2018 WL 4472895
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,
v.
Andre MOORE, appellant.

2014–01365
|
(Ind. No. 10416/11)
|
Argued—May 18, 2018
|
Decided September 19, 2018

Synopsis

Background: Defendant was **convicted**, after a jury trial in the Supreme Court, Kings County, Vincent M. DelGiudice, J., of second-degree murder, second-degree attempted murder, second-degree criminal possession of a weapon, second-degree assault, and second-degree robbery. He appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] Supreme Court did not err by admitting testimony regarding defendant's gang, a rival gang, and a posting from the social media page of one of defendant's gang's members; and

[2] any error regarding scope of cross-examination of a police detective was harmless.

Affirmed as modified.

West Headnotes (7)

[1] Sentencing and Punishment

Sentences of an indeterminate term of imprisonment of 25 years to life, imposed upon **conviction** for second-degree murder, of a determinate term of imprisonment of 10 years, imposed upon **conviction** of second-degree attempted murder, and of determinate terms of imprisonment of 5 years on **convictions** of second-degree criminal possession of a weapon, second-degree assault, and second-degree robbery, with all terms to run consecutively, except the terms for second-degree murder and criminal possession of a weapon in the second degree, which were to run concurrently, were excessive, and would be modified, as a matter of discretion in the interest of justice, by providing that all terms would run concurrently with each other.

Cases that cite this headnote

[2] Criminal Law

In fulfilling its responsibility to conduct an independent review of the weight of the evidence, Appellate Division accords great deference to jury's opportunity to view the witnesses, hear the testimony, and observe demeanor. N.Y. CPL § 470.15(5).

Cases that cite this headnote

[3] Criminal Law

Supreme Court did not err, in prosecution for second-degree murder, second-degree attempted murder, second-degree criminal possession of a weapon, second-degree assault, and second-degree robbery, by admitting testimony regarding defendant's gang, a rival gang, and a posting from the social media page of one of defendant's gang's members; that evidence constituted background on the gangs' purpose and was probative of motive, the probative value of the evidence outweighed the risk of prejudice to defendant, and the court's limiting instruction to the jury served to alleviate any prejudice resulting from admission of the evidence.

Cases that cite this headnote

[4] **Criminal Law**

Any error, in prosecution for second-degree murder, second-degree attempted murder, second-degree criminal possession of a weapon, second-degree assault, and second-degree robbery, regarding the scope of cross-examination, including the curtailment of cross-examination of a police detective about an action commenced against that witness for allegedly using excessive force in the line of duty, was harmless; there was overwhelming evidence of defendant's guilt, and no reasonable possibility that the error might have contributed to defendant's **convictions**. N.Y. CPL § 470.05(2).

Cases that cite this headnote

[5] **Criminal Law**

Supreme Court providently exercised its discretion, in prosecution for second-degree murder, second-degree attempted murder, second-degree criminal possession of a weapon, second-degree assault, and second-degree robbery, in limiting the defense's cross-examination of both a police witness and a civilian witness, where the defense's line of inquiry would have elicited inadmissible hearsay testimony.

Cases that cite this headnote

[6] **Criminal Law**

Defendant was afforded his right of confrontation, in prosecution for second-degree murder, second-degree attempted murder, second-degree criminal possession of a weapon, second-degree assault, and second-degree robbery, despite trial court's alleged curtailment of his cross-examination of both a police witness and a civilian witness, where the court provided defense counsel opportunity to contradict answers given by the witnesses to show bias, interest, or hostility. U.S. Const. Amend. 6.

Cases that cite this headnote

[7] **Criminal Law**

Nature and extent of cross-examination is subject to the sound discretion of the Trial Judge.

Cases that cite this headnote

Attorneys and Law Firms

The Legal Aid Society, New York, N.Y. (William B. Carney, New York, of counsel), for appellant.

Eric Gonzalez, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Keith Dolan, and Julian Joiris of counsel), for respondent.

SHERI S. ROMAN, J.P., SANDRA L. SGROI, JOSEPH J. MALTESE, HECTOR D. LASALLE, JJ.

DECISION & ORDER

***1** [1] Appeal by the defendant from a judgment of the Supreme Court, Kings County (Vincent M. DelGiudice, J.), rendered January 15, 2014, **convicting** him of murder in the second degree, attempted murder in the second degree, criminal possession of a weapon in the second degree, assault in the second degree, and robbery in the second degree, upon a jury verdict, and sentencing him to an indeterminate term of imprisonment of 25 years to life on the **conviction** of murder in the second degree, to a determinate term of imprisonment of 10 years on the **conviction** of attempted murder in the second degree, to determinate terms of imprisonment of 5 years on the **convictions** of criminal possession of a weapon in the second degree, assault in the second degree, and robbery in the second degree, with all terms to run consecutively, except the terms for murder in the second degree and criminal possession of a weapon in the second degree, which are to run concurrently.

