SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 18-01868

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN PARNELL, JR., DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered May 22, 2018. The judgment convicted defendant upon a jury verdict of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of assault in the first degree (Penal Law § 120.10 [1]) for stabbing an unarmed man in the chest with an eight-inch folding knife over a dispute regarding a $10 debt. Although defendant concedes that he intentionally stabbed the victim and that the victim sustained a serious injury as a result of the stabbing that nearly killed him, defendant contends that the evidence at trial was legally insufficient to establish that he intended to cause serious physical injury to the victim and that the verdict is against the weight of the evidence in that regard. We reject those contentions. Viewing the evidence in the light most favorable to the People, as we must when reviewing a contention regarding the legal sufficiency of trial evidence (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a valid line of reasoning and permissible inferences from which a rational jury could have found that defendant "intended to cause serious physical injury when he stabbed the victim in the chest with a knife" (*People v Williams*, 134 AD3d 1572, 1573 [4th Dept 2015]; *see People v Goley*, 113 AD3d 1083, 1083 [4th Dept 2014]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Further, 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 (*see generally Bleakley*, 69 NY2d at 495).

In light of the foregoing, we also reject defendant's contention

that, at most, the evidence established that he acted recklessly and, therefore, he should have been convicted of the lesser included offense of reckless assault in the second degree (Penal Law § 120.05 [4]). The jury was appropriately instructed "to consider the lesser included offense only upon reaching a unanimous verdict of not guilty of the greater" (*People v Boettcher*, 69 NY2d 174, 183 [1987]). Once the jury reached a unanimous verdict of guilty on the greater offense of intentional assault in the first degree (§ 120.10 [1]), it had no occasion to consider the lesser offense of reckless assault in the second degree (§ 120.05 [4]).

Defendant further contends that he was denied effective assistance of counsel when defense counsel failed to pursue an intoxication defense at trial (*see* Penal Law § 15.25). "An intoxication charge is warranted if, viewing the evidence in the light most favorable to the defendant, 'there is sufficient evidence of intoxication in the record for a reasonable person to entertain a doubt as to the element of intent on that basis' " (*People v Sirico*, 17 NY3d 744, 745 [2011]). It "requires more than a bare assertion by a defendant that [they were] intoxicated" (*People v Gaines*, 83 NY2d 925, 927 [1994]), and "[t]he decision whether to pursue an intoxication defense is clearly one of strategy" (*People v Russell*, 133 AD3d 1199, 1201 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]). Here, although the victim testified that defendant was "drunk" at the time of the incident, there was no evidence regarding "the number of drinks, the period of time during which they were consumed, the lapse of time between consumption and the event at issue, whether he consumed alcohol on an empty stomach, whether his drinks were high in alcoholic content, and the specific impact of the alcohol upon his behavior or mental state" (*Gaines*, 83 NY2d at 927). Moreover, the police investigator who interviewed defendant on the night of the stabbing had no concerns that defendant was intoxicated.

As a result, the record does not establish that defendant's use of intoxicants was " 'of such nature or quantity to support the inference that [his] ingestion was sufficient to affect [his] ability to form the necessary criminal intent' " (*Sirico*, 17 NY3d at 745, quoting *People v Rodriguez*, 76 NY2d 918, 920 [1990]). We thus conclude that, under the circumstances presented on this record, defendant has failed " 'to demonstrate the absence of strategic or other legitimate explanations' for defense counsel's alleged failure to pursue an intoxication defense" (*Russell*, 133 AD3d at 1201, quoting *People v Rivera*, 71 NY2d 705, 709 [1988]). To the extent that defendant's claim of ineffective assistance of counsel is based on matters outside the record, i.e., with respect to defense counsel's alleged failure to investigate a potential intoxication defense, it must be raised by way of a motion pursuant to CPL 440.10 (*see People v Beasley*, 147 AD3d 1549, 1550 [4th Dept 2017], *lv denied* 29 NY3d 1028 [2017]).

Finally, the sentence is not unduly harsh or severe.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court