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APPEALS.

THE FAILURE TO MENTION THE JUSTIFICATION DEFENSE ON THE VERDICT SHEET WAS NOT PRESERVED FOR APPEAL BY AN OBJECTION AND THE INTEREST OF JUSTICE APPELLATE JURISDICTION WILL NOT BE INVOKED WHERE THERE WAS AMPLE OPPORTUNITY TO OBJECT (FIRST DEPT).

The First Department determined defendant did not preserve the issue concerning the adequacy of the verdict sheet which did not mention the justification defense. Defendant was acquitted of the top counts (attempted murder and assault first) and convicted of assault second. The jury was instructed not to consider the lesser counts if the justification defense applied. But the verdict sheet was silent on the justification defense. The First Department refused to exercise its interest of justice jurisdiction because there was ample opportunity to interpose an objection to the jury instructions and verdict sheet:

… [D]efendant contends that his conviction on the lesser count of second-degree assault must be vacated since the verdict sheet made no mention of justification. Verdict sheets in criminal cases, however, may not include substantive instructions absent authorization by CPL 310.20(2) … . Here, defense counsel made no objections when the verdict sheet was reviewed and discussed by the court with the parties.

In prior cases, we reversed convictions in the interest of justice where defendants interposed no objections to jury instructions that failed to comply with Velez [131 AD3d 129], even though the claim was unpreserved … .

In People v Davis (176 AD3d 634 [2019], lv denied 34 NY3d 1157 [2020]), we changed course. The jury in that case similarly found defendant not guilty of the top count, but guilty of the lesser count. Although defendant interposed no objections to the verdict sheet or the jury instructions that were given, defendant appealed on the basis that both the initial and supplemental charges and the verdict sheet did not comply with Velez. We "decline[d] to exercise our interest of justice jurisdiction to review these unpreserved claims" … .

Davis is applicable here. The defendant, although afforded multiple opportunities during the two-and-a-half to three-day charge conference, during trial and prior to deliberations, interposed no objections, and thus, failed to preserve his claims. People v Macon, 2020 NY Slip Op 04519, First Dept 8-13-20

> Practice Note: This case illustrates a recent change in the law in the First Department. Prior to the Davis case in 2019, the First Department would consider on appeal the failure adequately explain the

justification defense to the jury, even if the issue was not preserved. Now, as long as the defense has the opportunity to object to the jury instructions or the verdict sheet, the failure to object precludes appeal.

APPEALS.

THE SIX 'LURING A CHILD' CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE (FOURTH DEPT).

The Fourth Department, reversing the "luring a child" convictions, over a two-justice dissent, determined the convictions were against the weight of the evidence. The court noted that if the evidence of an element of an offense is legally insufficient the conviction of that offense is against the weight of the evidence:

The evidence at trial established that, when defendant was 30 years old, he met 16-year-old BD on an adult dating website. The two thereafter communicated via cell phone, text messages, Facebook messaging, Skype and Snapchat. Shortly thereafter, NS, a friend of BD, initiated contact with defendant through Facebook. NS was also 16 years old at the time. While communicating for weeks with both BD and NS via cell phone, text messages, Facebook, Skype and Snapchat, defendant lied about his age and his military status, among other things. Also, he flattered the girls by saying that they were "really cute" and that he "really liked" them. Both girls lived in Ontario County and were juniors in high school.

Defendant eventually met NS in person and drove her to his house in Monroe County, where they had sexual intercourse. Over the ensuing two or three weeks, defendant drove NS to his house three more times to engage in sexual activity. In the meantime, defendant twice had both sexual intercourse and oral sexual contact with BD, once at her house in Ontario County after picking her up at school and driving her home, and the other time at his house after driving her there. * * *

"A verdict is legally sufficient when, viewing the facts in a light most favorable to the People, there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" … . If the evidence is legally insufficient to establish an element of the charged crime, it necessarily follows that the verdict is against the weight of the evidence inasmuch as we "necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight" … .

… [T]o convict defendant of luring a child, the People were required to establish that, on or about the dates alleged in the indictment, defendant lured the victims into his motor vehicle, that the victims were less than 17 years of age, and that defendant engaged in that activity for the purpose of committing a felony sex offense against the victims … . In our view, the People failed to prove that defendant lured the victims into a motor vehicle. …

The fact that defendant drove the victims to his house days and weeks later cannot transform his statements into luring.

From the dissent: "The majority concludes that the evidence is legally insufficient to support defendant's conviction on the counts of luring a child … . The majority bases its conclusion on the People's failure to establish that defendant committed contemporaneous acts of luring at the time that he invited the victims to enter his motor vehicle. Defendant did not, however, raise that issue on appeal as a ground for modifying the judgment, and thus it is not properly before us …". … People v Ringrose, 2020 NY Slip Op 04719, Fourth Dept 8-20-20

> Practice Note: Although not clear from the decision, it appears the defense did not make a motion for a trial order of dismissal arguing there was legally insufficient evidence of the luring offenses. So, as I interpret the case, it is possible to argue on appeal that a conviction is against the weight of the evidence because the proof of an element of an offense is legally insufficient--which seems to chip away at the requirement that a trial order of dismissal be made to preserve a legal insufficiency argument. There was a two-judge dissent so the Court of Appeals may have the last word.

ASSAULT.

ALTHOUGH THE VICTIM'S FACIAL SCARS WERE SHOWN TO THE JURY NO DESCRIPTION OF THE SCARS APPEARS IN THE TRIAL RECORD AND NO PHOTOGRAPH OF THE SCARS WAS INTRODUCED; THEREFORE THE SERIOUS DISFIGUREMENT ELEMENT OF ASSAULT FIRST WAS NOT DEMONSTRATED AND THE ASSAULT FIRST CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE; CONVICTION REDUCED TO ATTEMPTED ASSAULT FIRST (THIRD DEPT).

