



1 A.D.3d 619, 767 N.Y.S.2d 640, 2003 N.Y. Slip Op. 18871
(Cite as: **1 A.D.3d 619, 767 N.Y.S.2d 640**)

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Supreme Court, Appellate Division, Second Department, New York.
The PEOPLE, etc., respondent,
v.
Robert TAYLOR, Jr., appellant.
Nov. 24, 2003.

Joel A. Brenner, East Northport, N.Y., for appellant.

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Cameron Kenny of counsel), for respondent.

*620 Appeal by the defendant from a judgment of the Supreme Court, Suffolk County (Mullen, J.), rendered January 21, 1998, convicting him of murder in the first degree**641 and murder in the second degree (three counts), upon a jury verdict, and imposing sentence.

ORDERED that the judgment is modified, on the law and as a matter of discretion in the interest of justice, by vacating the conviction of murder in the first degree, vacating the sentence imposed thereon, and remitting the matter to the Supreme Court, Suffolk County, for a new trial on that count; as so modified, the judgment is affirmed.

We agree with the defendant that the trial court erred in its accomplice liability charge as it related to the first-degree felony murder count. **Penal Law § 125.27(1)(a)(vii)** provides that **Penal Law § 20.00** is not applicable to first-degree felony murder “unless the defendant’s criminal liability * * * is based upon the defendant having commanded another person to cause the death of the victim or intended victim pursuant to **section 20.00** of this chapter” (see *People v. Couser*, 258 A.D.2d 74, 695 N.Y.S.2d 781, *affd.* 94 N.Y.2d 631, 709 N.Y.S.2d 155, 730 N.E.2d 953). Here, the trial court only gave the **Penal Law § 20.00** definition of accomplice liability without any adjustment for the first-

degree murder count. Accordingly, the possibility exists that the jury convicted the defendant of first-degree murder without finding that he commanded another person to cause the death of the victim. Therefore, the defendant is entitled to a new trial on that count. However, the failure to properly instruct the jury with respect to the defendant’s accessorial liability does not affect the convictions of murder in the second degree (*cf. People v. Pons*, 68 N.Y.2d 264, 508 N.Y.S.2d 403, 501 N.E.2d 11; *People v. Almodovar*, 62 N.Y.2d 126, 476 N.Y.S.2d 95, 464 N.E.2d 463).

Viewing the evidence in the light most favorable to the prosecution (see *People v. Contes*, 60 N.Y.2d 620, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find that it was legally sufficient to establish the defendant’s guilt beyond a reasonable doubt.

Viewing the defense counsel’s conduct in its entirety, the defendant was not deprived of the effective assistance of counsel (see *People v. Rivera*, 71 N.Y.2d 705, 530 N.Y.S.2d 52, 525 N.E.2d 698; *People v. Baldi*, 54 N.Y.2d 137, 444 N.Y.S.2d 893, 429 N.E.2d 400).

The defendant’s remaining contentions are without merit.

SANTUCCI, J.P., **McGINITY**, **SCHMIDT** and **ADAMS**, J.J., concur.
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