

NEW YORK COURT OF APPEALS ROUNDUP

NEW TRIAL FOR DEFENDANT DEPRIVED OF RIGHT TO PRESENT A DEFENSE

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In *People v. Deverow*, the Court of Appeals ordered a new trial for a defendant convicted of murder in the second-degree and criminal possession of a weapon in the second-degree arising from the shooting death of a 17-year-old. In a unanimous opinion written by Judge Madeline Singas, the court held that the trial court deprived the defendant of his constitutional right to present a defense by precluding certain evidence offered by the defendant in support of his justification defense.

In December 2012, a group of approximately 20 people were standing outside of a home in Queens. According to the sole eyewitness to testify at trial, the eyewitness was traveling near the scene of the shooting while walking his girlfriend home. He saw the defendant and co-defendant, and recognized them from seeing them around the neighborhood. The eyewitness saw the defendant and co-defendant draw their guns. The eyewitness turned to run away and heard two shots fired behind him. When he turned around he saw the defendant and co-defendant pointing their guns at the crowd standing outside the home. The defendant and co-defendant opened fire on the crowd from across the street. One bullet fired by the co-defendant struck and killed the victim. Other witnesses, who did not see the victim being shot, testified that additional shots were fired further up the block moments after the victim was killed. The eyewitness testified that he saw the defendant's and co-defendant's guns flash and smoke, and heard approximately thirteen shots, but he did not see anyone fire a shot at the defendant or co-defendant.

Additionally, three people called 911 to report what they saw and heard. One caller reported that the victim was shot in the head and lying on the sidewalk, that the shooters left the scene in a beige Jeep Wrangler, and that there were probably four people in the car. The second caller did not see the shooting, but reported hearing approximately fifteen shots and said that the shooter escaped in a car. The third caller stated that there had been two bursts of gunfire from an assault rifle, 8 in the first and five in the second, and the shooter had left the scene and walked behind the building. That caller gave a general description of the shooter, but noted that there could have been more than one shooter.

Police recovered nine .45 caliber shells in the area where the eyewitness reported that he saw the defendant and co-defendant. They also recovered 14 assault rifle shells and live cartridges approximately 250 feet up the block from the crime scene. No other shells or ammunition was found near the victim's body.

At trial, the People argued that the defendant and his co-defendant initiated the shooting. They called an on-duty security guard who testified that he heard shots, walked outside to see the victim lying on the ground, and only then heard two additional rounds of shots from further up the block. They also called one of the 911 callers. However, at trial, the caller contradicted her statements to the 911 operator. She testified that she could not tell what the shooters looked like or how they left the scene because she had walked away from the window due to the shooting. She said she "assumed" the shots were fired from the car because it was driving off while she made the call. When the defense tried to introduce the original 911 call for impeachment purposes, the People objected because the witness had already admitted that her statements were inconsistent. The trial court agreed and precluded the introduction of the tape because the

witness had “not denied the fact she called 911 and said these things on the tape.” 2022 WL 1631508 at *2 (N.Y. May 24, 2022).

During his case, the defendant asserted a justification defense claiming that he and his co-defendant were fired upon and only returned fire in self-defense. He attempted to call the girlfriend of the eyewitness who, according to the defendant, was prepared to contradict the account of the eyewitness by testifying that she was not walking with him at any point that night and she did not live close to the crime scene. The trial court precluded the testimony on the ground that it would serve only to impeach the eyewitness on a collateral issue. Next, the defendant sought to introduce recordings of the 911 calls as present sense impressions or excited utterances. The trial court precluded introduction of the 911 recordings on the ground that there was insufficient evidence corroborating the statements made by the callers.

The jury rejected the justification defense and convicted the defendant of second-degree murder and second-degree criminal possession of a weapon. The Appellate Division, Second Department, affirmed the judgment but reduced the defendant’s sentence as a matter of discretion in the interests of justice. 180 A.D.3d 1064, 1065 (2d Dep’t 2020). A judge of the Court of Appeals granted the defendant’s motion for leave to appeal.

The court began by reiterating that criminal defendants have a fundamental right guaranteed by the Due Process Clause of the Fourteenth Amendment and the Compulsory Process and Confrontation Clauses of the Sixth Amendment to a meaningful opportunity to present a complete defense, noting that “[a] court’s discretion in evidentiary rulings is circumscribed by the defendant’s constitutional right to present a defense.” 2022 WL 1631508 at *3 (citing *People v. Carroll*, 95 N.Y.2d 375, 385 (2000)).

The court held that the trial court erred in excluding the testimony the defendant intended to elicit from the eyewitness’s girlfriend. The court noted that while “a party may not introduce extrinsic evidence on a collateral matter solely to impeach credibility ... where evidence is clearly probative of a witness’s ability to accurately recall or to observe the details of the relevant event, it is not collateral and it is admissible.” *Id.* In this case, the proffered testimony was relevant to the eyewitness’s ability to observe and recall details concerning the shooting. For example, he testified that he was with his girlfriend until right before he witnessed the shooting, and that he was at the scene because he was walking his girlfriend home. According to the court, if the girlfriend testified in accordance with the defendant’s proffer, her testimony would have directly contradicted the testimony of the sole eyewitness on which the People relied to establish that the defendant and co-defendant fired before being fired upon. Accordingly, the proffered testimony was not collateral to the fact issues to be decided by the jury.

With respect to the three 911 tapes, the court held that each tape was admissible as present sense impression exceptions to the hearsay rule. The present sense impression exception “applies to statements that are (1) made by a person perceiving the event as it is unfolding or immediately afterward and (2) corroborated by independent evidence establishing the reliability of the contents of the statement. Descriptions of the events made by a person who is perceiving the event as it is unfolding are deemed reliable because the contemporaneity of the communication minimizes the opportunity for calculated misstatement as well as the risk of inaccuracy from faulty memory.” *Id.* at *4. The proponent of the statement must demonstrate some independent verification of the declarant’s descriptions of the unfolding events. There is no bright-line rule for this standard; rather, the “critical inquiry” is “whether the corroboration offered to support admission of the statement truly serves to support its substance and content. What corroboration is sufficient will depend on the particular circumstance of each case.” *Id.* According to the court, each 911 call was sufficiently contemporaneous because the caller was describing the events as they unfolded from the scene of the crime. Each call was also sufficiently corroborated by independent evidence establishing the call’s reliability. For example, the callers identified the location of the victim, the nature of the victim’s wound, the number of shots fired, and a general description of cars in the area.

The fact that certain details within the calls conflict with the People's evidence and theory did not render the tapes unreliable. Indeed, that conflict supports the defendant's argument that precluding the jury from hearing the tapes denied him the right to present a defense. Accordingly, a unanimous court reversed and ordered a new trial because "[a]dmitting the 911 calls could have allowed the defendant the opportunity to buttress his justification defense, to mount a different defense, or to challenge the eyewitness's account of events. Precluding this testimony effectively tied defendant's hands. A jury should have been allowed to hear and assess the excluded information and reach a verdict after weighing all the relevant evidence."

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