

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

1381

KA 14-01313

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES HARVEY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, TREVETT CRISTO P.C.
(ERIC M. DOLAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered May 20, 2014. The judgment convicted defendant, upon a jury verdict, of assault in the second degree and criminal possession of a weapon in the second 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 assault in the second degree (Penal Law § 120.05 [4]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). This case arose from an incident in which defendant entered a crowded restaurant in the early morning while carrying a loaded revolver in his waistband. During an encounter with a police officer, the revolver discharged and a customer was shot.

Defendant contends that County Court erred in refusing to suppress physical evidence, i.e. the revolver, because the officer lacked probable cause to effect an arrest. We reject that contention. The record establishes that the officer had an articulable reason for initially approaching defendant "to conduct a common-law inquiry, i.e., [he] had 'a founded suspicion that criminal activity [was] afoot' " (*People v Mack*, 49 AD3d 1291, 1292 [4th Dept 2008], *lv denied* 10 NY3d 866 [2008], quoting *People v De Bour*, 40 NY2d 210, 223 [1976]). More particularly, a security guard from a nearby bar told the officer that defendant brushed up against him and, when defendant did so, the guard felt a hard object in defendant's waistband, which he knew to be a gun. After the guard identified defendant in the restaurant, the officer observed a bulge in defendant's waistband that looked like a gun inasmuch as it was hard, stuck upwards, and was inconsistent with an object other than a gun. Given defendant's subsequent furtive movements after making eye contact with the

officer, and the fact that the incident occurred in a crowded restaurant, the officer was justified in asking him to step outside "to request clarification as to the source of the waistband bulge" (*De Bour*, 40 NY2d at 221). Defendant's subsequent act of leaning back and reaching for his waistband "provided the officer[] with reasonable suspicion to believe that defendant posed a threat to [his] safety" (*Mack*, 49 AD3d at 1292; see *People v Benjamin*, 51 NY2d 267, 271 [1980]). The officer was thus justified in grabbing defendant's right arm in order to prevent him from drawing what turned out to be a revolver (see *Mack*, 49 AD3d at 1292). In the ensuing struggle, the revolver discharged, providing probable cause to effect an arrest (see generally *People v Daniels*, 147 AD3d 1392, 1393 [4th Dept 2017], lv denied 29 NY3d 1077 [2017]).

Viewing the evidence in light of the elements of the crime as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence with respect to assault in the second degree (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Finally, the sentence is not unduly harsh or severe.