State of New York
Court of Appeals

OPINION

No. 35
The People &c.,
Respondent,
v.
William A. Wilkins, &c.,
Appellant.

Brian Shiffrin, for appellant.
Scott Myles, for respondent.

DiFIORE, Chief Judge:

When a defendant is not present at a sidebar conference wherein the court actively solicits answers from a prospective juror which relate to issues of bias or hostility, *People v Antommarchi* (80 NY2d 247 [1992]) requires a new trial in the absence of defendant's

waiver of the right to be present. Defendant's protest in the trial court is generally not required. The purpose of the *Antommarchi* rule, as derived from CPL 260.20, is to provide defendant the opportunity to personally assess the juror's facial expressions and demeanor in order to provide meaningful input on the prospective juror's retention or exclusion from the jury. The question presented on this appeal is whether defendant, having explicitly waived his *Antommarchi* right to be present at sidebars in the middle of the voir dire proceeding involving a prospective juror who was ultimately struck when codefendant exercised a peremptory strike, is entitled to a new trial based on his absence from a pre-waiver sidebar conference with that same prospective juror. We conclude that the claimed error, under these unique circumstances, required defendant's protest in the trial court given his acquiescence in the post-waiver voir dire of the prospective juror after being invited to express any objection that he may have had regarding the pre-waiver sidebar conference. We therefore affirm.

I

Early one morning in August 2012, a group of customers formed a line outside a retail store to purchase newly released sneakers. Defendant and codefendant, armed with a gun, approached the line of waiting customers and robbed the victims of their wallets, keys, cellphones and jewelry. One person resisted the robbers' efforts and was shot and killed during the ensuing struggle. The assailants fled the scene. Defendant and codefendant were subsequently arrested and charged by indictment with murder in the second degree, three counts of robbery in the first degree and two counts of attempted

robbery in the first degree for their participation in the crimes. They proceeded to a joint trial.

During jury selection, the court conducted a voir dire in open court of each of the first 14 prospective jurors, including Juror 8, hereinafter referred to as CK. Before a recess and in response to the court's query whether any of the prospective jurors had anything to add to the proceedings, CK asked to approach the bench. It is undisputed that defendant had a right to be present at the sidebar with prospective juror CK, wherein she related that her nephew was a defendant in a federal drug prosecution and the court made inquiry of her general bias or hostility with regard to her nephew's unrelated criminal case. Defendant, although represented by counsel, was not present during this sidebar conference, remaining seated at counsel table. At the conclusion of the sidebar conference with counsel, CK was returned to the jury panel for the continuation of the court's voir dire.

The prospective jurors exited the court for a lunch recess and defendant's counsel moved for a mistrial and for a new jury panel on two grounds. He first argued that defendant was prejudiced by the court's instruction that the jurors should not draw any adverse inference regarding his client's right not to testify because he did not request that instruction. He also objected to the court instructing the panel not to speculate as to the presence of sheriff's deputies sitting at the defense table. The court denied the motion and recessed for lunch.

After the luncheon recess, the People alerted the court that it had failed to advise

defendant and codefendant of their *Antommarchi* rights and obtain a waiver of their right to be present at the sidebars. The People requested that the court review the right with both defendants and ask them if they were willing to waive their presence at the conferences, offering to give brief details of what had occurred at the prior sidebar conferences. The court, with both defendants present, advised the following:

> "I always give them the opportunity to appear with their clients, if they wish. On the other hand, if they wish to waive their right to be present then you can do that, as well. As to the four separate bench conferences[1], the defendants remained at the counsel table with the prosecutors and defense attorneys present. Is that still the intention of each of the clients, [defense counsel]?"

