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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART 18

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THE PEOPLE OF THE STATE OF NEW YORK — Decision and Order

– against –

HUMPHRIES QUAYE, — Indictment No. 6492/2011

Defendant.

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William M. Harrington, A.J.S.C.:

Following a jury trial, the defendant was found guilty of Robbery in the First Degree (P.L. § 160.15[2]).[1] On January 9, 2014, the defendant filed a Criminal Procedure Law section 330.30(1) motion, pro se, requesting this court to set aside the jury's verdict, substitute a verdict of guilty to a lesser charge, or acquit the defendant of all charges. On February 1, 2014, the defendant requested permission to amend his initial filing to include an ineffective assistance of counsel claim. The defendant's request was granted.

The People responded to the defendant's initial motion and motion to amend. The People opposed the defendant's request for relief and argued, among other things, that the motion must be denied, in large part, as the defendant's arguments are unpreserved for review. Moreover, the People argued that this court cannot consider the defendant's arguments that require an analysis of the weight of the evidence. Lastly, the People contend that the defendant's counsel was effective.

The court has considered the defendant's motions, the People's responses opposing the requested relief, as well as the trial record. For the reasons set forth below, the defendant's motion to set aside the jury's verdict is denied.

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[1]The defendant, Humphries Quaye, and co-defendant, Jerrod Drumgoole, were charged under Indictment Number 6492/2011. They were tried together in a unitary, dual-jury trial.

Procedural History

On June 10, 2013, this court presided over an evidentiary hearing on the defendants' motions to suppress identification evidence and physical evidence. In a written decision dated July 29, 2013, this court denied the defendants' motions to suppress evidence, finding that the officers were justified in seizing the property from the vehicle in which the defendants were seated and that the identification procedure was proper.

On September 18, 2013, a jury trial commenced before this court. The People called twelve witnesses to testify: the complainant, Erik Lavenburg, Police Officer Jason Santana, Communication Technician Beverly McBride, Firearms Analysis Detective Colleen Schutt, Evidence Collection Team Police Officer Brendan Sheehan, Police Officer Ryan Stiano, Sergeant Jason Vasquez, Criminalist Natalya Yanoff, Detective Richard Colangelo, Rikers Representative Amy Lowe, Police Officer Elvis Merizalde, and Detective Gerard Amato from the Kings County District Attorney's Office.

At the end of the People's case the defendant's counsel made a motion for a trial order of dismissal. The court considered the defendant's motion and denied the request in its entirety. The defendant, Humphries Quaye, opted to testify on his own behalf.

The court charged the jury on October 10, 2013 and, after receiving a note from the jury the next day, recharged the jury as to the elements of first, second and third degree robbery and fourth degree grand larceny. On October 11, 2013, the jury reached a verdict and convicted the defendant of Robbery in the First Degree.

After receiving an extension from the court to file his motion, the defendant, Humphries Quaye, filed a pro se motion dated January 7, 2014. The defendant requested an extension because he was filing the motion on his own behalf and he did not receive the court transcript for some time.

On January 21, 2014, the People filed an answer to the defendant's motion. The defendant was permitted an opportunity to respond and he filed a motion in response to the People's answer; his motion is dated February 1, 2014. By his motion, the defendant advanced an ineffective assistance of counsel claim. On February 14, 2014, the People replied to the defendant's response. Lastly, on March 4, 2014, the defendant replied to the People's response.[2]

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[2]The court also received a letter from the defendant. The letter, dated March 14, 2014, is a courtesy coup of the defendant's letter to his newly appointed attorney, Mitchell Salaway. In the letter to his attorney the defendant states that he was pleased to learn that the court had "accepted [his] argument that [he] had been the victim of ineffective assistance of counsel..." This court made no such ruling. Inasmuch as the defendant advanced an ineffective assistance of counsel claim, this court appointed new counsel to avoid any conflict of interest.

