

People v Murray

2014 NY Slip Op 33759(U)

August 26, 2014

Supreme Court, Westchester County

Docket Number: 12-1281-01

Judge: Barbara G. Zambelli

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FILED
AND
ENTERED
ON Aug. 27 2014
WESTCHESTER
COUNTY CLERK

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

THE PEOPLE OF THE STATE OF NEW YORK

- against -

JOHN MURRAY,

AUG 27 2014
Defendant.

ZAMBELLI, J.

COUNTY CLERK
COUNTY OF WESTCHESTER

DECISION & ORDER

Indictment No.:12-1281-01

The following papers numbered 1 to 6 were read on this motion to set aside the verdict pursuant to CPL Article 330.30:

PAPERS NUMBERED

Notice of Motion & June 10, 2014 Affirmation of Robert Georges, Esq.	
June 20, 2014 Georges Supplemental Affirmation in Support & Exhibits A-H	1-4
Affirmation in Opposition & Memorandum of Law	5-6

Upon the foregoing papers it is ordered that this motion is denied.

On April 17, 2014, the defendant was convicted, after a jury trial (Zambelli, J.) of murder in the first degree and criminal possession of a weapon in the second degree. The defendant now moves to set aside the verdict and for a new trial pursuant to CPL §330.30. He argues that the verdict should be set aside and a new trial granted on several grounds. Specifically, defendant alleges that 1) that the certificate of conviction relating to defendant's prior murder conviction was improperly admitted before the Grand Jury which indicted defendant; 2) that the Court's Sandoval ruling was unduly prejudicial; 3) that the Court improperly denied defendant access to Det. Sgt. Henderlong's personnel records

and improperly limited defense cross examination regarding his suspension from the Peekskill Police Department; 4) that the Court improperly allowed numerous references to defendant's prior incarceration; 5) that the Court improperly allowed Det. Burke to testify as an expert on the "ultimate issue" in the case; 6) that the Court improperly instructed the jury about an agreement between the People and the defense regarding the playing of prison phone calls between defendant and co-defendant Beatrice Camper, which agreement the defense submits did not exist; 7) that the People improperly vouched for their witnesses; 8) that the evidence at trial was legally insufficient to support defendant's conviction; 9) that the accomplice testimony of co-defendant Camper was unsupported by sufficient corroborative evidence; 10) that the defendant is actually innocent of the crimes for which he stands convicted, and 11) that the People knowingly used false evidence at trial. Defendant's supplemental motion reiterates and further elaborates on his claims of actual innocence and that the People allegedly knowingly presented false evidence to the jury, and also submits further grounds as to why he contends the verdict should be set aside: 12) that the criminal possession of a weapon in the second degree charge is unsupported by any evidence and 13) that the People committed a Batson violation by allegedly using their pre-emptory challenges to strike African American females from the jury. The People oppose the motion and argue that it should be summarily denied.

Pursuant to CPL §330.30(1), a trial court's authority to set aside a verdict is limited to grounds which, if raised on appeal, would require reversal as a matter of law. Thus, only a claim that is properly preserved for appellate review may serve as a basis to set aside a verdict (People v. Josey, 204 A.D.2d 571 (2d Dept. 1994)).

Grand Jury Certificate of Conviction

Defendant's argument that the People improperly submitted a certificate of conviction regarding defendant's prior murder in the second degree conviction to the grand jury is without merit. The People introduced the certificate of conviction in order to elevate defendant's crime to murder in the first degree. Defendant submits that it was unduly prejudicial to introduce the certificate of conviction prior to the jury voting to indict defendant on murder in the second degree and that the cautionary instruction provided by the People was insufficient to cure any prejudice. However, contrary to defendant's allegation, the People properly presented evidence of the prior conviction to the grand jury along with the remainder of the evidence (People v. Baez, 118 A.D.2d 863 (2d Dept. 1986), lv. denied, 68 N.Y.2d 665 (1986)).

Sandoval

Defendant argues that the Court erred in its Sandoval ruling. The Court ruled that if defendant were to testify, the People would be able to ask him if he had been previously convicted of murder in the second degree and whether he has been previously convicted of a violent felony. Defendant argues that the Court's ruling unduly prejudiced him because it kept him from testifying and that he was the only one who could testify as to his whereabouts on the date and time in question. The People argue that defendant failed to make this argument during the Sandoval hearing and it is therefore unpreserved.

