks).

Although defense counsel reviewed the verdict sheet before it was provided to the jury, they did not object to the language it contained concerning the seventh count, nor did they request that the verdict sheet direct the jury to specify the basis for a guilty verdict concerning that count should the jury return one.² Indeed, defense counsel specifically consented to the verdict sheet in the form in which it was presented to the jury. Accordingly, the defendant has not preserved this claim for appellate review. People v. Collins, 99 N.Y.2d 14, 17-18 (2002); People v. Fecunda, 226 A.D.2d 474, 475 (2d Dept. 1996) (“where, as here, the defendant raises objection to the perceived deficiency of the verdict sheet [on appeal], but voice[d] no objection to the content of the verdict sheet, despite being given adequate opportunity to do so, the failure to specifically object constitutes implicit, if not explicit, consent to the submission of an annotated verdict sheet); People v. Wilson, 185 A.D.2d 910 (2d Dept. 1992)(issue concerning court’s instructions to jury not preserved because not raised at trial); accord People v. Tinsley, 159 A.D.2d 602 (2d Dept. 1990).

In any event, the defendant’s claim is without merit. The Court instructed the jury

² As the People note, the defendant also did not seek to have the jury polled after it delivered its verdict, even though he was provided with the opportunity to do so. See People v. Townsend, 232 A.D.2d 261 (1st Dept. 1996)(defendant’s claim that he was deprived of right to unanimous verdict by court’s failure to poll jury unpreserved because he failed to make timely objection to omission); see also People v. Bembry, 209 A.D.2d 270 (1st Dept. 1994), aff’d 85 N.Y.2d 932 (1995)(defendant cannot claim error on appeal where he failed to object to court’s failure to poll jury at time when court could have corrected omission).

several times that its verdict had to be unanimous,³ and, in its charge, specifically instructed the jury as to the seventh count that,

... in order to find the defendant guilty of this crime, while the jury may find that the defendant thus compelled or induced Yellen to agree to pay Boone for the Central Brooklyn Primary Day operation, or for Adele Cohen's campaign committee for the Primary Day operations in Cohen's district, or for both operations, it is not enough for a unanimous verdict that, say, six jurors agree as to one possibility, and six agree to another.

All 12 jurors must find, beyond a reasonable doubt that the defendant thus compelled or induced Yellen to agree to pay for the Boone operation; or all 12 jurors must find, beyond a reasonable doubt that the defendant thus compelled or induced Yellen to agree to pay for the Cohen operation, or all 12 jurors must find the defendant thus compelled or induced Yellen to agree to pay for both campaign – for both Primary Day operations.

Indeed, this specific instruction was given to the jury not only in the Court's charge, but twice more during deliberations, once orally, and once in writing, when the Court furnished the jury, at its request, with a written copy of the elements of the crimes submitted to it. There is no record-based reason to believe that the jury failed to follow those instructions, nor has the defendant provided any reason for this Court to make such a finding.⁴

³ For example, in the context of instructing the jury concerning the concept of acting in concert, the Court instructed the jury that, "[y]our verdict on each count you consider, whether guilty or not guilty, must be unanimous." Similarly, in the very context of instructing the jury concerning the seventh count, and just before giving the jury the more specific instruction concerning that count quoted in the text, the Court reminded the jury that jury that, "[a]s I have told you and I'll tell you again, in order to reach a verdict, all 12 jurors must agree to the verdict." Later, in the course of instructing the jury concerning the process of its deliberations, the Court instructed the jury that "[i]n order to reach a verdict, each and every jury must agree to the verdict." Finally, in the course of instructing the jury concerning the verdicts it could return, the Court repeated that "[y]our verdict must be unanimous; that is, all 12 of you must agree with the verdict."

