2018 WL 6493535
Supreme Court, Appellate Division,
First Department, New York.

The PEOPLE of the State of New York, Respondent,
v.
Merlin MORENO–GRANTINI,
Defendant–Appellant.

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ENTERED: DECEMBER 11, 2018

Synopsis

Background: Defendant was convicted in the Supreme Court, New York County, Ruth Pickholz, J., of attempted murder in the second degree and **assault** in the first degree. Defendant appealed.

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

[1] trial court's purported restriction of defense counsel's voir dire of prospective jurors did not prejudice defendant;

[2] nontestifying declarant's statements were nontestimonial, and thus, their admission did not violate defendant's right to confront declarant; and

[3] defendant did not receive ineffective assistance of counsel.

Affirmed.

West Headnotes (4)

[1] Jury

Trial court's purported restriction of defense counsel's voir dire of prospective jurors did not prejudice defendant, where court permitted counsel to question panelists, provided that their inquiries would be brief and avoid repetitious questions or matters of law already covered by the court, and court did not improperly curtail any inquiries.

Cases that cite this headnote

[2] Criminal Law

Nontestifying declarant's statements, made shortly after officer arrived scene of crime after receiving report of knife **assault** in progress, were nontestimonial, and thus, their admission did not violate defendant's right to confront declarant, in prosecution for attempted murder in the second degree and **assault** in the first degree; officer's primary purpose was to determine what had happened and to ensure the safety of other persons, and declarant told officer that perpetrator was on the loose. U.S. Const. Amend. 6.

Cases that cite this headnote

[3] Criminal Law

Supreme Court, Appellate Division, would not review merits of defendant's ineffective assistance of counsel claims, in prosecution for murder in the second degree and **assault** in the first degree, where the claims involved matters not reflected in or fully explained by the record, unexpanded record was not sufficient to review the claims, and defendant did not file motion to vacate judgment. U.S. Const. Amend. 6; N.Y. CPL § 440.10.

Cases that cite this headnote

[4] Criminal Law

In prosecution for murder in the second degree and **assault** in the first degree, defense counsel's alleged deficiencies did not fall below an objective standard of reasonableness, deprive defendant of a fair trial, or have a reasonable probability of affecting the outcome of the case, and thus, defendant did

not receive ineffective assistance of counsel. U.S. Const. Amend. 6.

Cases that cite this headnote

Attorneys and Law Firms

Robert DiDio & Associates, Kew Garden (Danielle Muscatello of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

Sweeny, J.P., Renwick, Mazzarelli, Oing, Moulton, JJ.

Opinion

***1** Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered September 6, 2017, convicting defendant, after a jury trial, of attempted murder in the second degree and assault in the first degree, and sentencing him to an aggregate term of six years, unanimously affirmed.

[1] Defendant's challenge to the court's purported restriction of counsel's voir dire of prospective jurors is unpreserved (*see People v. Sewnarine,* 156 A.D.3d 459, 66 N.Y.S.3d 244 [1st Dept. 2017], *lv denied* 31 N.Y.3d 1087, 79 N.Y.S.3d 109, 103 N.E.3d 1256 [2018]), and we decline to review it in the interest of justice. As an alternative holding, we find that after its own thorough examination, the court permitted counsel to question panelists, provided that their inquiries would be brief and avoid repetitious questions or matters of law already covered by the court, and it did not improperly curtail any inquiries (*id.* at 459, 66 N.Y.S.3d 244). The record fails to demonstrate that defense counsel's decision not to ask questions on voir dire was compelled by the court, and defendant has not established any prejudice.

[2] Defendant did not preserve his claim that the admission, as an excited utterance, of a nontestifying declarant's statements violated the Confrontation Clause (*see People v. Kello,* 96 N.Y.2d 740, 743–744, 723 N.Y.S.2d 111, 746 N.E.2d 166 [2001]), and we decline to review it in the interest of justice. As an alternative holding, we find that the statements at issue, which were made to an officer shortly after she had arrived at the scene within three minutes of receiving a report of a knife assault in progress, encountered a frantic victim with a stab wound, and was told that defendant was the perpetrator and was on the loose, were nontestimonial, because they were made to an officer whose primary purpose was to determine what had happened and to ensure the safety of other persons (*see Davis v. Washington,* 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 [2006]; *People v. Nieves–Andino,* 9 N.Y.3d 12, 15–16, 840 N.Y.S.2d 882, 872 N.E.2d 1188 [2007]). Regardless of whether other officers may have already arrested defendant, there is no evidence that the officer who questioned the declarant at issue was aware of that fact.

***2** **[3]** **[4]** Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record, relating to counsel's strategic choices (*see People v. Rivera,* 71 N.Y.2d 705, 709, 530 N.Y.S.2d 52, 525 N.E.2d 698 [1988]), and we reject defendant's argument that the unexpanded record is sufficient to review these claims. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v. Benevento,* 91 N.Y.2d 708, 713–714, 674 N.Y.S.2d 629, 697 N.E.2d 584 [1998]; *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or had a reasonable probability of affecting the outcome of the case.

All Citations

--- N.Y.S.3d ----, 2018 WL 6493535, 2018 N.Y. Slip Op. 08448

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