PRESERVING APPEALS OVER EVIDENTIARY INSUFFICIENCY

By: Mark M. Baker[1]

"Your Honor, at the close of the Prosecution's evidence, I move to dismiss all charges because there was a failure to establish, prima facie, the elements of the offenses charged."

This unduly stark application, interposed by attorneys in myriad state and federal criminal trials which I have reviewed in almost 30 years of appellate litigation, may, or may not, be adequate to preserve the issue of evidentiary insufficiency for review in the usual event of denial. It all depends on the particular jurisdiction, and the point in the trial when it is made. Specifically, although such an unvarnished motion, made before or even after verdict, will perhaps allow for reviewability on a federal appeal from any resulting judgment of conviction, for purposes of reviewability in this state's appellate courts -- and much to the chagrin of many a New York appellate attorney who has gleaned a kink in the Prosecution's evidentiary armor -- it is completely worthless, even if timely made. This article will briefly survey the governing principles in these two jurisdictions so as to afford a sensitivity to these concerns which may have eluded the harried trial practitioner.[1]

The New York Rule

Under New York criminal procedure, in order to preserve a claim of error for appellate review with respect to the admission of evidence, or concerning the correctness of a jury instruction, there undoubtedly must be a registered protest at trial which brings the defendant's position to the attention of the court.[2] In People v. Cona,[3] the Court of Appeals indicated that the same rules of preservation necessitated that any alleged deficiency in the Prosecution's evidence, normally noted in a motion for a trial order of dismissal,[4] be "specifically directed" at the precise

[1]Mark M. Baker is of Counsel to the Manhattan white collar defense firm of Brafman and Ross, P.C.

evidentiary shortcoming being raised. The Court of Appeals has repeatedly reiterated that a general motion to dismiss will be ineffective for preservation purposes.[5]

Owing to this rule, trial counsel is required to highlight the particular statutory element which is claimed to be unsupported by the proof. Likewise, in the event of an ordinary defense,[6] such as justification, which the People must disprove beyond a reasonable doubt to the same extent that it must prove elements of the offense charged,[7] it is essential that the particular deficiency in the evidence which fails to overcome the defense be called to the Court's attention.[8] These rules are applicable to both jury and bench trials.[9]

It is notable that notwithstanding what appeared to have been a clear imperative, at least arising out of the Cona decision in 1979, a conflict had materialized between the First and Second Departments, with the First Department holding that there remained a distinction for preservation purposes between trial errors and questions of evidentiary sufficiency. Thus, in People v. Kilpatrick,[10] the First Department concluded, based on the difference in wording between paragraphs (a) and (b) of CPL §470.15(4),[11] that, unlike other types of trial errors which needed to be duly protested and preserved, questions of evidentiary insufficiency could be reviewed, even on the law, in the absence of specific objections. This position was repeatedly asserted, notwithstanding constant prosecutorial requests for reconsideration,[12] and despite pointed -- and specifically recognized -- rulings to the contrary by the Second Department.[13]

The controversy, however, was ultimately silenced in 1995 by the Court of Appeals in People v. Gray.[14] There, the High Court firmly articulated "the view that this portion of *Kilpatrick,* construing CPL §470.15(4) as described, should not be followed given its direct conflict with our holdings in *Cona* and *Dekle,* which govern here[]."[15] Based on an analysis of the underlying rationale supporting the need for objections to the trial judge, the Court held that "preservation is required in

all cases."[16]

So entrenched has the New York requirement for preservation become that even a legitimately questionable evidentiary basis for a jury verdict will be unreviewable in the absence of an appropriate application to the trial judge. In People v. Sala,[17] the trial court had instructed the jury in a larceny by false pretenses prosecution that a false statement or representation could be based on affirmative representations, in addition to any representation that effectively conceals or omits a material fact. The defendants did not object to this charge. Nor had they earlier moved for dismissal on evidentiary insufficiency grounds by specifically urging that larceny by false pretenses must rest on affirmative misstatements, and that omissions or concealments alone are insufficient to support a guilty verdict.

The Court of Appeals declined to review this claim when it was raised for the first time on appeal. Instead, finding that the evidence was sufficient based on the charge to the jury **as given**, the Court ruled that since the Defendants had not objected to the jury instruction, "our review is limited to whether there was legally sufficient evidence as to false statements based on *the court's charge as given without exception...*"[18] Therefore, finding evidentiary support for the principles upon which the verdict was predicated, the jury's determination was upheld.

