

2019 WL 454167
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., Respondent,
v.
Waheed AKBAR, Appellant.

2015-08494
|
(Ind. No. 3076/14)
|
Argued—November 2, 2018
|
February 6, 2019

Synopsis

Background: Defendant was convicted in the Supreme Court, Queens County, Ira H. Margulis, J., of **assault** in the first degree, and he appealed.

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

[1] evidence was legally sufficient to disprove defendant's justification defense;

[2] trial court inadequately charged jury regarding defendant's justification defense; and

[3] trial court should have submitted requested charges of **assault** in third degree as lesser included offenses of **assault** in the first degree.

Reversed.

West Headnotes (5)

[1] **Assault and Battery**



Evidence was legally sufficient to disprove defendant's justification defense in prosecution of defendant for **assault** in first degree; defendant slashed his roommate

across the neck and stabbed him in abdomen with large kitchen knife during physical altercation in their apartment.

[Cases that cite this headnote](#)

[2] **Criminal Law**



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

[Cases that cite this headnote](#)

[3] **Criminal Law**



Trial court inadequately charged jury regarding defendant's justification defense since neither jury instructions nor verdict sheet on the whole adequately conveyed the principle that, if jury found the defendant not guilty of the greater charge of attempted murder in second degree on basis of justification, it was not to consider any lesser counts.

[Cases that cite this headnote](#)

[4] **Criminal Law**



In case involving claim of self-defense, trial court's failure to instruct the jurors that, if they find the defendant not guilty of a greater charge on the basis of justification, they are not to consider any lesser counts, constitutes reversible error.

[Cases that cite this headnote](#)

[5] **Assault and Battery**



Trial court should have submitted the requested charges of **assault** in the third degree, i.e., recklessly causing physical injury, and **assault** in the third degree, i.e., causing

physical injury with criminal negligence by means of deadly weapon, as lesser included offenses of **assault** in the first degree; there was reasonable view of the evidence that defendant either was aware of and consciously disregarded substantial and unjustifiable risk that physical injury would occur or that he failed to perceive a substantial and unjustifiable risk of physical injury caused by his use of deadly weapon, but that he did not intend to cause serious physical injury to victim. N.Y. Penal Law §§ 120.00(2), 120.00(3), 120.10(1).

Cases that cite this headnote

Attorneys and Law Firms

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WILLIAM F. MASTRO, J.P., SHERI S. ROMAN, JEFFREY A. COHEN, FRANCESCA E. CONNOLLY, JJ.

DECISION & ORDER

*1 Appeal by the defendant from a judgment of the Supreme Court, Queens County (Ira H. Margulis, J.), rendered August 26, 2015, convicting him of **assault** in the first degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is reversed, on the law and as a matter of discretion in the interest of justice, and a new trial is ordered.

The defendant slashed his roommate across the neck and stabbed him in the abdomen with a large kitchen knife during a physical altercation in their apartment. At the trial, the Supreme Court submitted to the jury the charges of attempted murder in the second degree, two counts of **assault** in the first degree and the lesser included offenses

of **assault** in the second and third degrees, and criminal possession of a weapon in the fourth degree. The court also instructed the jury on the justification defense. The jury acquitted the defendant of attempted murder in the second degree and **assault** in the first degree with intent to disfigure, but found him guilty of **assault** in the first degree with intent to cause serious physical injury by means of a dangerous instrument. The defendant appeals.

[1] [2] The defendant contends that the People did not disprove his justification defense beyond a reasonable doubt. 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 disprove the defendant's justification defense beyond a reasonable doubt (*see People v. Flores*, 165 A.D.3d 695, 84 N.Y.S.3d 543; *People v. Simpson*, 151 A.D.3d 762, 762, 56 N.Y.S.3d 253; *People v. Landri*, 104 A.D.3d 791, 791, 960 N.Y.S.2d 504; *People v. Terrero*, 31 A.D.3d 672, 672–673, 818 N.Y.S.2d 288). 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, 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, 410, 779 N.Y.S.2d 399, 811 N.E.2d 1053). Upon reviewing the record here, we are satisfied that the jury's rejection of the defendant's justification defense and the verdict of guilt were 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] Nonetheless, we reverse the judgment because we find that the Supreme Court inadequately charged the jury regarding the defendant's justification defense.

[4] “ ‘This Court has held that, in a case involving a claim of self-defense, it is error for the trial court not to instruct the jurors that, if they find the defendant not guilty of a greater charge on the basis of justification, they were not to consider any lesser counts’ ” (*People v. Braithwaite*, 153 A.D.3d 929, 929, 60 N.Y.S.3d 403, quoting *People v. Palmer*, 34 A.D.3d 701, 703, 826 N.Y.S.2d 77; *see People v. Castro*, 131 A.D.2d 771, 516 N.Y.S.2d 966). Such failure constitutes reversible error (*see People v. Ross*, 2 A.D.3d 465, 466, 767 N.Y.S.2d 819).

Here, neither the jury instructions nor the verdict sheet on the whole adequately conveyed the principle that, if the jury found the defendant not guilty of the greater charge of attempted murder in the second degree on the basis of justification, it was not to consider any lesser counts (see *People v. Colasuonno*, 135 A.D.3d 418, 23 N.Y.S.3d 179; *People v. Velez*, 131 A.D.3d 129, 13 N.Y.S.3d 354; *People v. Castro*, 131 A.D.2d 771, 516 N.Y.S.2d 966). On this record, it is impossible to discern whether acquittal of the top count of attempted murder in the second degree was based on the jurors' finding of justification so as to mandate acquittal on the five lesser counts (see *People v. Velez*, 131 A.D.3d 129, 13 N.Y.S.3d 354; *People v. Feuer*, 11 A.D.3d 633, 782 N.Y.S.2d 858; *People v. Roberts*, 280 A.D.2d 415, 721 N.Y.S.2d 49).

*2 [5] Consequently, the judgment of conviction must be reversed, and a new trial ordered. Since we are remitting the matter for a new trial, we note that the Supreme Court should have submitted the requested charges of **assault** in the third degree, i.e., recklessly causing physical injury (Penal Law § 120.00[2]), and **assault** in the third degree, i.e., causing physical injury with criminal negligence by means of a deadly weapon (Penal Law § 120.00[3]), as lesser included offenses of **assault** in the first degree (Penal Law § 120.10[1]; see *People v. Ryan*, 55 A.D.3d 960, 964, 865 N.Y.S.2d 146; *People v. Leonardo*, 89 A.D.2d

214, 217, 455 N.Y.S.2d 434, *affd* 60 N.Y.2d 683, 468 N.Y.S.2d 466, 455 N.E.2d 1261). Viewing the evidence in the light most favorable to the defendant (see *People v. Rivera*, 23 N.Y.3d 112, 120–121, 989 N.Y.S.2d 446, 12 N.E.3d 444), there was a reasonable view of the evidence that the defendant either was aware of and consciously disregarded a substantial and unjustifiable risk that physical injury would occur (see Penal Law §§ 120.00[2]; 15.05[3]), or that he failed to perceive a substantial and unjustifiable risk of physical injury caused by his use of a deadly weapon (see Penal Law §§ 120.00[3]; 15.05[4]), but that he did not intend to cause serious physical injury to the victim (see Penal Law §§ 120.10[1]; 15.05[1]).

In light of the foregoing determination, we need not reach the defendant's remaining contentions.

MASTRO, J.P., ROMAN, COHEN and CONNOLLY, JJ., concur.

All Citations

--- N.Y.S.3d ----, 2019 WL 454167, 2019 N.Y. Slip Op. 00894