The Third Department, finding the assault first conviction to be against the weight of the evidence and reducing it to attempted assault first, determined the record of the evidence presented at trial did not support the serious disfigurement element in this knife attack case:

The testimonial, photographic and documentary evidence demonstrated that the victim sustained a laceration to his right cheek that was approximately four centimeters long, as well as a similarly sized laceration transversing the tip of his nose to his right nostril. Both lacerations were sutured by a plastic surgeon. Although the evidence clearly demonstrated the locations of the lacerations and their size prior to and immediately after suturing, the record is imprecise as to the extent and appearance of any resulting facial scars. The People did not introduce a photograph depicting the victim's nose and right cheek at the time of trial or any time after the sutures had been removed and the lacerations healed … . Further, although the physician who treated the victim testified that the victim was expected to have facial scars and the victim did in fact display facial scars to the jury, the People failed to make a contemporaneous record of what the jury observed, so as to demonstrate the extent and appearance of those scars … . Moreover, despite their prominent locations, there is no indication that the relatively small facial lacerations produced jagged, uneven or "unusually disturbing" scars … . In the absence of a photograph depicting the victim's facial scars or an on-the-record description of the victim's scars at the time of trial, we cannot conclude that the record evidence supports a finding of serious disfigurement … . People v Harris, 2020 NY Slip Op 04431, Third Dept 8-6-20

> Practice Note: Although it is clear the evidence at the trial may well have been sufficient because the jury could see the scars, the appeal was successful because the record did not include photographs of the scars. So from the point of view of the appellate court, an essential element of assault first was not proven.

ASSAULT.

THE EVIDENCE OF PHYSICAL INJURY WAS LEGALLY INSUFFICIENT, ASSAULT THIRD CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's assault third conviction, determined the evidence of "physical injury" was legally insufficient:

Physical injury is defined as "impairment of physical condition or substantial pain" (Penal Law § 10.00[9]). Although the question of whether physical injury has been established is generally for the jury to decide, "there is an objective level . . . below which the question is one of law" … . Here, the complainant testified that the defendant pushed him to the ground, and slapped him several times in the face. The complainant testified that he cried because he "was in a lot of pain." There was no evidence, however, corroborating the complainant's subjective description of the degree of pain he experienced … . There was no testimony about the duration of the pain, whether the shove or slaps left any visible bruising, swelling, or redness, or whether the defendant sought medical treatment or missed any time from work or school … . Under these circumstances, there was legally insufficient evidence from which a jury could infer that the complainant suffered substantial pain as a result of being pushed to the ground and slapped several times in the face … . People v Jhagroo, 2020 NY Slip Op 04580, Second Dept 8-19-20

> Practice Note: This case again illustrates that the failure to make a motion for a trial order of dismissal does not necessarily preclude a winning legal insufficiency argument on appeal. The court here held the evidence legally insufficient in the exercise of its interest of justice appellate jurisdiction. So, if the evidence is weak, and there was no motion for a trial order of dismissal, on appeal make the legal insufficiency argument anyway, and ask the court to exercise its interest of justice jurisdiction.

BURDEN OF GOING FORWARD (SUPPRESSION HEARING).

DEFENDANT WAS ARRESTED BY OFFICERS WHO BELIEVED HE WAS DEFENDANT'S BROTHER FOR WHOM THERE WERE OUTSTANDING ARREST WARRANTS; THE PEOPLE FAILED TO MEET THEIR BURDEN OF GOING FORWARD AT THE SUPPRESSION HEARING BECAUSE THEY FAILED TO PROVE THE EXISTENCE AND VALIDITY OF THE ARREST WARRANTS (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction and dismissing the indictment, over a two-justice dissent, determined defendant's motion to suppress the weapon seized from after he fled the police should have been granted. At the suppression hearing the officers testified they thought defendant was defendant's brother and approached defendant because they were aware of outstanding warrants for the brother's arrest. To meet their burden of going forward at the suppression hearing, the People were required to prove the existence and validity of the arrest warrants, but no such proof was presented:

… " [T]he arrest of a person who is mistakenly thought to be someone else is valid if the arresting officer (a) has probable cause to arrest the person sought, and (b) reasonably believed the person arrested was the person sought' " … . The " reasonableness of the arresting officers' conduct must be determined by considering the totality of the circumstances surrounding the arrest' " … . Thus, to establish a lawful arrest of defendant, the People were required to establish the existence of a validly issued arrest warrant for defendant's brother or probable cause to arrest him … and, here, the People concede that the police arrested defendant based only upon the arrest warrants issued for defendant's brother.

Contrary to the People's position and the dissent's assertion, we conclude that defendant challenged the existence and validity of the arrest warrants for his brother by questioning the police witnesses at the suppression hearing concerning the status of the arrest warrants and whether they were still valid … . Notably, the court acknowledged and "accept[ed] that the [d]efendant [was] in fact contesting the validity of [the] warrants." Once defendant challenged the existence and validity of the arrest warrants, the People were " required to make a further evidentiary showing by producing the . . . warrant[s]' " … , or "reliable evidence that the warrant[s were] active and valid" … . Here, the People failed to meet their burden inasmuch as they failed to produce the arrest warrants themselves or other reliable evidence that the warrants were active and valid … . People v Dortch, 2020 NY Slip Op 04711, Fourth Dept 8-20-20

Practice Note: The overarching principle at work is, at a suppression hearing, the People must affirmatively demonstrate the police acted lawfully. It appears, however, that the People were required

to demonstrate the existence and validity of the warrants here only because the defense challenged their existence and validity. Absent that challenge by the defense, the People probably would have met their burden. There was a two-judge dissent in this case so the Court of Appeals may decide the issue.

DARDEN HEARING.

PROOF AT DARDEN HEARING DID NOT DEMONSTRATE THAT THE PURPORTED CONFIDENTIAL INFORMANT EXISTED AND PROVIDED SUFFICIENT INFORMATION TO SUPPORT THE ISSUANCE OF A SEARCH WARRANT (SECOND DEPT).

The Second Department, reversing Supreme Court, over a two-justice dissent, determined the Darden hearing did not support the finding that the purported confidential informant existed and provided sufficient information for the issuance of the search warrant:

The Darden rule is necessary to insure "that the confidential informant both exists and gave the police information sufficient to establish probable cause, while protecting the informant's identity" … . The rule, which "gives clear guidance to lower courts and guarantees that the protections of the Fourth Amendment have not been circumvented" … , "is necessary to properly test the officer's credibility" … , and is "designed to protect against the contingency, of legitimate concern to a defendant, that the informer might have been wholly imaginary and the communication from him [or her] entirely fabricated" … . …

Here, the Supreme Court's credibility determinations are not supported by the record. As will be shown, there were substantial material discrepancies between the detective's affidavit in support of the search warrant, and the testimonies of the alleged CI and the detective at the Darden hearing pertaining to (1) the CI's track record of reliability, (2) the prior relationship between the detective and the CI, and (3) the facts and circumstances of the alleged controlled buy or buys at the subject apartment. Consequently, we find that the People failed to meet their burden at the Darden hearing. People v Nettles, 2020 NY Slip Op 04776, Second Dept 8-26-20

Practice Note: The Darden hearing was deemed necessary here by the appellate court because the detective's on-the-scene observations during the two controlled drug buys fell short of probable cause without the information provided to him by the CI. So where the information attributed to a CI is necessary to establish probable cause for a search warrant, a Darden hearing should be requested and granted. In accordance with the procedure for a Darden hearing, the defendant was not allowed to be present at the hearing, but he was allowed to submit written questions.