Conclusions of Law

At any time after the rendition of a guilty verdict and before sentence is imposed a trial court is empowered to "set aside or modify the verdict or any part thereof, upon...[a]ny ground appearing in the record 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." C.P.L. § 330.30(1). And "a defendant who does not rest after the court fails to grant a motion to dismiss at the close of the People's case, proceeds with the risk that he will inadvertently supply a deficiency in the People's case." *People v. Kirkpatrick*, 32 N.Y.2d 17, 21 (1973). Therefore, "a defendant who presents evidence after a trial court has declined to grant a trial motion to dismiss made at the close of the People's case waives subsequent review of that determination." *People v. Hines*, 97 N.Y.2d 56, 61 (2001). Based on the defendant's waiver, the court may only consider all of the evidence that the jury considered in reaching its verdict, which in this case includes the defendant's testimony. Thus, this court may only address the legal sufficiency of all of the evidence and, after reviewing the evidence in the light most favorable to the prosecution, the court must determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Contes*, 60 N.Y.2d 620, 621 (1983) citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in the original). Moreover, a trial court's ability to review is limited and "a trial court is powerless to set aside a verdict on the ground that it is against the weight of the evidence." *People v. Pirozzi*, 237 A.D.2d 628 (2d Dep't 1997); *People v. Hampton*, 2013 N.Y. Slip Op. 03936, *16-17 (June 4, 2013); *People v. Carter*, 63 N.Y.2d 530, 536 (1984); *People v. Lleshi*, 100 A.D.3d 780, 780 (2d Dep't 2012); *People v. Brown*, 141 A.D.2d 657 (2d Dep't 1988).

Weight of the Evidence

By his motion the defendant takes issues with the testimony of one witness, the complainant, Erik Lavenburg. His claims center around the believability of the witness. He does not claim that any element of the People's case was lacking, he merely takes exception to the weight of it. Notably, his motion highlights the fact that his point of contention rests with the believability of the witness (..."Defendant's point was that the People were unable to present any forensic evidence linking defendant to the crime, and that therefore, the People's entire case against Defendant rested upon the believability of the CW." Defendant's response to the People's Answer to Defendant's CPL 33.30 Motion, paragraph 1.)

According to the defendant, Mr. Lavenburg's trial testimony was inconsistent with prior testimony that the complainant gave at a Parole Hearing for co-defendant, Jerrod Drumgoole. The inconsistencies that the defendant complains of include that the complainant initially described the hallway where he was robbed as dimly lit, he did not notice what the assailants were wearing, he did not get a good look at the second assailant, and he identified the perpetrators only once. The defendant also argues that the complainant's testimony at the parole hearing demonstrates that it was difficult to identify his assailants because it was raining very hard, had gotten dark outside and visibility was limited. It is clear to this court that the defendant wishes that this court consider the passage of time regarding the complainant's ability to recall the event. However, again, the defendant's argument is about the weight of the evidence proffered by the People, not its sufficiency.

The defendant's argument regarding his testimony also addresses the weight of the evidence that the jury should have assigned to the evidence. The defendant believes that the innocent reason to be present in the vehicle advanced during his testimony should have outweighed the complainant's testimony.

To the extent that the defendant argues that the evidence at trial was legally insufficient, that argument is also unavailing. Specifically he contends that the admitted Riker's Island phone calls that he made were mere conjecture; the calls' speculatory nature coupled with conflicting testimony from the complainant and the lack of supporting evidence are "insufficient" to support his conviction.[3] The only question the court may consider is whether any rational jury could have found the essential elements of the crime beyond a reasonable doubt. Viewing all of the evidence, in the light most favorable to the People, the court is satisfied that a rational jury could have found the essential elements of the crime beyond a reasonable doubt. *People v. Contes*, 60 N.Y.2d at 621.

A person is guilty of Robbery in the First Degree when he forcibly steals property, and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime is armed with a deadly weapon. See P.L. § 160.15(2). Moreover, a person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for a particular purpose. See P.L. § 160.00. Larceny requires an intent to deprive another person of property .

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[3] The People responded to some of the defendant's arguments as if he had made a claim of prosecutorial misconduct. However, this court's reading of defendant's argument references the sufficiency or the inferences to be drawn from the evidence and not the propriety of the People's summation. Moreover, the defendant's counsel did not object to any of the statements made by the People during her summation. *See People v. Greene*, 298 A.D.2d 464 (2d Dep't 2002). In any event, the People's summation fairly commented on the evidence and fairly responded to the defense summation. *Id.*

To "deprive another person of property" means:

> "(a) to withhold it or cause it to be withheld from him permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to him, or (b) to dispose of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property." P.L. § 155.00(3).

