SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 19R

THE PEOPLE OF THE STATE OF NEW YORK

-against-

PETER LIANG,

Defendant.

MEMORANDUM OF LAW IN OPPOSITION TO THE DEFENSE MOTIONS PURSUANT TO C.P.L. §§ 290.10 AND 330.30

Kings County
Indictment Number
9988/2014

INTRODUCTION

This memorandum of law is submitted in response to defendant's motions, dated February 4, 2016 and March 15, 2016, to set aside the jury's verdict and dismiss the charges of Manslaughter in the Second Degree and Official Misconduct pursuant to C.P.L. § 290.10 and § 330.30. In his motions, defendant challenges the legal sufficiency of the evidence of his guilt. Defendant's motions should be denied because the evidence introduced at trial was more than sufficient to establish the crimes for which defendant was convicted.

The legal sufficiency of the evidence of the manslaughter count is addressed in Point I. The legal sufficiency of the evidence of the Official Misconduct count is addressed in Point II.

POINT I

THE EVIDENCE INTRODUCED AT TRIAL WAS LEGALLY SUFFICIENT TO ESTABLISH DEFENDANT'S GUILT OF MANSLAUGHTER IN THE SECOND DEGREE.

The evidence introduced at defendant's trial was more than sufficient to establish defendant's guilt of Manslaughter in the Second Degree. Therefore, defendant's motions challenging that count should be denied.

A trial court's power to set aside a verdict and dismiss a count pursuant to C.P.L. §§ 290.10 and 330.30 is limited. A trial court may not set aside a verdict and dismiss a count on the ground that the jury's verdict is against the weight of the evidence. The power to set aside a verdict and dismiss a count on the basis of the weight of the evidence is reserved exclusively to the Appellate Division. People v. Hampton, 21 N.Y.3d 277, 287 (2013); People v. Colon, 65 N.Y.2d 888, 890 (1985); People v. Carter, 63 N.Y.2d 530, 536 (1984).

A trial court may not set aside a verdict and dismiss a count on the ground that the evidence did not prove the defendant's guilt of that count beyond a reasonable doubt, as that would be an unauthorized usurpation of the power of the jury. People v. Vasquez, 142 A.D.2d 698, 701 (2d Dep't 1988); People v. Lynch, 116

A.D.2d 56, 62 (1st Dep't 1986); Holtzman v. Bonomo, 93 A.D.2d 574, 575-76 (2d Dep't 1983).

Instead, under C.P.L. § 290.10, a trial court may set aside a verdict and dismiss a count only if the trial evidence is legally insufficient to establish that count or a lesser included offense of that count. See C.P.L. § 290.10; People v. Vaughan, 48 A.D.3d 1069, 1070 (4th Dep't 2008); People v. Phillips, 256 A.D.2d 733, 735 (3d Dep't 1998). Pursuant to C.P.L. § 330.30, a trial court may set aside a verdict or reduce a count to a lesser included offense only if the evidence is legally insufficient to establish that count "as a matter of law." C.P.L. § 330.30(1); see Carter, 63 N.Y.2d at 536-37; see generally People v. Davidson, 122 A.D.3d 937, 938 (2d Dep't 2014).

"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." People v. Clyde, 18 N.Y.3d 145, 155 (2011) (internal quotation marks and citations omitted); see also People v. Khan, 18 N.Y.3d 535, 541 (2012). In making a legal sufficiency determination, a court may consider only the "record evidence," i.e., only the evidence that was introduced before the jury. See Jackson v. Virginia, 443 U.S. 307, 318 (1979); People v. Dukes,

284 A.D.2d 236 (1st Dep't 2001); see also People v. Thomas, 55 A.D.3d 357, 360 (1st Dep't 2008) (a C.P.L. § 330.30[1] motion is limited to grounds appearing in the record). In evaluating the evidence, a trial court must give the People the benefit of every reasonable inference that can be drawn from the evidence. People v. Khan, 82 A.D.3d 44, 52 (1st Dep't 2011), aff'd, 18 N.Y.3d at 535. "Questions of quality or the weight to be given to the proof are not to be considered." Hampton, 21 N.Y.3d at 287 (citation omitted); see People v. Dobson, 136 A.D.3d 941 (2d Dep't 2016).

Because a trial court must view the evidence in the light most favorable to the People, the trial court may not rely upon the self-serving exculpatory portions of a defendant's testimony as a basis for granting a motion to dismiss. See People v. Sullivan, 68 N.Y.2d 495, 499-500 (1986) (in evaluating the legal sufficiency of the evidence, "all conflicting and exculpatory evidence must be ignored"); Vasquez, 142 A.D.2d at 700 (trial court erroneously granted a C.P.L. § 290.10 motion, where trial court "decided the factual issues raised by the defense testimony in favor of the defendant"); Lynch, 116 A.D.2d at 60-61 (in deciding reserved C.P.L. § 290.10 motion, court erroneously "credited defendant's self-serving exculpatory testimony"); see also People v. Hines, 97 N.Y.2d 56, 62 (2001) (in assessing legal

insufficiency, a court should not "credit[ ] the testimony adduced by the defense").

But the trial court may consider the defense evidence, insofar as it supports the People's case. "[A] defendant who does not rest after the court fails to grant a motion to dismiss at the close of the People's case, proceeds with the risk that he will inadvertently supply a deficiency in the People's case.'" Hines, 97 N.Y.2d at 61 (internal quotation marks and citations omitted).

When the trial evidence in defendant's case is viewed in accordance with these standards, the evidence was legally sufficient to establish every element of Manslaughter in the Second Degree. For the evidence to be legally sufficient to establish second-degree manslaughter, there must be a valid line of reasoning and permissible inferences from which a rational trier of fact could have found that the defendant recklessly caused the death of another person. P.L. § 125.15(1).

