TRIAL AND ERRORS

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There are many reasons, some good others not, why a defendant may refuse to plead guilty and proceed to a trial. It could be that the prosecutor has not offered any reduced plea and/or or the court has not provided any incentive for a plea with a favorable sentence commitment. In such case, the defendant may believe that he/she has little or nothing to lose and everything to gain by rolling the dice with a jury.

It could also be that the People's proof against the defendant (as gleaned from discovery, investigation or testimony in the grand jury or at pre-trial hearings), appears to be weak, thereby giving the defendant and counsel confidence in the likelihood of a favorable verdict. Or, it may just be that the defendant, in a case where the People's proof is strong, refuses to see reality and believes that a jury will somehow ignore the evidence of guilt and believe his/her side of the story.

Then there's the case of actual innocence. While there are times when a defendant may plead guilty anyway (e.g. where the People's proof is strong and there is little room for a plausible defense beyond denial of the charges and cross examination with the faint hope of exposing kinks in the prosecution's armor), most innocent people would rather have their fate decided by a fair and impartial jury rather than admit to a crime that they did not commit.

Even in cases where the prospects of an acquittal seem remote and counsel's most realistic hope is to make a good record for appeal, it is worth remembering that there are plenty of mine fields in the landscape of a trial, from jury selection to the rendition of a verdict, that can upend the proceedings (e.g. mistrial), or level the path to an eventual reversal of the conviction.

Most errors, whether committed by the judge (e.g. in admitting or refusing to admit relevant evidence) or by the prosecutor (e.g. in eliciting irrelevant and/or unduly prejudicial evidence or making improper and inflammatory arguments), require a TIMELY and SPECIFIC objection to be PRESERVED for appeal.

New York Evidence Rule (NYER) 12.0(2) states that to preserve a specific error in the introduction of evidence as a QUESTION OF LAW for appellate review, a party must TIMELY object (i.e. when the objectionable question was asked, or when the court is still in a position to correct the error by striking the inadmissible testimony and instructing the jury to disregard it [see People v Grant 7 NY3d 421 (2006)], and do so on SPECIFIC GROUNDS (People v Jackson 29 NY3d 18 [2017]), UNLESS the error was apparent to the court. (People v Riback 13 NY3d 416 [2009]).

See also CPL 470.05[2]: a question of law with respect to a ruling or instruction during a trial is presented when a protest thereto was registered by the party claiming error, or at the time of such ruling or instruction, or any subsequent time when the court had an opportunity to effectively change same.

Counsel should be wary of objecting only on general grounds (i.e. without specifying the basis) because the court's evidentiary ruling on appeal will only be disturbed if there was no basis whatsoever for admitting the evidence. (NYER 12.01[3]). It is also not a good idea to rely on the context of the examination to ascertain the reason for the court's ruling because what may be obvious to counsel may not be so apparent to an appellate court.

When counsel is the proponent of evidence (e.g. desired testimony from a witness) that runs into a wall of judicial resistance (i.e. disallowed upon objection by the People), it is important to make an OFFER OF PROOF (whether formally, by questioning the witness outside the presence of the jury or informally by summary of the proposed testimony), so that the RECORD has been made and the issue preserved for review by the appellate court. (People v Williams 6 NY2d 18 [1959]).

It is worth noting that while judges cannot take on the role of advocate (e.g. by gratuitously and repeatedly favoring one side or the other or asking questions that fill in gaps in the proof), they still have an affirmative duty to ensure that the proceedings are conducted in a manner that prevents inadmissible (and unduly prejudicial evidence) from coming to the jury's attention, and to take steps to undo the damage with a curative instruction if the cat has already been let out of the bag. (See People v Ventimiglia 50 NY2d 350 [1980]).

So, if a prosecution witness (e.g. a police officer) starts testifying about the defendant's criminal history (e.g. when there has been no advanced ruling with respect to the admissibility of prior bad acts under People v Molineux 168 NY 264 [1901), and defense counsel fails to object (whether because he/she was conferring with the client or daydreaming), the judge would be well within his/her authority to shut it down and instruct the jury to disregard what would otherwise be inadmissible and highly prejudicial testimony.

