

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

284

KA 17-00494

PRESENT: WHALEN, P.J., SMITH, CENTRA, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DYQUAUN J. FRANCIS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (CAITLIN M. CONNELLY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered February 21, 2017. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree and unlawful possession of marihuana.

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 criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and unlawful possession of marihuana (former § 221.05). We affirm.

Viewing the evidence in light of the elements of the crime of criminal possession of a weapon in the second degree 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 that crime (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Although a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (see *People v Metales*, 171 AD3d 1562, 1564 [4th Dept 2019], *lv denied* 33 NY3d 1107 [2019]).

Defendant's contention that Supreme Court erred in its *Molineux* ruling with respect to evidence of an uncharged crime is not preserved for our review because defendant did not challenge that evidence in opposition to the People's application to introduce *Molineux* evidence or otherwise object to the admission thereof (see *People v Green*, 196 AD3d 1148, 1150 [4th Dept 2021], *lv denied* 37 NY3d 1096 [2021], *reconsideration denied* 37 NY3d 1161 [2022]; *People v Finch*, 180 AD3d 1362, 1363 [4th Dept 2020], *lv denied* 35 NY3d 993 [2020]) 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]). We reject defendant's related contention that defense counsel was ineffective for failing to object to the introduction of that evidence. "[I]t is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations for [defense] counsel's failure to object to the *Molineux* evidence, and defendant failed to meet that burden (*People v Conley*, 192 AD3d 1616, 1620 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021] [internal quotation marks omitted]; see also *People v Williams*, 107 AD3d 1516, 1516-1517 [4th Dept 2013], *lv denied* 21 NY3d 1047 [2013]). Nor was defense counsel ineffective for failing to request a circumstantial evidence charge. "It is well settled that a trial court must grant a defendant's request for a circumstantial evidence charge when the proof of the defendant's guilt rests solely on circumstantial evidence" (*People v Hardy*, 26 NY3d 245, 249 [2015]). "By contrast, where there is both direct and circumstantial evidence of the defendant's guilt, such a charge need not be given" (*id.*). Here, given the officers' testimony regarding their observations of defendant, a circumstantial evidence charge was not required (see generally *People v Lawrence*, 186 AD2d 1016, 1016-1017 [4th Dept 1992], *lv denied* 81 NY2d 790 [1993]) and, therefore, defense counsel was not ineffective for failing to request it (see *People v Smith*, 145 AD3d 1628, 1630 [4th Dept 2016], *lv denied* 31 NY3d 1017 [2018]).

Finally, defendant's sentence is not unduly harsh or severe.