The complainant testified that he observed the defendant and co-defendant near the elevator of his in-laws' apartment located at 415 Albemarle Road in Brooklyn. He had an opportunity to observe the defendants at close range and while the defendant was standing withing a few feet of him. Co-defendant Drumgoole was so close that he had his hand resting on the complainant's shoulder. There was nothing blocking the complainant's view of the co-defendant and the co-defendant's face was not covered. While holding the black gun within arm's length of the complainant, the co-defendant demanded the complainant's cash. During the exchange, the co-defendant revised his request and asked for the complainant's entire wallet and the defendant stood behind Jerrod Drumgoole during the entire incident. After the co-defendant took the complainant's wallet the defendant, Humphries Quaye, stepped forward and retrieved the complainant's phone and keys from the victim's pockets. As the defendant and co-defendant were leaving, the complainant requested that the defendants leave his driver's license in the lobby. He did not want to have to go to the Department of Motor Vehicles to apply for a replacement license. Co-defendant Drumgoole verbally responded to the complainant's request and indicated that he would leave the license in the lobby. The defendants exited the apartment building together.

Within two to three seconds the complainant followed the defendants down the stairs to the lobby, quickly scanned for his license, and walked outside the apartment building front door. He observed the defendants walking down the block of the building and turn onto the next street, East 4th Street. As the complainant was asking someone to call 911, he flagged down a passing police car and asked for help from Sergeant Jason Vasquez and Officer Jason Santana. The police car stopped at the intersection of Albemarle Road and East 4th Street, the complainant quickly explained what had happened, and he jumped inside the car at the officers's direction to begin canvassing for suspects. The complainant informed the officers that he had just been mugged and, in less than a minute, the police stopped next to a gray Honda Accord parked on East 4th Street, about a half block away from Albemarle Road. Co-defendant Drumgoole was seated in the driver's seat and the defendant was in the passenger seat. The officers observed the vehicle attempt to exit the parking spot. The complainant identified the defendants as the robbers stating, "That's them." The defendant was slouching in his seat. Police Officer Santana observed co-defendant Drumgoole reaching underneath the car's steering wheel. The police approached the vehicle. Sergeant Vasquez struggled to apprehend co-defendant Drumgoole. The defendant fled and ran down the street while handcuffed. The complainant helped the struggling police officers apprehend co-defendant Drumgoole.

Inside the car, the black handgun with the red light was found on the driver's side floorboard, along with the complainant's wallet and keys. The complainant's cellular telephone was retrieved from the passenger side of the vehicle. At the precinct the complainant's wallet, keys, and cellular telephone were returned to him. The complainant observed the gun in the vehicle as he assisted the police in apprehending co-defendant Drumgoole and watched the police remove his cellular telephone from the car and place it on the roof of the car.

The complainant testified that he was "100% sure" that the defendant and co-defendant were the assailants who robbed him on July 29, 2011. He described the lighting conditions in the apartment building, the time period that he had an opportunity to observe the defendants and even described the red tab located on the gun. The gun and ammunition loaded inside were secured by the officers at the scene. The firearm's serial number was also recorded. The firearm was swabbed and fumed for possible genetic material and the swabs were sent to the Office of the Chief Medical Examiner for processing. Detective Colleen Schutt, qualified as an expert in the field of firearms operability and identification, testified that she received the firearm, tested it, and completed a report. She also described the red tab at the back of the firearm. Detective Schutt concluded or opined, within a reasonable degree of scientific certainty, that the firearm and ammunition that she received was operable.

Criminalist Natalya Yanoff was qualified as an expert in the field of forensic biology, DNA testing and analysis and statistical results of DNA profiles. Criminalist Yanoff testified that genetic material was recovered from the swab from the trigger/trigger guard of the firearm.[4] More than one person contributed to the genetic material present on the swab, which she termed a mixture. However, a major contributor was identified and a DNA profile was developed, Male Donor A. Criminalist Yanoff testified that she was unable to conclusive determine alleles at two locations, however she was able to determine alleles present that were part of the mixture. Nevertheless, according to her statistical analysis the DNA profile that she generated would be expected to be seen in one in greater than 6.8 trillion individuals. With a population of seven billion people on Earth, this genetic profile would appear only once if there existed 971 planet Earths, each containing seven billion people.