Finally, even a properly preserved objection to the sufficiency of the evidence may later be waived if the Defense, upon denial of a motion for a trial order of dismissal at the conclusion of the People's case, proceeds to present its own evidence. In People v. Dashon Hines,[19] decided just recently, following the close of the People's evidence in a drug possession prosecution, Defense Counsel properly moved for a trial order of dismissal. It was argued at that time that there had been insufficient evidence of defendant's dominion and control over the subject apartment where drugs had been found. The motion was denied then and there, with the Court specifically not reserving

decision until the close of the evidence, as would have been within its power to do.[20] Thereafter, both defendants testified and called witnesses, offering seeming contradictions of controlling events. At the close of all the evidence, Defense Counsel did **not** renew the previous motion for dismissal, which he was statutorily authorized to do.[21]

Following conviction, pursuant to a motion to set aside the verdict, [22] the trial court granted the relief requested on the ground that it had erroneously denied the original motion for a trial order of dismissal at the close of the People's case. Thus, considering **only** the evidence that had been adduced in the People's case-in-chief, the Court held that such proof was insufficient to support the Defendant's constructive possession of the contraband in the apartment.

Affirming the Appellate Division's reinstatement of the verdict, the Court of Appeals held that the trial judge had been procedurally in error. As explained:

> Under this statutory standard [governing motions to set aside the verdict], an insufficiency argument may not be addressed unless it has been properly preserved for review during the trial...[citation omitted]. And we have held that "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"...[citations omitted]. Thus, a defendant who presents evidence after a court has declined to grant a trial motion to dismiss made at the close of the People's case **waives subsequent review of that determination**.[23]

Accordingly, it was held that "[b]ecause defendant waived review of the mid-trial decision by testifying himself and presenting the testimony of other witnesses...[citation omitted], this was not an issue of law that could properly be adjudicated in a CPL §330.30 motion."[24] The upshot of Hines, consistent with well-settled Court of Appeals jurisprudence, is that in order to perpetuate preservation of an evidentiary insufficiency claim in the event a defense case is presented, there must be a renewal of the motion for a trial order of dismissal at the close of the entire case. At that time, the application must again be "specifically directed" to the alleged evidentiary deficiencies.[25]

The Second Circuit Rule

The rule in federal court is significantly less restrictive, and specifically allows for preservation initially accomplished post-verdict. Indeed, because of the "plain error" or "manifest injustice" principle in federal appellate review,[26] there is even a chance for some level of reviewability in the absence of any protest at all. Yet, it may still be unsettled in this Circuit as to the actual standard to be employed on such "plain error" review in the absence of preservation.

A motion for a "judgment of acquittal"[27] at the close of either the Government's case or the entirety of the proof (which is the federal analogue to a motion for a trial order of dismissal in New York) may be initially made before submission to the jury. Importantly, in contrast to the New York rule, aside from issues of venue,[28] "'the defendant need not specify the ground of the [Rule 29] motion in order to preserve a sufficiency claim for appeal.'"[29] Therefore, a general application, in and of itself, appears to preserve the issue for appellate review.[30]

Additionally, a motion for a judgment of acquittal may be "made or renewed" within seven days ("or within such further time as the court may fix during the 7-day period") after the jury has rendered either a verdict or has deadlocked.[31] In fact, it is unequivocally provided that "[i]t shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury."[32] This is a striking departure from New York procedure, which, as noted, completely disallows a motion to set aside the verdict from raising any issue not preserved within the four corners of the trial record.[33]

The only ambiguity, if at all, arises when no motion for a judgment of acquittal has been interposed. On the one hand, it clearly has been stated in this Circuit that "[t]o preserve the sufficiency issue and avoid the burden of showing plain error, a defendant must have moved for judgment of acquittal either at the close of all the evidence pursuant to Rule 29(a) *or* post-trial in a

motion pursuant to Rule 29(c)."[34] Unlike in New York, the issue can even be raised in the context of a post-verdict motion for a new trial pursuant to Fed. R. Crim. P. 33.[35] In such instance, the challenge need not be made under both Rule 29(c) and Rule 33 in order to allow for reviewabilty.[36]

On the other hand, as in New York, normal reviewability is forfeited absent any motion, or absent the renewal of a previously denied motion following the close of all the evidence, where there has been the presentation of evidence by the Defense. Nonetheless, in such event, unlike in New York, all chances of review are not completely forfeited. That is because a defendant can still undertake "the burden of persuading a court of appeals on the insufficiency issue that there has been plain error or manifest injustice."[37]

