State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 20, 2019 109069

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
v MEMORANDUM AND ORDER

DEREK J. COPPINS,
Appellant.

Calendar Date: April 23, 2019

Before: Garry, P.J., Egan Jr., Clark, Mulvey and Pritzker, JJ.

David E. Woodin, Catskill, for appellant.

P. David Soares, District Attorney, Albany (Christopher D. Horn of counsel), for respondent.

Egan Jr., J.

Appeal from a judgment of the County Court of Albany County (Lynch, J.), rendered January 19, 2017, upon a verdict convicting defendant of the crimes of attempted assault in the first degree, assault in the second degree and tampering with a witness in the fourth degree.

In March 2016, defendant was charged by indictment with attempted assault in the first degree and assault in the second degree, stemming from an incident outside a residence in the City of Albany wherein defendant allegedly struck the victim multiple times with a bat, causing the victim to suffer serious injuries, including a laceration to the back of his head and a

broken left forearm. At the time of the incident, the victim was dating defendant's former girlfriend (hereinafter the girlfriend), who was also the mother of defendant's daughter. Following indictment, the People discovered that, while defendant was incarcerated pending action by the grand jury, he had telephoned the girlfriend in an attempt to dissuade her and the victim from testifying against him before the grand jury. As a result, in April 2016, the People filed a superseding indictment charging defendant with attempted assault in the first degree, assault in the second degree and tampering with a witness in the fourth degree (two counts).

Defendant filed an omnibus motion seeking to, among other things, dismiss both counts of tampering with a witness in the fourth degree. County Court partially granted defendant's motion by dismissing count 4 of the superseding indictment charging him with tampering with a witness in the fourth degree with respect to the victim, based upon legally insufficient evidence.[1] Prior to trial, County Court granted defendant's application for review of the grand jury minutes with respect to the superseding indictment, but denied his subsequent motion to dismiss same. Following a jury trial, defendant was found guilty as charged. He was thereafter sentenced to a prison term of 15 years, to be followed by five years of postrelease supervision, for his conviction of attempted assault in the first degree and lesser concurrent prison terms on the other two convictions. Defendant appeals.

County Court properly denied defendant's motion to dismiss the superseding indictment. Dismissal of an indictment may be granted upon a determination that the integrity of the grand jury proceeding has been so impaired that prejudice to the defendant may result (see CPL 210.35 [5]; People v West, 166 AD3d 1080, 1081 [2018], lv denied 32 NY3d 1129 [2018]). Dismissal of an indictment "is a drastic, exceptional remedy and 'should thus be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the [g]rand [j]ury'" (People v

[1] The People subsequently amended the indictment, removing count 4 based upon County Court's dismissal of said charge.

Moffitt, 20 AD3d 687, 688 [2005], lv denied 5 NY3d 854 [2005], quoting People v Huston, 88 NY2d 400, 409 [1996]; accord People v Wilkinson, 166 AD3d 1396, 1397 [2018], lv denied 32 NY3d 1179 [2019]).

A review of the grand jury minutes with respect to the superseding indictment reveals no "prosecutorial wrongdoing, fraudulent conduct or other prejudicial error in the People's presentation of evidence that would warrant dismissal of the [superseding] indictment" (People v Busreth, 167 AD3d 1089, 1090 [2018], lv denied 33 NY3d 946 [2019]; see CPL 210.35 [2], [3]; People v Huston, 88 NY2d at 409; People v Mesko, 150 AD3d 1412, 1414 [2017], lv denied 29 NY3d 1131 [2017]). Significantly, the 18 grand jurors empaneled for presentment of the initial indictment were the same grand jurors that heard the presentment of the superseding indictment. Thus, it was not error for the People to submit transcripts of the testimony of those witnesses who had previously testified at the first grand jury presentment because the People were not required to recall these witnesses or re-present evidence in order to obtain a true bill on the superseding indictment, and the procedure that was followed did not impair the integrity of the grand jury proceeding or otherwise prejudice defendant (see CPL 200.80; People v Cade, 74 NY2d 410, 414 [1989]; People v Salerno, 3 NY2d 175, 177-179 [1957]). It was also not necessary for the grand jury to vacate its prior vote on the initial indictment prior to the People's presentment on the superseding indictment (see People v Cade, 74 NY2d at 417; compare People v Grimes, 115 AD3d 1194, 1196 [2014], lv denied 24 NY3d 1084 [2014]).