Defendant's argument that the Court erred in making its Sandoval ruling is also without merit. Defendant is challenging the Court's exercise of discretion in making its ruling; however, he fails to demonstrate that the Court abused its discretion as a matter of law. In the event defendant chose to testify, the People had sought permission to question

him regarding a prior attempted robbery in the first degree, both of his prior murder in the second degree convictions and the facts underlying and sentences imposed for those convictions, as well as a conviction for assault in the second degree. Defendant opposed the motion and argued that the People should be limited to asking whether defendant had been convicted of a "violent felony" or just a "felony" (Milaccio Affirmation, p. 5, citing to March 28, 2014 minutes at 15). The Court made its ruling "in the exercise of discretion and balancing the respective interests at stake" (id.). The fact that defendant had committed a prior murder did not serve as an automatic bar for being questioned about that crime for impeachment purposes (see People v. Braithwaite, 254 A.D.2d 365 (2d Dept. 1998), lv. denied, 92 N.Y.2d 1028 (1998)). Defendant's prior convictions demonstrated that he was willing to place his own interests above those of society and the Court's ruling reflected an exercise of discretion in balancing the probative value against the prejudicial effect of the evidence (People v. Peterson, 262 A.D.2d 502, 503 (2d Dept. 1999), lv. denied, 94 N.Y.2d 828 (1999)).

Det. Sgt. Henderlong's Personnel Records

As to defendant's argument that the Court improperly denied defendant access to Det. Sgt. Henderlong's personnel records and improperly limited defense cross examination regarding his suspension from the Peekskill Police Department, it is noted that the records referred to, which were reviewed in camera by this Court, are confidential pursuant to Civil Rights Law §50-a(1), and thus, the decision of whether to admit their use for impeachment purposes, as with the Court's Sandoval ruling, rests on an exercise of discretion by the Court (People v. Gissendanner, 48 N.Y.2d 543, 548 (1979)).

Defendant fails to meet his burden of demonstrating that the Court abused its

discretion as a matter of law in its ruling regarding the records. Based upon the in camera review of the records, the Court determined that they were not relevant to the instant proceedings and involved a collateral matter. Defendant's motion on this ground is denied.

References to Defendant's Prior Incarceration

Defendant submits that the verdict should be set aside because the Court allowed the jury to hear an "excessive number of references to the fact that the defendant had been previously incarcerated" and failed to give a proper limiting instruction regarding the calls, which he submits caused him prejudice.

Defendant's motion is denied. The defense stated on the record in pretrial proceedings that he did not object to references that the defendant was incarcerated (Milaccio Affirmation, pp. 7, 17, citing March 28, 2014 transcript, p. 63). Indeed, as opposed to objecting to references to defendant's prior incarceration in general as he does herein, at trial, the defense requested and the People consented to redact records and to instruct witnesses not to name specific correctional institutions, such as Sing Sing and Attica, to avoid any prejudice to defendant (Id. at 7). Defendant also cross examined Beatrice Camper about her conversations with defendant while he was incarcerated. Accordingly, given the disparity between defendant's arguments herein and his position at trial, defendant failed to preserve this issue (People v. Gary, 115 A.D.3d 640, 641 (2d Dept. 2014); People v. Gray, 86 N.Y.2d 10, 20 (1995)). In any event, the motion is without merit, as the facts of this case are entwined in the defendant's prior incarceration, including, inter alia, his relationship with Beatrice Camper, who met defendant during his prior incarceration, and their numerous recorded conversations which occurred while defendant was incarcerated. Moreover, the Court gave the jury a limiting instruction

regarding this evidence.

Det. Burke's Testimony

Defendant argues that the Court improperly allowed Det. Burke to offer expert opinion on what he submits is the "ultimate issue" in the case. Det. Burke was called as an expert by the People to offer his opinion as to whether or not the car seen crossing the Bear Mountain Bridge on the date in question was the defendant's car. As an initial matter, contrary to defendant's appellation, this was not the "ultimate issue" in this case. Moreover, the decision of whether or not to admit expert testimony rests in the sound discretion of the trial court (see People v. LeGrand, 8 N.Y.3d 449, 455-56 (2007)). Defendant fails to demonstrate that the Court improvidently exercised its discretion in this matter. The Court considered the Detective's specialized experience and determined that the jury would benefit from his expertise, and instructed the jury that they were the ultimate finder of fact in this matter. Defendant's motion on this ground is denied.

Prison Phone Calls

Defendant submits that the Court improperly instructed the jury about an agreement between the People and the defense regarding the playing of prison phone calls between defendant and co-defendant Beatrice Camper because he alleges that no such agreement existed. Defendant submits that the only agreement between he and the People was that "certain portions of calls that were of a sexual nature would not be played for the jury." Defendant argues that due to the Court's ruling, he was "limited in what he could argue [in summation] regarding the People's decision to play only a portion of the calls", which he submits violated his right to a fair trial.