Co-defendant Drumgoole provided a DNA sample and Male Donor A's genetic profile was compared to the co-defendant's profile. Based on Criminalist Yanoff's analysis she was able to opine, within a degree of scientific certainty, that co-defendant, Jerrod Drumgoole, was the source of the genetic material found on the trigger/trigger guard swab from the recovered weapon.

The defendant, Humphries Quaye, also provided a DNA sample. Criminalist Yanoff determined, within a scientific certainty, that his DNA was not present on the gun.

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[4] The remaining two swabs contained an insufficient amount of DNA.

Moreover, the People entered into evidence portions of the defendant's recorded telephone calls that he made while incarcerated. During portions of the telephone calls the defendant alluded to the complainant and the incident and stated that he was at the location to help the other guy. In addition, the defendant discusses getting money together to get himself out of trouble. The People argued that the defendant talked about giving the complainant money to ensure that he did not get convicted.

Lastly, the defendant testified on his own behalf. He acknowledged that he and his co-defendant had previously worked together. After working together they spoke on the telephone a few times. The defendant admitted that he was with his co-defendant, Jerrod Drumgoole, on July 29, 2011, at approximately 6:00 p.m. near Albemarle Road and East 4th Street, in Kings County. Although he denied entering the apartment building and robbing the complainant, he admitted that his co-defendant entered the grey Honda and tried to pull out of the parking space. A police car stopped the car near the defendants, while they were seated in the vehicle, and officers attempted to arrest the defendants. The defendant further admitted that after the police arrested him he ran down the block. He ran to a store where he was later arrested by the police.

In view of the totality of the evidence, the defendant's request to set aside the verdict is denied based on the failure to proffer sufficient evidence. His specific request is unpreserved for review. In any event, the court finds that the jury could have reasonably concluded that all the elements of robbery in the first degree, including the defendant's identity as one of the perpetrators, were established beyond a reasonable doubt by credible evidence.

Preservation

Appellate review on the law also requires that any issue be preserved with specificity. *People v. Adams*, 281 A.D.2d 486 (2d Dep't 2001) (defendant made only generalized motions for a trial order of dismissal), citing People v. Gray, 86 N.Y.2d 10 (1995). The defendant claims that the jury's verdict should be overturned because the People failed to test the complainant's recovered property for forensic evidence. However, at the end of the entire trial the defendant's counsel did not preserve this issue for appellate review because the Court's attention was not specifically drawn to this alleged failure. At the end of the People's case defense counsel made a motion for a trial order of dismissal and argued that the People failed to make out a prima facie case. He specifically addressed the top count of the indictment, Robbery in the First Degree. He posited that there had been no evidence that showed that the defendant had acted in concert with the co-defendant who brandished the weapon. At the end of the entire case, the defendant's attorney restated his previous motion.

In any event, the defendant correctly states in his motion that the People are under no obligation to prove their case in a particular manner. The failure to test a physical object for forensic evidence has no bearing on its admissibility at trial. Most notably, however, the defendant's attorney questioned Criminalist Natalya Yanoff and remarked on the People's failure to present forensic evidence linking the defendant to the crime in his summation. During the trial the defendant's attorney specifically focused on Criminalist Yanoff's determination that the defendant's

deoxyribonucleic acid (DNA) was not present on the gun and that defendant was excluded from consideration. Also, the defendant's attorney argued during summation that the defendant's DNA was collected, tested and not found anywhere on the gun. He further highlighted the fact that DNA was not collected from any other item and although the witnesses alleged that the complainant's cellular telephone was found in the automobile near the defendant, it was not tested for DNA. The defendant's attorney noted that the witnesses presumed based on the defendant's movements that the cellular telephone had been in the hands of the defendant and still the phone was not tested for DNA. Lastly, counsel argued that the police should not be able to hide behind police protocol to explain why the phone was not tested and posited that the failure to test the objects created reasonable doubt of the defendant's guilt.

It is clear from the defendant's motion that it is his personal belief that the absence of a DNA test ought to have raised in the jurors' minds a reasonable doubt. However, as aforementioned, even if, arguendo, this court accepted the defendant's theory as correct, this court cannot substitute its judgement for that of the jury.