The jury verdict was not against the weight of the evidence. As relevant here, in order to be found guilty of attempted assault in the first degree, the People were required to prove that, "with intent to cause serious physical injury to another person, the defendant attempted to cause such injury by means of a deadly weapon" (People v Rawlinson, 170 AD3d 1425, 1426 [2019] [internal quotation marks, brackets, ellipsis and citations omitted]; see Penal Law §§ 110.00, 120.10 [1]). In order to be found guilty of assault in the second degree, the People were required to prove that, "[w]ith intent to cause

physical injury to another person, [the defendant] cause[d] such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument" (Penal Law § 120.05 [2]).[2] Lastly, "[a] person is guilty of tampering with a witness when, knowing that a person is or is about to be called as a witness in an action or proceeding, . . . he [or she] wrongfully induces or attempts to induce such person to absent himself [or herself] from, or otherwise to avoid or seek to avoid appearing or testifying at, such action or proceeding" (Penal Law § 215.10 [a]).

The evidence at trial established that defendant and the girlfriend had previously been in a relationship for 13 or 14 years and, during such time, had a daughter together. That relationship ended in 2013, and the victim and the girlfriend began dating in the fall of 2015. In November 2015, defendant sent the victim a Facebook message warning him to "stay the f**k away from [my] wife and daughter," that he was "serious as a heart attack," and that defendant remained involved with the girlfriend and was "still in the picture." Although the victim responded to the message and attempted to resolve the matter, he nevertheless continued dating the girlfriend. On the night in question, the victim was working as a cab driver and stopped over to the girlfriend's house for a few hours after she invited him to dinner. At approximately 11:45 p.m., the victim left the girlfriend's residence to return to work. As he was about to enter his cab – which was parked in the girlfriend's driveway – he was struck in the head from behind by a bat. The force of the blow caused him to fall down on one knee and, when he turned around, he observed defendant who stated, "I told you to stay the F away from my family." The victim unsuccessfully attempted to wrestle the bat away from defendant, and defendant continued to aggressively swing the bat "like he was Barry Bonds . . . trying to knock one out of the park," striking the victim a total of four to six times, including in the back, side of his head, shoulder and left forearm. The girlfriend heard the commotion outside and, upon exiting her apartment, recognized defendant's voice, observed him standing over the victim with a

[2] Physical injury is defined as "impairment of physical condition or substantial pain" (Penal Law § 10.00 [9]).

bat and later saw his face as he fled on foot from the scene. The victim was subsequently transported by ambulance to the hospital where he received staples to close the wound on his head and underwent surgery for a broken left ulna in his forearm, which required the insertion of a metal plate and numerous staples to close the surgical wound. The victim was out of work for approximately two months due to his injuries and continued to suffer headaches as a result of the assault. Two days after the assault, defendant was arrested after police observed him entering the apartment building where his father resided and subsequently found him hiding in a common closet in the building's foyer. While defendant was incarcerated pending trial, the girlfriend received multiple telephone calls from him on March 8, 2016 – the day before she was to testify before the grand jury – wherein defendant sought to dissuade her from testifying against him. Based on the foregoing, although another verdict would not have been unreasonable – given defendant's testimony denying his involvement in the assault and his purported alibi defense – when viewing the evidence in a neutral light and according deference to the jury's credibility determinations, we find that the jury's verdict is supported by the weight of the evidence (see People v Gill, 168 AD3d 1140, 1142 [2019]; People v Martinez, 166 AD3d 1292, 1294-1295 [2018], lv denied 32 NY3d 1207 [2019]).