The testimony of Melissa Butler, Police Officer Shaun Landau, and Doctor Floriana Persechino proved that defendant caused the death of Akai Gurley. In fact, shortly after the crime, defendant admitted to Lieutenant Vitaly Zelekov that he

fired the shot which struck and killed Mr. Gurley (Zelekov: 230, 254; Lopez: 59; Rivera: 116; Liang: 1026).[1]

The evidence also established that defendant acted recklessly when he shot and killed Mr. Gurley. A defendant "acts recklessly with respect to a result or to a circumstance . . . when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists." P.L. § 15.05(3). "The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." Id. A "small risk" that death will occur may constitute a "substantial and unjustifiable" risk of death for purposes of this definition. See People v. Lewie, 17 N.Y.3d 348, 357 (2011).

A rational trier of fact could have concluded that defendant acted recklessly for two different reasons. First, a rational trier of fact could have concluded that defendant acted recklessly by intentionally discharging his weapon in the direction of the seventh floor landing, even though defendant knew that people might be present in the stairwell. See infra

[1] Unless otherwise indicated, the numbers in parentheses refer to the trial minutes. The names preceding the numbers refer to the witnesses whose testimony is cited. The trial minutes will be provided to the Court upon request.

at 7-15. Second, even if the jury concluded that defendant did not intentionally fire his weapon, the jury could have rationally concluded that defendant acted recklessly by placing his finger on the trigger of a loaded weapon in the stairwell, even though he knew that people might be present in the stairwell. See infra at 15-18.

First, a rational trier of fact could have concluded that defendant intentionally discharged his weapon in the direction of the seventh floor landing, even though defendant knew that people might be present in the stairwell. The jury had an ample basis upon which to conclude that defendant fired his weapon voluntarily. The evidence showed that, in order to prevent unintentional discharges of police service weapons, the New York City Police Department modified the triggers of its Glock service weapons, by replacing the standard trigger with a "New York trigger" (Acevedo: 281, 288-89; Agosto: 535; Lamonica: 911). According to both the People's ballistics expert and defendant's ballistics expert, a person would have to exert 11.5 pounds of pressure to fire defendant's Glock service weapon, which was more than twice the amount of pressure that would be required to fire a weapon that was released directly by a manufacturer (Acevedo: 281-82, 298-99; Lamonica: 906, 930). This was a heavy trigger pull. See People v. Kalinowski, 118

A.D.3d 1434, 1435 (4th Dep't 2014) (expert describes a trigger pull of 5 to 7 pounds as "'a substantial trigger pull'"); People v. Hansen, 290 A.D.2d 47, 52 (3d Dep't 2002) (expert describes a trigger pull of 7½ pounds as a "'relatively heavy'" trigger pull), aff'd, 99 N.Y.2d 339 (2003).

Defendant's weapon also had a safety, which was built into the center of the trigger (Acevedo: 291-92, 299-300; Agosto: 491-92). As a result of the safety, defendant's weapon would not discharge if someone's finger pressed down upon either side of the trigger (Agosto: 492-93, 526; Lamonica: 917-18, 938-39, 953). Instead, in order to discharge defendant's weapon, a person's finger had to depress the safety in the center of the trigger and then exert 11.5 pounds of pressure to pull the trigger (Acevedo: 283; Agosto: 492-95; Lamonica: 939-40, 953).

During trial and during the deliberations, the jurors had the opportunity to examine and fire defendant's weapon (519). So the jurors were able to feel for themselves exactly how difficult it was to fire defendant's gun unintentionally.

Based upon the heavy trigger pull and the presence of the safety, the jury could have rationally concluded that defendant voluntarily discharged his weapon in the stairwell. See Kalinowski, 118 A.D.3d at 1435 (defendant's claim that rifle accidentally discharged when rifle slipped out of her hands was

undermined by evidence that it would take 5 to 7 pounds of pressure to pull rifle's trigger); People v. Cunningham, 222 A.D.2d 727 (3d Dep't 1995) (trial evidence was legally sufficient to establish a reckless homicide where evidence showed, inter alia, that 8 to 10 pounds of pressure had to be exerted to fire weapon); People v. Quiles, 172 A.D.2d 859 (2d Dep't 1991) (jury properly rejected defendant's claim that gun accidentally discharged where, among other factors, 7 to 7½ pounds of pressure were needed to fire weapon); People v. Sams, 170 A.D.2d 945 (4th Dep't 1991) (jury properly rejected defendant's claim that gun discharged as a result of someone bumping into defendant, where trigger pull of defendant's gun was between 4¼ and 4½ pounds).

The jury could also have rationally concluded from the evidence that defendant pointed his gun towards a sound that he heard on the seventh floor landing. During his testimony, defendant alleged that when he entered the stairwell on the eighth floor, his weapon was in his left hand and was pointed "downwards" "along the side of [his] body" (Liang: 1017-18, 1074). Defendant stated that he heard a "quick sound," "[l]ike a fast movement," coming from the seventh floor landing (Liang: 1019, 1056, 1073-74). Defendant said that, after hearing the noise, he turned left towards the stairs leading to the seventh

floor landing and his "gun went off" (Liang: 1019, 1074-75; Landau: 619, 713, 770).

Defendant's bullet struck the interior staircase wall, very near where Mr. Gurley and Ms. Butler were standing (Steiner: 184, 189). The ballistics impact mark was about six inches from the end of the interior wall on the seventh floor landing and five feet two inches above the seventh floor landing (Steiner: 184).

According to Detective Joseph Agosto, a firearms and tactics instructor at the Police Academy, the muzzle of defendant's weapon must have been pointed in the direction of the ballistics impact mark (Agosto: 552). In his trial testimony, defendant conceded that the bullet traveled in the direction of the sound that he had heard (Liang: 1075).