Jury Charge

In evaluating a challenged jury instruction, the court will "view the charge as a whole in order to determine whether a claimed deficiency in the jury charge requires reversal." *People v. Medina* 18 N.Y.3d 98, 104 (2011) citing *People v. Umali*, 10 N.Y.3d 417, 426-27 (2008) (holding that "(o)ur task in evaluating a challenge to jury instructions is not limited to the appropriateness of a single remark; instead, we review the context and content of the entire charge"). In *People v. Medina*, the Court of Appeals further held that a jury verdict will not be disturbed even where a "single sentence of the charge, when read in isolation, 'was improper and should not have been used' so long as the 'court's charge, taken as a whole, conveyed to the jury the correct standard.'" *People v. Medina*, 18 N.Y.3d at 104 (citations omitted). Moreover, the court recognizes that there are cases in which a court's omission of a definition or terms may constitute harmless error.

Here, the defendant contends that the court misspoke on two separate occasions during the jury charge. Citing the trial transcript the defendant found two errors. According to the trial transcript, after properly charging the jury as to the elements of Robbery in the Third Degree, the court stated:

> "Therefore, if you find that the People ***have proven beyond a reasonable doubt that element, you must find the defendant not guilty of the crime of robbery in the third degree*** as charged in the third count." Trial Transcript, October 10, 2013, page 24, lines 12-15 (emphasis added).

According to the transcript, the court misspoke by stating informing the jurors that they must find the defendant not guilty, even if the People had proven its case.

The second error that the defendant notes occurred during the court's charge of Grand Larceny in the Fourth Degree. After properly stating the elements, the transcript denotes that the court stated:

> "Therefore, if you find that the ***People haven't proven beyond a reasonable doubt all three of those elements, you must find the defendant guilty of the crime of grand larceny*** in the fourth degree as charged in fourth count." Trial Transcript, October 10, 2013, page 26, lines 22-25 through page 27, line 1.

First, the defendant's claim is not preserved. *People v. Gray*, 86 N.Y.2d at 19 (for a claim of error in a jury charge to be preserved a defendant must make his position known to the court and the argument must be specifically directed at the alleged error). Here, the defendant's attorney was specifically asked if there were any exceptions to the jury instructions and counsel indicated that there were none.

In any event, any error was subsequently corrected. On October 11, 2013, the court received a note from the jury requesting to be recharged on the law with respect to the definitions and criteria for first, second and third degree robbery, as well as fourth degree grand larceny. The jury was recharged and the aforementioned errors that appear in the transcript were corrected. The court reread the elements and the concluding statements to the jury. As to Robbery in the Third Degree, the court reread the correct elements and then stated:

> "Therefore, if you find that the People ***have proven beyond a reasonable doubt the above elements, you must find the defendant guilty of the crime of robbery in the third degree*** as charged in the third count." Trial Transcript, October 11, 2013, page 15, lines 19-22 (emphasis added).

Further, during the recharge of Grand Larceny in the Fourth Degree, the court reread the correct elements and concluded by stating:

> "Therefore, if you find that the ***People have proven beyond a reasonable doubt all three of those elements, you must find the defendant guilty of the crime of grand larceny*** in the fourth degree as charged in the fourth count.
>
> On the other hand, if you find that the People have not proven beyond a reasonable doubt any one or more of those elements, you must find the defendant not guilty of the crime of grand larceny in the fourth degree." Trial Transcript, October 11, 2013, page 18, lines 8-17 (emphasis added).

Although the defendant's argument is unpreserved, it cannot be said that the two claimed errors warrant reversal, especially when the errors were corrected the next day and prior to the pronouncement of the jury's verdict. Moreover, the defendant cannot be said to have suffered any prejudice because the jury is presumed to have followed this court's instructions, inasmuch as the jury returned a guilty verdict on the top count and the court instructed the jury not to consider the lesser counts in the event of such a finding. Therefore, the defendant's request for a new trial based on the perceived error in the jury instruction is denied.

Failure to Investigate the Defendant's Phone Records

The defendant also argues that the People's failure to investigate his personal cellular telephone records prevented him from obtaining evidence that might have been of an exculpatory nature. The defendant claims that his cellular telephone records would have proved that he was texting his girlfriend in the automobile during the time period that the robbery was taking place. The defendant also contends that he was incarcerated while awaiting trial and did not have access to his phone records or his phone because it was in police custody. The defendant testified that he remained in the automobile while co-defendant Jerrod Drumgoole left the vehicle to visit his girlfriend. He testified that during that time period he sent text messages to his girlfriend from his phone. The defendant advanced his defense and argues that the People failed to investigate it.