After conferring with defendant, counsel acknowledged that the court had accurately described what had taken place thus far and explicitly waived defendant's right to be present at any sidebar unless the court was notified otherwise. Defendant confirmed the waiver. At that juncture, the prospective jurors returned to the courtroom and jury selection resumed with the attorneys conducting the voir dire, each asking their own questions

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[1] Four sidebar conferences were held before the court advised defendant of his *Antommarchi* rights. The court conducted sidebars with prospective jurors LD and CO before conducting the sidebar with CK. After speaking with CK, the court conducted a final sidebar with prospective juror MC. These sidebar discussions focused on the qualifications of each prospective juror relative to certain personal issues they raised. During their respective sidebars, both LD and CK unequivocally stated that they could be fair and unbiased and both were returned to the panel. Eventually, the People peremptorily challenged LD and codefendant peremptorily challenged CK. Jurors CO and MC were excused by the court for cause and on consent of the attorneys. On this appeal, defendant also takes issue with his absence from the sidebar with CO but no *Antommarchi* violation occurred in that instance. CO, who presented a conflict of interest, was excused by the court for cause and, thus, defendant's absence had no impact on that result (*see People v Roman*, 88 NY2d 18, 28 [1996]).

collectively and individually of the prospective jurors, including CK. Defense counsel even constructed a hypothetical that incorporated CK.

At the conclusion of the voir dire of this first panel, defendant, his counsel, codefendant and codefendant's counsel retired to a separate room to discuss their joint use of peremptory challenges (CPL 270.25 [3]). Upon their return to open court, codefendant's counsel peremptorily challenged prospective juror CK and defendant did not object. During the remainder of jury selection, defendant never requested to be present at any sidebars. Defendant was convicted as charged.[2]

On appeal, the Appellate Division modified the sentence and, as modified, affirmed the judgment, with one Justice dissenting (175 AD3d 867 [4th Dept 2019]). The Court rejected defendant's claim that his *Antommarchi* rights were violated due to his absence from the sidebar conference with respect to prospective juror CK, finding that "the record establishe[d] that the court directed each defense counsel to independently exercise peremptory challenges, without input from the other defense counsel," a violation of CPL 270.25 (3), and codefendant's "counsel exercised a peremptory challenge to the second prospective juror [CK], before defendant's defense counsel had any opportunity to consider whether to challenge that prospective juror" (175 AD3d at

[2] Codefendant's conviction was reversed on appeal (*People v McKenzie-Smith*, 187 AD3d 1668 [4th Dept 2020]) and the People's application for leave to appeal to this Court was denied with leave to renew within 30 days of our decision in this case (36 NY3d 1099 [2021]).

868-869). Defendant's remaining arguments were rejected.[3]

The dissenting Justice voted to reverse and grant a new trial based on defendant's absence from the sidebar conference involving CK. The dissent observed that there was no support in the record for the majority's conclusion that CPL 270.25 (3) was not followed at trial—instead, the jointly tried defendants shared peremptory challenges which could be exercised only by majority vote. Because defendant was entitled to have input into codefendant's peremptory challenge of CK, the dissent concluded that the *Antommarchi* error was prejudicial, and warranted a new trial (*see* 175 AD3d at 871-872).

The dissenting Justice granted defendant's application for leave to appeal to this Court.

II

In New York, defendants have a statutory right to be personally present at sidebar conferences involving the voir dire "of prospective jurors concerning their ability to weigh the evidence objectively" (*People v Davidson,* 89 NY2d 881, 882 [1996]; *Antommarchi*, 80 NY2d at 250). A defendant's presence at sidebar discussions involving prospective jurors on certain subjects is "critical" because it allows a defendant the opportunity "to assess the jurors' facial expressions, demeanor and other subliminal responses as well as the manner and tone of their verbal replies so as to detect any indication of bias or

[3] We agree with the Appellate Division that any error regarding the trial court's unrequested instruction to the jury to draw no adverse inference from defendant's choice not to testify (*see* CPL 300.10 [2]) was harmless. We further agree that defendant's claim that he was prejudiced by the court's instruction to draw no adverse inference from the deputies sitting at defense table was meritless (*see People v Gamble*, 18 NY3d 386, 396-397 [2012]).