The appellate court found that the People did not demonstrate the confidential informant actually existed because the testimony at the hearing was riddled with too many inconsistencies.

DISCOVERY (WITNESS SAFETY).

PEOPLE'S REQUEST TO WITHHOLD DISCOVERY UNTIL FIFTEEN DAYS BEFORE A HEARING OR TRIAL, FOR THE WITNESSES' SAFETY, SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, in a memorandum which did not discuss the facts, determined the People's request to withhold discovery until 15 days before a hearing or trial, for the witnesses' safety, should have been granted:

Pursuant to CPL 245.70(6), a party who has unsuccessfully sought, or opposed the granting of, a protective order relating to the name, address, contact information, or statements of a person may obtain expedited review by an individual justice of the intermediate appellate court to which an appeal from a judgment of conviction would be taken. Where, as here, "the issue involves balancing the defendant's interest in obtaining information for defense purposes against concerns for witness safety and protection, the question is appropriately framed as whether the determination made by the trial court was a provident exercise of discretion" … .

Applying these standards to the matters at hand, I conclude that the Supreme Court's determination to grant the People's request only to the extent indicated was an improvident exercise of discretion. Under the particular facts and circumstances presented, concerns for witness safety and protection far outweigh the usefulness of the discovery of the material or information in question. People v Morales-Aguilar, 2020 NY Slip Op 04721, Second Dept 8-24-20

Practice Note: This case illustrates the application of new discovery rules which went into effect in 2020. If the trial court denies the People's request to withhold discovery from the defense until close to trial to protect witnesses, the People can, as they did here, seek a quick review by a judge on the appellate court.

GUILTY PLEAS.

BECAUSE THE PLEA AGREEMENT COULD NO LONGER BE COMPLIED WITH DEFENDANT'S GUILTY PLEA MUST BE VACATED; UNDER THE AGREEMENT DEFENDANT'S SENTENCE WAS TO RUN CONCURRENTLY WITH THE SENTENCE ON A SEPARATE INDICTMENT, BUT THAT SEPARATE INDICTMENT WAS DISMISSED AFTER APPEAL (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction by guilty plea, determined the inability to comply with the plea agreement required the vacation of the plea. The plea was based on the promise that defendant's sentence would be concurrent with the sentence imposed under a separate indictment. That separate indictment was dismissed after appeal:

Defendant appeals from a judgment entered in Livingston County convicting him upon a plea of guilty of criminal sale of a controlled substance in the third degree … . The plea satisfied another indictment pending against defendant in Livingston County (indictment No. 2014-042). Pursuant to the plea agreement, County Court sentenced defendant to a determinate term of imprisonment that was to run concurrently with a 10-year sentence previously imposed on defendant in Monroe County for criminal possession of a weapon in the second degree. We later reversed the Monroe County judgment and dismissed the indictment … . Defendant now contends, and the People correctly concede, that, inasmuch as his plea in Livingston County was induced by the promise of a concurrent sentence, which is no longer possible, the judgment must be reversed and the plea vacated … . This will result in the reinstatement of indictment No. 2014-042, which was satisfied by defendant's plea … . People v Peterson, 2020 NY Slip Op 04691, Fourth Dept 8-20-20

> Practice Note: The overarching principle at work here is the defendant's right to specific performance of a plea agreement. The terms of plea agreements are strictly enforced by the courts.

GUILTY PLEAS.

DEFENDANT WAS NOT INFORMED OF THE DEPORTATION CONSEQUENCES OF HIS GUILTY PLEA, MATTER REMITTED TO GIVE DEFENDANT THE OPPORTUNITY TO WITHDRAW HIS PLEA; MATTER CONSIDERED IN THE INTEREST OF JUSTICE; INEFFECTIVE ASSISTANCE ISSUE DEPENDS ON MATTERS OUTSIDE THE RECORD AND CAN ONLY BE ADDRESSED BY A MOTION TO VACATE (FOURTH DEPT).

The Fourth Department, remitting that matter to allow defendant to move to withdraw his guilty plea, considering the issue in the interest of justice, determined defendant was not informed of the deportation consequences of pleading guilty. Because the ineffective assistance claim depends in part on matters outside the record, it can only be addressed in a motion to vacate the conviction:

… [D]efendant, a noncitizen, contends that his felony guilty plea was not knowingly, voluntarily, and intelligently entered because Supreme Court failed to advise him of the potential deportation consequences of such a plea, as required by People v Peque (22 NY3d 168 [2013], cert denied 574 US 840 [2014]). As a preliminary matter, we note that defendant's challenge to the voluntariness of his plea would survive even a valid waiver of the right to appeal … . Even assuming, arguendo, that defendant was required to preserve his contention under the circumstances of this case … , we exercise our power to address it as a matter of discretion in the interest of justice … . "[D]ue process compels a trial court to apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a felony" … . Here, the record of the plea proceeding establishes that the court failed to fulfill that obligation … . As defendant contends and contrary to the People's suggestion, "the case should be remitted to afford defendant the opportunity to move to vacate his plea upon a showing that there is a reasonable probability that he would not have pleaded guilty had the court advised him of the possibility of deportation" … . People v Jumale, 2020 NY Slip Op 04697, Fourth Dept 8-20-20

> Practice Note: There are two lines of cases in this area, one requiring the court to inform a non-citizen of the deportation consequences of pleading guilty, pursuant to People vs Peque, 22 NY3d 168, and the other requiring defense counsel to so inform a non-citizen, pursuant to Padilla v Kentucky, 559 US 356.

GUILTY PLEAS.

THE MAJORITY DID NOT CONSIDER THE ARGUMENT DEFENDANT WAS NOT ADEQUATELY INFORMED OF THE RIGHTS HE WAS GIVING UP BY PLEADING GUILTY BECAUSE THE ISSUE WAS NOT PRESERVED; THE TWO-JUSTICE DISSENT ARGUED THE APPEAL SHOULD BE CONSIDERED IN THE INTEREST OF JUSTICE AND THE CONVICTION REVERSED (THIRD DEPT).

