

**People v Fernandez**

2009 NY Slip Op 33256(U)

May 13, 2009

Sup Ct, Ulster County

Docket Number: 72-08

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ULSTER

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

**DECISION and ORDER  
INDICTMENT NO. 72-08**

MARCOS A. FERNANDEZ,

Defendant.

Supreme Court, Ulster County, All Purpose Term, April 7, 2009  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

For the People: D. Holley Carnright  
District Attorney of Ulster County  
Attn: John Tobin, Esq.  
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Kingston, New York 12401

For the Defendant: Cynthia Feathers  
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PO Box 4818  
Saratoga Springs, New York 12866

**TERESI, J.:**

On January 12, 2009, at the close of the jury trial held in this matter, the jury rendered its verdict finding defendant guilty of Sexual Abuse in the First Degree, Sexual Abuse in the Second Degree and Endangering the Welfare of a Child. Defendant now moves to set aside the verdict, pursuant to Criminal Procedure Law §330.30(1), by claiming this court erred in denying his proffered evidence of the victim's bad reputation for truthfulness. The People oppose the motion. Because the defendant failed to demonstrate his entitlement to an order pursuant to CPL §330.30(1), his motion is denied.

A CPL §330.30(1) motion may be granted only where the record demonstrates an error, “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.” (*see generally* People v. Carter, 63 NY2d 530 [1984]). “The basis for vacating a jury verdict prior to sentencing is strictly circumscribed by CPL §330.30 to allow vacatur only if reversal would have been mandated on appeal as a matter of law.” (People v. Ortiz, 250 AD2d 372, 375 [1<sup>st</sup> Dept. 1998] quoting People v. D'Alessandro, 184 AD2d 114 [1<sup>st</sup> Dept. 1992][internal quotations omitted]).

Here, defendant’s basis for vacating the jury verdict is unpersuasive. Defendant contends that this court erred in excluding two defense witnesses from offering testimony regarding the victim’s “reputation”. Defendant claims that the victim’s credibility was central to the prosecution’s case, and that the proposed witnesses would have testified to the victim’s bad reputation for truth. However, the defendant failed to lay a proper foundation for the introduction of the proposed reputation testimony.

It is well settled that “[a]ssuming a proper foundation exists, a party has a right to call a witness to testify that a key opposing witness, who gave substantive evidence and was not called for the purposes of impeachment, has a bad reputation in the community for truth and veracity”. (People v. Hopkins, 56 AD3d 820, 821 [3d Dept. 2008] quoting People v. Hanley, 5 NY3d 108 [2005] quoting People v. Pavao, 59 NY2d 282 [1983]). Here, it is undisputed that defendant’s proposed evidence was offered to establish the bad reputation of the truth and veracity of a “key opposing witness”, i.e. the victim. Nor that the victim gave “substantive evidence”. However, no proper foundation was laid for the proposed testimony.

A proper foundation for reputation testimony rests upon a witness' personal knowledge of the reputation of an individual in a community where that "individual's associations are of such quantity and quality as to permit [her] to be personally observed by a sufficient number of individuals to give reasonable assurance of reliability." (People v. Bouton, 50 NY2d 130, 139 [1980]). Here, because the defendant did not establish the "quality" of the community member's associations with the victim, he failed to establish the reliability of his proposed witnesses' testimony or lay a foundation for its introduction into evidence.

This record demonstrates that the first proposed witness, Juan Collazo, would have based his testimony of the victim's character on the observations of, up to, thirty family members. While the "quantity" of such community may have been sufficient, the defendant failed to establish the "quality" of the family member's associations with the victim. Mr. Collazo testified that he had heard the family members discuss the victim's reputation for truth, however, he was unable to testify about how many times he had heard the family members discuss the victim. Nor did he offer any details establishing the quality of the discussions, or testify about the family member's opportunities to observe the victim's truthfulness. This record contains no proof establishing the quality of the victim's associations and relationships with the family members Mr. Collazo's reputation testimony would have been based upon. Because Mr. Collazo did not establish the "quality" of the victim's associations with the community he would have based his reputation testimony upon, his proposed reputation testimony was properly denied as it lacked a foundation.

The record similarly demonstrates that the defendant's second proposed reputation witness, Ramona Collazo, also failed to establish the "quality" of the community's associations

with the victim. Ms. Collazo did not specify the “quantity” of individuals in the family that she would have based her reputation testimony upon, but did testify that she had heard “all” of her family discuss the victim. Such “quantity” may have been sufficient. Again, however, Ms. Collazo did not establish the “quality” of her family member’s associations with the victim. She offered no details about her family member’s observations of, or relationship with, the victim. Nor any facts to establish the reliability of her family member’s observations. Without such a foundation, Ms. Collazo’s proposed reputation testimony was properly excluded.

Accordingly, defendant’s motion is denied.

The original of this Decision and all papers upon which it was decided are filed with the Supreme Court Clerk and a copy of the Decision provided to all counsel.

So Ordered.

Dated: May 13, 2009  
Albany, New York



JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion, dated April 15, 2009; Affirmation of Cynthia Feathers, dated April 15, 2009, with attached Exhibit A1-A127.
2. Affirmation of John Tobin, dated May 5, 2009, with attached unnumbered exhibits.