hostility" (*People v Sloan*, 79 NY2d 386, 392 [1992]). In determining whether attendance at sidebar requires a defendant's presence, the court's consideration centers on whether the "defendant might have provided valuable input regarding his attorney's discretionary decision to excuse" venire members or consent to their excusal (*Davidson*, 89 NY2d at 883). However, the statutory right to be present alongside defense counsel at a sidebar conference can be waived "by a voluntary, knowing and intelligent choice" (*People v Vargas*, 88 NY2d 363, 375-76 [1996]), and the waiver can be either express or implied (*see People v Spotford*, 85 NY2d 593 [1995]; *People v Flinn*, 22 NY3d 599 [2014]). The form of the waiver is "flexible" and can be made by counsel (*see Flinn*, 22 NY3d at 602; *Vargas*, 88 NY2d at 376]).

The right conferred by *Antommarchi* is not predicated upon defendant's constitutional right to confront witnesses (*see People v Mitchell*, 80 NY2d 519, 527-528 [1992]) or to be present during proceedings that involve factual matters for which the defendant possesses peculiar knowledge of the salient facts, such as *Sandoval* or *Ventimiglia* hearings (*People v Dokes*, 79 NY2d 656, 661 [1992]; *Spotford*, 85 NY2d at 597). Nor is there any constitutional infirmity in the exclusion of a defendant from a sidebar conference (*see Mitchell*, 80 NY2d at 527). Rather, the right is statutory, contained in CPL 260.20, and ensures a defendant's right to personal presence during jury selection for the purpose of assessing a prospective juror's demeanor in order to have meaningful input about that juror's bias or hostility. Our holding in *Antommarchi* "represented a dramatic shift away from [the] customary and established procedure" of having defense counsel appear alone at sidebars and, as a result, was held not to be

retroactive (80 NY2d at 524). However, prospectively, *Antommarchi* violations generally may be raised on appeal even absent an objection in the trial court (*see* 80 NY2d at 528).

Here, defendant argues that his absence from the sidebar conference with CK—a conference that was preceded by open-court voir dire of CK by the court and followed by defendant's explicit waiver of his *Antommarchi* rights as well as open-court voir dire of CK by the attorneys—requires a new trial. We reject that argument based on the unique circumstances of the waiver given in this particular case.

Pivotally, the *Antommarchi* violation was addressed by the court at a time when any error in the ongoing proceeding as to CK was easily curable. To be sure, the court apprised defendant of his *Antommarchi* rights in the middle of the voir dire of CK. Defendant immediately and explicitly waived those rights, a demonstration that he trusted his attorney to convey to him the information imparted at that sidebar without requiring his presence. He made no protest as to his absence from the pre-waiver sidebar conference with CK, despite being informed of the right and invited to object. Defendant was indisputably present as the court and then his counsel conducted further voir dire of CK, giving defendant ample opportunity to assess her demeanor and provide meaningful input as to his view of her suitability, satisfying the fundamental objective of the holding in *Antommarchi* (*see People v Roman,* 88 NY2d 18, 28 [1996]; *Davidson,* 89 NY2d at 883). Defendant's failure to object after being given the opportunity to do so is entirely consistent with his express waiver of the right to be present at such sidebars, trusting his counsel to act on his behalf while he personally witnessed the court's and his counsel's voir dire of CK in open court. Defendant was then given the opportunity to provide

meaningful input when he convened privately with his counsel, his codefendant and codefendant's counsel to discuss any challenges to the jury panel.[4] Under the circumstances presented here, defendant's continued participation in the post-waiver voir dire proceeding of CK was nothing less than acquiescence to that proceeding as a whole. The core purpose of *Antommarchi* was fulfilled and the proceedings required no further remedy by the trial court.

