

**People v Johnson**

2019 NY Slip Op 34381(U)

November 12, 2019

County Court, Westchester County

Docket Number: Ind. No. 2018-1265

Judge: David S. Zuckerman

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This opinion is uncorrected and not selected for official publication.

COUNTY COURT : STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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

-against-

DECISION AND ORDER  
Ind. No. 2018-1265

ROBERT JOHNSON,  
Defendant.

-----X  
ZUCKERMAN, J.

**FILED**

NOV 15 2019

TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

Defendant stood accused under Indictment No. 18-1265 of two counts each of Attempted Assault in the First Degree (Penal Law §120.10[1]) and Criminal Possession of a Weapon in the Third Degree (Penal Law §265.02[1]). As set forth in the Indictment, it was alleged that, on or about October 6, 2018, Defendant, in Westchester County, New York, with intent to cause serious physical injury to two other persons, attempted to cause said injury to those persons by means of two dangerous instruments. Following pre-trial proceedings, Defendant was tried before a jury on September 10, 12, and 13, 2019. He was convicted after trial of two counts of Attempted Assault in the First Degree (one count relating to Miguel Tarrant, the other to an unidentified male) and one count of Criminal Possession of a Weapon in the Third Degree. On October 28, 2019, Defendant moved, pursuant to CPL §330.30(1), to vacate his conviction. Annexed to his motion is an Affirmation by counsel. On November 6, 2019, the People filed an Affirmation in Opposition to the motion. The court has considered all of these

papers as well as the entire court file in deciding Defendant's motion.

### Facts

On October 6, 2018, Defendant, in the City of Mount Vernon, Westchester County, New York; was recorded by video camera outside of a store located at 401 South Eighth Avenue, owned by Giancarlo Ortiz ("Ortiz"), chasing an individual named Miguel Tarrant with a silver-colored bat. Defendant was observed swinging the bat at Tarrant several times, including at Tarrant's head. Tarrant was observed falling behind an automobile and Defendant was observed swinging the bat at Tarrant several more times. After Tarrant got up from the ground, Defendant swung the bat and struck Tarrant in the back, causing Tarrant's legs to buckle. After leaving the area in front of the store, Defendant was observed swinging the bat, striking a stop sign. He also was observed chasing an unidentified male, swinging the bat at that male's head. After the unidentified male ran away, Defendant struck the stop sign with the bat again and entered the Ortiz store. Ortiz observed that Defendant, who was yelling at Ortiz, was holding a silver metal bat. Defendant left the store and struck the stop sign with the bat again before being arrested. After the close of the evidence and the court's charge to the jury, Defendant was convicted of two Class C Felony counts of Attempted Assault in the First Degree and one D Felony count of Criminal Possession of a Weapon in the Third Degree.

### Contentions of the Parties

Defendant challenges his conviction to the named counts on the following ground:

1. The evidence adduced at trial was not legally sufficient to establish defendant's guilt of the offenses of conviction beyond a reasonable doubt because the People failed to prove that Defendant attempted to cause serious physical injury with a weapon, namely a metal bat.

### Analysis

The authority of a trial court to set aside a guilty verdict prior to imposition of sentence is created and limited by statute. *People v Jackson*, 78 NY2d 638 (1991). Trial courts are not vested with any inherent power to set aside a verdict; indeed, they are *prohibited* from setting aside a verdict as against the weight of the evidence. *People v Hampton*, 21 NY3d 277 (2014); *People v Carter*, 63 NY2d 530 (1984). Upon consideration of an application to set aside a verdict for legal insufficiency, the parameters within which a trial court must act, and the grounds upon which such relief may be granted, are derived solely from CPL §330.30. *Jackson*, *supra*, 647; *People v Carthens*, 171 AD2d 387 (1<sup>st</sup> Dept 1991). Insofar as relevant to consideration of the defendant's

motion, CPL §330.30(1) provides that a trial court may only set aside a guilty verdict 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."