The Third Department, over a two-justice dissent, determined defendant's assertion that he was not adequately informed of the rights he was giving up by pleading guilty was not preserved for appeal. The dissent argued the court should consider the appeal under its interest of justice jurisdiction and reverse the conviction:

Defendant also asserts that his guilty plea was not knowing, voluntary and intelligent because County Court did not fully advise him of the rights that he was giving up by pleading guilty. This claim was not preserved for our review as the record does not disclose that defendant made an appropriate postallocution motion … , and we decline to exercise our interest of justice jurisdiction to take corrective action.

From the dissent:

… County Court engaged in a limited and brief exchange with defendant in which it explained that, by pleading guilty, defendant was giving up the "right to remain silent and not to incriminate yourself," the "right to a jury trial" and "any other rights you have on a trial." County Court failed to advise defendant of his right to be confronted by witnesses. Additionally, and significantly, when asked if he had discussed the plea and its consequences with counsel, defendant merely stated, "She told me about violating, would be like 90 days. I understand." The record does not establish that defendant understood and affirmatively waived the trial-related rights that he was automatically forfeiting by pleading guilty and, thus, defendant's plea is invalid … . People v Cruz, 2020 NY Slip Op 04514, Third Dept 8-13-20

> Practice Point: There are circumstances where an appellate court will exercise its interest of justice jurisdiction and consider a challenge to the voluntariness of a guilty plea in the absence of preservation by a motion to withdraw the plea. The dissent felt this was such a case.

GUILTY PLEAS.

THE RECORD WAS NOT SUFFICIENT FOR CONSIDERATION OF THE INEFFECTIVE ASSISTANCE ARGUMENT RE WHETHER DEFENDANT WAS ADEQUATELY INFORMED OF THE DEPORTATION CONSEQUENCES OF HIS GUILTY PLEA; THE PRECISE NATURE OF COUNSEL'S ADVICE WAS NOT IN THE RECORD; TWO-JUSTICE DISSENT (FIRST DEPT).

The First Department, over a two-justice dissent, determined the record was insufficient to preserve the ineffective assistance of counsel argument. The defendant argued that he was insufficiently informed about the deportation-risk associated with his guilty plea. The majority held that the record did not reflect the precise advice given by counsel and therefore the appropriate mechanism for review is a CPL 440.10 motion. The dissenters argued the record was sufficient to send the matter back for a motion to vacate the plea:

We do not agree with defendant's attempt to exempt himself from the necessity of making a CPL 440.10 motion based on his counsel's statements at the plea hearing concerning the off-the-record advice concerning immigration that had been rendered. To reiterate, counsel's statements to the court, on their face, are general in nature and do not purport to describe the contents of the immigration advice that defendant actually received. The statement that defendant had been advised of "all possible consequences" was consistent both with accurate advice that the plea would subject him to mandatory deportation and with inaccurate advice that failed to warn him of that consequence. We cannot, on this record, tell whether the advice actually given was accurate or inaccurate. Certainly, it cannot be said that counsel's statement establishes "irrefutably" … that the advice given was inaccurate, as is required to render a CPL 440.10 motion unnecessary. People v Gomez, 2020 NY Slip Op 04518, First Dept 8-13-20

> Practice Point: This is an example of the line of cases based on defense counsel's duty to advise a non-citizen of the deportation consequences of a guilty plea pursuant to Padilla v Kentucky. The record here was not sufficient to support the defendant's argument that counsel was ineffective. Where an ineffective assistance argument is dependent on counsel's off-the-record advice, the only mechanism for court review is a motion to vacate the guilty plea with the necessary evidence submitted by affidavit.

INCLUSORY CONCURRENT COUNTS.

THE JURY SHOULD HAVE BEEN INSTRUCTED TO CONSIDER THE INCLUSORY CONCURRENT COUNT (MURDER SECOND) AND THE TOP COUNT (MURDER FIRST) IN THE ALTERNATIVE; THE ERROR NEED NOT BE PRESERVED FOR APPEAL (FOURTH DEPT).

The Fourth Department, noting that the issues need not be preserved for appeal, determined the jury should have been instructed to consider the top count, murder first degree, and the inclusory concurrent count, murder second degree, in the alternative:

… [T]he court should have instructed the jury to consider count two "only in the alternative as an inclusory concurrent count" of count one … . The court, … erred when it did not instruct the jury to consider counts one and two in the alernative and instead directed the jury to consider the lesser included offenses of manslaughter in the first degree and manslaughter in the second degree for each of the two murder charges. That error resulted in the jury improperly returning a verdict convicting defendant of two identical counts of manslaughter in the first degree with respect to the same victim. We therefore … modify the judgment by reversing the conviction of manslaughter in the first degree under count two of the indictment and dismissing that count of the indictment … . People v Smith, 2020 NY Slip Op 04702, Fourth Dept 8-20-20

> Practice Point: Inclusory concurrent counts, here murder first degree and murder second degree, must be considered by the jury in the alternative. Because the jury considered both counts, and convicted on lesser included manslaughter counts, the defendant ended up being convicted of the same manslaughter count twice.

INCLUSORY CONCURRENT COUNTS.

CONCURRENT INCLUSORY COUNT MUST BE DISMISSED DESPITE FAILURE TO REQUEST THAT IT BE PRESENTED TO THE JURY IN THE ALTERNATIVE IN THIS CRIMINAL CONTEMPT PROSECUTION (SECOND DEPT).

The Second Department determined the inclusory concurrent count must be dismissed despite the failure to request that it be presented to the jury in the alternative:

… [U]nder the facts of this case, the defendant could not have committed the crime of criminal contempt in the first degree as charged in count 10 of the indictment (Penal Law § 215.51[b][i]) without also having committed the crime of criminal contempt in the second degree as charged in count 11 of the indictment (Penal Law § 215.50[3]). As these counts were "inclusory concurrent counts" as defined by CPL 300.30(4), a verdict of guilty upon the greater is deemed a dismissal of every lesser (see CPL 300.40[3][b]). Thus, although the defendant did not request that the subject counts be charged in the alternative, the conviction of the lesser count must be dismissed … . People v Bentley, 2020 NY Slip Op 04753, Second Dept 8-26-20

> Practice Point: If one count is a concurrent inclusory count of another, defense counsel should request the counts be charged to the jury in the alternative. Failing that, argue that dismissal is required on appeal pursuant to CPL 300.30 and 300.40.