⁴ To the contrary, Ms. Yellen's testimony provided the jury with no basis upon which to conclude that the defendant had coerced her to pay one amount of money while not having coerced her to pay the other. See discussion, *infra*. Moreover, given that the jury found the defendant guilty of the fifth count, which charged the defendant with stealing more than \$3000 by extortion, which concerned the same \$9000 and \$1000 checks, and which alleged that the defendant stole the checks by making the same threat which formed the basis of the coercion charge in the seventh count, it is clear that the jury was unanimous at least as to the \$9000 check. Indeed, given that the notation for the fifth count – reminding the jury that it concerned "[Karen Yellen: Boone and Cohen primary day operations]" it appears that the jury unanimously found that the defendant had extorted (and thus coerced) both checks.

Finally, a jury instruction requiring the jury to specifically indicate on the verdict sheet which payment or payments Ms. Yellen had been coerced into making, would, in essence, have constituted a direction to the jury to return a special verdict. “Although special verdicts ... are commonplace in civil cases, the Criminal Procedure Law makes no provision for them and they are generally disfavored in criminal trials.” People v. Ribowsky, 77 N.Y.2d 284, 290 (1991), citing CPL §300.10(4). As the Court of Appeals has held in another context, it is “the better course ... for the court simply to [instruct] the jury that it [may] find the defendant guilty or not guilty on each of the ... counts.” People v. Piazza, 48 N.Y.2d 151, 165 (1979). Thus, it was entirely proper that the verdict sheet in this case did not require the jury to make more specific findings.

SUFFICIENCY OF PROOF THAT THE DEFENDANT INSTILLED FEAR IN KAREN YELLEN

The defendant next contends that Karen Yellen testified that “she had no problem” with his demand that she pay \$1,000 to Adele Cohen’s campaign, and that she paid the entire \$10,000 after she lost the primary election, not out of fear, but because she hoped that the defendant would support her nomination for a Supreme Court judgeship. Thus, he argues, the People failed to establish that Ms. Yellen acted out of fear instilled by the defendant, one of the requisite elements of the crimes of Grand Larceny by Extortion and Coercion in the Second Degree. This claim, while preserved by the defendant, is without merit.

A motion brought under CPL §330.30(1) is designed to “test[] the legal sufficiency of the evidence supporting a jury’s guilty verdict.” People v. Floyd, 176 A.D.2d 554, 555 (1st Dept. 1991). In deciding such a motion, the court is “limited to a determination that the trial evidence was legally sufficient to establish the defendant’s guilt of an offense of which he was convicted.” People v. Carter, 63 N.Y.2d 530, 536 (1984). When the Court makes

that determination, it must give “the People ... the benefit of every reasonable inference to be drawn from the evidence.” People v. Cintron, 95 N.Y.2d 329, 332 (2000). Thus, the standard is “whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” People v. Pirozzi, 237 A.D.2d 628, 639 (2d Dept. 1997) (internal quotation marks and citation omitted).

Karen Yellen gave the following testimony at trial on this issue. Neither she nor her campaign had entered into any agreement with the defendant to pay either \$9,000 to William H. Boone III or \$1,000 to Adele Cohen for primary day operations before the defendant made his demands for those payments through Jeffrey Feldman a week before the primary. She had been astonished by the defendant’s demand when she learned of it, was not able to understand why she needed to make those payments, and her first inclination was not to make them. She was concerned about paying the money because all the funds in her campaign account had been already allocated, and she did not have other funds available then to comply with the defendant’s unexpected demands. Needing more money for additional mailings right before primary day, she had borrowed some of the money in her Committee’s account on her credit line because she was fighting for her career. She had hoped, however, that she would not have to use the borrowed money, and, instead, could pay it back at the end of the campaign. Ms. Yellen agreed to pay the \$10,000 because her consultant, Scott Levenson, told her that if they did not comply with the defendant’s demands, on primary day the County would not “carry her” in any area of Brooklyn and County workers would not distribute any palm cards with her name. She agreed to pay the money because she believed that, without County support, it would be almost impossible to win the nomination, and that she would no longer have a job or a career.

