163 A.D.3d 16
Supreme Court, Appellate Division, Fourth Department, New York.

The PEOPLE of the State of New York, Respondent,
v.
Andrew J. GRAVES, Defendant–Appellant.

1368
|
KA 15–00100
|
Decided June 15, 2018

Synopsis
Background: Defendant was convicted in the County Court, Seneca County, of criminal mischief in the second degree and conspiracy in the fifth degree, arising from vandalizing cars at an auto dealership. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, NeMoyer, J., held that:

[1] sufficient evidence supported jury's finding that auto dealership was person;

[2] sufficient evidence supported finding that defendant caused $1,500 in damages;

[3] sufficient evidence supported jury's finding that defendant vandalized vehicles;

[4] illegal sentence exception to preservation requirement did not apply to restitution sentence; and

[5] district court did not abuse its discretion in requiring defendant to pay full value of auto dealership's loss in restitution.

Affirmed.

West Headnotes (10)

[1] **Malicious Mischief**
Weight and sufficiency

Sufficient evidence supported jury's finding that auto dealership that defendant vandalized was either a private corporation or partnership, and thus an appropriate **nonhuman** person as required to support finding that defendant damaged property of "another person" as required to support his conviction for criminal mischief in the second degree, even though the People never definitively established dealership's precise corporate form, given background testimony offered by employees regarding dealership's operations and jurors' common sense and life experience. N.Y. Penal Law §§ 10.00(7), 145.10.

Cases that cite this headnote

[2] **Malicious Mischief**
Weight and sufficiency

Evidence that group defendant was part of did well over $1,500 in damages to vehicles in auto dealership was sufficient to support defendant's conviction for criminal mischief in the second degree, notwithstanding jury's failure to find that defendant personally caused over $1,500 in damage. N.Y. Penal Law § 145.10.

Cases that cite this headnote

[3] **Criminal Law**
Weight and sufficiency

Appellate Division is constrained to weigh the evidence in light of the elements of the crime as charged without objection.

Cases that cite this headnote

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[4] **Criminal Law**
Identity and characteristics of persons or things

Sufficient evidence supported jury's finding that defendant vandalized vehicles at auto dealership as would support his conviction for criminal mischief in the second degree; defendant confessed to police, two eyewitnesses, including an accomplice, definitely described defendant as one of the vandals, and countervailing evidence upon which defendant relied, i.e., his own trial testimony, alibi offered by friend, and fact that he was developmentally disabled to some extent, merely created credibility contest that jury reasonably and justifiably resolved in the People's favor. N.Y. Penal Law § 145.10.

Cases that cite this headnote

[5] **Criminal Law**
Sentencing and Punishment

An illegal sentence which can be adjudicated on appeal notwithstanding failure to raise claims below is one to which a defendant may not consent and which does not depend on the resolution of evidentiary disputes; for illegal sentence exception to preservation requirement to apply, the illegality must be plain from the face of the appellate record.

Cases that cite this headnote

[6] **Criminal Law**
Restitution
Sentencing and Punishment
Other particular amount-related matters

Sentence imposing restitution award of $40,700 on defendant convicted of criminal mischief in the second degree based on vandalism of vehicles in an auto dealership was not illegal sentence, and thus illegal sentence exception to preservation requirement did not apply; restitution award above $15,000 statutory cap was not facially illegal in the sense that it could never be lawfully imposed and was rather only potentially illegal, i.e., contingently illegal depending on the adequacy of the People's showing on a cap exception. N.Y. Penal Law §§ 60.27(5)(a), 145.10.

Cases that cite this headnote

[7] **Criminal Law**
Sentencing and Punishment

Potential illegality does not trigger the illegal sentence exception to the preservation rule.

Cases that cite this headnote

[8] **Sentencing and Punishment**
Insurers

An insurer can be a proper restitutionee.

Cases that cite this headnote

[9] **Criminal Law**
Restitution

Illegal sentence exception to preservation rule did not apply to criminal mischief defendant's claim that restitution award of $40,700 was improper because auto dealership, which defendant vandalized, was reimbursed for its losses by its insurer; defendant's challenge to restitution award depended on resolution of evidentiary dispute as to whether restitution was being directed to proper recipient, be it auto dealership, insurer, or someone else.