This case is, in some ways, similar to *People v Narayan* (54 NY2d 106 [1981]). There, the trial court twice instructed the defendant and his attorney not to discuss the defendant's ongoing testimony when the court recessed, implicating the constitutional right to counsel. Defense counsel did not object on either occasion. The following day, defense counsel asked to confer with his client and the court denied the request. At that point, defense counsel objected and later, he was permitted to speak with his client. On appeal, the defendant argued that his right to the assistance of counsel had been interfered with by the instructions of the trial court.

We held that "in light of counsel's *acquiescence* at a time when correction was possible, defendant could not, in disregard of the statutory requirement of timely protest, thereafter secure appellate review of what transpired when counsel stood mute" (54 NY2d at 113 [emphasis added]). When the trial court was apprised of the error while the very proceeding affected by the right to counsel violation was ongoing, the court rescinded the

[4] To the extent that the Appellate Division concluded that the CPL 270.25 (3) procedure was not followed, nothing in the record supports that conclusion.

violation without the defendant registering an objection to the antecedent violation, thereby effectively curing the error. The defendant's assent to the continuation of the proceedings in light of the cure was fatal to the belated claim on appeal.

Likewise, in *People v Garay*, the trial court stated, on the record but in the absence of defense counsel, that it was going to replace a sick juror with an alternate juror, noting that the court had discussed the matter with counsel earlier that morning (25 NY3d 62, 66 [2015]). After counsel had entered the courtroom and the jurors were seated, the court instructed the alternate juror to take the missing juror's seat. Defense counsel made no objection to the replacement of the sworn juror and continued on with the trial (*see* 25 NY3d at 66). We held that "[i]f counsel had any objection to the replacement of the juror, . . . [i]t was incumbent upon him to raise an objection at that time . . . when the trial court had the opportunity to change course" (25 NY3d at 68). Just as in *Narayan*, the acquiescence of counsel in *Garay* to continued proceedings left the issue of any violations prior to the cure unreviewable by this Court (*see also People v Nealon*, 26 NY3d 152 [2015] [departure from the *O'Rama* procedure required an objection when counsel had sufficient notice in trial court to cure the error by objection]; *People v Anderson*, 223 AD2d 547 [1996], *lv denied* 88 NY2d 980 [1996]).

In sum, under the circumstances presented, defendant's acquiescence to the continued voir dire of prospective juror CK in open court, after he explicitly waived his *Antommarchi* rights and failed to object to his pre-waiver absence from the brief sidebar with CK despite being invited to object, renders his claim unavailing.

Accordingly, the order of the Appellate Division should be affirmed.

FAHEY, J. (dissenting):

Criminal defendants have "a fundamental right to be present during any material stage of the trial," which includes sidebar discussions with prospective jurors regarding their "backgrounds and their ability to weigh the evidence objectively" (*People v*

Antommarchi, 80 NY2d 247, 250 [1992], *rearg denied* 81 NY2d 759 [1992]). "[B]ecause [a] defendant ha[s] a fundamental right to be present" at such sidebar conferences with prospective jurors, a defendant's "failure to object to being excluded from the side-bar discussions is not fatal to [that] claim" (*id.*).

That has been the law since the *Antommarchi* case was decided, nearly 30 years ago. We have since reaffirmed that "the right to be present at sidebar questioning need not be preserved by objection" (*People v Velasquez*, 1 NY3d 44, 47 [2003]). Today, however, the Court holds that because defendant did not object when he was informed about an *Antommarchi* violation that had already occurred, and he then participated in additional voir dire regarding that prospective juror, he effectively "acquiesced" in or "cured" the violation. There is no functional distinction between this holding and a holding that a defendant is required to preserve a claim regarding an *Antommarchi* violation for appellate review. This holding is contrary to our established case law. It will impair a defendant's fundamental right to be present at material stages of the trial.

I respectfully dissent.

I.

