

**People v Harrison**

2008 NY Slip Op 32766(U)

September 9, 2008

Supreme Court, Kings County

Docket Number: 13786/89

Judge: R. Holdman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM PART 34

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THE PEOPLE OF THE STATE OF NEW YORK,

v.

Indictment No.  
13786/89

ARTHUR HARRISON,

**DECISION  
AND  
ORDER**

Defendant.

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HOLDMAN, R., J.S.C.

Defendant moves pro se pursuant to CPL 440.10 for an order vacating his judgment of conviction on the grounds that erroneous supplemental instructions were given to the jury as to ownership of a gold chain the deceased was wearing; that prosecutorial misconduct occurred during summation; and that his counsel was ineffective for failing to object to the erroneous instructions or to the prosecutor's improper comments.

Defendant was convicted, following a jury trial, of Murder in the Second Degree (Penal Law § 125.25 (3)). On December 29, 1990, the Court sentenced Defendant to a term of imprisonment of eighteen years to life. Defendant appealed to the Appellate Division, Second Department. On appeal, Defendant raised the identical issues raised on this motion as to the erroneous supplemental instructions

and prosecutorial misconduct. On June 7, 1993, the Appellate Division affirmed the judgment. The Appellate Division held that “the defendant’s challenge to the supplemental jury instructions is unpreserved for review” and the Court declined to reach the issue in the interest of justice. The Court further held that the defendant’s argument regarding the prosecution’s summation “is largely unpreserved for appellate review, as well,” but to the extent that the issue was preserved, the Court found that the comments constituted a fair response to the defense counsel’s summation. People v. Harrison, 194 AD2d 627 (2d Dep’t, 1993).

CPL 440.10 (2) (a) provides that the court must deny a motion to vacate a judgment when the ground or issue raised upon the motion was previously determined on the merits upon an appeal. In this case, the Appellate Division determined that the prosecutor’s summation, to the extent the issue was preserved, constituted fair response and was not so prejudicial as to deprive Defendant of a fair trial.

While the Appellate Division declined to reach the merits in the interests of justice of the unpreserved issues of the supplemental jury instructions or the improper summation to the extent it was unpreserved, had the Court found error so egregious that it deprived Defendant of a fair trial, it would have exercised its

discretion to review in the interest of justice. See CPL 470.15 (6) (a); People v. King, 105 AD2d 1015 (3d Dep't, 1984); People v. Fragale, 60 A.D.2d 972 (4<sup>th</sup> Dep't, 1978). "The court will not exercise its discretionary power to disregard the absence of objection unless on the whole case there is a reasonable basis for the fear that injustice has been done." People v Semione, 235 NY 44, 46 (1923).

With respect to Defendant's contention that the jury was erroneously instructed on ownership of the chain, impermissibly shifting the burden of proof on the element of ownership, the Court correctly charged the jury that the People had to prove beyond a reasonable doubt that Defendant attempted to take the chain from the deceased and that the deceased was the owner of the property

During deliberations, the jury sent a note to the Court asking if the law states that the deceased is the owner of the chain if he is in possession of it. The Court responded to the question by reading the Penal Law definition of ownership. After the Court read the statutory definition of ownership to the jury twice, the jury continued to express confusion. The jury clarified its request in another note asking if the person in possession of the chain is considered to be the owner even if the person who takes it claims to be the owner. The Court then charged the jury that it was up to the jury to determine whether they believed Defendant's claim

that the chain was his, and if they did not believe that, then there is a presumption that the jury may choose to accept, that possession of the property, if unexplained by anything else, creates a presumption of ownership. The Court further charged the jury that if they determined that Defendant owned the chain, he could not be guilty of robbery.

The Court's charge to the jury made it clear that the factual determination regarding ownership was for the jury to decide. The jury was instructed twice that the People had the burden of proving the element of ownership. Most importantly, the instruction that Defendant could not be guilty of robbery if the jury found that the chain belonged to him was favorable to Defendant and could not have adversely affected him.<sup>1</sup> See People v. Goodfriend, 64 NY2d 695(1984); CPL 470.15(1).

Defendant's claim of ineffective assistance of counsel is a matter of record

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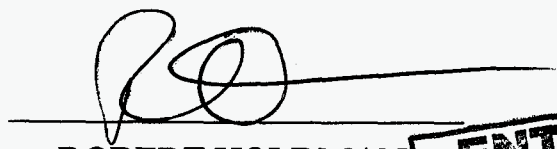
<sup>1</sup> In fashioning its charge, the trial Court relied on People v. Reid, 69 NY2d 469 (1987), in which the Court of Appeals noted that "because taking property 'from an owner thereof' is an element of robbery, a person who recovers property which is his own (as compared to the fungible cash taken to satisfy a claimed debt in the cases before us) may not be guilty of robbery)" (citations omitted). In 2005, the Court of Appeals, again reaching this issue, noted that Reid, while not deciding the "question of whether an individual who uses force to recover a specific chattel which he owns may be convicted of robbery," inferred that the Legislature recognized that an accused should not be permitted to invoke the defense in crimes involving force. See People v. Green, 5 NY3d 538, 543 (2005).

and capable of review on direct appeal. Since Defendant unjustifiably failed to raise the claim on direct appeal, this claim is procedurally barred. See CPL 440.10 (2) (c). In any event, as to Defendant's claim that his counsel was ineffective for failing to object to the prosecutor's comments on summation, the Appellate Division held that the prosecutor's summation, to the extent the issue was preserved, constituted fair response, and the prosecutor's comments were not so prejudicial as to deprive Defendant of a fair trial. As to the claim that counsel was ineffective for failing to object to the supplemental instructions to the jury regarding ownership, the instruction that Defendant could not be guilty of robbery if the jury found that the chain belonged to him, was favorable to Defendant and could not have adversely affected him.

Defendant's motion to vacate his judgment is denied.

This constitutes the decision and order of the Court.

ENTER:



ROBERT HOLDMAN  
J.S.C.

**ENTERED**  
SEP 15 2008  
NANCY T. SUNSHINE  
COUNTY CLERK

Dated: September 9, 2008