While counsel may, in certain circumstances, have sound strategic reasons for not objecting to seemingly objectionable testimony, there are very few instances where eliciting evidence of the defendant's checkered or nefarious past (which could well suggest a predisposition toward criminality) serves any purpose other than to add more fuel to the prosecution's fire.

Some errors may be reviewable by an intermediate appellate court (Appellate Division for appeals from County and Supreme Courts and County Court for local court appeals), in the INTERESTS OF JUSTICE as a matter of DISCRETION even though no objection was raised at the trial court level. (CPL 470.15 [3][c]); People v Patterson 39 NY 2d 238 [1976]).

Such review may occur, for example, where the error implicates the lower court's jurisdiction (i.e. authority) to adjudicate the case (e.g. accept a guilty plea or proceed to trial) or some other fundamental right of the defendant. In People v Alejandro 70 NY2d 133 (1987), the Court held that it was appropriate to review (and dismiss) the accusatory instrument upon which the defendant was convicted after trial of Resisting Arrest despite the absence of objection (or motion to dismiss) because the information was legally insufficient for failure to allege facts establishing the lawful basis for the arrest. As such it was jurisdictionally defective. (See also People v Boston 75 NY2d 585 [1990] where the defendant's post-indictment plea under an SCI in violation of the clear language of CPL 195.10 and NY Const. Art. 1 Section 6 was a jurisdictional nullity which could not be waived by a guilty plea.

In contrast, see People v Casey 95 NY2d 354 (1980) where the Court held that HEARSAY PLEADING DEFECTS (there, the failure to attach the order of protection to an information charging Criminal Contempt) had to be objected to in order to be preserved because, unlike the failure to allege facts in support of an element of a crime as in Alejandro, they do not deprive the court of subject matter jurisdiction and abridge the defendant's fundamental right

to be prosecuted upon a valid accusatory instrument. (See also People v Keizer 100 NY2d 114 [2003]).

Unlike the Appellate Divisions, the Court of Appeals does not have INTEREST of JUSTICE review power. It may, however, review a case as a matter of law where there was a so-called MODE OF PROCEEDINGS error that it deems to have implicated (and offended) the very organization of the courts and the manner in which proceedings are supposed to be conducted as prescribed by law. Such "rare case" review may occur even though the defendant failed to preserve the matter by objection or even where he/she may have consented to it. Moreover, actual prejudice need not be shown since the error, by its very nature, is deemed to be prejudicial.

As noted in People v Patterson 39 NY2d 288 (1976) supra, "the purpose of this narrow historical exception is to ensure that criminal trials are conducted in accordance with the mode of procedure mandated by the constitution and (by) statute, (and) where the procedure adopted by the trial court is at BASIC VARIANCE with the mandate of law, the ENTIRE TRIAL IS IRREPARABLY TAINTED." (citing People ex rel. Battista v Christian 249 NY 214 [1928].

In Patterson, the Court held that the defendant's claim that the trial court's requirement that he prove the affirmative defense of Extreme Emotional Disturbance (EED) to the murder of his estranged wife's boyfriend (two shots to the head in her presence), violated due process, was a MODE OF PROCEEDINGS matter reviewable as a question of law because it implicated the defendant's fundamental right to a fair trial (with proper allocation of the burden of proof).

The Court ultimately ruled, however, that imposing the burden of persuasion (by a preponderance of the evidence) upon the defendant with respect to the affirmative defense did not violate due process because, inter alia, it did not relieve the People of their burden of proving the defendant's guilt of Murder 2d degree beyond a reasonable doubt (after which the jury had the option, upon proof by a lesser standard, of reducing the charge to Manslaughter 1st degree if they were satisfied that he acted under an EED for which there was a reasonable explanation).