Defendant never argued at trial that the Court's ruling allegedly impaired his ability

to make arguments regarding the calls; thus, his argument is unpreserved and not cognizable on this motion (People v. Amato, 238 A.D.2d 432, 433 (2d Dept. 1997), lv. denied, 90 N.Y.2d 937 (1997)). In any event, defendant's argument is inherently contradictory, because he alleges on one hand that there was no agreement, but then admits that there was an agreement not to play calls of a sexual nature, the logical inference of which indicates that there was an agreement that other, non-sexual calls would be played. Moreover, defendant's allegation that the Court's instruction deprived him of a fair trial is conclusory in that he fails to establish in what way his arguments were limited. It is also noted that the Court's instruction to the jury was that their verdict must be based upon the evidence alone. Defendant's motion on this ground is therefore denied.

Vouching for Witnesses

Defendant alleges that the People improperly vouched for the evidence and credibility of certain witnesses. Defendant submits that during their summation, the People vouched for the testimony of witnesses, including Beatrice Camper, Det. Sgt. Henderlong, Det D'Aliso and the police generally, the effect of which, he argues, was prejudicial and entitles him to a new trial. Defendant also specifically faults the People for using posterboards during summation which defendant submits improperly substituted defendant's name for the (201) telephone number at issue in the case. Defendant argues that the use of the posterboard gave the jury the mistaken impression that the Court was in agreement that they should believe that the (201) number was the defendant, even though the board was not admitted into evidence.

Defendant's motion is without merit and is denied. As an initial matter, regarding defendant's claim that the People improperly vouched for the witnesses, defendant fails

to point to any specific testimony that he submits the People vouched for. Defendant has therefore failed to meet his burden in demonstrating that an error occurred at trial, which, if reviewed on appeal, would require reversal as a matter of law (CPL §330.30(1)). In any event, the People's arguments during summation were fair comment upon the evidence and the reasonable inferences to be drawn therefrom (People v. Washington, 117 A.D.3d 1019 (2d Dept. 2014)). As to the posterboard, the posterboard was demonstrative evidence and the use of visual aids to assist the jury is permitted (People v. Potter, 255 A.D.2d 763, 766 (3d Dept. 1998); see also People v. Berry, 110 A.D.3d 1002 (2d Dept. 2013)). While defendant disputes that he placed the call to the victim's phone from the (201) number, the People's arguments seeking to connect defendant to that number were again fair comment upon the evidence and the reasonable inferences to be drawn therefrom (People v. Washington, supra). Moreover, the Court instructed the jury that their verdict was to be based upon the evidence alone.

Legal Sufficiency

Defendant argues that the verdict was not supported by legally sufficient evidence and that the credible evidence in the case pointed to the co-defendant, Beatrice Camper, (who pleaded guilty to murder in the second degree regarding the death of the victim in this matter and who testified against the defendant at trial) as the shooter herein. In support of his motion, defendant points to the fact that there were no eyewitnesses to the crime, nor any surveillance photos of it, and that there was no forensic evidence which connected the defendant to the victim's death. He also highlights certain portions of the trial evidence which he submits "points to" Beatrice Camper as the shooter.

A court reviewing legal sufficiency of the trial evidence must determine "whether

any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the fact finder on the basis of the evidence at trial, viewed in the light most favorable to the People” (People v. Williams, 84 N.Y.2d 925, 926 (1994)). Applying that test to the evidence adduced at trial, the Court finds that the evidence was legally sufficient. While the defendant couches his argument in terms of legal sufficiency, it is clear from the substance of his motion that what he seeks is for this Court to conduct a weight of the evidence review, as he submits essentially that factual discrepancies undermined the credibility of the People’s case and point to Beatrice Camper as the shooter; however, weight of the evidence review is not permitted pursuant to CPL §330.30(1) (People v. Garcia, 272 A.D.2d 189 (1st Dept. 2000), lv. denied, 95 N.Y.2d 889 (2000)). It is also noted that in support of his argument, defendant cherry picks certain portions of the evidence which he submits supports his position, but chooses to ignore significant portions of the evidence which does not, which also supports the determination that defendant ultimately seeks an impermissible weight of the evidence review.