From this evidence, the jury could conclude that, upon hearing the sound of Mr. Gurley and Ms. Butler moving across the seventh floor landing, defendant turned left, raised his arm, and intentionally fired his weapon in the direction of the sound. After all, if defendant's gun had still been pointed "downwards" "along the side of [his] body" (Liang: 1017-18, 1074) when the gun discharged, then his bullet would have hit the floor of the eighth floor landing or one of the steps just below the eighth floor landing. But defendant's bullet did not

strike the landing or steps near defendant. Instead, the bullet traveled down the staircase until it struck the interior wall near Mr. Gurley and Ms. Butler. Therefore, defendant must have raised his arm and pointed his weapon in the direction of the sound coming from the seventh floor landing.[2]

The evidence also established that, at the time defendant fired the weapon, defendant was aware of the possibility that people might be in the stairwell. Melissa Butler, Melissa Lopez, and Miguel Rivera each testified that residents of 2724 Linden Boulevard used the stairwells in the building "[a]ll the time" (Lopez: 43-44, 71-72; Rivera: 118; Butler: 392). Defendant testified that the staircases, roofs, and elevators of

[2] In defendant's C.P.L. § 330.30 motion, defendant suggests that the People's contention that defendant intentionally fired his weapon in the stairwell is "new" (Defendant's 330.30 Motion at 16). This suggestion is incorrect. The People argued in their answer to defendant's omnibus motion that the evidence supported the inference that defendant intentionally fired his weapon in the stairwell. See People's Memorandum of Law, dated April 15, 2015, at 32-33.

Defendant's testimony provided evidence that supported the additional inference that, before intentionally firing the weapon, he raised his arm and pointed his weapon in the direction of a noise that he had heard on the seventh floor landing. See supra at 9-11. In reviewing the legal sufficiency of the evidence, a court may consider defendant's testimony insofar as it supports the People's case (see Hines, 97 N.Y.2d at 61) and may even constructively amend an indictment insofar as it is necessary to reflect new facts revealed in a defendant's testimony. See People v. Spann, 56 N.Y.2d 469 (1982).

housing developments were not safe, because "a lot of" crime occurred in those areas (Liang: 1010).

Defendant also admitted that he had encountered people on the roof landing of stairwells in Housing Authority buildings "a lot of times" (Liang: 1028, 1069, 1097). His partner, Officer Landau, testified that "you [are] almost guaranteed to find somebody on the roof landing" (Landau: 709). The people on the roof landings would have had to use the stairs in order to return to the apartment hallways and to reach the elevator.

Furthermore, the evidence showed that, just before the shooting, defendant was actively thinking about the possibility that someone might be in the stairwell. Officer Landau testified that before defendant entered the stairwell, defendant asked Officer Landau to point a flashlight at the window of the stairwell door (Landau: 605). In his testimony, defendant admitted that he looked through the window of the stairwell door on the eighth floor in order to see whether someone was in the stairwell (Liang: 1016, 1070).

In addition, once defendant entered the stairwell, defendant had reason to know that other people were in the stairwell. Defendant admitted that his flashlight was on when he entered the stairwell (Liang: 1071-72, 1017). So, even though the lights were off on the seventh and eighth floor

landings, defendant had some light to see by (Liang: 1019-20, 1075).

Moreover, regardless of whether defendant saw Ms. Butler and Mr. Gurley in the stairwell, defendant admitted that he heard a "quick sound," like a "fast movement," in the stairwell before he turned left towards the descending staircase and discharged his weapon (Liang: 1019, 1056, 1073). That sound, by itself alone, would have alerted defendant to the possible presence of other people in the stairwell.

Defendant's unusual conduct after the shooting further supported the inference that defendant knew that there might have been people in the stairwell at the time of the shooting. Immediately after the shooting, defendant told Officer Landau that he would be fired for the shooting, he refused to report the shooting in violation of police procedure, and he re-entered the stairwell to find the bullet and the bullet casing, which could link his service weapon to the shooting (Landau: 621-25; Liang: 1020-22, 1079-80, 1102). Defendant's extraordinary post-shooting conduct would seem to be a tremendous over-reaction if all that defendant thought that he had done was fire his weapon in an empty stairwell. But defendant's post-shooting conduct makes perfect sense if defendant knew that he had fired his weapon, without cause, when other people might have been present

in the stairwell.[3] See People v. Bierenbaum, 301 A.D.2d 119, 138-39 (1st Dep't 2002) (conduct demonstrating a consciousness of guilt can constitute strong evidence of guilt).

On the basis of all of this evidence, a rational trier of fact could have concluded that defendant voluntarily fired his gun in the direction of the seventh floor landing, even though defendant knew that other people might be present in the stairwell. By voluntarily firing a weapon in the "narrow staircase" (Lamonica: 924) of a residential building, when the defendant knew that other people might be present, defendant consciously disregarded a substantial and unjustifiable risk that his conduct might kill someone. Such dangerous conduct constitutes a gross deviation from the conduct that a reasonable person would observe. Therefore, on this ground alone, the jury was entitled to convict defendant of Manslaughter in the Second Degree. See People v. Parker, 29 A.D.3d 1161 (3d Dep't) (verdict finding defendant guilty of reckless depraved-indifference murder was not against the weight of the evidence, where evidence showed that defendant fired a single shot on a dark, snowy night, in a direction of several people), aff'd, 7

[3] The People are not suggesting that defendant knew, immediately after the shooting, that he had seriously injured someone. Defendant may have assumed that no one was hit by his bullet because Ms. Butler and Mr. Gurley quickly fled down the stairs (Butler: 395-96; Landau: 1020).