There is no dispute on this appeal that an *Antommarchi* violation occurred. Prospective juror CK approached the bench in defendant's absence and discussed with the court and the attorneys an issue that related to her possible bias or hostility. The majority acknowledges that defendant had the right to be present at this sidebar discussion with CK (majority op at 3). The People conceded before this Court that this sidebar discussion with prospective juror CK constituted an *Antommarchi* violation because defendant was not

present and had not yet waived his right to be present.[1] Indeed, the record demonstrates that the court did not mention to defendant or his codefendant that they had the right to be present at such sidebar conferences until after four such sidebar conferences had already occurred.[2] The only dispute on this appeal is whether defendant was entitled to reversal and a new trial for the conceded *Antommarchi* violation. The People contend that because defendant did not object when he was subsequently informed of the *Antommarchi* violation that had already occurred, he impliedly and retroactively waived the prior *Antommarchi* violation.

The majority does not expressly adopt the People's position of implied retroactive waiver, which would constitute a drastic expansion of our jurisprudence on the implied waiver of the right to be present. A defendant may waive the right to attend sidebar conferences with prospective jurors, and may do so impliedly, but we have held that an implied waiver has occurred only when the defendant has *previously* been informed of the

[1] The People further conceded before this Court that there was no record support for the Appellate Division's conclusion that the *Antommarchi* violation with respect to CK did not require reversal because the trial court had violated CPL 270.25 (3) by instructing each defense counsel to independently exercise peremptory challenges. As explained by the dissenting Justice at the Appellate Division, the trial court instructed that peremptory challenges would be exercised by the defendants collectively and kept count of those exercised challenges collectively (*see* 175 AD3d 867, 871 [4th Dept 2019] [Curran, J., dissenting]). The record therefore demonstrates that the trial court adhered to the requirements of CPL 270.25 (3).

[2] As the majority explains (majority op at 4 n 1), defendant does not challenge two of those sidebar conferences on this appeal. With respect to the other sidebar conference that defendant does challenge regarding prospective juror CO, I agree with the majority that CO was excused for cause and therefore that defendant's absence from that sidebar conference does not require reversal (*see People v Roman*, 88 NY2d 18, 28 [1996], *rearg denied* 88 NY2d 920 [1996]).

right to attend sidebar conferences and then, by remaining at counsel table, chooses not to attend those sidebar conferences (*see People v Flinn*, 22 NY3d 599, 601-602 [2014], *rearg denied* 23 NY3d 940 [2014]; *People v Williams*, 15 NY3d 739, 740 [2010]; *People v Keen*, 94 NY2d 533, 538-539 [2000]; *see also People v Spotford*, 85 NY2d 593, 597-599 [1995] [holding that the defendant waived his right to be present at a *Ventimiglia* hearing where the defendant was informed of his right to attend the hearing, expressly requested that his attendance at the hearing be waived, and thereafter did not attend the hearing]).

That application of implied waiver comports with our traditional understanding of what constitutes a "waiver" of the right to be present. "In order to effect a voluntary, knowing and intelligent waiver, the defendant must, at a minimum, be informed in some manner of the nature of the right to be present" (*People v Parker*, 57 NY2d 136, 141 [1982]). Criminal defendants cannot implicitly waive a right that they do not know they have. To waive the right to attend sidebar conferences with prospective jurors, a defendant must be informed that the right to attend exists.

Moreover, nothing defendant or his counsel said after the prior *Antommarchi* violation was brought to their attention constituted an express waiver of the *Antommarchi* violation that had already occurred. Defendant and his counsel merely confirmed that defendant was waiving his right to be present at sidebar conferences with prospective jurors that might occur in the future, and even then, defendant reserved his right to approach on a case-by-case basis.