Corroboration of Camper’s Testimony

Defendant argues that the accomplice testimony of Beatrice Camper was unsupported and thus legally insufficient. He specifically argues that “[h]er testimony on the following subjects lacked corroboration: i) that defendant Murray went to a hotel with her and while in the hotel, told Ms. Camper that he was going to kill her husband, ii) that defendant Murray was going to get a spider - meaning a gun, and iii) that defendant Murray told Beatrice Camper that he was in Peekskill on the day of the murder and that he then told her it was done.”

CPL §60.22(1) provides that “[a] defendant may not be convicted of any offense

upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense.” However, the Court of Appeals has noted that “corroborative evidence need not be powerful in itself. [It] need not show the commission of the crime, it need not show that the defendant was connected with the commission of the crime. It is enough if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling the truth.” (People v. Reome, 15 N.Y.3d 188, 191-92 (2010)). The Court further noted therein that “some evidence may be considered corroborative even though it simply supports the accomplice testimony, and does not independently incriminate the defendant” (Id.).

Beatrice Camper’s testimony was sufficiently corroborated at trial. While defendant singles out specific statements within her testimony which he submits were not corroborated, as the statute and above citations make clear, there is no requirement that every single, individual statement of the accomplice testimony be corroborated. The record herein as a whole contains evidence which tends to connect defendant with the commission of the crime, including, inter alia, the taped conversations between defendant and Beatrice Camper; evidence of defendant’s connection to the (201) phone number; evidence that the victim received a call from that (201) number shortly before the crime; the recovery of the victim’s phone in Orange County, and photographic evidence regarding a car of the same make, model and color of defendant’s crossing the Bear Mountain Bridge both before and after the murder, which the People submitted was defendant’s car. Defendant’s motion on this ground is therefore denied.

Actual Innocence

Defendant argues that his motion to set aside the verdict should be granted because he submits that he is actually innocent of the crimes for which he was convicted. Defendant relies upon People v. Hamilton, 115 A.D.3d 12 (2d Dept. 2014), a case which held that actual innocence was a ground upon which a court was empowered to vacate a defendant's conviction pursuant to CPL §440.10. Defendant argues that while that case was decided pursuant to a different statute, it is nevertheless viable on this motion to set aside the verdict. In support of his argument that he is actually innocent, defendant points to, inter alia, certain discrepancies in witnesses' testimonies, what he submits are contradictions in the testimony of the witness who testified regarding the cell phones in this case and their locations at the time of the crime herein and the evidence which he submits demonstrates that Beatrice Camper was the shooter in this case.

Defendant's motion is denied. The Hamilton court made clear that "actual innocence" means "factual innocence, not merely legal insufficiency of evidence of guilt" (Id. at 73). The Court further noted that "[t]he constitutional violation on a claim of actual innocence is that the defendant is subject to a criminal conviction while he or she is in fact innocent. Mere doubt as to the defendant's guilt, or a preponderance of conflicting evidence as to the defendant's guilt, is insufficient, since a convicted defendant no longer enjoys the presumption of innocence, and in fact is presumed to be guilty." (Id. at 27). Thus, the test for actual innocence requires determination of the factual issue of innocence, as opposed to "grounds which, if raised on appeal, would require reversal as a matter of law" as is required on this CPL §330.30 motion. Actual innocence is therefore not a ground cognizable in a motion to set aside the verdict brought pursuant to CPL

§330.30. In any event, given the other evidence in the record herein, including, inter alia, Beatrice Camper's testimony, the recorded prison phone calls between defendant and Beatrice, evidence of defendant's connection to the (201) phone number, evidence that the victim received a call from that (201) number shortly before the crime, the recovery of the victim's phone in Orange County, and photographic evidence regarding a car of the same make, model and color of defendant's crossing the Bear Mountain Bridge both before and after the murder, defendant's motion falls well short of meeting his burden of establishing by clear and convincing evidence that he is actually innocent of the crimes for which he was convicted (People v. Hamilton, supra).

False Evidence

Defendant argues that the People knowingly relied on false evidence which he submits violated his due process rights and his right to a fair trial. In support of his argument, defendant points to the testimony of the People's witness Dean Delitta regarding the location of the cell phones at issue in this case during the time of the crime. Defendant argues that this witness first stated, in sum and substance, that he did not know the exact area where the phone was used but only what tower its signal was received at so there was no way to know what road was taken, but that the People later elicited testify from him where he opined that signals from the tower were consistent with the phone being utilized at the crime scene location, which defendant submits was false testimony as it was in conflict with the witness' first statement. Relatedly, he argues that the People used false testimony when they introduced Exhibits 153S and 118S which showed the placement of the phones and which defendant submits is incorrect when compared to the testimony. Defendant further alleges that the People used false testimony in regard to witnesses

alleging that they placed or received calls at on certain dates and times, which testimony defendant submits was not supported by the phone records in the People's possession. He also submits that the People used false testimony regarding defense witness Jaquan Boykin and the use of the (201) telephone when they referred to the phone in summation as the Jaquan Boykin phone, even though that witness repeatedly denied it was his phone. Defendant further submits that the People knowingly used false evidence when they used a telephone call log which was used in the grand jury and also at trial which names defendant as the subscriber of the (201) telephone when the People were in possession of subscriber information from Sprint which advised that the subscriber of the (201) telephone was "Carlos Antonio" of "580 Westside, Jersey, NJ 07304".