The concept of MODE OF PROCEEDINGS error was invoked before the Civil War in Cancemi v The People 18 NY128 (1858) where the court found that the defendant's consent to permit 11 jurors to deliberate to a verdict in his murder trial (after one of the jurors was disqualified) was invalid because it violated the State Constitution's requirement of a 12-person jury in a criminal case. The Court stated that it would be a "dangerous innovation" that should not be tolerated for a court to allow any number short of a full panel of 12 jurors.

The sanctity of the 12-person jury was subsequently called into question as bordering on superstitious reverence (People v Cosmo 205 NY 91 (1912), and in 1938, the State Constitution was amended to allow for a NON-JURY TRIAL upon a signed, written waiver of jury trial by the defendant in the presence of the court. (See CPL 320.10[2]). This was extended further to permit a substitution of a deliberating juror (who has become ill or otherwise unable to continue), with an alternate juror upon the defendant's written signed consent in open court. (See CPL 270.35; People v Ryan 19 NY2d 100 [1966]. People v Page 888 NY2d 1 [1996]).

In People v Gadajhar 9 NY3d 438 (2007) the Court held the it was NOT a mode of proceedings error (i.e. a violation of Art. 1 Section 2 of the NYS Constitution), for the trial court to allow the defendant, (after the alternates were discharged and one of the 12 deliberating jurors became too ill to continue), to consent to deliberation by 11 jurors (who, as it turned out, convicted him of felony murder and robbery stemming from a dispute over an unpaid bill for auto work performed by the defendant).

After reviewing the evolution of the State Constitution with respect to jury trials, the Court reasoned that since a defendant can waive a jury trial altogether, it follows that if a juror becomes unavailable after deliberations begin, and there are no available alternates, the defendant should be able to request an 11-person deliberation. (In the court's view, if the idea of 12 jurors was so sacred, it would have been mandated in all cases).

The dissent argued that the 1938 amendment to Art. 1 Section 2 of the State Constitution permitting waiver of a jury trial altogether did not translate into consent to a allowing a trial by fewer than 12 jurors. (CPL 320.10 does not address waiver of individual jurors). Nevertheless, in the majority's interpretation, consenting to deliberation by fewer than 12 jurors was NOT a mode of proceedings error.

Judges can run into mode of proceedings problems in their handling of and responding to notes from a deliberating jury. CPL 310.30 states that a jury may request additional information or instruction with respect to any matter pertinent to its consideration of the case. Upon such request, the judge must return the jury to the courtroom and, after giving notice to the People and defense counsel, provide the requested information/instructions as the court deems proper.

In People v O'Rama 78 NY2d 290 (1991) a Felony DWI case, the Court held that the trial court deprived the defendant of effective assistance of counsel (thereby violating his right to a fair trial) by summarizing the contents of a juror's written note (expressing concern and seeking guidance over the serious disagreement and intransigence among jurors who were split six to six over the verdict). The court then urged the jurors to keep on deliberating after which they returned a verdict of guilty. (The court refused to disclose the exact contents of the note because of the reference to the status of the vote).

In reversing the Appellate Division's affirmance of the conviction, the Court held that the NOTICE requirement of CPL 310.30 is not just a formality intended to ensure counsel's (and the defendant's) presence when the court responds to a jury's request. In this context, notice must be meaningful in that it provides counsel with the opportunity to weigh in and make suggestions as to an appropriate (and non-prejudicial) response. (See People v Malloy 55 NY2d 296 [1982]).

The Court recommended the following steps whenever a jury note is submitted to the court:
1. Obtain the request in writing;
2. Mark the note as an exhibit;
3. Share the note's contents on the record with the prosecutor and defense counsel in the defendant's presence;
4. Give the attorneys an opportunity to offer suggestions as to an appropriate response;
5. Tell the lawyers what the court will say to the jurors;
6. Bring the jurors back into court and read their request on the record;
7. Respond appropriately.