Cases that cite this headnote

[10] **Sentencing and Punishment**

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Actual loss
Sentencing and Punishment
Other particular amount-related matters

District Court did not abuse its discretion in requiring criminal mischief defendant, convicted of vandalizing vehicles in auto dealership, to pay restitution in amount of $40,700, which was full value of auto dealership's loss, instead of apportioning the loss among defendant and his accomplices. N.Y. Penal Law §§ 60.27(5)(a), 145.10.

Cases that cite this headnote

***615** Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered October 6, 2014. The judgment convicted defendant, upon a jury verdict, of criminal mischief in the second degree and conspiracy in the fifth degree.

Attorneys and Law Firms

REEVE BROWN PLLC, ROCHESTER (GUY A. TALIA OF COUNSEL), FOR DEFENDANT–APPELLANT.

BARRY L. PORSCH, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

OPINION AND ORDER

Opinion by NeMoyer, J.:

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Defendant Andrew J. Graves challenges his convictions for vandalizing cars at an auto dealership. We reject his challenges to the legal sufficiency and weight of the evidence underlying those convictions, and we decline to review his unpreserved challenges to the restitution award as a matter of discretion in the interest of justice. We therefore affirm.

FACTS

In March 2013, a group of young people took an ill-advised nocturnal trek to Bill Cram Chevrolet, a car dealership in the Town of Seneca Falls, Seneca County. Once there, the group keyed 57 cars. Police investigated, and defendant was identified as one of the vandals. Although he initially denied any involvement, defendant eventually confessed to participating in the vandalism spree. According to defendant's written confession, he personally damaged approximately four to six cars.

Defendant was thereafter indicted on charges of criminal mischief in the second degree (Penal Law § 145.10) and conspiracy in the fifth degree (§ 105.05[1]). The victim of these crimes, according to the indictment, was "Bill Cram Chevrolet."

At trial, one of the admitted vandals testified and implicated defendant as a perpetrator. Another eyewitness also testified against defendant and identified him as one of the vandals. A police officer relayed defendant's confession to the jury. ***616** Several employees of Bill Cram Chevrolet testified about the structure of the auto dealership and the damages it suffered as a result of the vandalism. Although the amount of damage personally attributable to defendant remains hotly contested, it is undisputed that, in the aggregate, the group caused approximately $40,000 worth of damages to Bill Cram Chevrolet.

Defendant testified at trial, retracted his confession, and denied any involvement in the crimes. Defendant's mother and his therapist testified about his various autism-related developmental disabilities, presumably to cast doubt on his confession. Finally, defendant's friend—a convicted sex offender—offered alibi testimony on defendant's behalf, although the purported alibi was very weak and is barely mentioned on appeal.

Defendant was convicted as charged, and he was subsequently sentenced to a state prison term of 1½ to 4½ years. Defendant was also ordered to pay restitution (to an undefined entity) in the amount of $40,743.19. Critically, defendant offered no objection to the restitution order on

any ground. Defendant now appeals.

DISCUSSION

I

Defendant first challenges the legal sufficiency and weight of the evidence underlying his criminal mischief conviction (*see generally People v. Delamota,* 18 N.Y.3d 107, 113, 116–117, 936 N.Y.S.2d 614, 960 N.E.2d 383 [2011]; *People v. Romero,* 7 N.Y.3d 633, 636–644, 826 N.Y.S.2d 163, 859 N.E.2d 902 [2006]).[1] "A person is guilty of criminal mischief in the second degree when with intent to damage property of another person, and having no **right** to do so nor any reasonable ground to believe that he has such **right**, he damages property of another person in an amount exceeding [$1,500]" (Penal Law § 145.10). Defendant argues that this conviction is against the weight of the evidence on three elements: the victim's personhood, the value of the damage, and his identity as a perpetrator. We will address each claim in turn.