Defendant's motion is without merit and is denied. As an initial matter, with the exception of the telephone call log, the use of which the defense objected to at trial, defendant did not object to the remaining testimony at the time of trial, thus making these grounds unpreserved and not cognizable on this motion (People v. Amato, supra). Additionally, to the extent that defendant refers to matters de hors the record, such as the telephone records for the various witnesses that the defendant submits were in the People's possession and the alleged subscriber information for the (201) telephone, such matters are also improperly raised in a CPL §330.30 motion (see People v. Grossfeld, 216 A.D.2d 319, 320-21 (2d Dept. 1995); lv. denied, 86 N.Y.2d 735 (1995)). In any event, as to discrepancies in witness testimony regarding when phone calls were made, defendant has failed to establish that the testimony was knowingly false, as opposed to simply mistaken (see People v. Stern, 226 A.D.2d 238, 240 (1st Dept. 1996), lv. denied, 88 N.Y.2d 1072 (1996)). In regard to the Dean Delitta testimony, defendant's allegations are

contradictory as he concedes that the witness explained to the jury that the location of the phone could not be exactly determined and also explained why he located the phone icons on the exhibits as he did. Given this, defendant has not established that this testimony was knowingly false. As to the People's arguments during summation regarding the (201) telephone and Jaquan Boykin, these arguments were fair comment upon the evidence and the reasonable inferences to be drawn therefrom (People v. Washington, supra) and it is further noted that the Court instructed the jury that their verdict was to be solely based upon the evidence. As noted above in the section which addressed defendant's claim of vouchering, the telephone call log which identified the (201) telephone number as being defendant's was permissible demonstrative evidence (People v. Potter, supra; People v. Berry, supra).

Criminal Possession of a Weapon Conviction

Defendant argues that his conviction for criminal possession of a weapon in the second degree is unsupported by any testimony or evidence, as the only evidence that was introduced was that .25 caliber bullets and a casing were found in the victim's vehicle, that this ammunition could match numerous types of guns, no gun was ever recovered, that there was no testimony which established that defendant was ever seen with a gun and that there was no evidence to establish what type of firearm killed the victim and whether it was loaded and operable.

Defendant's motion is unavailing. The weapon's caliber and operability were established by the live .25 cartridge and discharged .25 caliber shell casing recovered at the scene, as well as the fatal gunshot wound and the two bullets removed from the victim, and the other evidence at the trial indicated that defendant was the person who killed the

victim. Given this, the jury could reasonably infer that the defendant possessed the weapon (see People v. Bailey, 19 A.D.3d 431, 432 (2d Dept. 2005)).

Batson Challenge

Defendant argues that the People improperly used their peremptory challenges to strike five consecutive African American women from the jury panel in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Defendant submits that the People did this because they did not want any jurors from the same age, gender and ethnicity as their chief witness, Beatrice Camper. Under Batson, in order to establish a prima facie case, defendant must establish that the People intentionally used their peremptory challenges to discriminate against a cognizable group. The burden then shifts to the People to establish race and gender neutral reasons for striking the jurors. If the reasons appear to be race and gender neutral, the Court must then determine whether defendant has proved race and gender discrimination (see People v. Davis, 253 A.D.2d 634 (1st Dept. 1998)).

Defendant's motion is denied, as he failed to establish a prima facie case during jury selection. Defendant attempted to make his Batson challenge the day after the jury and its alternates had been sworn and it was therefore untimely (People v. Barnes, 198 A.D.2d 289, 290-91 (2d Dept. 1993); lv. denied, 82 N.Y.2d 921 (1994)). Accordingly, defendant's Batson challenge was appropriately rejected by the Court.

Accordingly, defendant's motion is summarily denied in its entirety.

This Decision constitutes the Order of the Court.

Dated: White Plains, New York
August 26, 2014


BARBARA G. ZAMBELLI
COUNTY COURT JUDGE