JUDGES.

BY ENTERING A PLEA AGREEMENT WITH A TESTIFYING CODEFENDANT THE TRIAL JUDGE ABANDONED THE ROLE OF A NEUTRAL ARBITER AND DEPRIVED DEFENDANT OF A FAIR TRIAL (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering a new trial before a different judge, determined defendant was deprived of a fair trial by the judge's entering a plea agreement with a testifying codefendant:

The defendant … contends that he was deprived of his due process right to a fair trial by the County Court's act of entering into a plea agreement with the testifying codefendant. The court's agreement with the codefendant

was made in conjunction with a cooperation agreement reached between the codefendant and the People. The codefendant had been charged with, inter alia, murder in the second degree. The People had promised to recommend a determinate sentence of imprisonment between two and seven years in exchange for the codefendant's guilty plea to the reduced charge of attempted robbery in the second degree. However, the court promised the codefendant a sentence of only probation in exchange for her testimony against the defendant. Although the defendant failed to preserve this issue for appellate review (see CPL 470.05[2]), we nevertheless reach it in the exercise of our interest of justice jurisdiction.

We agree with the defendant that, under the circumstances here, the County Court committed reversible error when it "negotiated and entered into a [plea] agreement with a codefendant requiring that individual to testify against defendant in exchange for a more favorable sentence" … . By doing so, "the trial court abandoned the role of a neutral arbiter and assumed the function of an interested party, thereby creating a specter of bias that requires reversal" … . People v Greenspan, 2020 NY Slip Op 04408, Second Dept 8-5-20

> Practice Note: A judge who negotiates a plea agreement to ensure a co-defendant will testify against the defendant on trial exhibits a pro-prosecution bias which requires reversal.

JURY INSTRUCTIONS.

DEFENDANT'S REQUEST FOR THE MISSING WITNESS JURY INSTRUCTION SHOULD HAVE BEEN GRANTED, CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's request for a missing witness jury instruction should have been granted. Defendant was charged with contempt stemming from the violation of a protective order. It was alleged defendant pushed his former girlfriend to the ground in the presence of her date. Her date was subpoenaed by the People and was ready to testify but was not called by the People:

The proponent of a missing witness charge "initially must demonstrate only three things via a prompt request for the charge: (1) that there is an uncalled witness believed to be knowledgeable about a material issue pending in the case,' (2) that such witness can be expected to testify favorably to the opposing party,' and (3) that such party has failed to call' the witness to testify" … . "The party opposing the charge, in order to defeat the proponent's initial showing, must either account for the witness's absence or demonstrate that the charge would not be appropriate" … . "This burden can be met by demonstrating that the witness is not knowledgeable about the issue, that the issue is not material or relevant, that although the issue is material or relevant, the testimony

would be cumulative to other evidence, that the witness is not available', or that the witness is not under the party's control' such that he [or she] would not be expected to testify in his or her favor" … . If the party opposing the charge meets its burden to rebut the proponent's prima facie showing, "the proponent retains the ultimate burden to show that the charge would be appropriate" … .

Here, the defendant met his prima facie burden to show that the complainant's date was believed to be knowledgeable about a material issue pending in the case and was expected to testify favorably to the People, who had failed to call him to testify. According to the complainant, her date was present during the incident … and was a victim during that incident. The People failed to rebut this prima facie showing … . Contrary to the People's contention, they failed to establish that the complainant's date was unavailable as a witness. He appeared in court pursuant to the People's so-ordered subpoena, and his counsel stated that although he did not wish to be a witness, he was outside the courtroom and was prepared to testify. Further, the People did not establish that the complainant's date was not under the People's "control," such that he would not be expected to testify in their favor, given that he allegedly was on a date with the complainant when the defendant lunged at them, threatened them, and pushed the complainant to the ground. Moreover, the People did not demonstrate that the testimony would have been cumulative. People v Sanchez2020 NY Slip Op 04494, Second Dept 8-12-20

> Practice Point: The People's failure to call a witness expected to testify in the prosecution's favor should trigger a request for the missing witness jury instruction demonstrating the three criteria outlined in this decision. The denial of request can be, as it was here, reversible error.

LESSER INCLUDED COUNTS.

CONVICTION OF A LESSER INCLUDED COUNT OF PREDATORY SEXUAL ASSAULT (I.E. COURSE OF SEXUAL CONDUCT AGAINST A CHILD) VACATED (SECOND DEPT),

The Second Department vacated defendant's conviction of a lesser included count:

… [T]he defendant's conviction of predatory sexual assault against a child under Penal Law § 130.96 requires dismissal of the lesser included count of course of sexual conduct against a child in the first degree under Penal Law § 130.75(1)(a) … . People v Mendez-Huales, 2020 NY Slip Op 04774, Second Dept 8-26-20

MENTAL HYGIENE LAW.

RESPONDENT IS A DANGEROUS SEX OFFENDER REQUIRING CONFINEMENT, NOT STRICT AND INTENSIVE SUPERVISION AND TREATMENT (SIST), SUPREME COURT REVERSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined respondent was a dangerous sex offender requiring confinement under the Mental Hygiene Law. Supreme Court had found respondent was entitled to release under strict and intensive supervision and treatment (SIST).

Throughout the entirety of the respondent's confinement and incarceration, he has never successfully completed any sex offender treatment program. The respondent was violent and "destructive" in group therapy, and repeatedly threatened and assaulted his treatment providers and other staff members. During interviews with treatment providers and evaluators, the respondent threatened to kill the judge who sentenced him; indicated that he derived excitement out of humiliating, tormenting, hunting, and hurting other people; and indicated that he kept a "revenge" list in his mind of people he intended to retaliate against. The respondent also repeatedly feigned psychiatric illnesses that he did not have in an attempt to manipulate the evaluators. Up until the time of the subject dispositional hearing, the respondent continued to make threats and express a desire to kill facility staff members. …

The State presented the testimony of two experts, each of whom opined to a reasonable or high degree of psychological certainty that the respondent is a dangerous sex offender requiring confinement. Both experts diagnosed the respondent with several disorders that affect his emotional, cognitive, or volitional capacity in a manner making it likely that the respondent would engage in recidivist violent sexual offense behavior again. Both experts' testimony also established that the respondent is presently unable to control his behavior because he has steadfastly refused to meaningfully engage in any treatment program. Each of the experts believed that the respondent's disorders were treatable, but because the respondent had not successfully completed treatment to resolve his disorders, deviance, offense cycle, or triggers, the disorders remained untreated, and the respondent lacked the ability to control his behavior. Matter of State of New York v Raul L., 2020 NY Slip Op 04479, Second Dept 8-12-20

MENTAL HYGIENE LAW.