A. *Personhood*

[1]Defendant first contends that the People did not adequately prove that the identified victim in this case—"Bill Cram Chevrolet"—qualifies as a "person" for purposes of the criminal mischief statute. We disagree. In accordance with Penal Law § 145.10, the jury was instructed that, in order to convict defendant of criminal mischief in the second degree, the People must prove beyond reasonable doubt that he damaged the property of "another person." For these purposes, " '[p]erson' means a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality" (§ 10.00[7]). Given the background testimony offered by the employees regarding Bill Cram Chevrolet and its operations, and crediting the jurors' common sense and life experience, the jury had ample basis to infer that Bill Cram Chevrolet was either a "private corporation" or a "partnership." Under the circumstances, either structure would qualify as an "appropriate" **nonhuman** "person" within the meaning of section 10.00(7) (*see People v. Assi,* 14 N.Y.3d 335, 340–341, 902 N.Y.S.2d 6, 928 N.E.2d 388 [2010]; ***617** *People ex rel. Shaffer v. Kuhlmann,* 173 A.D.2d 1034, 1035, 570 N.Y.S.2d 695 [3d Dept. 1991], *lv denied* 78 N.Y.2d 856, 574 N.Y.S.2d 937, 580 N.E.2d 409 [1991]).

We acknowledge that the People never definitively established Bill Cram Chevrolet's precise corporate form. In light of the description of the enterprise offered by the employees, however, formal corporate documentation was not strictly necessary to prove, beyond reasonable doubt, that Bill Cram Chevrolet qualified as an "appropriate" **nonhuman** person for purposes of section 10.00(7). Indeed, the Court of Appeals in *Assi* found that a synagogue was a **nonhuman** "person" under section 10.00(7) because it was *either* a "religious corporation" *or* an unincorporated association (14 N.Y.3d at 340–341, 902 N.Y.S.2d 6, 928 N.E.2d 388), and the high Court did not seem bothered by the lack of precision on the point.[2]

Defendant does not argue otherwise (i.e., he does not claim that, by failing to adduce Bill Cram Chevrolet's precise corporate form, the People failed to satisfactorily establish any of the potential **nonhuman** personhood categories). In fact, defendant's brief concedes that Bill Cram Chevrolet *is* a **nonhuman** person under section 10.00(7). Rather, invoking the familiar rule that factual sufficiency is measured against the elements as charged to the jury without objection (*see People v. Noble,* 86 N.Y.2d 814, 815, 633 N.Y.S.2d 469, 657 N.E.2d 490 [1995]), defendant argues that County Court's failure to read the Penal Law's definition of a "person" to the jury means that the People "were required to prove that property of another *human being* was damaged" (emphasis added).

We are unpersuaded by defendant's logic. The court told the jury that defendant must have damaged the property of "another person"—not "another human being"—and it is common knowledge that personhood can and sometimes does attach to **nonhuman** entities like corporations or animals (*see e.g. Citizens United v. Federal Election Commn.,* 558 U.S. 310, 343, 130 S.Ct. 876, 175 L.Ed.2d 753 [2010]; *Palila v. Hawaii Dept. of Land & Natural Resources,* 852 F.2d 1106, 1107 [9th Cir.1988]; *State v. Fessenden,* 258 Or.App. 639, 640, 310 P.3d 1163, 1164 [2013], *affd* 355 Or. 759, 333 P.3d 278 [2014]; *see also Matter of* ***Nonhuman Rights Project****, Inc. v. Presti,* 124 A.D.3d 1334, 1335, 999 N.Y.S.2d 652 [4th Dept. 2015], *lv. denied* 26 N.Y.3d 901, 2015 WL 5125507 [2015]). Indeed, the Court of Appeals has written that personhood is "not a question of biological or 'natural' correspondence" (*Byrn v. New York City Health*

& Hosps. Corp., 31 N.Y.2d 194, 201, 335 N.Y.S.2d 390, 286 N.E.2d 887 [1972], *appeal dismissed* 410 U.S. 949, 93 S.Ct. 1414, 35 L.Ed.2d 683 [1973], *reh denied* 411 U.S. 940, 93 S.Ct. 1889, 36 L.Ed.2d 404 [1973]), and we can "presume[ ]" that the jurors had " 'sufficient intelligence' to make [the] elementary logical inferences presupposed by the language of [the court's] charge" (*People v. Samuels,* 99 N.Y.2d 20, 25, 750 N.Y.S.2d 828, 780 N.E.2d 513 [2002], quoting *People v. Radcliffe,* 232 N.Y. 249, 254, 133 N.E. 577 [1921]). In short, defendant's personhood argument effectively transforms an *undefined* but commonly understood term into an *incorrectly defined* term, and we decline to follow him down that path.[3]

***618** B. *Value*

[2]Next, defendant argues that the criminal mischief conviction is against the weight of the evidence on the element of value because the People failed to prove that he *personally* caused over $1,500 in damage to the vehicles. Defendant relies on Penal Law § 20.15 for this argument, which says that when "two or more persons are criminally liable for an offense which is divided into degrees, each person is guilty of such degree as is compatible with ... his own accountability for an aggravating fact or circumstance."