It is well-settled that this statutory proscription authorizes a trial court to vacate a guilty verdict only where the ground raised in the motion would mandate that an appellate court reverse or modify the verdict as a matter of law. *People v Hines*, 97 NY2d 56, 61 (2001); *Carter, supra*, 536. Furthermore, the facts asserted in support of the ground(s) raised must appear on the record. *Carter, supra*, 536; *People v Bagarozzy*, 182 AD2d 565 (1<sup>st</sup> Dept 1992), *app den* 80 NY2d 901 (1992), as matters outside of the record may not be properly raised in connection with a motion brought pursuant to CPL §330.30(1). *People v Albert*, 85 NY2d 851 (1995); *Carter, supra*, 536-537; *People v Leka*, 209 AD2d 723 (2<sup>nd</sup> Dept 1994), *lv den* 85 NY2d 911 (1995); *People v Cheung*, 247 AD2d 405 (2<sup>nd</sup> Dept 1998).

Defendant's assertion here is that the proof was not sufficient to convict him of any of the counts charged due to a lack of evidence as to the element of intent to cause serious physical injury as well as proof that Defendant possessed a weapon. Defendant has thus moved to set aside the instant verdict on grounds that it was against the weight of the evidence. A trial

court, of course, "...may not consider whether the proof establishes guilt beyond a reasonable doubt, but rather, whether the evidence is legally sufficient." *Hampton, supra; People v Goodfriend*, 64 NY2d 695 (1984); *People v. Pirozzi*, 237 AD2d 628, 630 (2d Dept 1997), *ap den* 90 NY2d 909 (1997). Legally sufficient evidence is defined as "competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof." *Carter, supra*, 537.

Since a trial court's authority to set aside a verdict is limited to specific grounds enumerated by CPL § 330.30, it may not evaluate the quality or the weight of the evidence. *People v Adams*, 272 AD2d 177 (1<sup>st</sup> Dept 2000), *ap disp* 95 NY2d 862 (2000); *People v. Prefontaine*, 6 Misc3d 1031(A) (Suffolk Co 2005), *affd* 11 Misc3d 137(A) (Appellate Term, 2<sup>nd</sup> Dept 2006, *lv den* 7 NY3d 793 (2006)). A trial court's power to review is significantly more limited than that of an intermediate appellate court. A trial court can only set aside a verdict on a matter of law, not on the basis of the trial court's assessment of the facts. *Carter, supra; People v. Tillman*, 273 AD2d 913 (4<sup>th</sup> Dept 2000).

Defendant asserts that the evidence adduced at trial failed to establish that he intended to cause serious physical injury to two persons or that he possessed a weapon. In essence, Defendant is making a weight of the evidence argument which, however, is not an appropriate subject for an application to set aside a verdict under

CPL § 330.30.

In any event, competent evidence was introduced by the People which, if accepted as true, established every element of the offenses charged and the defendant's commission thereof. They presented video evidence and testimony that Defendant swung a silver bat at the heads of two different males; that when struck in the back with the bat one male's legs buckled; that Defendant struck a stop sign three times as well. Ortiz specifically testified that the bat in Defendant's possession appeared to be made of metal. Swinging a metal bat at the heads of two persons, if true, established Defendant's intent to cause serious physical injury with a weapon.

Likewise, throughout the incident Defendant possessed a silver bat which was later observed to be metal. He was seen, personally by Ortiz and on video, swinging the silver metal bat at the heads and bodies of two different males, striking one hard enough in the back to cause his legs to buckle. The People thus also established Defendant's possession of a weapon, and his intent to use that weapon unlawfully against the two males.

Based upon the foregoing, it is hereby

**ORDERED**, that Defendant's application to vacate his conviction is denied, and it is further

**ORDERED**, sentencing shall take place as previously scheduled on November 13, 2019, at 9:30 a.m.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York  
November 12, 2019



HON. DAVID S. ZUCKERMAN A.J.S.C.

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