THE JURY FOUND THE DEFENDANT SEX OFFENDER DID NOT SUFFER FROM A MENTAL ABNORMALITY WHICH AFFECTED HIS ABILITY TO CONTROL HIS BEHAVIOR AND WAS THEREFORE ENTITLED TO RELEASE; UPON THE STATE'S MOTION THE VERDICT WAS SET ASIDE; THE APPELLATE DIVISION REVERSED FINDING THAT THE STATE WAS NOT PREJUDICED BY ALLEGED JUROR MISCONDUCT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined the sex offender civil management verdict, which found defendant did not suffer from a mental abnormality and was therefore entitled to release, should not have been set aside. The state argued the jury foreperson's telling the jury that, according to the foreperson's father, "if inmates wanted to do something in prison they could do it" constituted jury misconduct. The remark was relevant to the expert testimony about the ways an inmate can act out sexually. The defendant argued he had not been cited for sexual misbehavior during his 30 years in prison, so the evidence he could have acted out was relevant to his ability to control his behavior:

… [W]e conclude that petitioner [the state] was not prejudiced by the foreperson's failure to disclose during voir dire that his father previously worked as a correction officer… . We note that several of the jurors in this case either worked in prison or had close relations who worked as correction officers or in law enforcement. Neither party seems to have considered that to have been a disqualifying attribute because those jurors were selected to serve on the jury. Indeed, because the trial was held in the shadow of Auburn Correctional Facility, it would have been difficult for the parties to select 12 qualified jurors with no connection to the prison. Petitioner's attorney was well aware of that fact and seized upon it during summation, urging the jurors to draw upon their knowledge of the internal workings of prisons in order to decide the case. Petitioner had every reason to believe that a jury packed with prison employees and their relations would likely return a verdict unfavorable to the convicted offender. Petitioner cries foul only because its strategy backfired. Matter of State of New York v Donald G., 2020 NY Slip Op 04716, Fourth Dept 8-20-20

MOLINEUX.

THE PRIOR BAD ACT EVIDENCE EXCEEDED THAT ALLOWED BY THE MOLINEUX RULING, DEFENDANT'S MURDER CONVICTION REVERSED IN THE INTEREST OF JUSTICE (THIRD DEPT).

The Third Department determined defendant's murder conviction must be reversed in the interest of justice because the evidence of prior bad acts exceeded that allowed by the court's Molineux ruling:

Defendant also challenges certain testimony by the victim's niece as being beyond the scope of County Court's Molineux ruling. As part of its Molineux application, the People requested that they be allowed to offer proof about instances of verbal and emotional abuse by defendant toward the victim. The court granted the application and permitted the People to elicit such evidence. At trial, however, the niece testified that the victim told her that defendant once grabbed her arm in a store because he did not like who she was talking to and that bruises on her legs were caused by defendant. The niece further testified that she observed defendant kick the victim in the stomach. That said, incidents of physical abuse by defendant were not part of the People's Molineux application. As such, the niece's testimony, some of which was hearsay, exceeded the scope of the court's Molineux ruling and deprived defendant of a fair trial … .

Because the evidence of defendant's guilt was not overwhelming, there must be a new trial … . We note that defendant did not object to the niece's testimony and, consequently, failed to preserve this argument . Despite this infirmity, we deem it appropriate under the particular circumstances of this case to exercise our interest of justice jurisdiction and reverse the judgment (see CPL 470.15 [6] [a]). People v Callahan, 2020 NY Slip Op 04618, Third Dept 8-20-20

> Practice Point: The People must be held to the specific evidence described in a Molineux application. Here the application alleged incidents of verbal and emotional abuse, but evidence of physical abuse was allowed. Because the evidence of guilt was not overwhelming, reversal was required, even though the error was not preserved.

MOLINEUX.

RULING THAT DEFENDANT COULD BE CROSS-EXAMINED ABOUT THREE PRIOR GUN-RELATED CONVICTIONS IF HE TESTIFIED THE SHOOTING WAS AN ACCIDENT DID NOT DEPRIVE DEFENDANT OF THE RIGHT TO PUT ON A DEFENSE; TWO DISSENTERS DISAGREED (SECOND DEPT).

The Second Department, affirming defendant's murder conviction, over a two-justice dissent, determined the Molineux ruling that defendant could be cross-examined about his three prior gun-related convictions if he were to testify the shooting was an accident did not deprive defendant of the right to put on a defense. The dissenter argued that it did:

Prior to trial, the Supreme Court ruled that if the defendant were to testify that the shooting was an accident, the People would be permitted to offer evidence, through their cross-examination of him, of the facts underlying his three prior gun-related convictions … . The defendant contends that this ruling deprived him of his due process right to a fair trial as it deterred him from testifying at trial. Contrary to the defendant's contention, and the position of our dissenting colleagues, the court's Molineux ruling did not deprive the defendant of his right to a fair trial … . Moreover, any error in the ruling was harmless, as there was overwhelming evidence of the defendant's guilt and no reasonable possibility that any error might have contributed to the defendant's conviction … . * * *

From the dissent:

… [T]he fact that the defendant committed gun-related offenses against persons other than the victim nearly 20 years before the subject shooting bears no relevance whatsoever to the issue of whether the subject shooting was an accident. In my view, permitting the People to elicit the underlying facts of prior gun-related acts that were totally unrelated to the victim would serve only to demonstrate that the defendant had a propensity for gun violence … . Consequently, the Supreme Court's pretrial ruling in this case cannot be justified under Molineux and, thus, the ruling effectively precluded the defendant from presenting a defense. People v Huertas, 2020 NY Slip Op 04577, Second Dept 8-19-20

> Practice Point: The court ruled that the underlying facts of three gun-related offenses could be introduced as Molineux, not Sandoval, evidence during the cross-examination of the defendant if the defendant claimed the shooting was an accident. This is an example of allowing Molineux evidence (People's evidence-in-chief) to be presented through the cross-examination of a defendant, apparently to demonstrate intent.

SEARCHES.

THE STRIP SEARCH OF DEFENDANT WAS JUSTIFIED AND CONDUCTED PROPERLY (THIRD DEPT).