[3]For purposes of this analysis, we will assume, arguendo, that the People did not satisfactorily prove that defendant *personally* caused over $1,500 in damage. It remains, however, that the jury was instructed—without objection—that "[i]f it is proven ... that the defendant acted in concert with others, he is thus criminally liable for their conduct. *The extent or degree of the defendant's participation in the crime does not matter* " (emphasis added). Perhaps this instruction was inconsistent with section 20.15 (*see People v. Castro,* 55 N.Y.2d 972, 973, 449 N.Y.S.2d 184, 434 N.E.2d 253 [1982]),[4] but it still forecloses defendant's claim of factual insufficiency as to value. After all, it is extraordinarily well established that "the Appellate Division is constrained to weigh the evidence in light of the elements of the crime as charged without objection" (*Noble,* 86 N.Y.2d at 815, 633 N.Y.S.2d 469, 657 N.E.2d 490), and the jury in this case was told that the "extent or degree" of defendant's personal participation in the vandalism "does not matter" to his guilt. Accordingly, since it is undisputed that the group as a whole did well over $1,500 in damage, it simply "does not matter" whether the People proved that defendant *personally* caused damage to such an "extent or degree." As the saying goes, "in for a penny, in for a pound" (Edward Ravenscroft, The Canterbury Guests; Or, A Bargain Broken, act v, scene 1 [1695]).

C. *Identity*

[4]Finally, defendant challenges the weight of the evidence on the element of identity, contending that the People failed to prove that he had anything to do with the vandalism, or even that he was present when it happened. We summarily reject defendant's contention on this score. Defendant confessed to police, and two eyewitnesses (including an accomplice) definitively identified defendant as one of the vandals. Under these circumstances, we ***619** harbor no reasonable doubt that defendant was actively involved in the vandalism and thereby qualifies for accessorial liability under Penal Law § 20.00. The countervailing evidence upon which defendant relies—i.e., his own trial testimony, the (very weak) alibi offered by his (convicted sex offender) friend, the fact that he is developmentally disabled to some extent, and the assorted marginalia of inconsequential discrepancies in the eyewitnesses' testimony—merely created a credibility contest that the jury reasonably and justifiably resolved in the People's favor (*see e.g. People v. Sommerville,* 159 A.D.3d 1515, 1515–1516, 72 N.Y.S.3d 704 [4th Dept. 2018]; *see generally Romero,* 7 N.Y.3d at 642–646, 826 N.Y.S.2d 163, 859 N.E.2d 902).

* * *

Accordingly, the criminal mischief conviction is not against the weight of the evidence on any of the three challenged elements (*see generally People v. Danielson,* 9 N.Y.3d 342, 348–349, 849 N.Y.S.2d 480, 880 N.E.2d 1 [2007]). It follows that defendant's identical (and unpreserved) legal sufficiency challenges on those elements are necessarily meritless, as well (*see People v. Nichols,* 163 A.D.3d 39, ——, 78 N.Y.S.3d 590, 2018 WL 3007537 [June 15, 2018] [4th Dept. 2018]).[5] Finally, because there is no basis to upset the criminal mischief conviction, there is likewise no reason to upset the conspiracy conviction (*see People v. McLaurin,* 260 A.D.2d 944, 945, 690 N.Y.S.2d 289 [3d Dept. 1999], *lv denied* 93 N.Y.2d 1022, 697 N.Y.S.2d 581, 719 N.E.2d 942 [1999]; *accord* n 1, *supra*).

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II

Turning to the sentencing phase of the trial, defendant offers three grounds for vacating or reducing the $40,743.19 restitution award. *First,* defendant argues that the award impermissibly exceeded the $15,000 statutory cap on restitution awards (*see generally* Penal Law § 60.27[5] [imposing $15,000 cap on felony restitution awards, subject to five identified exceptions]). *Second,* defendant argues that the restitution award was improper because Bill Cram Chevrolet was reimbursed for its losses by its insurer. *Third,* given his purportedly limited personal culpability and likely inability to pay, defendant argues that County Court abused its discretion in saddling him with the full value of the damage caused by the entire group.

We see no basis for upsetting the restitution award.