The court should be careful to avoid engaging in ad hoc, off-the-cuff responses to any spontaneous follow-up questions (especially if they go into new areas of inquiry), and request that the question be submitted in writing so that the court and counsel can re-engage in the above described process (which is not carved in stone, especially where the note may be very personal to a particular juror or where reading it aloud to the entire group may inflame already existing tensions among jurors). In any event, the court should handle matters in a way that ensures the defendant's presence and participation in this critical stage of the proceedings where responses to the jury's own inquiries can well determine the outcome of the case.

The Court in O'Rama held that the court's decision to withhold the exact substance of the note (both as to content and tone which reflected serious concern over the combative nature of the deliberations on the part of the inquiring juror), deprived the defendant of the opportunity, through counsel, to provide input into the court's response BEFORE the jury was called back into court. In the court's view, this was a significant departure from the mode of proceedings prescribed by law (citing People v Patterson, supra), which presented a reviewable question of law even though defense counsel only objected after the Allen charge (urging continued deliberations) was given.

In contrast, see People v Agosto 73 NY2d 963 where the trial court's 20-minute delay in responding to the jury's note (requesting an early release that day for the Sabbath) during which time the jury reached a verdict, in light of the court's pattern of responses up to that point, could not properly be construed as a denial of the jury's request leading to a pre-mature verdict in violation of the defendant's right to a fair trial.

In People v Williams 2014 NY Slip Op. 00038 (4th dep't 1/3/14), a robbery case from Erie County, the Fourth Department remitted the case to the trial court for a reconstruction hearing to establish (where the record was unclear) that the court had, in fact, read back requested testimony to the jury in the defendant's presence. Referencing the trial judge's core responsibilities under CPL 310.30 (to give notice of the contents of a jury note to defense counsel and the People), the court noted that such responsibilities are triggered only by a SUBSTANTIVE JUROR INQUIRY which does not include a request for a read back of testimony. (Citing People v Kahley 105 AD3d 1322 [4th dep't 2019]).

While the record on appeal contained a court exhibit (a jury note requesting a read back of witness' entire testimony), the trial record did not reflect whether the court had complied with the request. The People alleged that the court clerk's notes (not included in the record on appeal) indicated that the court provided the read back with the defendant present. However, since the record was silent on the matter, the AD remitted for a hearing to determine whether the defendant and counsel were notified of the contents of the note.

See also People v Kuzdzal 2018 NY Slip Op. 05099 (4th dep't 7/6/18) a murder/predatory sexual assault case (also from Erie County), where the defendant's conviction was initially reversed (144 AD3d 1618), because the trial court refused the defense's request to make inquiry of jurors who, according to a courtroom spectator, had referred to the defendant as a "scum bag." (The trial court's denial of the request was based on its finding that the spectator was not credible). The Court of Appeals reversed and remitted the case to the the AD for consideration of facts and issues pertaining the trial judge's determination that the spectator was not credible enough to warrant an inquiry of the jurors about their alleged comment which, if true, could reflect improper bias.

The AD determined that while trial court should have made specific findings to support its conclusion of incredibility, the weight of the evidence supported the judge's "implicit factual determination" that the spectator was not credible. Giving due deference to the trial court's credibility finding, (and in view of the inconsistencies in her testimony describing the sequence of events), the AD held that the weight of the evidence supported the trial court's credibility determination. Consequently, the finding of incredibility was deemed to have been justified without the court having to make inquiry of the jurors.

Judges must be careful about delegating their substantive responsibilities to court staff which can constitute a mode of proceedings error that deprives the defendant of his/her right to a fair trial. In People v Ahmed 66 NY2d 307 (1985), a conspiracy/drug case, the judge took ill with a sore throat on day two of deliberations whereupon he had his law secretary step in and read instructions on the law and respond to juror notes (some of which were never answered including a request for a read-back of testimony and a lab report with respect to DNA evidence), with defense counsel's consent.

