

People v Magnan

2014 NY Slip Op 32166(U)

July 1, 2014

Supreme Court, Kings County

Docket Number: 7373/2012

Judge: Albert Tomei

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

preserved for appeal by timely motions, objections, and/or requests to charge.

While the legal sufficiency claim was preserved for review by a motion to dismiss at the end of the case, the weight of the evidence claim cannot be raised pursuant to CPL §330.30(1) because it is not based on a matter of law, but is a unique factual review solely within the province of the intermediate appellate courts. *See People v. Romero*, 7 N.Y.3d 633, 643 (2006); *People v. Garcia*, 272 A.D.,2d 189, 190 (1st Dept., 2000). Therefore, only the legal sufficiency claim will be addressed herein.

Evidence is legally sufficient when, viewed in the light most favorable to the People, “there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt.” *People v. Danielson*, 9 N.Y.3d 342, 349 (2007). Here the evidence established that the murder occurred in the course of and in furtherance of the attempted robbery of the occupants of the livery cab. The inference that the defendant’s firing of multiple shots at the fleeing car was an effort to stop the car and to continue the robbery. *See People v. Barnes*, 50 N.Y.2d 375, 381 (1980); *People v. Paul*, 133 A.D.2d 711 (2d Dept., 1987); *People v. Jackson*, 20 N.Y.2d 440, 454 (1967). The fact that the cab driver attempted to end the robbery by fleeing from the scene does not establish that the defendant abandoned his intent to rob the victims. Nor, since the intended victims were unable to escape to a place of safety, was the robbery attempt ended merely due to distance. The defendant’s act of firing multiple shots at the moving car can reasonably be interpreted as an attempt to stop the car to continue his robbery goal. The jury’s verdict was, therefore, supported by a valid line of reasoning and permissible inferences leading to the determination that the defendant fired the shots that killed the passenger in the course of or in furtherance of the attempted robbery.

“A charge of intoxication should be given if there is sufficient evidence of intoxication in the record for a reasonable person to entertain a doubt as to the element of intent on that basis.” *People v. Perry*, 61 N.Y.2d 849, 850(1984). A defendant is entitled to a jury charge on intoxication when, viewing the evidence in the light most favorable to the defendant (*People v. Gaines*, 83 N.Y.2d 925, 927 [1994]), “the record contains evidence of the recent use of intoxicants of such nature or quantity to support the inference that their ingestion was sufficient to affect defendant’s ability to form the necessary criminal intent.” *People v. Rodriguez*, 76 N.Y.2d 918, 920 (1990). Although entitlement to an intoxication charge has a “relatively low threshold” of proof, bare assertions by a defendant that he was intoxicated are insufficient to meet that burden. *Gaines*, 83 N.Y.2d at 927. Before a charge is required, there must be objective evidence in the record, “such as the number of drinks, the period of time during which they were consumed, the lapse of time between consumption and the event at issue, whether [the defendant] consumed alcohol on an empty stomach, whether his drinks were high in alcohol content, and the specific impact of the alcohol upon his behavior or mental state. *Id.* Such evidence is necessary before any reasonable inference of lack of intent due to intoxication may be drawn.

The only evidence of intoxication in this case was the opinion of the cab driver that defendant looked “high” and that the defendant might have been drinking or on PCP because he attempted to rob a tattooed man larger than himself. The driver also described the defendant as “agile,” “very coherent,” and his movements as “intentional and deliberate.” The police officer who transported the defendant to the precinct also stated that defendant appeared to be high. Thus, while there was evidence that the defendant appeared to be high or intoxicated, there was no evidence presented from which a reasonable person could have made a determination regarding how much or

what type of alcohol or drugs the defendant had consumed. Absent such evidence, there was simply no objective way to determine how intoxicated the defendant was or what affect that intoxication had upon his ability to form the intent to rob the victims of to cause serious physical injury to the passenger he shot and killed. This case is factually similar to *Gaines*, in which no intoxication charge was required. In *Gaines*, 83 N.Y.2d at 925, the defendant testified that he had a couple of drinks and lost control, the police officer testified that the defendant had glassy eyes and alcohol on his breath and another witness testified that the defendant appeared “high.” Despite such testimony, absent details regarding the alcohol consumption, no intoxication charge was warranted. *See also Rodriguez*, 76 N.Y.2d at 920 (the defendant’s failure to establish the timing, quantity or effect on his behavior of the drugs he had ingested, no reasonable person could entertain a doubt as to the element of intent). Therefore, the defendant failed to meet the evidentiary threshold for a intoxication charge.