[5]The threshold issue is preservation, which defendant concedes is lacking on all three of his arguments. Defendant contends, however, that his *first* and *second* arguments implicate the illegal sentence exception to the preservation requirement, and thus must be adjudicated notwithstanding his failure to raise them below. An illegal sentence within the meaning of the exception is one to which a defendant may not consent (*see People v. Lopez,* 28 N.Y.2d 148, 152, 320 N.Y.S.2d 235, 269 N.E.2d 28 [1971]) and which does not depend on the "resolution of evidentiary disputes" (*People v. Samms,* 95 N.Y.2d 52, 57, 710 N.Y.S.2d 310, 731 N.E.2d 1118 [2000]). Put differently, the illegality must be plain "from the face of the appellate record" in order to dispense with the preservation requirement (*id.*).

[6] [7]The face of the appellate record reveals nothing plainly illegal about this restitution order, however. With respect ***620** to defendant's *first* argument, the Legislature has explicitly authorized a defendant to consent to a restitution award above $15,000 (*see* Penal Law § 60.27[5][a])—presumably to facilitate plea bargaining. As such, a restitution directive that exceeds the $15,000 statutory cap is not facially illegal in the sense that it could *never* be lawfully imposed, even with the defendant's consent.[6] Rather, such an award is only potentially illegal (i.e., contingently illegal depending on the adequacy of the People's showing on a cap exception), and it is well established that potential illegality does not trigger the illegal sentence exception to the preservation rule (*see Samms,* 95 N.Y.2d at 57, 710 N.Y.S.2d 310, 731 N.E.2d 1118, citing *People v. Smith,* 73 N.Y.2d 961, 962–963, 540 N.Y.S.2d 987, 538 N.E.2d 339 [1989]). Our conclusion on this score is consistent with *People v. Ford*, 77 A.D.3d 1176, 1177, 910 N.Y.S.2d 235 (3d Dept. 2010), *lv denied* 17 N.Y.3d 816, 929 N.Y.S.2d 805, 954 N.E.2d 96 (2011) and *People v. Rivera*, 70 A.D.3d 1484, 1485, 894 N.Y.S.2d 661 (4th Dept. 2010), *lv denied* 15 N.Y.3d 756, 906 N.Y.S.2d 829, 933 N.E.2d 228 (2010); in both cases, the Appellate Division required preservation when the defendant claimed that the restitution award exceeded the statutory cap.

[8] [9]With respect to defendant's *second* argument, it is well established that an insurer can be a proper restitutionee in certain instances (*see People v. Kim,* 91 N.Y.2d 407, 411–412, 671 N.Y.S.2d 420, 694 N.E.2d 421 [1998]), and defendant's failure to object below means that the People were never called upon to show that restitution was being directed to a proper recipient in this instance (be it Bill Cram Chevrolet, the insurer, or someone else). Thus, defendant's *second* challenge to the restitution award depends on the resolution of at least one evidentiary dispute, and it therefore does not implicate the illegal sentence exception to the preservation rule (*see Samms,* 95 N.Y.2d at 57, 710 N.Y.S.2d 310, 731 N.E.2d 1118). Our conclusion on this score is consistent with *People v. Roberites*, 153 A.D.3d 1650, 1651, 60 N.Y.S.3d 879 (4th Dept. 2017), *lv denied* 30 N.Y.3d 1108, 77 N.Y.S.3d 7, 101 N.E.3d 393 (2018), *reconsideration denied* 31 N.Y.3d 986, 77 N.Y.S.3d 664, 102 N.E.3d 441 (2018) and *People v. Daniels*, 75 A.D.3d 1169, 1171, 904 N.Y.S.2d 859 (4th Dept. 2010), *lv denied* 15 N.Y.3d 892, 912 N.Y.S.2d 581, 938 N.E.2d 1016 (2010); in both cases, we required preservation when, as here, the defendant claimed that the sentencing court erroneously directed restitution to a person or entity that was not a victim of the crime.

We decline to review either defendant's *first* argument or his *second* argument as a matter of discretion in the interest of justice, if only because intelligent appellate review of either point is significantly hindered by his failure to make a record below. Indeed, the merits of defendant's *first* argument (which relate to the scope of the statutory cap exception for out-of-pocket losses under Penal Law § 60.27[5][b]) are novel and complicated, and we hesitate to venture into those waters without a full record.

