

People v Ogilvie
2019 NY Slip Op 33957(U)
May 20, 2019
County Court, Westchester County
Docket Number: 17-1136
Judge: George E. Fufidio
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COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
THE PEOPLE OF THE STATE OF NEW YORK

- against -

JOSEPH OGILVIE & TREMAINE GORDON,

Defendant.

-----X
FUFIDIO, J.

DECISION AND ORDER

Ind. No. 17-1136

FILED 

MAY 20 2019

**TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER**

The Defendant, Tremaine Gordon, moves for an order pursuant to CPL 330.30 to set aside the jury trial verdict convicting him of one count of attempted assault in the first degree, one count of assault in the second degree and one count of criminal possession of a weapon in the fourth degree. The jury acquitted the Defendant of one count of attempted murder in the second degree.

By motion dated May 8, 2019, the Defendant argues that the guilty verdicts should be set aside pursuant to CPL 330.30 because the People presented insufficient evidence that the Defendant aided and abetted his Co-Defendant, Joseph Ogilvie and therefore cannot be held liable for Ogilvie's actions.

By Affirmation in Opposition, the People oppose the Defendant's claims and argue that the motion pursuant to CPL 330.30 (1) should be denied in its entirety since his arguments are insufficiently preserved or without merit.

After a verdict is rendered and before sentence is imposed, a defendant may move to set aside the verdict on "any 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," (CPL 330.30[1]). Since the authority to set aside a verdict is limited to grounds which would require reversal or modification on appeal, only an error of law which has been properly preserved for appellate review may serve as a basis for setting aside the verdict (*see People v Hines*, 97 NY2d 56 [2001]; *People v Josey*, 204 AD2d 571 [2d Dept 1994]; *People v Amato*, 238 AD2d 432, 433 [2d Dept 1997]; *People v Thomas*, 8 AD3d 303 [2d

Dept 2004)). The Defendant's motion is denied for the following reasons:

A. SUFFICIENCY OF THE EVIDENCE

The standard for setting aside a verdict for insufficient evidence under CPL 330.30 is, after viewing the evidence and the reasonable inferences drawn from it, in the light most favorable to the People, could *any* rational juror have found that the People proved the essential elements of the charged crime beyond a reasonable doubt (*People v Contes* 60 NY2d 620 [1983]).

As this Court decided in his Co-Defendant's motion, it is evident that when applying the law to even the barest recitation of facts presented; that is that the Co-Defendant, Ogilvie, who was armed with a sharp object, that the Defendant concedes was in fact a knife, repeatedly stabbed the victim in and around his chest and heart, this standard has been met, regardless of the actual extent of the injuries the victim sustained (*see; People v Gilford*, 65 AD3d 840 [1st Dept. 2009]; *People v Elliot*, 299 AD2d 731 [3rd Dept. 2002]; *Matter of Carlton P.*, 143 AD2d 833 [2nd Dept. 1988][the "mere fortuity" that physical injury was not inflicted does not preclude a conviction for attempted assault]; *People v Mazariego*, 117 AD3d 1082 [2nd Dept. 2014][sustaining an attempt conviction even though the victim did not sustain serious physical injury; the evidence demonstrated that the defendant came dangerously close to completing the crime which required the infliction of serious physical injury]).

Turning to whether there was sufficient evidence before the Jury that the Defendant aided, abetted or acted in concert with his Co-Defendant, this Court finds that in the light most favorable to the People, a rational juror could have found that the People proved beyond a reasonable doubt that he did. To begin, this was a question of fact that the Jury resolved against the Defendant based on the following evidence.

First, the Defendant was the offended party and began the escalation of what was depicted on video as an innocuous bump of the kind that happens inadvertently between people on sidewalks everyday. Second, the Defendant followed the victim down the sidewalk and then at some point he and his Co-Defendant, Joseph Ogilvie, are seen on video conferring briefly on the sidewalk, where it was seen, and the Defendant now admits despite arguing differently at trial, that he handed Ogilvie a closed knife. In a brief oral argument, the Defendant contends that

because the knife was closed when he handed it to Ogilvie, this somehow shows that he has no culpability for how Ogilvie ultimately used the knife. This argument strains credibility. As soon as he handed the knife to Ogilvie he introduced a weapon into what was an otherwise non-violent event. Upon receiving the knife, Ogilvie headed straight for the passing car in which the victim was a passenger. The side of the car where the victim was sitting faced the video camera which captured the incident. Ogilvie is seen opening and then hiding the knife from view on his way to the car and immediately thereafter is shown repeatedly stabbing the victim through the open window of the car. As this was happening, the Defendant came off the sidewalk where he was standing and stood nearby Ogilvie while he was stabbing the victim. The Defendant knew Ogilvie was armed with a knife because he had given it to him and at no time during the stabbing did the Defendant try to intervene. The driver of the car then took defensive action and drove at Ogilvie and the Defendant and crashed the car onto the sidewalk. Once he freed the car and began driving away, the Defendant picked up a brick off the sidewalk and chased the car down the street as it fled.

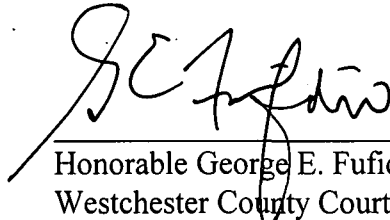
In order to find a defendant guilty of aiding and abetting a co-defendant, the People must prove beyond a reasonable doubt that the defendant solicited, requested, commanded, importuned or intentionally aided the co-defendant to engage in such conduct and that the defendant did so with the same state of mind required for the commission of the offense (*People v Fonerin*, 159 AD3d 717 [2nd Dept. 2017], *lv denied*, 31 NY3d 1081 [2018]). While it is certainly true that mere presence at the scene of a crime, even with knowledge that the crime was taking place, or mere association with the perpetrator is insufficient for accessorial liability, that is not the case here (*id.* at 719 [Finding that although the Defendant's actions were deplorable by encouraging and filming the incident, he did not supply any of the materials to his Co-Defendant in order for him to commit the act]).

Here it is entirely evident that the only way that the knife, which was immediately used by the Co-Defendant to stab the victim, entered the scene was by the Defendant who had just had an incident with the victim moments prior to the stabbing. It makes no difference whether the knife was opened or closed when it was handed off. Based on the evidence, the Jury was entirely justified in finding beyond a reasonable doubt that the two Defendants acted as a team and operated with a "community of purpose," that is the Defendant supplied the weapon for his friend, the Co-Defendant, to use (*People v Carpenter*, 138 AD3d 1130 [2nd Dept. 2016]).

Based on the foregoing, it is hereby ordered that the motion is DENIED in its entirety.

The foregoing constitutes the opinion, decision and order of this court.

Dated: White Plains, New York
May 20, 2019



Honorable George E. Fufidio
Westchester County Court Judge

TO:

HON. ANTHONY A. SCARPINO, JR.
District Attorney, Westchester County
111 Dr. Martin Luther King, Jr. Boulevard
White Plains, New York 10601

PATRICK A. H. WATTS, ESQ.
Attorney for the Defendant, Tremaine Gordon
878 Melrose Avenue
Bronx, New York 10451