

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

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KA 11-02474

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL S. WHITE, ALSO KNOWN AS MICHAEL BREWER,
DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, MULDOON & GETZ, ROCHESTER
(GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES RITTS OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Thomas M. Van Strydonck, J.), rendered July 27, 2011. The judgment convicted defendant, after a nonjury trial, of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, following a nonjury trial, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Contrary to defendant's contention, he was not denied his constitutional right to proceed pro se. Defendant's request to proceed pro se "was made in the context of a claim expressing his dissatisfaction with his attorney and was not unequivocal" (*People v Alexander*, 109 AD3d 1083, 1084; see *People v Gillian*, 8 NY3d 85, 88; *People v Caswell*, 56 AD3d 1300, 1301-1302, lv denied 11 NY3d 923). We note in any event that defendant thereafter "abandoned his request to proceed pro se and, instead, requested the assignment of new counsel" (*People v Grippo*, 124 AD2d 985, 986, lv denied 69 NY2d 881; see *Gillian*, 8 NY3d at 88; *Alexander*, 109 AD3d at 1084; *People v Mercer*, 66 AD3d 1368, 1370, lv denied 13 NY3d 940).

Defendant's challenge to the legal sufficiency of the evidence is unpreserved for our review inasmuch as he failed to move for a trial order of dismissal at the close of the People's case (see *People v Jamieson*, 88 AD3d 1298, 1298; *People v Batjer*, 77 AD3d 1279, 1279, lv denied 77 NY3d 951; see generally CPL 470.05 [2]). In any event, we conclude that the evidence is legally sufficient to establish defendant's intent to sell the narcotic drugs in his possession (see *People v Alverson*, 79 AD3d 1787, 1788; see generally *People v*

Bleakley, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crime in this nonjury trial (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495). Defendant's contention that a police witness lacked sufficient experience to testify as an expert with respect to defendant's intent to sell is unpreserved for our review inasmuch as he failed to object to that testimony (see *People v Snyder*, 100 AD3d 1367, 1369, lv denied 21 NY3d 1010; *People v Hamilton*, 96 AD3d 1518, 1519, lv denied 19 NY3d 997; see also *People v Scully*, 61 AD3d 1364, 1365, affd 14 NY3d 861), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Finally, the sentence is not unduly harsh or severe.