N.Y.3d 907 (2006); People v. Abreu-Guzman, 39 A.D.3d 413 (1st Dep't 2007) (evidence was sufficient to establish second-degree manslaughter where defendant fired fatal shot in the direction of the victim without looking); People v. Claudio, 135 A.D.2d 358 (1st Dep't 1987) (a reasonable view of the evidence supported the charge of second-degree manslaughter, where defendant allegedly swung his bat wildly with his eyes averted or closed).

Second, even if the evidence had not supported the inference that defendant intentionally fired his weapon -- which the evidence unquestionably did -- the jury could have rationally concluded that defendant was guilty of second-degree manslaughter, based upon defendant's placing his finger on the trigger of a loaded weapon. Appellate courts have held that a defendant may be found guilty of a reckless homicide, where the evidence showed that the defendant had placed his finger on the trigger of a loaded weapon, even though the subsequent discharge of the gun was unintentional. See People v. Licitra, 47 N.Y.2d 554, 559 (1979) (trial evidence was legally sufficient to establish defendant's guilt of second-degree manslaughter, where defendant swung across his body a loaded firearm with his finger on the trigger, even if discharge of weapon was unintentional); People v. White, 75 A.D.3d 109, 120 (2d Dep't 2010) (defendant's

"brandishing a loaded gun in front of the youths, with his finger on the trigger," was sufficient to establish second-degree manslaughter, "even if, as [defendant] claims, the gun accidentally discharged when the victim tried to grab it away from him"); People v. Rammelkamp, 167 A.D.2d 560 (2d Dep't 1990) (evidence was sufficient to establish reckless depraved indifference murder where defendant displayed loaded gun with finger on trigger).

During defendant's time at the Police Academy, defendant was taught that a police officer should never put a finger on the trigger of a service weapon unless the officer intended to fire the weapon, to avoid an accidental discharge that might injure an innocent person (Agosto: 494-98, 506-08, 516-17). During his trial testimony, defendant admitted that he was aware of this rule (Liang: 1017, 1028, 1056).

Nonetheless, despite defendant's training, defendant placed his finger on the trigger of his service weapon in the stairwell of a residential building, even though defendant had no reason to fire his weapon. Defendant may have placed his finger on the trigger because he was concerned for his safety in the darkened stairwell. As mentioned before, defendant in his testimony stated that the staircases, roofs, and elevators of housing developments were not safe, because "a lot of" crime occurred in

those areas (Liang: 1010). Defendant also said that he had been ordered to patrol the Pink Houses that day because of shootings and robberies that were occurring in the complex (Liang: 1011-12). See Bierenbaum, 301 A.D.2d at 133-36, 139 (in assessing evidence of guilt, a court may consider whether defendant had motive to commit the charged acts).

But, by placing his finger on the trigger of loaded weapon in the confined space of a narrow stairwell, when he had reason to know that other people might be present, defendant consciously disregarded a substantial and unjustifiable risk that his conduct might kill someone. See Licitra, 47 N.Y.2d at 559; White, 75 A.D.3d at 120; Rammelkamp, 167 A.D.2d at 561; see also People v. George, 43 A.D.3d 560, 564 (3d Dep't 2007) (evidence was sufficient to establish second-degree manslaughter because "[d]efendant's conduct in pointing the rifle at the victim and shooting him, whether accidental or purposeful, evinced, in our view, such a conscious disregard of a substantial and unjustifiable risk that the result would occur"), aff'd, 11 N.Y.3d 848 (2008); People v. Coley, 289 A.D.2d 252 (2d Dep't 2001) (trial evidence was legally sufficient to establish second-degree manslaughter where gun discharged while defendant was dancing and posing with gun); People v. Bernier, 204 A.D.2d 732 (2d Dep't 1994) (trial

evidence was sufficient to establish criminally negligent homicide where defendant, a nightclub security guard, accidentally shot someone while using rifle and elbow to push back crowd).

For all of these reasons, the jury had a rational basis upon which to conclude that defendant recklessly killed Akai Gurley.

In his motions to dismiss pursuant to C.P.L. § 290.10 and § 330.30, defendant challenges the legal sufficiency of the evidence supporting the manslaughter count on a number of grounds, none of which has merit. First, in his C.P.L. § 290.10 motion, defendant argues that there is nothing improper in a police officer removing his or her service weapon from the holster (Defendant's § 290.10 Motion at paras. 6-8; see also 845). This is true, but irrelevant. Defendant's criminal liability is not based upon defendant's decision to remove his gun from his holster, but instead on what defendant did with his gun once he removed the gun from his holster.

Second, in his C.P.L. § 290.10 motion, defense counsel argues that defendant's conduct did not create a substantial risk of death because defendant pointed his gun in the direction of the stairwell wall (Defendant's § 290.10 Motion at par. 8; see also 845). But it is not unusual for bullets to ricochet

when they strike hard objects. By firing a gun in the confined space of a narrow staircase of a residential building, defendant created a substantial risk that a person would be killed by a bullet that ricocheted. See People v. Rivera, 70 A.D.3d 1177, 1182-83 (3d Dep't 2010) (a reasonable view of the evidence established second-degree manslaughter, where bullet ricocheted and killed victim); People v. Vargas, 60 A.D.3d 1236, 1238 (3d Dep't 2009) (evidence was sufficient to establish reckless third-degree assault, where bullet ricocheted and struck victim's hand).

Third, in his oral argument in support of his C.P.L. § 290.10 motion, defense counsel proffered an innocent explanation for the presence of defendant's finger on the trigger of his service weapon. Defense counsel suggested that defendant's finger may have unintentionally slipped onto the trigger (845).[4]

[4] In his C.P.L. § 330.30 motion, in support of his assertion that defendant's finger unintentionally slipped onto the trigger, defendant relies upon two academic articles, which were never introduced into evidence at trial. See Defendant's C.P.L. § 330.30 Motion at 7 n.8. Because these articles were not introduced into evidence before the jury, this Court may not consider them when deciding the legal sufficiency of the trial evidence. See Dukes, 284 A.D.2d at 236 ("Our review of the sufficiency and the weight of the evidence is limited to the evidence actually introduced at trial"); see also Thomas, 55 A.D.3d at 360; People v. Akili, 289 A.D.2d 55, 56 (1st Dep't 2001).