But, what is the standard of review under a "plain error" or "manifest unjust" analysis? In United States v. Muniz ("Muniz I"),[38] the Court, when faced with the then understanding that there had been a failure of Defense Counsel to make a timely Rule 29 Motion, held, in a split decision, that "because of the failure to object below, the defendant must show on appeal not only that the evidence was legally insufficient but that it was plain error for the court to fail to dismiss on its own motion. '[T]he error must be so plain [that] the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it.'"[39] Thereupon affirming the conviction, the Court added, amidst a discussion of the standards laid out by the Supreme Court in United States v. Olano,[40] that, "[t]his [plain error] test imposes less exacting demands on the strength of the government's evidence than the ordinary test of sufficiency."[41] The Majority emphasized this point in rejoinder to the dissent of Judge Kearse, who noted that "I am not aware of any case in which we have found the evidence insufficient to establish guilt beyond a reasonable doubt and yet have refused to find that error "plain" and reversible."[42]

Although Finley and Muniz I seem to indicate that absent a preserved sufficiency

issue, the plain error test necessitates a less exacting appellate evaluation, and hence, a greater burden for the Defense, such conclusion may or not be valid. In a later decision in the same case, United States v. Muniz ("Muniz II"),[43] the Second Circuit seemingly clouded the governing standard. Following Muniz I, the en banc Circuit Court had agreed to convene in order "to decide whether, where the issue of the sufficiency of the evidence is raised for the first time on appeal, and the evidence is insufficient to support a guilty verdict under the 'beyond a reasonable doubt' standard but is close to sufficient, a conviction may be affirmed on the ground that the insufficiency was not 'plain' within the meaning of Rule 52(b), Fed.R.Crim.P."[44] However, two days prior to oral argument, the Government successfully moved to vacate the en banc rehearing based on the discovery of minutes which demonstrated that, indeed, there had been made at trial a Rule 29 motion for a judgment of acquittal. As a result, the Court, now considering the evidence according to the higher standard of review,[45] held the evidence to be insufficient. In doing so, however, it added that it "need not decide whether the standard would be the same or different for an unpreserved error."[46]

Conclusion

In New York practice, following the close of the People's case, and again, in the event of the Defense's presenting evidence, following the close of the entire case, it is essential that Defense Counsel make an appropriate motion for a trial order of dismissal in order to preserve a claim of evidentiary insufficiency for appeal. Moreover, for the issue to be reviewable, the application must be specifically directed toward the precise evidentiary deficiency being alleged.

Likewise, in order to preserve the issue of evidentiary insufficiency for the higher level of review on appeal in a federal prosecution, prior to verdict, there must be a motion for a judgment of acquittal at the close of the Government's case, and a renewed motion for a judgment of acquittal at the close of all the evidence in the event of a defense case. Although, challenges to

venue aside, the motion need not be as precise as in a New York trial, it certainly would be helpful to appellate counsel to benefit from a comprehensive record.

In striking contrast with New York procedure, in the event that no motion had been made at a federal trial, there can still be made either a Rule 33 motion for a new trial or a post-verdict motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29(c) within seven days of the verdict, or within whatever additional time is fixed by the Court during those seven days. Either such motion should specifically raise the issue of the insufficiency of the evidence. On the other hand, absent such applications, the issue of evidentiary sufficiency may still be reviewable on appeal, but only under the less exacting, and more burdensome plain error or manifest injustice standards. It remains to be seen, exactly what those standards will entail.

1. To be distinguished for purposes of this discussion is the determination as to whether the verdict is against the **weight** of the evidence. This is a purely factual power of review which is not vested in either trial courts or the Court of Appeals. Hence, being unique to intermediate appellate courts, it does not invite concerns of reviewability. *See* CPL §470.20(5); People v. Bleakley, 69 N.Y.2d 490 (1987).

2. *See* CPL §470.05(2).

3. 49 N.Y.2d 26, 33, n. 2, 424 N.Y.S.2d 146 (1979).

4. *See* CPL §290.10(1), which provides that a motion to dismiss any count of the indictment on the ground that the evidence failed to establish either the evidence charged or any lesser included offense may be made either "[a]t the conclusion of the People's case or at the conclusion of all the evidence[]."

