

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

936

KA 14-01243

PRESENT: WHALEN, P.J., CENTRA, CARNI, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSEPH MACHADO, DEFENDANT-APPELLANT.

STEPHEN J. BIRD, ROCHESTER, FOR DEFENDANT-APPELLANT.

JOSEPH MACHADO, DEFENDANT-APPELLANT PRO SE.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered May 22, 2014. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (two counts), burglary in the first degree (two counts), grand larceny in the fourth degree (three counts) and unlawful imprisonment in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts each of robbery in the first degree (Penal Law § 160.15 [3], [4]) and burglary in the first degree (§ 140.30 [3], [4]). At trial, the victim testified that two men entered his home, placed a pillowcase over his head, and took many of his belongings, including a shotgun. Before leaving the victim's home, one of the men held the shotgun to the victim's head, and the victim noticed that one of the intruders wore red sneakers. One of the intruders testified at defendant's trial that he and defendant committed the crimes, and that defendant had been wearing the red sneakers during the incident. The victim's neighbor testified that defendant had been at his house the evening prior to the crimes, and that defendant was wearing red sneakers. The neighbor further testified that, while defendant was at his house, a video was recorded that depicted defendant's red sneakers. Although the video did not show defendant's face, the victim testified that the red sneakers depicted in the video were the same ones that he observed on one of the intruders.

We reject defendant's contention that County Court should have dismissed the indictment on the ground that the integrity of the grand jury proceeding was impaired. Although the People submitted some

hearsay evidence to the grand jury, the remaining evidence was sufficient to sustain the indictment (see *People v Huston*, 88 NY2d 400, 409; *People v Butcher*, 11 AD3d 956, 958, lv denied 3 NY3d 755).

Defendant contends that the evidence is legally insufficient to sustain the conviction of one count of robbery in the first degree (Penal Law § 160.15 [3]) and one count of burglary in the first degree (§ 140.30 [3]) because the People did not establish that the shotgun was used or threatened to be used as a dangerous instrument. We reject that contention. To establish that a gun is a dangerous instrument, the People must present evidence that it was loaded and operable or that it was used as a club or bludgeon (see *People v Spears*, 125 AD3d 1400, 1400, lv denied 25 NY3d 1172; *People v Wilson*, 252 AD2d 241, 249). Here, the People established through circumstantial evidence that the weapon was a dangerous instrument inasmuch as it was loaded and operable (see *People v Spears*, 125 AD3d 1401, 1402, lv denied 25 NY3d 1172). The shotgun was never recovered, but the victim testified that he kept it loaded and in his bedroom, and that he had fired it on previous occasions.

Defendant further contends that the conviction on all counts should be reversed because there is legally insufficient evidence identifying him as the perpetrator. According to defendant, the People did not provide the required notice pursuant to CPL 710.30 that the victim would identify the red sneakers at trial and that identification testimony therefore should have been precluded. We conclude that no CPL 710.30 notice was required because there was no police-arranged identification procedure in which the victim identified defendant (see CPL 710.30 [1] [b]; *People v Jackson*, 71 AD3d 1457, 1457-1458, lv dismissed in part and denied in part 17 NY3d 774). We further conclude that the evidence, including the testimony of the second intruder identifying defendant and the testimony of the neighbor that defendant was wearing red sneakers around the time of the offense, is sufficient to establish defendant's identity. Contrary to defendant's further contention, upon viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to preserve for our review his contention that he was denied a fair trial based on prosecutorial misconduct on summation (see *People v Cullen*, 110 AD3d 1474, 1475, affd 24 NY3d 1014; *People v Clark*, 138 AD3d 1449, 1451, lv denied 27 NY3d 1130). In any event, any alleged improprieties were not so egregious as to deprive defendant of a fair trial (see *Clark*, 138 AD3d at 1451; *People v Walker*, 117 AD3d 1441, 1442, lv denied 23 NY3d 1044). Defendant also failed to preserve for our review his contention in his main brief that the prosecutor improperly bolstered the victim's identification of the red sneakers worn by defendant, and his contention in his pro se supplemental brief that the prosecutor offered precluded testimony (see CPL 470.05 [2]). We decline to exercise our power to review those contentions as a matter of

discretion in the interest of justice (see CPL 470.15 [6] [a]). Viewing the evidence, the law and circumstances of this case, in totality and as of the time of representation, we reject defendant's further contention in his main and pro se supplemental briefs that he was denied effective assistance of counsel (see generally *People v Baldi*, 54 NY2d 137, 147). Finally, the sentence is not unduly harsh or severe.

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court