The Court held that the judge's absence along with the delegation of some of his duties to the secretary during deliberations deprived the defendant of his right to a jury trial, a major part of which involves SUPERVISION and CONTROL of the proceedings by the judge. The failure to do so in this case constituted a mode of proceedings error reviewable as a question of law despite defense counsel's acquiescence in the judge's abdication of authority (in the interest of not delaying the trial until he got his voice back). (See also People v Parisi 276 NY 97 [1937]: Trial by Jury in a criminal case means a trial by 12 people under the supervision of a judge who is supposed to present for all proceedings relating thereto).

But see People v Hernandez 94 NY2d 552 (2000), where the trial court's response to the jury's request for a read-back and further instructions on the law, while NOT FAVORED, was held not not to rise to a mode of proceedings error. After the jury's request was received, the court, in counsels' presence, directed the court reporter what to read (without objection) at which point, he repaired to chambers while the reading occurred, but remaining within reach if needed. After the read-back, the judge returned to the courtroom and instructed the jurors on the law as requested.

The Court of Appeals noted that the read-back did not involve or require any further legal rulings and the court did not delegate the duty to instruct the jury on the law. As such, unlike Ahmed supra, the court did not relinquish supervision and control of the proceedings.

While defense counsel must be present to weigh in on any notes that the jury may submit, so too must the defendant be there to observe (and provide input on a suggested response). In People v Mehmedi 69 NY2d 759 (1987), a gun-possession case, the Court held that it was a mode of proceedings error to respond to a jury note in the defendant's absence. The note asked, "who opened the console" (where bullets were reportedly observed leading to a search which ended up in the retrieval of a gun). The court responded: "the officer said the defendant did but the defendant denied it."

Defense counsel objected to the wording of the court's response but not to the defendant's absence from the discussion about the note. The Appellate Division reversed the defendant's conviction and the Court of Appeals affirmed finding that the trial court's failure to adhere to the mandate of CPL 310.30 constituted a substantial departure from the mode of proceedings prescribed by law. (Citing People v Ahmed, supra and People v Ciaccio supra 47 NY2d 431 [1979]). And, since the defendant was absent from a material part of the trial, harmless error analysis did not apply.

See also People v Antommarchi 80 NY2d 247 [1992]: the defendant has a right to be personally present for juror bench conferences when prospective jurors discuss substantive matters regarding their fitness to serve including matters of potential bias, hostility or pre-disposition for or against certain witnesses, and to size up assess their demeanor and body language. In that case, by questioning jurors in defendant's absence about their ability to weigh evidence objectively and impartially, the court violated his fundamental right to be present at a critical stage of the proceedings. As such, the defendant's failure to object to being excluded from the side bars was not fatal. (Citing People v Dokes 79 NY2d 656 [1992]): error to conduct a Sandoval hearing in the defendant's absence).

It should be noted that the defendant may, as a practical matter, elect to remain absent from such conferences and defer to counsel's ability to evaluate the prospective jurors' s answers and demeanor. A couple of possible ways to accommodate the defendant's right to be present without putting off any particular juror is to exclude the other jurors and question the juror as he/she sits in the jury box, while the defendant sits at counsel table, or proceed to the jury room with the juror seated at the end of the table and have counsel and client and the prosecutor seated on opposition sides at the other end of the table.

Sometimes, court personnel can overstep their bounds and say or do things in the jury's presence that can deprive the defendant of his/her right to a fair trial. In Peope v Ciaccio, supra, a robbery case, on day two of deliberations, the jury sent in two notes, one from a juror complaining that a fellow juror refused to deliberate and the other advising that the vote was seven to five in favor of guilty. The court instructed the jurors to keep deliberating. Late that night, the jury reported that the vote was now 11 to 1 for guilty. (Whether the court admonished them against updating the vote status is unclear). The judge adjourned to the following day when, after additional deliberation, the jury came back with a unanimous guilty verdict.