Instead, the majority concludes that because CK remained on the panel after the *Antommarchi* violation occurred, and defendant had the opportunity to assess her demeanor

during the remainder of voir dire, the "fundamental objective of the holding in *Antommarchi*" was satisfied (majority op at 8). That position is illogical. If the opportunity to assess a prospective juror's demeanor during voir dire in open court is sufficient to satisfy the fundamental objectives of the *Antommarchi* holding, then why does a defendant's *Antommarchi* right to attend sidebar conferences with prospective jurors exist? *Antommarchi* itself answers that question:

> "The court may not, however, explore prospective jurors' backgrounds and their ability to weigh the evidence objectively unless defendant is present. Defendants are entitled to hear questions intended to search out a prospective juror's bias, hostility or predisposition to believe or discredit the testimony of potential witnesses and the venire person's answers so that they have the opportunity to assess the juror's facial expressions, demeanor and other subliminal responses" (*Antommarchi*, 80 NY2d at 250 [internal quotation marks omitted]).

Prospective jurors may reveal more information and speak more freely during sidebar conferences than they would in front of the entire panel of prospective jurors. There is, after all, usually a reason that prospective jurors ask to speak with the court privately at a sidebar conference. The ability to view the prospective juror's demeanor in open court is no substitute for the defendant's right to attend such sidebar conferences, a right that, although based in statute (*see People v Vargas*, 88 NY2d 363, 375 [1996]), we have nevertheless deemed "fundamental" (*Antommarchi*, 80 NY2d at 250; *see Velasquez*, 1 NY3d at 48).

Moreover, this Court has previously concluded, absent a waiver, that an *Antommarchi* violation does not require reversal and a new trial because the defendant was

not prejudiced by the violation in only two situations: (1) where "because of the matter then at issue before the court or the practical result of the determination of that matter, the defendant's presence could not have afforded him or her any meaningful opportunity to affect the outcome," such as where the prospective juror is excused for cause or challenged peremptorily by the People; or (2) where the trial court essentially replicates the sidebar conference "de novo" in the defendant's presence (*Roman*, 88 NY2d at 26, 28-29). We have never held, before today, that the defendant's absence from a sidebar conference with a prospective juror may be cured, and the defendant will not be prejudiced, because the defendant otherwise had the opportunity to observe the prospective juror's demeanor in open court during the remainder of jury selection.

II.

The majority's alternative rationale that defendant "acquiesced" in the *Antommarchi* violation with respect to CK because defendant did not object after the *Antommarchi* violation was called to his attention is equally inconsistent with our precedent. It is merely a preservation requirement by another name.

Indeed, the cases cited by the majority to support its "acquiescence" rationale all make clear that the Court in those cases was holding that the error was required to be preserved for appellate review and was not. In *People v Narayan* (54 NY2d 106 [1981]), the Court held that "protest was required to preserve the issue for appellate review as a question of law" (*id.* at 113). In *People v Garay* (25 NY3d 62 [2015], *cert denied* 577 US 985 [2015]), we stated that the "preservation rule that we applied in *Narayan*" applied equally to that case (*id.* at 68). And in *People v Nealon* (26 NY3d 152 [2015]), we held

that the trial court's failure to discuss a jury note with counsel outside the presence of the jury before reading it verbatim into the record in the presence of the jury was "not a mode of proceedings error, and the preservation rule therefore applies" (*id.* at 154).

