

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

Decided and Entered: May 4, 2023

108909B

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

JAUSHI'IR WEAVER,

Appellant.

Calendar Date: March 31, 2023

Before: Egan Jr., J.P., Clark, Pritzker, Ceresia and Fisher, JJ.

Craig S. Leeds, Albany, for appellant.

P. David Soares, District Attorney, Albany (*Emily Schultz* of counsel), for respondent.

Fisher, J.

Appeal from a judgment of the County Court of Albany County (Stephen W. Herrick, J.), rendered May 31, 2016, upon a verdict convicting defendant of the crimes of murder in the second degree and criminal possession of a weapon in the second degree.

Following a jury trial, defendant was convicted of murder in the second degree (depraved indifference murder) and criminal possession of a weapon in the second degree for his role as the shooter in a drive-by shooting that killed one person and wounded two others. County Court sentenced defendant to a prison term of 22 years to life for the murder conviction, and a concurrent prison term of 15 years to be followed by five years of postrelease supervision for the weapon conviction. Defendant appealed and this Court

affirmed the judgment of conviction (167 AD3d 1238 [3d Dept 2018], *lv denied* 33 NY3d 955 [2019]). Subsequently, defendant made a motion to this Court for a writ of error coram nobis alleging that County Court's jury instruction on the depraved indifference murder charge was erroneous and that appellate counsel was ineffective for failing to raise this issue on appeal. This Court granted the motion and reinstated the appeal for the purpose of addressing this limited issue (2020 NY Slip Op 66089[U] [3d Dept 2020]).


Defendant asserts that County Court's instructions to the jury regarding depraved indifference murder were consistent with the overruled objective standard set forth in *People v Register* (60 NY2d 270 [1983], *cert denied* 466 US 953 [1984]), and therefore the court's instructions failed to explain the requisite culpable mental state as required by *People v Feingold* (7 NY3d 288 [2006]). We agree. In discharging its duty to deliver a charge to the jury, "[a] court must instruct the jury regarding both the 'fundamental legal principles applicable to criminal cases in general' and those 'material legal principles applicable to the particular case' " (*People v Williams*, 36 NY3d 156, 160 [2020], quoting CPL 300.10 [1], [2]). At the time of defendant's trial, the Court of Appeals had already held that "depraved indifference to human life is a culpable mental state" (*People v Feingold*, 7 NY3d at 294). As a result, "under *Feingold*, it is not the circumstances under which the homicide occurred that determines whether [a] defendant is guilty of depraved indifference murder, but rather [the] defendant's mental state at the time the crime occurred" (*People v Jean-Baptiste*, 11 NY3d 539, 542 [2008]).

Upon our review of the record, which reflects that County Court had twice instructed the jury with the overruled objective standard, "the jury charge did not unambiguously state that depraved indifference was the culpable mental state for the crime with which defendant was charged, [and therefore] we cannot conclude that the jury, hearing the whole charge, would gather from its language the correct rules which should be applied in arriving at a decision" (*People v Fulmore*, 64 AD3d 1146, 1146 [4th Dept 2009] [internal quotation marks, brackets, and citation omitted]; *see People v Munck*, 92 AD3d 63, 69 [3d Dept 2011]). Although the People are correct that this contention is unpreserved because defendant failed to raise an appropriate objection (*see People v Barzee*, 190 AD3d 1016, 1020 [3d Dept 2021], *lv denied* 36 NY3d 1094 [2021]), given the nature of the challenged instruction, we exercise our interest of justice jurisdiction to take corrective action and grant a new trial on that count only (*see* CPL 470.15 [6] [a]; *People v Fulmore*, 64 AD3d at 1147; *see also People v Daniels*, 174 AD3d 955, 957 [3d Dept 2019], *lv dismissed* 34 NY3d 950 [2019]; *People v Facey*, 127 AD3d 1256, 1257 [3d Dept 2015]; *People v Ross*, 97 AD3d 843, 844 [3d Dept 2012], *lv denied* 20 NY3d 935 [2012]).

Egan Jr., J.P., Clark, Pritzker and Ceresia, JJ., concur.

ORDERED that the judgment is modified, as a matter of discretion in the interest of justice, by reversing defendant's conviction of murder in the second degree under count 2 of the indictment; matter remitted to the County Court of Albany County for a new trial on count 2; and, as so modified, affirmed.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court