

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

1319

KA 15-00277

PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TERRANCE L. STRONG, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered November 14, 2014. The judgment convicted defendant, upon a jury verdict, of assault in the second degree (four counts), endangering the welfare of a child (four counts), attempted assault in the second degree and assault in the third degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, four counts of assault in the second degree (Penal Law § 120.05 [2]), and one count of attempted assault in the second degree (§§ 110.00, 120.05 [1]). In appeal No. 2, defendant appeals from his resentencing on that conviction.

Initially, we dismiss the appeal from the judgment in appeal No. 1 insofar as it imposed sentence because that part of the judgment was superseded by the resentencing at issue in appeal No. 2 (*see People v Weathington* [appeal No. 2], 141 AD3d 1173, 1173 [4th Dept 2016], *lv denied* 28 NY3d 975 [2016]). We also dismiss the appeal from the resentencing in appeal No. 2 inasmuch as defendant has not raised any challenges with respect thereto (*see People v Griffin*, 151 AD3d 1824, 1825 [4th Dept 2017], *lv denied* 30 NY3d 949 [2017]).

We reject defendant's contention that Supreme Court erred in denying his challenge for cause to a prospective juror. Although no "particular expurgatory oath or 'talismanic' words [are required,] . . . [prospective] jurors must clearly express that any prior experiences

or opinions that reveal the potential for bias will not prevent them from reaching an impartial verdict" (*People v Arnold*, 96 NY2d 358, 362 [2001]; see *People v Mitchum*, 130 AD3d 1466, 1467 [4th Dept 2015]). Here, when a prospective juror's answers raised a concern, the court and defense counsel elicited unequivocal statements from the prospective juror that she would "decide the case impartially and based on the evidence" (*People v Garcia*, 148 AD3d 1559, 1560 [4th Dept 2017], *lv denied* 30 NY3d 980 [2017] [internal quotation marks omitted]).

We reject defendant's further contention that the court erred in denying his request to charge the jury with assault in the third degree as a lesser included offense of each of the assault in the second degree counts (see *People v Vaughn*, 36 AD3d 434, 436 [1st Dept 2007], *lv denied* 9 NY3d 870 [2007], *cert denied* 552 US 1284 [2008]; *People v Saunders*, 292 AD2d 780, 781 [4th Dept 2002], *lv denied* 98 NY2d 681 [2002]). "To establish a charge on a lesser included offense, a defendant must show both that the greater crime cannot be committed without having concomitantly committed the lesser by the same conduct, and that a reasonable view of the evidence supports a finding that he or she committed the lesser, but not the greater, offense" (*People v James*, 11 NY3d 886, 888 [2008]). Here, it is undisputed that the first prong of that test is satisfied because assault in the third degree (Penal Law § 120.00 [1]) is a lesser included offense of assault in the second degree as charged in the indictment (§ 120.05 [2]; see *People v Smith*, 121 AD3d 1568, 1569 [4th Dept 2014], *lv denied* 26 NY3d 1150 [2016]). With respect to the second prong, however, we conclude that there is no reasonable view of the evidence to support a finding that defendant "intended to cause physical injury to the victim[s] and that he caused physical injury to the victim[s], but that he did not do so 'by means of . . . a dangerous instrument' " (*People v Brown*, 117 AD3d 1536, 1538 [4th Dept 2014], quoting § 120.05 [2]; see *People v Agina*, 163 AD3d 980, 980 [2d Dept 2018], *lv denied* 32 NY3d 1062 [2018]).

The record amply establishes that defendant repeatedly struck the victims with a folded-over extension cord, leaving scars on both victims that were still visible months after the beatings. Under the circumstances in which the extension cord was used, it was "readily capable of causing . . . serious physical injury" (Penal Law § 10.00 [13]), and therefore constituted a dangerous instrument (see *People v Rozanski*, 209 AD2d 1018, 1018 [4th Dept 1994], *lv denied* 84 NY2d 1048 [1995]; see also *People v Still*, 26 AD3d 816, 817 [4th Dept 2006], *lv denied* 6 NY3d 853 [2006]).

We have reviewed defendant's remaining contention and conclude that it lacks merit.