The Third Department determined the strip search of defendant, which resulted in the seizure of cocaine, was proper:

"[I]t is clear that a strip search must be founded on a reasonable suspicion that the arrestee is concealing evidence underneath clothing and the search must be conducted in a reasonable manner" … . The trooper testified at the suppression hearing that the search of the vehicle led to the discovery of 1.1 grams of marihuana in the center console. A K-9 search of the vehicle revealed "hits" at both the center console and the driver's seat. According to the trooper, during the transport of defendant to the State Police barracks, the smell of marihuana was "overwhelming." At the barracks, defendant was handcuffed to a bench and the trooper continued to smell marihuana. Each time the trooper asked defendant if he had marihuana on him, he denied it. After defendant was advised that he was to be strip-searched, he was taken to a private interview room and the search was conducted by two male officers. Defendant was asked to remove one article of clothing at a time; when he was down to his underwear, defendant handed over the marihuana, and the cocaine was revealed shortly thereafter. Given this evidence, a reasonable suspicion existed that defendant was concealing evidence and we find that the search was conducted in a reasonable manner … . People v Hightower, 2020 NY Slip Op 04513, Third Dept 8-13-20

SENTENCING.

DEFENDANT HAS THE RIGHT TO BE PERSONALLY PRESENT AT RESENTENCING ABSENT WAIVER, RESENTENCE REVERSED (SECOND DEPT).

The Second Department, reversing defendant's resentence, determined the right to be personally present at sentencing extends to resentencing:

The defendant's fundamental right to be "personally present at the time sentence is pronounced" (CPL 380.40[1]) extends to resentencing or to the …amendment of a sentence … . While a defendant convicted of a felony may waive the right to be present at resentencing, this waiver must be expressly made … . A "[w]aiver results from a knowing, voluntary and intelligent decision"… . Here, the defendant was not produced at resentencing and the record is devoid of any indication that he expressly waived his right to be present. Thus, the Supreme Court's

failure to have the defendant produced at the resentencing proceeding violated the defendant's fundamental right to be present at the time of sentence. People v Rodriguez, 2020 NY Slip Op 04493, Second Dept 8-12-20

Practice Point: Absent an express waiver, a defendant has a right to be present at a felony resentencing.

SENTENCING.

DEFENDANT SHOULD HAVE BEEN ALLOWED TO MAKE A PERSONAL STATEMENT BEFORE RESENTENCING, RESENTENCE REVERSED (SECOND DEPT).

The Second Department, reversing defendant's resentence, determined defendant should have been allowed to make a sentence before the sentence was pronounced:

At that proceeding, the defendant requested an opportunity to address the court. The court denied the defendant's request. The defendant appeals, and we reverse.

A defendant is entitled "to make a statement personally in his or her own behalf, and before pronouncing sentence the court must ask the defendant whether he or she wishes to make such a statement" (CPL 380.50 [1]). "[T]he provisions of CPL 380.50 apply to occasions of resentencing as well as to those of initial sentencing" … . Here, the defendant was denied that opportunity. Accordingly, we remit the matter … for resentencing to give the defendant an opportunity to make a statement in his behalf … . People v Taylor, 2020 NY Slip Op 04413, Second Dept 8-5-20

Practice Point: A defendant has the right to make a statement at a resentencing.

SENTENCING.

THE JUDGE DID NOT PRONOUNCE THE LENGTH OF THE TERM OF PROBATION, SENTENCE VACATED AND MATTER REMITTED (SECOND DEPT).

The Second Department, vacating defendant's sentence, determined the judge's failure to pronounce the term of probation required remittal:

CPL 380.20 requires that courts "must pronounce sentence in every case where a conviction is entered." "When the sentencing court fails to orally pronounce a component of the sentence, the sentence must be vacated and the matter remitted for resentencing in compliance with the statutory scheme" … . Here, although the parties do not dispute that, as part of the negotiated disposition, the defendant was promised a term of probation of three years, the sentence must be vacated and the matter must be remitted to the Supreme Court, Kings County, for resentencing because the court failed to pronounce the length of the probation term … . People v Childs, 2020 NY Slip Op 04404, Second Dept 8-5-20

Practice Point: The length of any sentence, including probation, must by pronounced by the court.

SENTENCING.

THE SENTENCING COURT INDICATED IT COULD NOT DEVIATE FROM ITS SENTENCING AGREEMENT WITH THE PEOPLE BUT SENTENCING COURTS HAVE DISCRETION; SENTENCE VACATED AND MATTER REMITTED FOR RE-SENTENCING (FOURTH DEPT).

The Fourth Department, vacating defendant's sentence and remitting the matter, determined the sentencing court erroneously indicated it had no discretion to deviate from the sentencing agreement with the People:

"[T]he sentencing decision is a matter committed to the exercise of the court's discretion and . . . can be made only after careful consideration of all facts available at the time of sentencing" … . "The determination of an appropriate sentence requires the exercise of discretion after due consideration given to, among other things, the crime charged, the particular circumstances of the individual before the court and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence" … . Here, the court indicated that it had no choice but to sentence defendant pursuant to its agreement with the People … , and the sentencing transcript, read in its entirety, does not reflect that the court conducted the requisite discretionary analysis … . We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing. People v Knorr, 2020 NY Slip Op 04690, Fourth Dept 8-20-20

SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT'S PHYSICAL CONDITION AFTER A STROKE WARRANTED A DOWNWARD MODIFICATION OF HIS SORA RISK LEVEL FROM THREE TO TWO (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined defendant's application for a downward modification of his SORA risk level should have been granted:

… [T]he defendant established, by a preponderance of the evidence … , facts warranting a downward modification of his existing risk level classification to risk level two … . The medical evidence adduced at the hearing demonstrated that the defendant, who uses a wheelchair, suffered from a stroke in 2009, resulting in permanent paralysis on the right side of his body. A treating physician testified, inter alia, that there is no possibility of improvement of the paralysis condition. He also testified that although the defendant is able to transfer himself from a bed to a wheelchair, he requires assistance in propelling the wheelchair and in transferring himself to a shower stall. In addition, he is unable to stand for any length of time. Furthermore, the record indicates that the defendant had no disciplinary infractions in prison, spanning a lengthy period of time preceding the hearing. People v Sanchez, 2020 NY Slip Op 04796, Second Dept 8-26-20

SPEEDY TRIAL.

