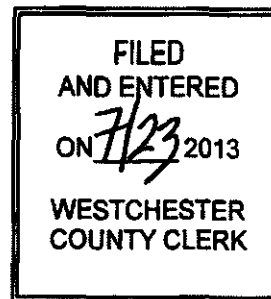


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| <b>People v Vale</b>                                                                                                                                                                                                                                             |
| 2013 NY Slip Op 34066(U)                                                                                                                                                                                                                                         |
| July 22, 2013                                                                                                                                                                                                                                                    |
| Supreme Court, Westchester County                                                                                                                                                                                                                                |
| Docket Number: 12-645                                                                                                                                                                                                                                            |
| Judge: Lester B. Adler                                                                                                                                                                                                                                           |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                                                           |

SUPREME COURT: STATE OF NEW YORK  
COUNTY OF WESTCHESTER



THE PEOPLE OF THE STATE OF NEW YORK

-against-

RICHARD VALE,

**FILED**  
JUL 23 2013  
Defendant.  
TIMOTHY C. IDONIX  
COUNTY CLERK  
COUNTY OF WESTCHESTER

**DECISION & ORDER**

Indictment No.: 12-645

ADLER, J.

Defendant, by notice of motion dated June 26, 2013, moves pursuant to CPL §330.30 for an order vacating the jury verdict of guilty rendered on March 19, 2013. Defendant contends that the verdict should be set aside on the ground that errors were made during the course of the trial which if raised on appeal would require reversal as a matter of law (see CPL §330.30[1]).

Defendant was charged by Indictment No.: 12-645 with two counts of burglary in the first degree, two counts of burglary in the second degree, one count of robbery in the first degree, one count of attempted robbery in the first degree, one count of attempted robbery in the second degree, one count of criminal use of a firearm in the first degree, one count of grand larceny in the third degree, and one count of criminal possession of stolen property in the third degree. On May 31, 2012, defendant was arraigned on the indictment and the matter was adjourned for purposes of pre-trial motions and discovery. Subsequent to the rendering of a decision with respect to those motions, the instant matter was assigned to this Court for trial on February 26, 2013.

Following a charge conference, summations, and the Court's instruction to the jury on the applicable law, the jury retired to deliberate. On March 19, 2013 the jury

returned its verdict in which defendant was found guilty of two counts of burglary in the first degree, one count of robbery in the first degree, one count of attempted robbery in the first degree, one count of attempted robbery in the second degree, one count of criminal use of a firearm in the first degree, one count of grand larceny in the third degree, and one count of criminal possession of stolen property in the third degree.<sup>1</sup> The matter was then adjourned to May 23, 2013 for sentencing.

Prior to the sentencing date, defendant filed a motion to relieve trial counsel and for the assignment of new counsel for the purposes of filing a motion to set aside the verdict pursuant to CPL §330.30. On May 23, 2013, trial counsel was relieved, new counsel was assigned and a motion schedule was set.

In his motion, defendant contends that the verdict rendered on March 19, 2013 should be set aside on the ground that the curative instruction given by the Court with respect to certain testimony given by the co-defendant, Eugene Lorino, was insufficient to "remedy the error." Defendant further contends that the failure of trial counsel to present the testimony of co-defendant Carlos Burgos and to present an alibi defense constitutes ineffective assistance of counsel.

In considering a motion to set aside a verdict pursuant to CPL §330.30(1), a court "may only consider questions of law, not fact" (*People v. McFadden*, 94 A.D.3d 1150, 1150, 942 N.Y.S.2d 811, *lv. denied* 19 N.Y.3d 998, 951 N.Y.S.2d 475, 975 N.E.2d 921, citing *People v. Ventura*, 66 N.Y.2d 693, 694-695, 496 N.Y.S.2d 416, 487

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<sup>1</sup>The two counts of burglary in the second degree were submitted as lesser included offenses of the two counts of burglary in the first degree, and the jury was instructed not to consider these counts if they found defendant guilty of the greater offense.

N.E.2d 273). “Moreover, a court may only consider claims of error which are properly preserved for appellate review” (*People v. Simmons*, 74 A.D.3d 1247, 1248, 904 N.Y.S.2d 719, *lv. denied* 15 N.Y.3d 855, 909 N.Y.S.2d 33, 935 N.E.2d 825).

In order to preserve his claim that the Court’s instruction with respect to Eugene Lorino’s testimony was insufficient to cure any prejudice to him, defendant was required to raise the claim at trial (*People v. Silas*, 308 A.D.2d 465, 764 N.Y.S.2d 193, *lv. denied* 100 N.Y.2d 645, 769 N.Y.S.2d 211, 801 N.E.2d 432). During cross-examination and in response to a question posed as to when Mr. Lorino “met up again” with defendant, Mr. Lorino responded “I think he was released in 2010.” The Court immediately stopped the cross-examination and asked to see counsel. Following a sidebar, the Court, at the request of defense counsel, directed the jury to disregard the last question and answer, which were then stricken from the record.<sup>2</sup>

Since no objection to the curative instruction was made during trial, the Court lacks authority to set aside the verdict on this ground (*People v. Thomas*, 8 A.D.3d 303, 777 N.Y.S.2d 673, *lv. denied* 3 N.Y.3d 682, 784 N.Y.S.2d 9, 817 N.E.2d 827; *Silas*, 308 A.D.2d at 466).

Defendant further argues that trial counsel’s failure to call Mr. Burgos to testify on his behalf and the failure to present an alibi defense deprived him of effective assistance of counsel at trial. The Court lacks authority to review this contention since it is based on facts dehors the record and is not reviewable on direct appeal (*People v. Rohlehr*, 87 A.D.3d 603, 927 N.Y.S.2d 919; *People v. Miller*, 68 A.D.3d 1135, 892

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<sup>2</sup>The sum and substance of the sidebar was placed on the record, outside of the presence of the jury, following the lunch break.

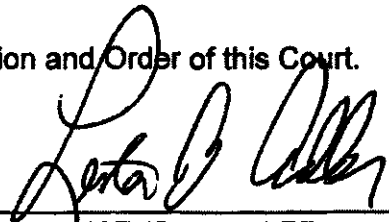
N.Y.S.2d 152; *People v. Frias*, 250 A.D.2d 495, 673 N.Y.S.2d 416, *lv. denied* 92 N.Y.2d 982, 683 N.Y.S.2d 763, 706 N.E.2d 751; *People v. Bagarozzy*, 182 A.D.2d 565, 582 N.Y.S.2d 424, *lv. denied* 80 N.Y.2d 901, 588 N.Y.S.2d 826, 602 N.E.2d 234).

Accordingly, the defendant's motion to set aside the verdict pursuant to CPL §330.30(1) is denied.

The Court considered the following papers on this application: 1) defendant's notice of motion and affirmation in support thereof dated June 26, 2013 and exhibits attached thereto; and 2) the People's affirmation in opposition with accompanying memorandum of law dated July 11, 2013.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
July 22, 2013

  
 HON. LESTER B. ADLER  
 SUPREME COURT JUSTICE

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