

142 A.D.3d 625

Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Alshawn HOLIDAY, appellant.

Aug. 17, 2016.

Synopsis

Background: Defendant was convicted in the Supreme Court, Kings County, Guzman, J., of murder in the second degree and criminal possession of a weapon in the second degree. Defendant appealed.

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

any error by trial court in refusing to prohibit victim's family from wearing shirts bearing photograph of victim during defendant's murder trial was harmless;

prosecutor improperly appealed to jury's sympathy; and

prosecutor committed misconduct when she identified certain barely visible figures in surveillance video as the victim and the defendant.

Reversed.**Attorneys and Law Firms**

****521** Lynn W.L. Fahey, New York, N.Y. (**Paul Skip Laisure** of counsel), for appellant, and appellant pro se.

Kenneth P. Thompson, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Morgan J. Dennehy, and Gamaliel Marrero of counsel), for respondent.

RUTH C. BALKIN, J.P., ROBERT J. MILLER, SYLVIA O. HINDS-RADIX, and VALERIE BRATHWAITE NELSON, JJ.

Opinion

***625** Appeal by the defendant from a judgment of the Supreme Court, Kings County (Guzman, J.), rendered August

10, 2011, convicting him of murder in the second degree and criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence.

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

The defendant was convicted after a jury trial of charges related to the shooting death of the victim in April 2010. On appeal, he raises several meritorious claims of error, some of which are preserved for appellate review and some of which are not. None of the errors is by itself sufficient to require reversal. Nonetheless, we conclude that the cumulative effect of certain of these errors cannot be deemed harmless in this case, and thus, we must reverse the judgment and order a new trial.

On the second day of trial, defense counsel advised the Supreme Court that “quite a few members of the deceased's family are present in the court, they are all wearing T-shirts with his photograph on it, displayed in a fairly prominent position on the front of their T-shirts.” Defense counsel requested that the court instruct the spectators to remove the T-shirts or turn them inside out. After asking the members of the audience to stand up for a moment so as to view the T-shirts, the court stated that there was no basis to ****522** limit their right to wear items or make a statement since they had a First Amendment right to do so. The court also stated: “It should be noted that the Court, in viewing the audience, saw nothing outstanding other than T-shirts with some pictures and some words. One of the picture[s] may be of the [victim], I can't tell from this distance. But, at any rate, that's my ruling for the record, over counsel's objection.”

The Court of Appeals has recently held that “spectator ***626** displays depicting a deceased victim should be prohibited in the courtroom during trial” because such “depictions may be viewed by the jury as an appeal to sympathy for the deceased victim and the spectators wearing the display, and perhaps as a request to hold the defendant responsible for their loss” (*People v. Nelson*, 27 N.Y.3d 361, 371, 33 N.Y.S.3d 814, 53 N.E.3d 691). In this case, there was no evidence in the record that the spectators attempted to draw attention to themselves or engage in any other egregious behavior, and no evidence that the words on the T-shirts were prominent. When defense counsel raised the issue early in the trial, the Supreme Court refused to prohibit the conduct. However, that conduct did not deprive the defendant of a fair trial and, therefore, is subject to harmless error analysis. Since

the evidence of the defendant's guilt was overwhelming, and there was no significant probability that the court's failure to prohibit the conduct contributed to the verdict, this error was harmless (*see id.* at 372–373, 33 N.Y.S.3d 814, 53 N.E.3d 691; *People v. Crimmins*, 36 N.Y.2d 230, 367 N.Y.S.2d 213, 326 N.E.2d 787).

The prosecutor improperly appealed to the jury's sympathy by eliciting testimony from the victim's mother that the victim's wife was expecting a child and expressing sympathy for her loss by stating on the record, “Thank you ma-am. I'm sorry for your loss” (*see People v. Miller*, 6 N.Y.2d 152, 157, 188 N.Y.S.2d 534, 160 N.E.2d 74). A defendant is “entitled to a trial upon evidence proving or tending to prove the crime with which he was charged ‘... uninfluenced by irrelevant facts and circumstances which tend to prejudice or mislead the jury’ ” (*People v. Tassiello*, 300 N.Y. 425, 430–431, 91 N.E.2d 872, quoting *People v. Posner*, 273 N.Y. 184, 190, 7 N.E.2d 93). “Testimony about victims' personal backgrounds that is immaterial to any issue at trial should be excluded” (*People v. Harris*, 98 N.Y.2d 452, 490–491, 749 N.Y.S.2d 766, 779 N.E.2d 705). Here, the testimony in question was calculated to appeal to the passion and sympathy of the jury and unduly prejudiced the defendant (*see People v. Miller*, 6 N.Y.2d at 157, 188 N.Y.S.2d 534, 160 N.E.2d 74; *People v. Caruso*, 246 N.Y. 437, 443, 159 N.E. 390).

That error was compounded when, during summation, the prosecutor improperly appealed to the jury's sympathy by commenting that when the victim left his house on the night in question, he had no idea that he was “never going to see his family again” and “never going to be able to see his girlfriend

again,” and stating that it was a “tragedy” that his “24-year-old life was taken away by this man here (indicating), [the defendant]” (*see People v. Walters*, 251 A.D.2d 433, 434, 674 N.Y.S.2d 114). The prosecutor committed misconduct of a different sort during summation when, while playing a surveillance video introduced *627 into evidence at trial, she identified certain barely visible figures on the screen as the victim and the defendant. Throughout the course of these comments, the Supreme Court repeatedly instructed the jury that it alone should assess the video and not rely on the prosecutor's comments, but the prosecutor persisted in **523 her characterization of the figures on the screen.

Although the claims of prosecutorial misconduct regarding the testimony of the victim's mother and improper summation comments are unpreserved for appellate review, we nonetheless reach them in the exercise of our interest of justice jurisdiction (*see People v. Jackson*, 139 A.D.3d 875, 31 N.Y.S.3d 565; *People v. Rodriguez*, 75 A.D.2d 829, 427 N.Y.S.2d 466). While each of these errors, standing alone, may not warrant reversal, there is a significant probability that their combined effect contributed to the defendant's conviction. Accordingly, the judgment must be **reversed**, and a new trial ordered.

The defendant's remaining contentions, including those raised in his pro se supplemental brief, are without merit.

All Citations

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