

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

744

KA 14-01316

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, DEJOSEPH, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KENNETH R. ROGERS, 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 (STEPHEN X. O'BRIEN OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County
(Thomas E. Moran, J.), rendered June 30, 2014. The judgment convicted
defendant, upon a jury verdict, of robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a
jury trial of robbery in the second degree (Penal Law § 160.10 [1]),
defendant contends that Supreme Court erred in refusing his request to
charge robbery in the third degree (§ 160.05) as a lesser included
offense. We reject that contention. It is undisputed that robbery in
the third degree is a lesser included offense of robbery in the second
degree as charged under Penal Law § 160.10 (1) (*see People v Bayard*,
32 AD3d 328, 329-330 [1st Dept 2006]; *People v Ceballos*, 98 AD2d 475,
476-477 [2d Dept 1984]). Nevertheless, when the evidence is viewed in
the light most favorable to defendant (*see People v Johnson*, 45 NY2d
546, 549 [1978]), we conclude that "[t]here is no reasonable view of
the evidence by which defendant was guilty of forcibly stealing
property but that he was not aided by another person actually present"
(*People v Bennett*, 147 AD2d 967, 968 [4th Dept 1989]; *see People v*
Gray, 77 AD3d 766, 766-767 [2d Dept 2010], *lv denied* 16 NY3d 797
[2011]; *see generally People v Van Norstrand*, 85 NY2d 131, 135
[1995]). Based on this record, " '[i]n order to find that defendant
robbed the victim but acted alone, the jury would have been required
to speculate that the robbery was committed in some alternative manner
not described in any testimony' " (*Gray*, 77 AD3d at 767).

Contrary to defendant's contention, this is not a case "where
proof of guilt of the greater and lesser offenses is found essentially
in the testimony of one witness" such that the jury could find the
lesser upon rejecting a portion of the testimony of the witness

(*People v Negron*, 91 NY2d 788, 792 [1998]). Rather, this is a situation in which "no identifiable record basis exists upon which the jury might reasonably differentiate between segments of a witness' testimony" (*id.*).

Contrary to defendant's remaining contention, the sentence is not unduly harsh or severe.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court