We also reject defendant's contention that County Court failed to conduct an adequate inquiry before discharging one of the jurors. CPL 270.35 (1) provides, in relevant part, that a court shall discharge a juror "[i]f at any time after the trial jury has been sworn and before the rendition of its verdict, a juror is unable to continue serving by reason of illness or other incapacity, or for any other reason is unavailable for continued service." Under these circumstances, the court may discharge a sworn juror after it has made "'a reasonably thorough inquiry' and . . . 'determine[d] that there is no reasonable likelihood' that the juror will be able to resume service 'within two hours of the time set by the court for the trial to resume'" (People v Wilkinson, 166 AD3d at 1398, quoting CPL 270.35 [2] [a]; see People v Jeanty, 94 NY2d 507, 514 [2000]).

On the morning that County Court was scheduled to charge the jury, it was informed by an employee from the Commissioner of Jurors' office that juror No. 3 had telephoned earlier that morning and reported that he had the flu and would be unable to appear for jury service that day. County Court consulted with counsel and, after rejecting a request from defense counsel that the court personally call the juror, directed the same employee to call juror No. 3 back and make further inquiry as to whether "he would be available [to serve] at any time today."[3] After the employee made this call, she returned to the courtroom and reported that she had spoken to the juror, who informed her that he was not feeling well, that he had been sleeping at the time she called and that "he was sick, and he would not be able to make it back today, but possibly tomorrow morning he would be able to make it at about 8:30." County Court permitted defense counsel to make inquiry of the employee and heard argument concerning whether juror No. 3 should be discharged. Following counsel's arguments, County Court discharged juror No. 3, over defendant's objection, finding that there was no reasonable likelihood that he would be able to appear within two hours. County Court also denied defendant's request for an adjournment and substituted one of the alternate jurors in the place of juror No. 3.

County Court correctly conducted the requisite inquiry, provided the parties with an opportunity to be heard and had a sufficient basis to conclude that juror No. 3's absence would delay the trial for more than the statutorily required two hours (see CPL 270.35 [2] [a]; People v Jeanty, 94 NY2d at 516-517; People v Wilkinson, 166 AD3d at 1399; People v Tyrell, 82 AD3d 1352, 1356 [2011], lv denied 17 NY3d 810 [2011]; People v Cruz, 48 AD3d 205, 206 [2008], lv denied 10 NY3d 957 [2008]). Insofar as "there is no material distinction between regular and alternate jurors," County Court did not abuse its discretion by replacing juror No. 3 with an alternate juror (People v Jeanty, 94 NY2d at 517 [internal quotation marks and citation omitted];

[3] Defense counsel conceded that there was nothing improper with County Court delegating the authority to make this call to the employee.

see People v Ballard, 51 AD3d 1034, 1036 [2008], lv denied 11 NY3d 734 [2008]).

Finally, defendant's contention that his sentence was harsh and excessive is without merit. Given the violent nature of defendant's conduct, the serious injuries inflicted and his extensive criminal history, we find no abuse of discretion or extraordinary circumstances warranting a reduction of defendant's sentence in the interest of justice (see CPL 470.15 [3] [c]; [6] [b]; People v Woods, 166 AD3d 1298, 1300 [2018], lv denied ___ NY3d ___ [May 2, 2019]; People v Cayea, 163 AD3d 1279, 1283 [2018], lv denied 32 NY3d 1109 [2018]; People v Brabham, 126 AD3d 1040, 1044 [2015], lv denied 25 NY3d 1160 [2015]).

Garry, P.J., Clark, Mulvey and Pritzker, JJ., concur.

ORDERED that the judgment is affirmed.

ENTER:

Robert D. Mayberger
Clerk of the Court