5. *See* People v. Gray, 86 N.Y.2d 10, 629 N.Y.S.2d 173 (1995) (resolving a conflict between the First and Second Departments in favor of the absolute need for preservation of insufficiency claims); *see also* People v. Finger, 95 N.Y.2d 894, 716 N.Y.S. 34 (2000); People v. Hill, 85 N.Y.2d 256, 624 N.Y.S.2d 79 (1995); People v. Velasquez, 76 N.Y.2d 905, 561 N.Y.S.2d 911 (1990); People v. Bynum. 70 N.Y.2d 858, 859, 523 N.Y.S. 492 (1987); People v. Dekle 56 N.Y.2d 835, 452 N.Y.S.2d 568 (1982) and People v. Stahl, 53 N.Y.2d 1048, 442 N.Y.S. 488 (1981).

6. PL §25.00(1).

7. *See*, People v. McManus, 67 N.Y.2d 541, 547, 505 N.Y.S.2d 43, 46 (1986).

8. *See e.g.* People v. Lyons, 280 A.D.2d 926, 721 N.Y.S.2d 179 (4th Dept. 2001), *lv denied*, 96 N.Y.2d 802, 726 N.Y.S.2d 830 (2001); People v. Clinton, 268 A.D.2d 531, 701 N.Y.S.2d 647 (2d Dept. 2000), *lv denied*, 95 N.Y.2d 794, 711 N.Y.S.2d 162 (2000); People v. Delcarpio, 220 A.D.2d 341, 632 N.Y.S.2d 790 (1st Dept. 1995), *lv denied*,

87 N.Y.2d 920, 641 N.Y.S.2d 602 (1996).

9. People v. Santos, 86 N.Y.2d 869, 635 N.Y.S.2d 168 (1995).

10. 143 A.D.2d 1, 2-3, 531 N.Y.S. 2d 262 (1st Dept. 1988).

11. Those paragraphs read:

"4. The kinds of determinations of reversal or modification deemed to be upon the law include, but are not limited to, the following:

"(a) That a ruling or instruction of the court *duly protested* by the defendant, as prescribed in subdivision two of section 470.05, at a trial resulting in a judgment, deprived the defendant of a fair trial;

"(b) That evidence adduced at a trial resulting in a judgment was not legally sufficient to establish the defendant's guilt of an offense of which he was convicted" (emphasis supplied).

12. *See e.g.* People v. Blacknall, 185 A.D.2d 108, 586 N.Y.S.2d 110 (1st Dept. 1992), *lv. denied* 80 N.Y.2d 1025, 592 N.Y.S.2d 674 (1992); People v. Atkins, 173 A.D.2d 424, 570 N.Y.S.2d 9 (1st Dept. 1991), *lv denied*, 78 N.Y.2d 961, 574 N.Y.S.2d 940 (1991); People v. Abdullah, 164 A.D.2d 260, 562 N.Y.S.2d 470 (1st Dept. 1990); People v. Rodriquez, 164 A.D.2d 832, 559 N.Y.S.2d 725 (1st Dept. 1990); and People v. Watson, 163 A.D.2d 253, 254, 558 N.Y.S.2d 537 (1st Dept. 1990), *app. withdrawn*, 76 N.Y.2d 992, 563 N.Y.S.2d 781 (1990).

13. *See e.g.* People v. Canute, 190 A.D.2d 745, 593 N.Y.S.2d 539 (2nd Dept. 1993), *lv. denied* 81 N.Y.2d 968, 598 N.Y.S.2d 769 (1993); People v. Lyons, 154 A.D.2d 715, 546 N.Y.S.2d 691 (2nd Dept. 1989); People v. Bailey, 146 A.D.2d 788, 537 N.Y.S.2d 548 (2nd Dept. 1989), *lv. denied* 74 N.Y.2d 844, 546 N.Y.S.2d 1009 (1989); People v. Okehoffurum, 201 A.D.2d 508, 607 N.Y.S.2d 695 (2nd Dept. 1994), *lv denied*, 83 N.Y.2d 913, 614 N.Y.S.2d 395 (1994), *on reconsideration*, 83 N.Y.2d 970, 616 N.Y.S.2d 23 (1994).

14. 86 N.Y.2d 10, 629 N.Y.S. 173 (1995).

15. 86 N.Y.2d at 19, 629 N.Y.S.2d at 175.

16. *Id.*

17. 95 N.Y.2d 254, 716 N.Y.S.2d 361 (2000).

18. 95 N.Y.2d at 260, 716 N.Y.S.2d at 364, citing Dekel and Gray (emphasis in original).

19. __ N.Y.2d__, __N.Y.S.2d__, 2001 N.Y. Slip Op. 07979 (October 23, 2001).