ORDERED that the judgment is modified, as a matter of discretion in the interest of justice, by providing that

all sentences shall run concurrently with each other; as so modified, the judgment is affirmed.

[2] The defendant failed to preserve for appellate review his challenge to the legal sufficiency of the evidence supporting the **convictions** (*see* CPL 470.05[2]). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v. Contes,* 60 N.Y.2d 620, 621, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find that it was legally sufficient to establish the defendant's guilt on each of the **convictions** beyond a reasonable doubt. Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15[5]; *People v. Danielson,* 9 N.Y.3d 342, 348, 849 N.Y.S.2d 480, 880 N.E.2d 1), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v. Mateo,* 2 N.Y.3d 383, 779 N.Y.S.2d 399, 811 N.E.2d 1053; *People v. Bleakley,* 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v. Romero,* 7 N.Y.3d 633, 826 N.Y.S.2d 163, 859 N.E.2d 902).

[3] The defendant failed to preserve for appellate review his contention that the Supreme Court improperly admitted testimony regarding the defendant's gang, a rival gang, and a posting from the Facebook page of one of the defendant's gang's members. In any event, the contention is without merit. Such evidence constituted background on the gangs' purpose and was probative of motive, and the probative value of the evidence outweighed the risk of prejudice to the defendant (*see People v. Molineux,* 168 N.Y. 264, 293, 61 N.E. 286; *People v. Giuca,* 58 A.D.3d 750, 871 N.Y.S.2d 709; *People v. Washington,* 28 A.D.3d 335, 812 N.Y.S.2d 525; *People v. Elder,* 12 A.D.3d 379, 786 N.Y.S.2d 184; *People v. Edwards,* 295 A.D.2d 270, 743 N.Y.S.2d 872). Moreover, the court's limiting instruction to the jury served to alleviate any prejudice resulting from the admission of the evidence (*see People v. Beer,* 146 A.D.3d 895, 47 N.Y.S.3d 38; *People v. Holden,* 82 A.D.3d 1007, 918 N.Y.S.2d 773).

[4] The defendant failed to preserve for appellate review his contention that the Supreme Court improperly curtailed the scope of cross-examination of a police detective about an action commenced against that witness for allegedly using excessive force in the line of duty (*see* CPL 470.05[2]). In any event, any error regarding the scope of cross-examination was harmless, as there was overwhelming evidence of the defendant's guilt, and no reasonable possibility that the error might have contributed to the defendant's **convictions** (*see People v. Crimmins,* 36 N.Y.2d 230, 237–238, 367 N.Y.S.2d 213, 326 N.E.2d 787; *People v. Wallace,* 60 A.D.3d 1268, 1270, 875 N.Y.S.2d 353; *People v. Batista,* 113 A.D.2d 890, 891, 493 N.Y.S.2d 608).

***2 [5] [6] [7]** The defendant's further contention that the Supreme Court's curtailment of his cross-examination of both a police witness and a civilian witness constituted a violation of his right of confrontation and to present a defense is unpreserved for appellate review (*see* CPL 470.05[2]). In any event, the contention is without merit. "The nature and extent of cross-examination is subject to the sound discretion of the Trial Judge" (*People v. Schwartzman,* 24 N.Y.2d 241, 244, 299 N.Y.S.2d 817, 247 N.E.2d 642, *remittitur amended* 24 N.Y.2d 914, 301 N.Y.S.2d 644, 249 N.E.2d 483; *see People v. Kinard,* 215 A.D.2d 591, 626 N.Y.S.2d 858). Here, the court providently exercised its discretion in limiting the defense's cross-examination of the witnesses, because the defense's line of inquiry would have elicited inadmissible hearsay testimony (*see People v. Romero,* 78 N.Y.2d 355, 575 N.Y.S.2d 802, 581 N.E.2d 1048; *People v. Burns,* 122 A.D.3d 1435, 996 N.Y.S.2d 842). Furthermore, insofar as the court afforded defense counsel the opportunity to contradict answers given by the witnesses to show bias, interest, or hostility, the defendant was afforded his right of confrontation (*cf. People v. Diaz,* 85 A.D.3d 1047, 926 N.Y.S.2d 128, *affd* 20 N.Y.3d 569, 965 N.Y.S.2d 738, 988 N.E.2d 473; *People v. Vigliotti,* 203 A.D.2d 898, 611 N.Y.S.2d 413).

The sentences imposed were excessive to the extent indicated herein (*see People v. Suitte,* 90 A.D.2d 80, 455 N.Y.S.2d 675).

ROMAN, J.P., SGROI, MALTESE and LASALLE, JJ., concur.

All Citations

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