Ms. Yellen also testified that after she lost the election, she paid Boone the \$9,000, and Adele Cohen the \$1,000, as the defendant had demanded, because Levenson, acting on her behalf, had agreed with the defendant, through Feldman, that she would pay the money after the election. She did not want Levenson to be labeled as someone who did not honor his commitments when a candidate he represented lost an election. She paid the money after the election because she thought it was still possible that she could receive a nomination to a Supreme Court judgeship.

On cross-examination, Ms. Yellen was asked by defense counsel if it was true that her campaign did not have “a problem” with paying \$1,000 to Adele Cohen’s campaign. Ms. Yellen responded that it was not true, and, in response to additional questions posed by defense counsel, specifically testified that she did have a problem paying \$1,000 to the Adele Cohen campaign. Defense counsel persisted, asking Ms. Yellen if it was not a fact that her campaign advisors had concluded that it was not a problem paying that money to the Adele Cohen campaign because there were “some favorable areas” for her within Cohen’s Assembly District. Ms. Yellen responded unequivocally, “no.”

Thus, the evidence does not support the defendant’s claim that Ms. Yellen testified that she had “no problem” paying the money to Adele Cohen’s campaign; indeed, she expressly testified to the contrary. Moreover, although Ms. Yellen testified that she followed through on her commitment to make the payments out of her concern for Mr. Levinson’s reputation and in hope of a Supreme Court nomination, neither led her to make the commitment – which was the proximate cause of the payment – and which she made before primary day, out of the express fear that the defendant would withdraw the County’s support of her candidacy. Ms. Yellen’s testimony provided the jury with sufficient evidence upon which to conclude that she had made the commitment to pay the money out of fear of damage

to her job and her career, and that she paid the money, even after she had lost, because of that commitment, irrespective of whether she also had any subsidiary reasons for honoring it. Because a reversal or modification of the judgment by an appellate court is thus not required as a matter of law, there is no basis for granting the defendant's motion under CPL §330.30(1).

PLACING THE DEFENDANT'S CHARACTER IN ISSUE

The defendant next claims that the People denied him a fair trial by improperly placing his character in issue. The defendant makes this claim based on a single comment made by the prosecutor during his summation and on the admission of testimony from two witnesses, Judges Margarita Lopez Torres and Delores Thomas. This claim, too, is without merit.

The defendant first objects to the prosecutor's description of him on summation as a "thug-in-a-suit." He claims the prosecutor did this "repeatedly," thereby "stepp[ing] over the bounds of legitimate advocacy" and violating the defendant's right to a fair trial. In fact, the prosecutor made this comment, not repeatedly, but only once during the course of a more than an hour-long summation. Because the defendant neither objected to the prosecutor's remark, nor moved for a mistrial based on it, this claim is not preserved, People v. Scott, 267 A.D.2d 259, 260 (2d Dept. 1999); see also People v. Carranza, 18 A.D.3d 667, 668 (2d Dept. 2005), and it cannot serve as a basis for setting aside the verdict.

In any case, the prosecutor made the comment in response to arguments advanced by the defense both in its opening statement and in summation. During his opening, the prosecutor referred to the defendant not as a "thug," but as a "bully," a term not out of place

in a case in which the defendant was charged with extortion and coercion.⁵ During his opening statement, however, defense counsel took note of the prosecutor's remark, to which he had not objected, by characterizing the prosecutor's description of the defendant, not as a "bully," but as a "thug." Indeed, defense counsel used the term no fewer than three times, saying the prosecutor had depicted the defendant as a "thug, sitting behind the table with his thumb, good, kind judicial candidates coming before him and he puts his thumb up or down," insisting that the defendant "is not a thug;" and explaining to the jury that his "reason for telling you that Mr. Norman is not a thug is so that you begin to understand that an intellectual process goes behind his decisions." Given the use of the term by defense counsel, and given defense counsel's comparison of the defendant to Martin Luther King, and defense counsel's assertion that the defendant, by his conduct, was fighting Dr. King's fight against disenfranchisement,⁶ the prosecutor had the right to repeat, in the limited manner in which he did, the term introduced into the trial by defense counsel.⁷ See People

⁵ Specifically, the prosecutor said, "And Karen Yellen's people looked at each other, and they spoke to each other, and in making that choice that we've all had to make, 'Do I face the bully, or do I give in to the bully; do I stand my ground or do I capitulate,' well they heard the words, and they knew the man, and they saw his actions, and they gave in. The prosecutor also argued in his opening statement that Ms. Yellen and her advisors could not stand up to the "bully" and the force of the County organization.