20. CPL §290.10(1).

21. *Id.*

22. CPL §330.30(1). Under New York procedural rules, a motion pursuant to CPL §330.30(1) to set aside a verdict may be predicated only on those issues appearing in the record, which, "...if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court." Thus, when determining such a motion, a trial judge has only such power as is vested in an appellate court in passing on preserved questions of law, and hence, can only consider issues that were duly protested on the trial record. *See* People v. Carter, 63 N.Y.2d 530, 536, 483 N.Y.S.2d 654 (1984), as recently reiterated in People v. Hines, __ N.Y.2d__, __N.Y.S.2d__, 2001 N.Y. Slip Op. 07979, p. 7 (October 23, 2001).

23. __ N.Y.2d__, __N.Y.S.2d__, 2001 N.Y. Slip Op. 07979, p. 7 (October 23, 2001) (emphasis added).

24. *Id.,* at p. 8

25. Another downside to this requirement is that the bringing of such motion puts the Prosecution on notice of an evidentiary deficiency which can then be cured by a reopening of its case-in-chief. *See* People v. Whipple, ___ N.Y.2d__, __N.Y.S.2d__, 2001 N.Y. Slip Op. 09095 (Nov. 15, 2001).

26. Fed. R. Crim. P. 52(b); United States v. Olano, 507 U.S. 725 (1993).

27. Fed. R. Crim. P. 29(a), entitled "Motion before Submission to the Jury," provides for motions for a judgment of acquittal "after the evidence on either side has closed if the evidence is insufficient to sustain a conviction of such offense or offenses."

28. Because venue need only be proved by a preponderance of the evidence, "'[o]bjections to venue are waived unless "specifically articulated" in defense counsel's motion for acquittal.'" United States v. Bala, 236 F.3d 87, 95 (2d Cir. 2000), quoting United States v. Potamitis, 739 F.2d 784, 791 (2d Cir. 1984).

29. United States v. Hoy, 137 F.3d 726, 729 (2d Cir.), *cert denied*, 525 U.S. 850 (1998), quoting United States v. Gjurashaj, 706 F.2d 395, 399 (2d Cir.1983).

30. *See also* Michaels Enterprises, Inc. et al. v. United States, 376 U.S. 356, 357 (1964) (" The record clearly shows, however, that petitioners did move for 'judgment of acquittal at the close of all the evidence,' as well as 'at the close of the government's case.'").

31. Fed R. Crim. P. 29(c).

32. *Id.*

33. *See* note 22, *ante.*

34. United States v. Allen, 127 F.3d 260, 264 (2d Cir. 1997).

35. Insofar as pertinent to this discussion, a Rule 33 motion for a "New trial" may be made within 7 days of the verdict, "or within such further time as the court may fix during the 7-day period," "if the interests of justice so require." Accordingly, unlike a CPL §330.30(1) motion to set aside a New York verdict, a Rule 33 motion is not restricted to preserved questions of law. *See* note 22, *ante*.

36. United States v. Allen, 127 F.3d 260, 264 (2d Cir. 1997), citing United States v. Leslie, 103 F.3d 1093, 1100-01 (2d Cir.) (holding that defendant did not waive a sufficiency challenge by raising argument in Rule 33 motion for new trial and not in Rule 29 motion for judgment of acquittal), *cert. denied,* 520 U.S. 1220 (1997).

37. United States v. Finley, 245 F.3d 199, 202 (2d Cir. 2001).

38. 60 F.3d 65, 70 (2d Cir. 1995).

39. Muniz I, 60 F.3d at 70, quoting United States v. Yu-Leung, 51 F.3d 1116, 1121 (2d Cir.1995) (internal quotation omitted).

40. 507 U.S. 725 (1993).

41. Muniz I, 60 F.3d at 70.

42. Muniz I, 60 F.3d at 73-74 (Dissent, per Kearse, J.).

43. 184 F. 3d 114 (2d Cir. 1997).

44. 184 F.3d at 115.

45. *I.e.*, "whether, viewed in the light most favorable to the government, the evidence was sufficient to permit a "rational trier of fact [to find] the essential elements of the crime beyond a reasonable doubt." Muniz II, 184 F.3d at 115-116, quoting, United States v. Amato, 15 F.3d 230, 235 (2d Cir.1994) (quoting Jackson v. Virginia, 443 U.S. 307, 319 [1979]).

46. Muniz II, 184 F.3d at 116.