SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

819

KA 17-01665

PRESENT: SMITH, J.P., BANNISTER, GREENWOOD, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CALVIN L. PARNELL, JR., DEFENDANT-APPELLANT.

ANDREW G. MORABITO, EAST ROCHESTER, FOR DEFENDANT-APPELLANT.

CALVIN L. PARNELL, JR., DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MERIDETH H. SMITH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered June 12, 2017. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree (two counts), criminal possession of a controlled substance in the fifth degree, endangering the welfare of a child, criminally using drug paraphernalia in the second degree (three counts) and criminal possession of a controlled substance in the seventh degree.

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, inter alia, two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), one count of criminal possession of a controlled substance in the fifth degree (§ 220.06 [1]), and one count of endangering the welfare of a child (§ 260.10 [1]). We affirm.

The evidence at trial established that, shortly before midnight on the night in question, a police officer stopped defendant's car after observing defendant make an illegal turn. During the traffic stop, the officer smelled marihuana, which defendant admitted to having smoked before driving. A second officer then arrived and, following a pat frisk and subsequent vehicle search, defendant was found to be in possession of what appeared to be cocaine. Defendant was informed that he was under arrest, and placed in a patrol car. While in the patrol car, defendant told the two officers that his four-year-old daughter was home alone. Concerned, one of the officers contacted dispatch, and two other police officers were sent to the address defendant provided to check on the unattended child. The

responding officers entered defendant's apartment, which was unlocked, and found the child asleep. While in the kitchen of the apartment discussing how to proceed under the circumstances, the officers observed what appeared to be multiple bags of heroin and a number of loose pills on top of the microwave. Shortly thereafter, the officers also noticed a bag of loose ammunition on a shelf above the microwave. The police then obtained and executed a search warrant for the apartment, and recovered two handguns, various ammunition, drugs, and drug paraphernalia.

Preliminarily, we reject the People's assertion that defendant's failure to submit an adequate record requires the appeal to be dismissed or summarily affirmed. Unlike civil appeals (*see e.g. Knapp v Finger Lakes NY, Inc.*, 184 AD3d 335, 337 [4th Dept 2020], *lv denied* 36 NY3d 963 [2021]; *Mergl v Mergl*, 19 AD3d 1146, 1147 [4th Dept 2005]), on criminal appeals, this Court has the authority to request and consider any transcript, exhibit, or other document that it deems appropriate, whether included in the record or not (*see* Rules of App Div, 4th Dept [22 NYCRR] § 1000.7 [c]; Rules of App Div, All Depts [22 NYCRR] § 1250.7 [d] [3]). Here, all documents that we deem appropriate for the appeal have been requested and considered.

We reject defendant's contention in his main brief that Supreme Court erred in refusing to suppress his statement to the police that his daughter was home alone. Inasmuch as the record of the suppression hearing establishes that defendant was not being questioned at the time the inculpatory statement was made, "[t]he record supports the court's determination that defendant's statement was genuinely spontaneous and was not the product of interrogation or its functional equivalent" (*People v Tomion*, 174 AD3d 1495, 1496 [4th Dept 2019], *lv denied* 34 NY3d 1019 [2019]; *see also People v Dell*, 175 AD3d 1037, 1039 [4th Dept 2019], *lv denied* 34 NY3d 980 [2019]). The fact that defendant made the inculpatory statement immediately after being told that he was under arrest is irrelevant, because "merely informing a defendant that [they are] under arrest does not undermine the spontaneity of a statement" (*Tomion*, 174 AD3d at 1496).

We also reject defendant's contention in his main brief that there was no emergency requiring the police to enter his apartment without a warrant and, thus, that the physical evidence recovered therefrom should have been suppressed. "The emergency doctrine exception is comprised of three elements: (1) the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property and this belief must be grounded in empirical facts; (2) the search must not be primarily motivated by an intent to arrest and seize evidence; and (3) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched" (*People v Turner*, 175 AD3d 1783, 1783 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019] [internal quotation marks omitted]). Here, the suppression hearing testimony established that, after defendant stated that his four-year-old daughter was home alone shortly before midnight and confirmed the address where he had left her unattended, one of the arresting officers, concerned for the

child's safety, notified dispatch, and two other officers were sent to the residence to locate, and check on, the unattended child. We conclude that the People established through that testimony that "the [police] had a reasonable belief that the child might be in danger or distress and that [their] immediate assistance was required," and that all three elements of the emergency doctrine exception were met (*People v Radcliffe*, 185 AD2d 662, 663 [4th Dept 1992], *lv denied* 80 NY2d 976 [1992]; *see also People v Bruen*, 119 AD2d 685, 685 [2d Dept 1986], *lv denied* 68 NY2d 667 [1986], *reconsideration denied* 68 NY2d 769 [1986]).

Defendant contends in his pro se supplemental brief that the evidence is legally insufficient to support the conviction of the two weapon counts because there was no evidence that the two handguns found in his apartment had been in his possession. We reject that contention. "To meet their burden of proving defendant's constructive possession of the [handguns], the People had to establish that defendant exercised dominion or control over [the handguns] by a sufficient level of control over the area in which [they were] found" (*People v Everson*, 169 AD3d 1441, 1442 [4th Dept 2019], *lv denied* 33 NY3d 1068 [2019] [internal quotation marks omitted]). Here, the officers who responded to defendant's apartment testified at trial that the handguns had been hidden in the drop ceiling of the sole bathroom in the apartment, that defendant's DNA was found on one of the handguns, and that ammunition for the other handgun had been left out in the open in the kitchen. Moreover, the People presented admissions made by defendant in recorded jail calls, including one in which defendant stated that, during the search of his apartment, the police had found "both of them," thereby suggesting that he had knowledge of the handguns' hidden location. We conclude that the evidence is legally sufficient to establish the element of constructive possession (*see id.* at 1443; *see also People v Jones*, 149 AD3d 1580, 1580-1581 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]). Additionally, 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]) and "according great deference to the jury's resolution of credibility issues" (*People v Bassett*, 55 AD3d 1434, 1436 [4th Dept 2008], *lv denied* 11 NY3d 922 [2009]), we conclude that, contrary to defendant's contention in his pro se supplemental brief, the verdict with respect to the two weapon counts is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *Bassett*, 55 AD3d at 1436).

Defendant also contends in his pro se supplemental brief that the jail call recordings and the transcripts thereof were erroneously admitted in evidence without a proper foundation. We reject that contention. Here, the calls were made from central booking at the time of defendant's arrest, the caller identified himself by defendant's first name, and the caller discussed the circumstances of his arrest. Under these circumstances, "[t]he content of the recordings established defendant's identity as the caller, and the testimony of [an individual who maintained] the jail's recording

system established that the recordings were 'complete and accurate reproduction[s] of the conversation[s] and [that they had] not been altered' " (*People v Harlow*, 195 AD3d 1505, 1508 [4th Dept 2021], *lv denied* 37 NY3d 1027 [2021], quoting *People v Ely*, 68 NY2d 520, 527 [1986]; *see generally People v Devine*, 206 AD3d 1720, 1721 [4th Dept 2022]).

Finally, we have considered defendant's remaining contentions in his main and pro se supplemental briefs and conclude that none warrants reversal or modification of the judgment.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court