Moreover, even where the details of the quantity and type of alcohol or drugs and the timing of their ingestion are established, a charge on intoxication is not required if the evidence shows that the defendants overall behavior on the day of the assault was purposeful. *See People v. Beaty*, 22 N.Y.3d 918, 921 (2013); *People v. Sirico*, 17 N.Y.3d 744 (2011). In *Sirico*, the Court of Appeals rejected the claim that the trial court had erred in failing to charge intoxication in a case where there was evidence that the defendant had ingested two large glasses (12 to 15 ounces each) of whiskey and a Xanax pill shortly before threatening his friends and neighbors with a bow and arrow, firing an arrow into the side of a truck, and then fatally shooting an arrow into the victim. Despite the objective evidence regarding alcohol and drug consumption no charge was required because other evidence in the case established that the defendant was an experienced bow hunter and was able to give a full account of the incident.

Here, the defendant's overall behavior negates a claim of intoxication. His actions in approaching the livery cab when it was stopped at the light, displaying his gun and demanding property from the driver and the passengers was purposeful and calculated to achieve his robbery goal. The defendant attempted to intimidate his victims into acquiescing with his demands by pointing his gun at them and reached inside the driver's pocket to determine if the driver had any money on his person, despite his denials. When the driver attempted to escape the robbery by driving away, the defendant immediately fired several shots at the fleeing car, in an attempt to disable the car and to cause serious physical injury to the occupants in order to prevent his victims from escaping. Police happened to be nearby, heard the shots and chased the defendant. During the flight, he threw away the gun and jumped over a fence in an unsuccessful attempt to elude the police. Thus, the evidence showed that the defendant's actions were calculated and purposeful to achieve the robbery, to injure his victims when they attempted to flee, and to prevent the police from arresting him and from recovering the weapon he had used. Under these circumstances, no intoxication charge was required, particularly where there was no evidence was presented of the quantity of alcohol consumed, the timing of that consumption or its effect on the defendant's ability to reason and form intent.

Finally, the court properly denied the defendant's mistrial motion and substituted a second prosecutor to present the summation after the trial assistant was hospitalized and unable to continue the trial. The defendant has no statutory or constitutional right to be prosecuted by a particular Assistant District Attorney. *See People v. Carter*, 77 N.Y.2d 95, 106 (1990) (defendant received a fair trial although non-lawyer ADA presented the case to grand jury and prosecuted trial). Moreover, a judge may be substituted for another if the original judge becomes incapacitated during

a jury trial “as long as the substitute indicates on the record the requisite familiarity with the proceedings and no undue prejudice occurs to the defendant or the People.” *People v. Thompson*, 90 N.Y.2d 615, 621 (1997); *People v. Thomas*, 45 A.D.3d 483 (1st Dept., 2007).

The defendant has been unable to articulate how the substitution prejudiced him. The new prosecutor was given ample time to familiarize herself with the record and to prepare for summation and the adjournment was arranged to accommodate the jurors’ other obligations. The court addressed the concerns that the jurors “may feel some sympathy” due to the substitution or speculate about the reasons for it by instructing the jury that they were not to consider or speculate about the original prosecutor’s absence from the case. Therefore, the court acted within its discretion in substituting the prosecutor to present the summation for the incapacitated trial assistant and the defendant has not been prejudiced by the substitution.

Therefore, and for the foregoing reasons, the defendant’s motion to set aside the verdict pursuant to CPL § 330.30 is denied in all respects.

This constitutes the decision and order of the court.

Albert Tomei
HON. ALBERT TOMEI, J.S.C.

HON. ALBERT TOMEI