But defense counsel's speculation as to how defendant's finger might have slipped onto the trigger was implausible. If defendant was holding his Glock service weapon in the proper position, with his trigger finger lying along the frame of the gun, defendant's trigger finger should not have moved to the trigger, even if defendant was startled by something. Furthermore, defendant's finger should have been blocked from reaching the center of the trigger by the trigger guard, which is designed to prevent objects from unintentionally coming in contact with the trigger (Agosto: 490-91). See Lynch, 116 A.D.2d at 62 (jury was entitled to reject unlikely defense theory).

Moreover, the jurors could have rationally concluded, from the evidence and from their own examination of the weapon, that even if defendant's finger unintentionally slipped from the frame of the gun and touched the trigger, defendant's gun would not have fired unless defendant intentionally pressed down the safety in the center of the trigger and exerted 11.5 pounds of pressure. See supra at 7-9. Therefore, this defense argument does not undermine the legal sufficiency of the evidence on this count.

Fourth, in defendant's C.P.L. § 290.10 motion, the defense asserts that the evidence did not establish that defendant

perceived the risks inherent in his conduct that day in the stairwell (Defendant's C.P.L. § 290.10 Motion at par. 8). But the evidence strongly refuted this contention. At the Police Academy, defendant received extensive training on firearm safety and firearm tactics (Agosto: 472-75; Liang: 1032-33, 1039-40). As part of the training, he was taught that he should never place his trigger finger on the trigger of his weapon unless he intended to fire that weapon (Agosto: 498, 506-08, 512, 514, 516-17, 538, 540-41). Defendant was also taught that he was never supposed to fire a weapon, unless he had a legal justification for doing so (Agosto: 498-99).

During his testimony, defendant, a college graduate, stated that he had "studied hard" while he was at the Police Academy (Liang: 1003, 1035). Defendant admitted that he was taught that, because of safety concerns, police officers should consider not drawing their weapon in stairwells (Liang: 1055). Defendant admitted that he was taught that, if a police officer has to draw a firearm, the police officer's trigger finger should be placed outside the trigger guard and in a safe position (Liang: 1056). Defendant admitted that he was taught that whenever police officers discharge weapons, "it must be a conscious use of deadly physical force" (Liang: 1057, 1052). Defendant admitted that he was taught that he should not fire

his weapon, if firing his weapon would unnecessarily endanger civilians (Liang: 1037).

Thus, the evidence showed that defendant was aware of the risks that arise from placing a finger on the trigger of a weapon and firing a weapon in a stairwell.[5]

Finally, in his C.P.L. § 330.30 motion, defense counsel raises, for the first time, the claim that defendant's conduct at the time of the shooting was not sufficiently blameworthy to constitute second-degree manslaughter (Defendant's C.P.L. § 330.30 Motion at 11-14). This claim is not reviewable by this Court.

When deciding a motion pursuant to C.P.L. § 330.30(1), a court may set aside or reduce a count on the basis of the insufficiency of the evidence only if the evidence is legally insufficient as a "matter of law." C.P.L. § 330.30; see Carter, 63 N.Y.2d at 536. Evidence is legally insufficient as a matter of law only if the legally insufficiency claim has been preserved for appellate review during trial. See Hines, 97 N.Y.2d at 61 ("an insufficiency argument [raised in a C.P.L. § 330.30 motion] may not be addressed unless it has been properly

[5] In any event, even if this Court were persuaded by the defense argument on this point, this contention would entitle defendant only to the reduction of his conviction to the lesser offense of Criminally Negligent Homicide. See P.L. § 125.10; People v. Asaro, 21 N.Y.3d 677, 684 (2013).

preserved for review during the trial"); People v. Simmons, 111 A.D.3d 975, 977 (3d Dep't 2013); People v. Sudler, 75 A.D.3d 901, 904 (3d Dep't 2010); see generally People v. Davidson, 122 A.D.3d 937, 938 (2d Dep't 2014).

To preserve a legal insufficiency argument for review, a defendant has to specifically raise the argument in his motions for a trial order of dismissal. See People v. Gray, 86 N.Y.2d 10, 19 (1995); People v. Crooks, 118 A.D.3d 816, 817 (2d Dep't 2014); People v. Raffaele, 41 A.D.3d 869 (2d Dep't 2007). A defendant cannot preserve a claim for appellate review by raising the claim for the first time in a motion pursuant to C.P.L. § 330.30. See People v. Padro, 75 N.Y.2d 820, 821 (1990); People v. Brunson, 121 A.D.3d 914, 915 (2d Dep't 2014); People v. Borukhova, 89 A.D.3d 194, 225 (2d Dep't 2011).

In this case, in his written motion, dated February 4, 2016, for a trial order of dismissal and his oral arguments in support of his motions for a trial order of dismissal, defendant did not claim that his conduct was insufficiently blameworthy to constitute the crime of manslaughter (844-47, 1111; Defendant's C.P.L. § 290.10 Motion).[6] Because this claim is unpreserved,

[6] The People are providing to the Court with this answer pages 844 to 849 and pages 1110 to 1113 of the trial minutes.

this claim may be reviewed only by the Appellate Division. See Simmons, 111 A.D.3d at 977; Sudler, 75 A.D.3d at 904.