⁶ In his opening, defense counsel asked the jury, when it was time to consider the case, to think about one of his favorite philosophers, who, "one time about 50 years ago, ... sat in a jail and wrote a letter that was called the letter from a Birmingham jail. And in that letter, he reminded us how important it is that everybody votes" Continuing his comparison, defense counsel told the jury, "You can't win elections by disenfranchising people. Just like that man who was sitting in that cell, writing that letter 50 years ago, he is sitting over there too. Fighting the same fight. It is the same fight. It is the enfranchisement of 67." Defense counsel also made reference to Dr. King's remarks about "the moral arc of justice," and exhorted the jurors to "honor who you are, bring dignity to that man who sat in that cell writing, all of us make the system work by reserving judgment." Similarly, in his summation, defense counsel argued that, the defendant, by his conduct, was protecting the voting rights of African Americans and referred again to Dr. King's "arc of justice."

⁷ Specifically, the prosecutor said, "Clarence Norman is no hero. Clarence Norman is no champion. Clarence Norman is a thug in a suit and tie. He uses the suit and the tie in that political position he had, just as an ordinary thug would use a gun or a knife to steal money ... and to compare

v. Phillips, 285 A.D.2d 477, 478 (2d Dept. 2001); People v. Johnson, 231 A.D.2d 591, 592 (2d Dept. 1996). In the context of the trial, where there were no claims and no evidence of physical violence, the term was obviously meant, and could only be taken, rhetorically, and did not prejudice the defendant in any way.

The defendant next complains that the People wrongly placed his character into question by eliciting from Judge Lopez Torres and Judge Thomas testimony concerning “discriminatory statements and acts on the part of the defendant,” which “assailed [his] character, “had no relationship to the issues at trial ... and abridged [his] right to a fair trial.” The defendant has failed to specify what testimony either witness gave that allegedly detailed such bad acts, and his generalized complaint provides no basis to set aside the verdict.⁸

In any case, while it is true that the defendant objected to the admission of the testimony of these witnesses before they appeared before the jury, his objection was insufficient to preserve the issue he now raises. The People’s offer of proof concerning these witnesses was limited to a showing of what efforts and expense a candidate for the Democratic nomination for Civil Court Judge would have to make without the endorsement and support of the Democratic Party, and, before the witnesses testified, the Court ruled that such testimony was relevant and admissible. While their testimony did, in fact, go beyond this offer of proof, neither during their testimony nor after it did the defendant object to it on

him to greatness is an insult.

The evidence in the People’s case proves that this indeed was a race about color, except the color was his favorite color, “green.”

⁸ The People argue that they used the witnesses’ testimony properly on summation, and the defendant has failed to preserve any argument concerning their remarks. However, this prong of the defendant’s motion does not assert that in his summation the prosecutor improperly referred to any prior bad acts testified to by those witnesses. In any event, as the People note, and as the Court ruled at the time, the prosecutor’s remarks constituted fair comment on the witnesses’ testimony and were responsive to the defendant’s arguments in his opening statement and summation, as well as his cross-examination of the witnesses. See People v. Louisias, 29 A.D.3d 1017 (2d Dept. 2006).

the grounds he currently raises. He never moved for a mistrial on these grounds, nor did he request the Court to instruct the jury on how to evaluate their testimony concerning any of the alleged prior bad acts.