[10]We turn finally to defendant's *third* challenge to the restitution order (abuse of discretion). Defendant does not attempt to shoehorn this particular argument into the illegal sentence exception, and the conceptual genesis of the argument ***621** is unclear. Is it really a harsh and

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excessive sentence claim? Or is it some sort of claim unique to the restitution context?

But no matter, for the Court of Appeals previously upheld a restitution award that imposed the full value of the victim's loss on a single perpetrator, instead of apportioning the loss among the defendant and his accomplices (*see Kim,* 91 N.Y.2d at 412, 671 N.Y.S.2d 420, 694 N.E.2d 421)—as defendant appears to seek here. As the *Kim* Court explained:

> "While the statute is silent on the issue, imposing joint and several liability on all perpetrators for the entire loss of the victim caused by their concerted action is more consistent with, and better promotes, the dual purposes of the restitution statute. Those goals are to insure, to the maximum extent possible, that victims will be made whole and offenders will be rehabilitated and deterred, by requiring ***all*** defendants to confront concretely, and take responsibility for, the entire harm resulting from their acts" (*id.*).

In short, whatever the true nature of defendant's *third* argument, *Kim* effectively disposes of it.[7]

CONCLUSION

Accordingly, the judgment of the Seneca County Court should be affirmed.

All Citations

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Footnotes

1 Defendant's challenge to his conspiracy conviction is entirely derivative of his challenge to the criminal mischief conviction. In other words, defendant's challenge to the conspiracy conviction assumes the invalidity of his criminal mischief conviction. As such, the conspiracy conviction stands or falls alongside the criminal mischief conviction.

2 That said, the People would be well advised in future cases involving corporate victims to take a few additional minutes and actually prove the precise corporate form of the "person" allegedly victimized.

3 Contrary to defendant's assertion, nothing in *People v. Saporita*, 132 A.D.2d 713, 518 N.Y.S.2d 625 (2d Dept. 1987), *lv denied* 70 N.Y.2d 937, 524 N.Y.S.2d 689, 519 N.E.2d 635 (1987) supports his personhood argument. In *Saporita,* certain convictions were quashed as against the weight of the evidence because they had no victim at all—be it human, **nonhuman**, corporation, animal, government agency, or other assorted entity (*see id.* at 715, 518 N.Y.S.2d 625). As such, the Second Department had no occasion to consider whether a particular victim qualified as an "appropriate" **nonhuman** person under section 10.00(7), for there was no such victim to analyze.

4 Or perhaps it wasn't (*see People v. Fingall,* 136 A.D.3d 622, 623, 24 N.Y.S.3d 704 [2d Dept. 2016], *lv denied* 27 N.Y.3d 1132, 39 N.Y.S.3d 113, 61 N.E.3d 512 [2016]; *People v. Cruz,* 309 A.D.2d 564, 564–565, 765 N.Y.S.2d 508 [1st Dept. 2003], *lv denied* 1 N.Y.3d 570, 775 N.Y.S.2d 787, 807 N.E.2d 900 [2003]). The case law regarding Penal Law § 20.15 is murky at best, and the "[a]pplication of [the statute] has been further complicated by the failure of some courts to explicitly rely on it in circumstances in which it was obviously relevant, and by the confusing references made by other courts who have explicitly applied its provisions" (Hon. Martin Marcus, N.Y. Crim Law, Accessorial liability—Liability for different degrees of offense § 1:15 at 56 [4th ed West's N.Y. Prac Series 2016] [Richard A. Greenberg, Principal Author]). Interestingly, defendant does not seek a new trial in the interest of justice to remediate what he calls "County Court's [unpreserved] error in failing to charge the jury on Penal Law § 20.15."

5 Nor was defense counsel ineffective in failing to preserve these losing legal sufficiency claims (*see Nichols,* 163 A.D.3d at ––– –, 78 N.Y.S.3d 590).

6 Indeed, a "defendant's failure at the time of sentencing to object to the amount of restitution might be deemed to constitute an implied consent" to an above-cap restitution order (*People v. Barnes,* 135 A.D.2d 825, 827, 522 N.Y.S.2d 930 [2d Dept. 1987]).

7 If defendant's *third* argument is construed as a bid to reduce or reallocate the restitution award in the interest of justice, we would decline to exercise whatever discretionary powers we might have to do so.

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