In any event, even if this Court had the power to review this unpreserved claim, this claim would provide no basis for disturbing the jury's verdict on the manslaughter count. Defendant's conduct in placing his finger on the trigger of a loaded weapon and discharging his weapon in the narrow stairwell of a residential building, when defendant knew that people might be present, demonstrated "the kind of seriously blameworthy carelessness whose seriousness would be apparent to anyone who shares the community's general sense of right and wrong.'" Asaro, 21 N.Y.3d at 685 (internal quotation marks and citation omitted).

Defendant's argument to the contrary is based in part upon People v. Cabrera, 10 N.Y.3d 370 (2008) (Defendant's C.P.L. § 330.30 Motion at 15-16). In that case, the Court of Appeals held that a defendant's careless driving was not sufficiently blameworthy to convict the defendant of criminally negligent homicide, even though the defendant's careless driving caused a fatal traffic collision.

In this case, the criminal charges are not based on careless driving, but instead upon the improper handling and use of a loaded firearm. Because of the unique dangerousness of a

loaded firearm, persons in possession of a loaded firearm are required to exercise "a high degree of care in [their] use and handling." People v. Heber, 192 Misc. 2d 412, 420 n.8 (Sup. Ct. Kings Cty. 2002). Under the circumstances of this case, defendant's improper handling and use of a loaded firearm was sufficiently blameworthy to constitute second-degree manslaughter. See Licitra, 47 N.Y.2d at 559; White, 75 A.D.3d at 120; George, 43 A.D.3d at 564; Abreu-Guzman, 39 A.D.3d at 413; Coley, 289 A.D.2d at 253 (in all of these cases, courts held that a defendant's improper handling or use of a loaded firearm constituted second-degree manslaughter).

Because the evidence was legally sufficient to establish every element of Manslaughter in the Second Degree, the jury's verdict on the manslaughter count should not be disturbed.

POINT II

THE EVIDENCE INTRODUCED AT TRIAL WAS LEGALLY SUFFICIENT TO ESTABLISH DEFENDANT'S GUILT OF OFFICIAL MISCONDUCT.

When the evidence is viewed in the light most favorable to the People and all reasonable inferences are drawn in the People's favor (see Point I, supra, at 3-4), the evidence introduced at defendant's trial was legally sufficient to establish defendant's guilt of Official Misconduct. Therefore, insofar as defendant's motions pursuant to C.P.L. § 290.10 and § 330.30 challenge that count, the motions should be denied.

A public servant commits the offense of Official Misconduct when, with intent to obtain a benefit or deprive another person of a benefit, the public servant knowingly refrains from performing a duty which is clearly inherent in the nature of his office. P.L. § 195.00(2).

The evidence established that defendant was a public servant. The evidence showed that, at the time of the crime, defendant was working as a police officer (Landau: 592; Liang: 1006, 1012). See P.L. § 10.00(15)(a).

Promptly seeking and providing medical assistance to an injured person is a duty inherent in the nature of a police officer. "A primary role of the police is to . . . provide

emergency assistance to those whose lives may be in danger." People v. Krom, 61 N.Y.2d 187, 198 (1984); see People v. De Bour, 40 N.Y.2d 210, 218 (1976) (the police have an obligation "to render assistance to those in distress"); ABA Standards for the Urban Police Function 1.1(b). The New York City Police Department Patrol Guide requires police officers to provide reasonable aid to persons who are in need of it and to summon an ambulance, if warranted (Garcia: 337-38; Pino: 438-39, 441, 445, 446). At the New York City Police Academy, police recruits are given seven hours of training on first aid and seven hours of training on CPR so that they may fulfill this vital function (Pino: 428-29, 452, 456).

The evidence showed that defendant was aware that Mr. Gurley needed medical assistance. Defendant testified that when he arrived at the fifth floor landing, he saw that Mr. Gurley was "seriously injured," that Mr. Gurley's "eyes were rolled back," and that Mr. Gurley appeared likely to die (Liang: 1025, 1081-82, 1098).

The audiotaped recording of Melissa Lopez's 911 call shows that defendant also knew that, at certain point, Mr. Gurley stopped breathing. The audiotaped recording of Melissa Lopez's 911 call reveals that Ms. Butler screamed, "He's not breathing"

at 11:17:59 p.m. (People's Exhibit 1; 911 Transcript at 4).[7] The 911 recording further proves that defendant was in the vicinity of the fifth floor landing before 11:17:59 p.m. Defendant's voice can be heard on the audiotaped recording of Ms. Lopez's 911 call at 11:17:38 p.m., asking for the address of the building (911 Transcript at 3). Ms. Lopez's voice can be heard telling the EMS dispatcher that "[t]here's a cop right here" at 11:17:42 p.m. (id. at 3).

The evidence showed that defendant did not put pressure on Mr. Gurley's wound, perform CPR on Mr. Gurley, or provide any other kind of medical assistance to Mr. Gurley (Lopez: 57-58; Landau: 631, 635). In fact, defendant admitted in his testimony that he did not perform CPR on Mr. Gurley or provide Mr. Gurley with any other assistance (Liang: 1025-26).

The evidence also proved that defendant did not promptly summon an ambulance for Mr. Gurley. Defendant fired the shot in the stairwell prior to 11:14:46 p.m., when Ms. Lopez called 911 (911 Transcript at 1). As mentioned before, defendant was in the vicinity of Mr. Gurley by 11:17:38 p.m., because, at that time, defendant's voice can be heard on the recording of Ms.

[7] The transcripts of Ms. Lopez's 911 call (People's Exhibit 1) and the police radio transmissions (People's Exhibit 21), which were provided to the jury during trial, are being provided to the Court with this memorandum of law.

Lopez's 911 call, asking for the address of the building (id. at 3). The recording of the police radio transmissions shows that defendant did not radio the dispatcher until 11:19:46 (People's Exhibit 21; Police Radio Transmissions Transcript at 2). In his first communication, defendant said only, "Pink House Post 1" (id. at 2). In three subsequent communications from 11:19:57 to 11:20:09, defendant said only, "Post 1" (id. at 3). It was not until 11:20:24 that defendant, for the first time, radioed that there had been "an accidental discharge" and that a male had been shot (id.).