Judge Lopez Torres, for example, testified that she went to see the defendant in February, 2002, to try to obtain his support of her candidacy for re-election to the Civil Court. She said that the defendant told her that he was not prepared to endorse her and that in order for him to change his mind, it was necessary for her to get the support of a particular assemblyman who was viewed as a leader in the Latino community, as well the support of other district leaders, and other leaders in the Latino community. Lopez Torres also testified that she met with the defendant again in May, 2002, before the County announced the candidates it was endorsing, to try to persuade him to support her. The defendant would not give her his support, and Lopez Torres testified that Jeffrey Feldman, who was at this meeting, told her, without explanation, that “he” did not like her “lifestyle.”⁹ The defendant did not object to any of this testimony.

On re-direct, Lopez Torres testified that when she went to see the defendant in February, 2002, she urged him to support her by pointing to the substantial Latino population in Brooklyn and arguing that it was important that the judiciary reflect that population, and that it would make the defendant “look good” to be endorsing a qualified jurist who had a diverse background and had exhibited competence. She also testified that she told the defendant that she had the support of many community leaders and elected officials, and endorsements from different groups, but the defendant again said that he would not support her, and Feldman again said that he did not like her lifestyle. The defendant did not object

⁹ Lopez Torres was not asked if the “he” to which she testified was the defendant or Feldman, and no testimony was elicited to explain to whom the comment referred.

to this testimony, either.

At the conclusion of Lopez Torres' testimony, the defendant moved to strike her entire testimony. He argued that he had moved to preclude her testimony before she testified; that her testimony had gone far beyond the parameters of what the People had initially proffered, having evolved into a referendum on diversity on the Brooklyn bench; that the jury was to evaluate the evidence by an objective standard; and that Lopez Torres had only testified to her subjective view of what the denial of the endorsement did to her and her campaign. He also contended that she was in a different position than Ms. Yellen and Ms. Sikowitz, because the refusal to endorse a candidate and the threat to withdraw an endorsement were two different things. Even then the defendant did not move for the witness's testimony to be stricken on the specific grounds he now raises.

The Court observed that "[a]n offer of proof was made and it was my determination that evidence fell within that offer of proof and was relevant and admissible at this trial." Asking whether "some of the questions that [were] asked on direct [went] beyond that, the Court conceded that "they did." The Court then asked whether "there [was] an objection to it on that grounds," and responded for itself, "[N]o there wasn't[;] instead, the defense took the opportunity to make its own points in response to that, to those areas and did so [at] some length and [to] whatever effect on this the jury will decide." Reasoning that "to take that opportunity in that way and then ask me to strike all the testimony I think is not an appropriate thing to do," and noting that the defense had "chose[n] to take a different tact,"¹⁰

¹⁰ On cross-examination, defense counsel questioned Lopez Torres about the defendant's failure to endorse her candidacy, and her strategy in concentrating her resources in certain, predominantly white areas of Brooklyn. She admitted that although she was running against Ms. Yellen and Judge Thomas, her name had been linked with theirs in some literature and palm cards. Defense counsel questioned her extensively about the results from the 2002 Primary and how they disproved her theories concerning where she would garner the most votes, her campaign expenses, and about other topics not covered on her direct examination.

the Court denied the motion to strike the testimony.

Subsequently, Judge Thomas testified on direct examination that she met with the defendant to ask him to endorse her for a Civil Court judgeship, and that he refused to support her candidacy because he did not think she could win because she did not have “the right last name.” On re-direct examination, Judge Thomas testified that she believed that the defendant had been stereotyping when he decided not to support her candidacy. This testimony was also admitted without objection.

Because the defendant’s claims concerning the testimony of both Judge Lopez Torres and Judge Thomas have not been properly preserved for review, People v. Evans, 16 A.D.2d 595 (2d Dept. 2005)(complaint that trial court impermissibly admitted testimony of an uncharged crime must be preserved for appellate review); see also People v. Gray, 86 N.Y.2d 10, 19 (1995); People v. Silverman, 239 A.D.2d 445, 446 (2d Dept. 1997), the testimony of neither witness can serve as a basis upon which to set aside the verdict. CPL §330.30(1).

This constitutes the order and decision of the Court.

Dated: May 15, 2007


MARTIN MARCUS
J.S.C.