Each of the "acquiescence" cases cited by the majority is, in fact, a preservation case. Yet the majority does not expressly phrase its holding in terms of a preservation requirement. Perhaps that is because to do so would expressly conflict with our precedent declining to impose a preservation requirement for an *Antommarchi* violation (*see Antommarchi*, 80 NY2d at 250; *Velasquez*, 1 NY3d at 47). But there is another problem with the majority's reluctance to call its newly-imposed preservation requirement by its name: if defendant was required to preserve the *Antommarchi* violation for appellate review and did not, this Court would be required to remit to the Appellate Division for that Court to consider whether to review the issue in an exercise of its interest-of-justice jurisdiction (*see e.g. Nealon*, 26 NY3d at 163; *Narayan*, 54 NY2d at 114). This Court unanimously rejects the rationale the Appellate Division *did* provide for holding that the *Antommarchi* violation did not require reversal, i.e., that the trial court conducted jury selection in a manner that violated CPL 270.25 (3). Notably, the Appellate Division reversed the codefendant's judgment and granted him a new trial on the very same *Antommarchi* violation at issue here (*see People v McKenzie-Smith*, 187 AD3d 1668, 1669-1670 [4th Dept 2020], *lv denied with lv to renew* 36 NY3d 1099 [2021]). The majority's refusal to phrase its holding in terms of a preservation requirement deprives defendant of that additional possibility for appellate review.

III.

It is the court's obligation to protect a defendant's fundamental right to be present at the material stages of trial. By previously declining to impose a preservation requirement for *Antommarchi* violations, we have placed the onus squarely on the courts to ensure that a defendant's right to attend this material stage of trial is protected, and, if possible, to correct a violation of that right once it has occurred.

Here, as in other situations where the trial court has mistakenly conducted sidebar conferences with prospective jurors without first obtaining an *Antommarchi* waiver from the defendant, the trial court was not without options. The court could have obtained an express, retroactive waiver from defendant on the record, confirming that defendant was waiving the *Antommarchi* violation that had already occurred before he was informed of his right to attend sidebar conferences (*see e.g. People v Moyer*, 292 AD2d 793, 794 [4th Dept 2002]). That did not occur here, and the People do not contend otherwise. Alternatively, the trial court could have recreated the sidebar conference with CK for defendant's benefit in his presence (*see Roman*, 88 NY2d at 29; *People v Anderson*, 223 AD2d 547, 548 [2d Dept 1996], *lv denied* 88 NY2d 980 [1996]). Defendant did not request that remedy, but he was not required to, because we do not require defendants to preserve claims of *Antommarchi* violations for appellate review. The record does not support the majority's assertion that defendant was "invited to object" to the *Antommarchi* violation that had already taken place.[3]

[3] After the *Antommarchi* violation was called to its attention by the prosecutor, the trial court stated as follows:

The Court's holding today violates our precedent regarding preservation of *Antommarchi* claims, dilutes the fundamental right to be present for sidebar conferences articulated in that case, and will no doubt be extended to other violations of a defendant's fundamental right to be present at material stages of trial, despite the majority's insistence that this is a "unique" case. Criminal defendants should be on notice that unless the legislature or a future Court corrects the majority's error, defendants, rather than the courts, are now expected to protect their *Antommarchi* rights, and to object to *Antommarchi* violations of which they are made aware in order to preserve their claims for appellate review.

> "The court did not inquire of defense counsel an *Antommarchi* ruling or request of defense counsel. I always give them the opportunity to appear with their clients, if they wish. On the other hand, if they wish to waive their right to be present then you can do that, as well. As to the four separate bench conferences, the defendants remained at the counsel table with the prosecutors and the defense attorneys present. Is that still the intention of each of the clients, [defense counsel]?"

Thus, the court merely noted that defendant and his codefendant had remained at the counsel table during the four sidebar conferences that had already taken place, and then asked defense counsel if that was "still [their] intention," i.e., whether defendants planned to remain at counsel table during future sidebar conferences. Counsel for defendant and defendant himself confirmed that if defendant "feels the need to approach he would like to," but that defendant would review that decision "on each occasion." The court did not expressly invite defendant to object to the *Antommarchi* violations that had already occurred, and defendant merely waived his right to attend future sidebar conferences with prospective jurors, even then reserving the right to attend if he wished.

Order affirmed. Opinion by Chief Judge DiFiore. Judges Garcia, Singas and Cannataro concur. Judge Fahey dissents in an opinion, in which Judges Rivera and Wilson concur.

Decided December 14, 2021