The trial testimony adduced by the People corroborated the accuracy of the police recording. Officer Landau testified that defendant did not immediately report Mr. Gurley's injuries or request an ambulance (Landau: 646, 736). Instead, according to Officer Landau, when defendant initially contacted the police radio dispatcher, defendant repeatedly said only "Pink House Post One" (Landau: 631, 645-46, 652, 656). Officer Landau recalled thinking at the time that defendant ought to have said, "accidental discharge, male shot, need an ambulance," but defendant did not do so (Landau: 646). According to Officer Landau, it was not until "somewhere down the line" that

defendant finally informed the police dispatcher about a discharge of a weapon (Landau: 649-53, 655, 736).[8]

The testimony of Miguel Rivera, a civilian witness with no motive to lie, provided further proof that defendant did not promptly report the injury to Mr. Gurley and request an ambulance for him. Mr. Rivera did not arrive at the stairwell at the same time as Ms. Lopez, because Mr. Rivera was showering at the time of the shooting and he had to finish getting dressed before leaving Ms. Lopez's apartment (Rivera: 107, 111). By the time Mr. Rivera arrived at the fourth floor entrance to the stairwell, defendant and Officer Landau were already in the fourth floor hallway (Rivera: 112-13, 126). Mr. Rivera overheard Officer Landau say to defendant in a panicked tone of voice, "Hurry up and call. Hurry and call" (Rivera: 114-15).

[8] At one point during his cross-examination, Officer Landau stated that, while defendant was still between the fifth and sixth floors, defendant notified the police dispatcher that a male had been shot (Landau: 657). But Officer Landau later clarified that defendant did not make this report immediately (Landau: 736). Furthermore, in reviewing the legal sufficiency of the evidence, the Court must view the evidence in the light most favorable to the People. Clyde, 18 N.Y.3d at 155. When viewed in totality and in the light most favorable to the People, Officer Landau's testimony supports the accuracy of the police dispatch tape. Hines, 97 N.Y.2d at 62 (in assessing legal insufficiency, a court should not "credit[ ] the testimony adduced by the defense"); Sullivan, 68 N.Y.2d at 499-500 (in evaluating the legal sufficiency of the evidence, "all conflicting and exculpatory evidence must be ignored"); Vasquez, 142 A.D.2d at 700.

Officer Landau would have had no reason to urge defendant to "[h]urry up and call" in the fourth floor hallway if defendant had promptly reported the shooting and requested an ambulance when he first saw Mr. Gurley on the fifth floor landing. Mr. Rivera's testimony proves that defendant failed to promptly seek medical assistance for Mr. Gurley.

Ms. Lopez's call to 911 did not obviate the need for defendant to summon an ambulance. Defendant admitted that ambulances respond more quickly when then are summoned by a police officer, rather than a civilian (Liang: 1095).

Finally, the evidence was legally sufficient to establish the intent element of this offense. The evidence showed that, at the time of the crime, defendant intended to "obtain a benefit or deprive another person of a benefit." P.L. § 195.00(2).

For purposes of Official Misconduct, a benefit is defined as "any gain or advantage to the beneficiary." P.L. § 10.00(17). The definition is "broad[]" (People v. Garson, 6 N.Y.3d 604, 612 [2006]) and is not limited to "graft or financial advantage." People v. Feerick, 93 N.Y.2d 433, 446 (1999).

In this case, the evidence showed that, after the shooting, defendant intended to deprive Mr. Gurley of a benefit,

specifically, the benefit of prompt emergency medical assistance from someone trained in first aid and CPR. Defendant admitted in his testimony that he made a conscious decision not to provide Mr. Gurley with any medical assistance himself (Liang: 1025-26). In addition, the evidence showed that defendant also did not promptly summon an ambulance for Mr. Gurley. See supra at 28-31. As a result of defendant's omissions, for some time after the shooting, Mr. Gurley received only the assistance of Ms. Butler, a civilian who had no training in first aid or CPR, and who was "crying uncontrollably" as she tried to help Mr. Gurley (Butler: 402-03; Landau: 630 Liang: 1084). For this reason alone, the evidence established the necessary criminal intent. See generally People v. Lopez, 104 A.D.3d 554 (1st Dep't 2013) (jury could presume that defendant intended the natural consequence of his acts, regardless of whether defendant simultaneously had another intent).

In addition, through his actions after the shooting, defendant attempted to gain a benefit for himself, specifically, to save his job. Defendant told Officer Landau immediately after the shooting that he would be fired if his superiors in the New York City Police Department learned of his discharge of his weapon in the stairwell (Landau: 620-21; Liang: 1020). Defendant thereafter took numerous steps to conceal his

connection to the shooting in order to avoid being fired. Defendant did not immediately report the shooting to his supervisors, as he was required to do (Landau: 621-26; Liang: 1020-21, 1059-62). He re-entered the stairwell to find the bullet and the shell casing, which could connect him to the crime (Liang: 1022, 1079-80, 1102; Parlo: 313, 316). Once he discovered that Mr. Gurley was injured, he did not immediately report Mr. Gurley's injuries or summon an ambulance. Through all of these steps, defendant tried to avoid alerting his superiors to his connection to the crime.

By 11:20:24 p.m., defendant realized that he would not be able to successfully conceal that he fired his weapon and he radioed to the police dispatcher that there had been an accidental discharge (People's Exhibit 21; Police Radio Transmissions Transcript at 3). But prior to this radio call, defendant took every step he could to avoid informing any of his supervisors of his responsibility for the shooting.