ALTHOUGH THE PEOPLE SHOULD HAVE DISCOVERED THE PROBLEM WITH CERTAIN EVIDENCE SOONER, FOR SPEEDY TRIAL PURPOSES THE PEOPLE CAN BE CHARGED ONLY WITH THE TIME NECESSARY TO INVESTIGATE THE NEWLY DISCOVERED EVIDENTIARY ISSUE; THE NEED FOR MORE INVESTIGATION DID NOT INVALIDATE THE PEOPLE'S STATEMENT OF READINESS WHICH WAS WITHDRAWN; THEREFORE THE INDICTMENT SHOULD NOT HAVE BEEN DISMISSED ON SPEEDY TRIAL GROUNDS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the indictment should not have been dismissed on speedy trial grounds. The People withdrew their statement of readiness stating that there was newly discovered evidence. Supreme Court found that the evidence was available early on and should have been discovered had the People been diligent.

The record shows that the People were not aware until April 30, 2019 that mistakes by police detectives had incorrectly led them to conclude that they could not locate the user of the Instagram account that had been used to send the photographs of defendant engaging in sexual acts with the victim to defendant's ex-girlfriend. While we agree with the court that the People's late realization was entirely due to the People's failure to properly inspect the evidence within their possession, the time chargeable to the People is only the delay that is directly attributable to their inaction, and that which directly implicated their ability to proceed to trial … . Thus, the delay that is chargeable to the People due to their inaction with respect to the photographs is any additional time that they required to investigate the matter, which they could have previously investigated. Moreover, the People's need to further investigate the photographs did not render their prior statement of readiness illusory because the record shows that, at the time they announced their readiness, the People would have been able to establish a prima facie case and proceed at trial … . People v Pratt, 2020 NY Slip Op 04662, fourth Dept 8-20-20

TRAFFIC STOPS.

POLICE OFFICER WAS JUSTIFIED IN FOLLOWING DEFENDANT'S CAR AFTER OBSERVING A TRAFFIC VIOLATION, DIRECTING THE OCCUPANTS OF THE CAR TO RETURN TO THE CAR AFTER IT PULLED INTO A RESIDENTIAL DRIVEWAY, AND DETAINING THE DEFENDANT AND CONDUCTING A SEARCH ON THE PROPERTY AFTER THE HOMEOWNER SAID HE DID NOT KNOW THE OCCUPANTS OF THE CAR (THIRD DEPT).

The Third Department determined the police officer acted properly in following the defendant's car after observing a traffic violation, directing the occupants of the car to return to car after it pulled into a residential driveway, detaining the defendant when the homeowner said he did not know the defendant and the others, and arresting the defendant after a weapon was found after a search behind the house:

The officer observed a traffic infraction when the vehicle ran a stop sign … and was accordingly justified in approaching the vehicle after he had caught up to it … . Defendant suggests that the traffic infraction was a pretext for making the approach, but that contention is unpreserved for our review … . As a result, although one might reasonably question why the officer, upon seeing a traffic violation of sufficient gravity to cause him to make a U-turn and follow the vehicle, did not put on his siren or emergency lights, and then approached the vehicle with more apparent interest in the passengers than the driver, the record was not developed on the possibility of an ulterior motive for the officer's actions. It follows that the record affords no basis for defendant's

speculation as to the officer's motivations. We are, in any event, bound by controlling precedent that those speculative motivations would not render an otherwise proper approach invalid … .

The officer had discretion to "control the scene in a way that maximize[d]" safety as the approach unfolded, could have directed defendant to exit the vehicle had he been in it and, in … view of the heightened safety concerns stemming from defendant's refusal to return to the vehicle and brief disappearance behind the house, was free to direct that defendant sit on the hood of the vehicle upon his return … . Shortly thereafter, the officer learned that the homeowner did not know anyone in the vehicle despite their claims and had watched defendant throw something away behind the house. The foregoing created a reasonable suspicion of criminal activity by defendant that warranted his detention, after which the handgun was recovered and afforded probable cause for his arrest … . People v Price, 2020 NY Slip Op 04430, Third Dept 8-6-20

VERDICTS (SET ASIDE).

TRIAL COURT MAY NOT SET ASIDE THE VERDICT PURSUANT TO CPL 330.30 ON A GROUND WHICH DOES NOT REQUIRE REVERSAL AS A MATTER OF LAW–HERE THE ALLEGED FACTUAL INCONSISTENCY BETWEEN THE CONVICTION OF ENDANGERING THE WELFARE OF A CHILD AND THE ACQUITTALS ON ALL THE OTHER SEXUAL-OFFENSE COUNTS (SECOND DEPT).

The Second Department, reversing County Court on the People's appeal, in a full-fledged opinion by Justice Chambers, determined the verdict should not have been set aside based upon an alleged inconsistency between the conviction on one count and the acquittals on all other counts:

This appeal by the People and cross appeal by the defendant presents a rare opportunity to consider the circumstances under which a trial court, in reviewing the record on a motion pursuant to CPL 330.30(1) to determine whether a conviction on one count is supported by legally sufficient evidence, may consider a jury's factually inconsistent acquittal on another count.

The defendant was charged with two counts of rape in the third degree (Penal Law § 130.25[2]), three counts of criminal sexual act in the third degree (Penal Law § 130.40[2]), and two counts of endangering the welfare of a child (Penal Law § 260.10[1]). * * *

The jury returned a verdict of guilty on count six [endangering the welfare of a child] and acquitted the defendant of all other charges. * * *

… [T]he defendant contends that a factual inconsistency in the verdict may … , under appropriate circumstances, provide grounds for a reviewing court to "consider a jury's acquittal on one count in reviewing the record to determine if a factually inconsistent conviction on another count is supported by legally sufficient evidence" … . … [T]here is some support in the case law for the defendant's contention—at least within the context of a direct appeal from the judgment of conviction, where this Court has both a unique power of factual review … as well as the discretionary authority, in the interest of justice, to reach unpreserved errors that deprived the defendant of a fair trial … . However, we now explicitly hold that a trial court determining a motion pursuant to CPL 330.30 lacks the power to overturn a verdict on this ground where, as here, the contention does not present an issue that "would require a reversal or modification of the judgment as a matter of law by an appellate court" (CPL 330.30[1] …). People v Taylor, 2020 NY Slip Op 04790, Second Dept 8-26-20

> Practice Point: The power of a trial court to set aside a verdict extends only to issues which an appellate court must reverse or modify as a matter of law.

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