Unbeknownst to the judge and to counsel (until after the verdict), the judge's clerk had gone into the deliberation room and admonished the jurors that " the judge says that a lot of time and money has gone into the trial of this case, so keep deliberating." The People did not contest the juror affidavits attesting to the intrusion but claimed that it was not enough to set aside the verdict.

The Court held that the defendant was deprived of his right to be present for court communication with jurors that could affect his right to a fair trial, and the clerk's misguided attempt to rattle the jurors into continuing their deliberations (apparently out of concern for wasting time and money in the event of a hung jury), was a fundamental error requiring reversal of the conviction.

See also People v Torres 72 NY2d 1007 (1988) where the judge's telephone direction to the court officer to tell the jurors (who had sent in a note advising that they were at an impasse), to keep deliberating (the functional equivalent of an Allen charge which can affect juror deliberations) required reversal. In the Court's assessment, the delegation of a judicial duty to a non-judicial staff member at a critical stage of the proceedings deprived the defendant of his right to be present in a matter that was not merely ministerial in nature.

In contrast, see People v Bonaparte 78 NY 2d 26 [1991] where the court officer's instruction the jurors to stop deliberating (as they were breaking for dinner), was a MINISTERIAL ACT not requiring reversal. While the court's failure to admonish the jurors to refrain from discussing the case, was of concern, it was not deemed to warrant a new trial. (Hence, the AD'S order reversing the conviction was reversed and the conviction as re-instated).

In People v Kelly 5 NY3d 216 (2009), a murder trial where the defendant claimed he stabbed his girlfriend in self-defense, the jury asked to inspect the bayonet with which the victim was stabbed. When the court officer brought it to the deliberation room, the jurors asked to handle it which the officer refused for safety reasons. At their request, though, he put it in his waistband and removed it from the sheath. They asked if it came out easily and he replied, "yes."

The officer informed the court of what had transpired and the court, in turn, shared the information with counsel in the defendant's presence. After conferring with the defendant, defense counsel asked the court to instruct the jurors to disregard the demonstration and proceed with their deliberations. They did so and then returned with a guilty verdict.

The defendant subsequently brought a CPL 440 motion to set aside the judgment of conviction and sentence which the court denied after a hearing. The defendant appealed the denial to the AD which in turn affirmed, reasoning that the by agreeing to the remedy of a curative instruction (rather than moving for a mistrial), the defendant waived any objection to the demonstration.

The defendant argued to the Court of Appeals that the unsupervised demonstration deprived the defendant of his fundamental right to a jury trial supervised by a judge (not a court officer). Recognizing the existence of a narrow category of tightly circumscribed cases that involve mode of proceeding errors that do not require preservation, (citing People v Agramonte 89 NY2d 765 [1996]), the Court held that this was not one of them.

In the Court's view, rather than delegating its judicial authority, the trial judge directly addressed the matter with counsel who, with the defendant's input, elected the remedy of a cautionary instruction. As such, the court and not the court officer was deemed to have had the last word on the matter. The Court also considered the court officer's interaction with the jurors to be more ministerial than substantive in nature.

One could argue that demonstrating the ease with which the murder weapon could be removed from its sheath could have had a substantive impact on the jury's deliberations with respect to the defendant's claim of self-defense or otherwise contradict his version of events. Nevertheless, the Court seemed persuaded by the fact that the defense elected its remedy. As the court observed, "the impropriety was protestable but protested, curable and cured."

As is evident, it is always a risky business to rely on an appellate court's discretionary exercise of interest-of-justice review of unpreserved errors at the trial court level or hope that they warrant review as a matter of law on a mode of proceedings basis. This is because certain errors qualify as such (or not) for no predictable reason or than because the appellate courts say so. Counsel is well advised, therefore, to strike while the iron is hot during the trial and object on specific grounds so that the issue will be reviewable on its merits on appeal.

Resources: NY Advisory Committee on the Rules of Evidence (nycourts.gov)

Understanding New York's Mode of Proceedings Muddle by Gary Muldoon Esq. University at Buffalo Law Review Vol. 59 No. 5, 12/1/11.