However, the People do not have an obligation to provide evidence to the defendant that is within his purview to procure. The records that the defendant discusses are his personal records. Moreover, the People's only burden is to prove the defendant's guilt beyond a reasonable doubt and disprove any affirmative offense. Whether the People disprove a defense is a question of fact, not law. *People v. South*, 649 N.Y.S.2d 533 (4th Dep't 1996). Therefore, this court lacks authority to set aside the verdict on this ground.

Ineffective Assistance of Counsel

A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *see* U.S. Const., 6th Amend.; N.Y. Const., Art. 1, § 6. To prevail on an ineffective assistance of counsel claim under the federal standard, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v Washington*, 466 US 668 at 694. In New York, it is well settled that "so long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met." *People v. Baldi*, 54 N.Y.2d 137, 147 (1981).

Here, the defendant contends that he received the ineffective assistance of counsel because counsel failed to elicit contradictory statements made by the complainant and his counsel did not object to the claimed errors in the jury's charge.

It is clear from the totality of the record that the defendant received meaningful representation. Mr. Horowitz cross-examined the witnesses and elicited favorable testimony to the defendant. On cross-examination the complainant admitted that he testified at a hearing shortly after the incident and stated he was robbed in a dimly lit hallway. But at trial, the complainant testified that the hallway was well lit. Mr. Horowitz also elicited that the complainant spoke with the Assistant District Attorney Sara Kurtzburg more than a half dozen times before he testified at trial; he reviewed the questions that he may be asked and he provided answers to those questions. It should be obvious that Mr. Horowitz elicited this testimony because it was clear that the People did not prepare the complainant for his testimony before the Parole Board. Moreover, Mr. Horowitz pointed out that the complainant's eyes had to adjust to the more dimly lit hallway once he entered the building from outside because it was a bright day.

The defendant's attorney drew attention to the fact that the complainant saw the defendant for a few seconds at which time he was focused on the gun and he felt stunned. The complainant testified that he only focused on the defendant for a few seconds before refocusing on the gun and co-defendant Drumgoole. He also mentioned that the defendant never said a word to him. Mr. Horowitz also concentrated on the fact that the only physical description that the complainant gave to the police was two black males. He did not indicate the type of clothing, height, weight, or complexion of the individuals that robbed him.

Lastly, Mr. Horowitz also focused on the fact that the complainant only viewed the defendant at the crime scene. He did not view a lineup, peruse a photograph book, or have an opportunity to see the defendant at the precinct. In sum, defense counsel's cross-examination of the complainant was skillful and focused. As aforementioned, he elicited testimony that was favorable to the defendant and concentrated on inconsistencies in the complainant's testimony.

In addition, the defendant contends that his attorney was ineffective for failing to object to the court's charge. As aforementioned, the two perceived errors that appear in the transcript were corrected. It cannot be said that the failure to object to one alleged error constitutes ineffective assistance of counsel.

On the record before this court, it cannot be said that the defendant received ineffective assistance of counsel. Mr. Horowitz made multiple motions through the prosecution of this case. For instance, he moved the court to permit separate cross-examinations of the complainant to ensure that his client's jury would not be tainted by any adverse inferences by his co-defendant. He also highlighted inconsistences in the complainant and officers' testimony. Moreover, Mr. Horowitz made certain to redact certain portions of the calls from Rikers Island so that he would not be identified as the defendant's attorney. He did not want it to appear to the jury that he could have been a part of any alleged scheme to influence the complainant. He specifically questioned the witnesses about the identification and whether the complainant stated, "I think that's them" when he observed the defendant. He used the hearing testimony to impeach the witnesses and laid a foundation to infer that the complainant was not sure in his identification of the defendant. In addition, he focused on the lack of forensic evidence connecting the defendant to the crime and elicited that the main witness, the complainant, had viewed the defendant very quickly and had not seen the defendant since the date of the crime. The record as a whole determines that the defendant received the effective assistance of counsel. Mr. Horowitz interposed appropriate objections and effectively cross-examined the People's witnesses.

Therefore, and for the foregoing reasons, the defendant's motion to set aside the verdict is denied.

This is the decision and order of the court.

So Ordered.

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Dated: May 23, 2014
Brooklyn, New York

William M. Harrington, A.J.S.C.