

People v Viera

2014 NY Slip Op 32207(U)

May 27, 2014

Sup Ct, Kings County

Docket Number: 2405/2011

Judge: Albert Tomei

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This opinion is uncorrected and not selected for official publication.

Dept. 2003); *People v. Patino*, 259 AD2d 502 (2d Dept. 1999). Trial courts have no authority to consider unpreserved issues on a motion to set aside the verdict (*Id.*), unless the issue constitutes a violation of a fundamental right. *See People v. Antommarchi*, 80 NY2d 247, 250 (1992). Moreover, even if an error is fully preserved, it does not require reversal as a matter of law when the error is harmless in light of the overwhelming evidence of guilt. *See People v. Levy*, 194 AD2d 319 (1st Dept. 1993); *People v. D'Alessandro*, 184 AD2d 114 (1st Dept. 1992).

During trial, the court permitted the People to introduce several recorded telephone calls that co-defendant Freeman made from Rikers Island after his arrest on an unrelated matter in which he discussed this case and reached out to several persons to attempt to ensure that neither his then-girlfriend, her mother, or her family would tell the police that they knew him. The court gave limiting instructions when the conversations were played for the jury that the statements were admissible only against co-defendant Roger Freeman and only on the issues of his consciousness of guilt and possible admissions. The court specifically instructed that the tapes were not admitted against either defendant Shamar Viera or co-defendant Terell Viera and could not be used for any purpose as against them. In addition, the court instructed that the jury had to consider the evidence against each of the defendant's separately and could only consider the admissible evidence against each defendant.

In the January 23, 1011 telephone call to his girlfriend, Tasha Ham, co-defendant Roger Freeman asked her "Where's D-mar?" and she responded "He got lo." Defendant Shamar Viera then objected on confrontation grounds that he had no opportunity to cross-examine Tasha Ham. The court informed counsel that the conversation was not being admitted against defendant Shamar Viera and that Ham's statements were not offered for their truth but only for their affect on

co-defendant Freeman. Defendant Shamar Viera then informed the court that the instruction was fine and that he just wanted to make sure that his objection was clear for the Appellate Division. The limiting instruction was given and no mistrial motion was made. Under these circumstances, the defendant has not preserved his present claim for appellate review and it is, in any event, meritless.

Next, defendant argues that the admission of this telephone conversation prejudiced him because the shooting victim never identified him and the police used the telephone conversations of the co-defendant's to connect him to the case. This claim was never advanced at trial in any form and is, in any event, factually incorrect. The victim identified the defendant by name to the first police officers responding to the scene before he was placed in the ambulance, and to Detective Obdyke in the ambulance on the way to the hospital. He also identified the defendant from a photo array a few days later and made an in-court identification. Although one of the two police officers who first spoke to the victim at the scene thought the victim said the name "Jamal" rather than "Shamar," as the other officer heard, the victim clearly told Detective Obdyke that the defendant's name was Shamar and not Jamal. Therefore, this claim is both unpreserved for review and factually inaccurate.

Finally, the defendant argues that the court denied him a fair trial by denying a defense motion to sever and by ignoring the potential for prejudice by inconsistent defenses and because the introduction of the co-defendant's statements at the joint trial constituted a *Bruton* violation, and because co-defendant Freeman opened the door to the admission of the photo array identification. First, no written severance motion was ever filed in this case, as required by CPL §§ 2140(1); 255.20. The defendant did orally request separate trials due to the admission of various telephone conversations of his co-defendant's on the grounds that he could not confront the co-defendants. However, he never advanced the claim that separate trials were needed due to inconsistent defenses

or due to his inability to confront and cross-examine Tasha Ham.

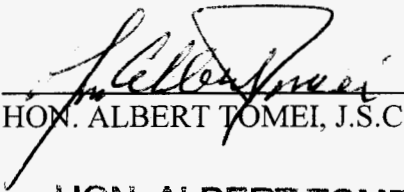
The court denied the request, ruling that the telephone conversations were admissible only against the particular defendant or defendant's who participated in each telephone call and only for the limited reasons set forth for each telephone call. Detailed limiting instructions were given when each telephone call was introduced into evidence, and the jury was repeatedly charged that the calls in which defendant did not participate were not to be considered as evidence against him. These telephone calls did not contain any description of any one of the co-defendant's actions during the crime itself. Indeed, only the statements of co-defendant Freeman were made after the shooting and, although he made some statements which could be interpreted as admissions, he did not make any statement regarding the events of the crime itself. Therefore, to the extent that defendant has preserved for appellate review any portion of his severance claim, it is without merit.

The defendant also argues that he was prejudiced by the joint trial because his co-defendant opened the door to the admission of his photo array identification by the victim. The defendant objected on the grounds of prejudiced and argued that the court should have granted severance, but did not move for a mistrial. In any event, the court limited the prejudice to defendant by not admitting the array itself or even testimony that the defendant had been identified in a photo array. Rather, the court instructed the jury that lineups were not necessary when a suspect had been identified and that, before their arrest, both the defendant and co-defendant Freeman had been identified by the victim in a legal identification procedure. This compromise was approved by defense counsel and prevented any undue prejudice to the defendant from his co-defendant's mistake, particularly where the jury had already heard that the victim identified the defendant by name to the police minutes after the shooting. Under these circumstances, there is no reason that the jury would

have even inferred that the legal identification procedure the court referred to was a photo array.

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.


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

ENTERED
MAY 27 2014
NANCY T. SUNSHINE
COUNTY CLERK