Thus, when the evidence is viewed in the light most favorable to the People and all reasonable inferences are drawn in the People's favor, there is a valid line of reasoning and permissible inferences from which a rational trier of fact could have found that the defendant committed the offense of Official Misconduct.

In his C.P.L. § 290.10 and § 330.30 motion, defense counsel argues that defendant's failure to perform CPR was excusable, but none of his arguments has any merit. First, in his C.P.L. § 290.10 and his § 330.30 motion, defendant argues that his failure to conduct CPR did not constitute Official Misconduct because the medical examiner subsequently determined, from the autopsy, that prompt basic CPR would not have saved Mr. Gurley's life. See Defendant's C.P.L. § 290.10 Motion at par. 23; Defendant's C.P.L. § 330.30 Motion at 20. However, defendant could not have known, when he saw Mr. Gurley on the fifth floor landing, that basic CPR would not have helped him. Moreover, as a police officer, he had an obligation to try to save Mr. Gurley's life, even if his efforts were unlikely to be successful.

In his motion pursuant to C.P.L. § 330.30, defendant claims that he was not obliged to perform CPR upon Mr. Gurley because of alleged deficiencies in the Police Academy training on CPR. This claim is not reviewable by this Court, because defense counsel did not preserve this claim in his written and oral motions for a trial order of dismissal (846-47, 1111-12; Defendant's C.P.L. § 290.10 Motion). See Point I, supra, at 22-24; Hines, 97 N.Y.2d at 61 ("an insufficiency argument [raised in a C.P.L. § 330.30 motion] may not be addressed unless it has been

properly preserved for review during the trial"); Simmons, 111 A.D.3d at 977 (same); Crooks, 118 A.D.3d at 817 (to preserve a claim regarding the legal insufficiency of the evidence, the defendant must specifically advance that argument in a motion for a trial order of dismissal); Raffaele, 41 A.D.3d at 869 (same).

Furthermore, this claim is meritless. Because this Court must view the evidence in the light most favorable to the People, this Court may not consider the evidence elicited by the defense concerning alleged deficiencies in defendant's police training. See Hines, 97 N.Y.2d at 62 (in assessing legal insufficiency, a court should not "credit[ ] the testimony adduced by the defense"); Sullivan, 68 N.Y.2d at 499-500 (in evaluating the legal sufficiency of the evidence, "all conflicting and exculpatory evidence must be ignored"); Vasquez, 142 A.D.2d at 700.

In any event, this defense evidence does not undermine the sufficiency of the evidence of the Official Misconduct count. According to the evidence elicited by the defense, police recruits in defendant's class at the Police Academy had little or no time to practice CPR on mannequins and were given some of the answers

to the written test on CPR.[9] But that does not alter the fact that defendant, a college graduate, who had "studied hard" at the Police Academy, had seven hours of training on how to perform CPR (Pina: 428-29, 452, 456; Liang: 1003, 1035).

In fact, Police Officer John Funk, who was in defendant's class in the Police Academy and who testified on defendant's behalf at trial, said that, despite any alleged deficiencies in the police training, if he (Officer Funk) encountered someone who was gravely injured, he would perform CPR on the person (Funk: 872-74, 878-79).

In his motion pursuant to C.P.L. § 330.30, defendant also claims that he was not obligated to perform CPR upon Mr. Gurley, because Ms. Butler was attempting to perform CPR on Mr. Gurley (Defendant's C.P.L. § 330.30 Motion at 19). This claim is also not reviewable by this Court, because defense counsel did not preserve this claim in his written and oral motions for a trial order of dismissal (846-47, 1111-12; Defendant's C.P.L. § 290.10 Motion). See Point I, supra, at 22-24; Hines, 97 N.Y.2d at 61;

[9] In support of this claim, defendant also relies upon a newspaper account of an action taken by the New York City Police Department after defendant's trial. See Defendant's C.P.L. § 330.30 Motion at 7-8 n.9, 20. In reviewing the legal sufficiency of the evidence, a court must consider only the evidence before the jury. See Dukes, 284 A.D.2d at 236; see also Thomas, 55 A.D.3d at 360. Therefore, defendant's references to events after defendant's trial should be disregarded.

Simmons, 118 A.D.3d at 977; Crooks, 118 A.D.3d at 817; Raffaele, 41 A.D.3d at 869.

Moreover, contrary to defendant's contention, defendant was in a much better position to provide emergency medical assistance to Mr. Gurley than was Ms. Butler. Defendant was bigger and stronger than Ms. Butler, who was only five feet one inch tall and weighed only 99 pounds (Butler: 403). Defendant, who had had seven hours of training in CPR, was more familiar with CPR than Ms. Butler, who learned how to perform CPR from the instructions that Ms. Lopez relayed from her telephone conversation with the EMS dispatcher. In addition, at the time she was performing CPR, Ms. Butler was crying uncontrollably (Liang: 1084). Given all of these circumstances, defendant had an obligation to perform CPR.

Finally, even if this Court were to agree with the defense argument that defendant had no duty to perform CPR on Mr. Gurley, that conclusion would not undermine the legal sufficiency of the evidence of the Official Misconduct count. The Official Misconduct count was based on defendant's failure to provide any immediate assistance to Mr. Gurley, including his failure to put pressure on Mr. Gurley's wound and his failure to promptly summon an ambulance. Therefore, even without considering defendant's

failure to perform CPR, the evidence was legally sufficient to establish defendant's guilt of this count.

In sum, when viewed in the light most favorable to the People, the evidence was legally sufficient to establish every element of Official Misconduct. Therefore, the jury's verdict on this count should not be disturbed.

CONCLUSION

FOR THE FOREGOING REASONS, DEFENDANT'S MOTIONS PURSUANT TO C.P.L. §§ 290.10 AND 330.30 SHOULD BE DENIED.

Dated: Brooklyn, New York
April 5, 2016

Respectfully submitted,

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