

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

883

KA 20-00326

PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, OGDEN, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL D. GANDY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN R. HUTCHISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. MATTLE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered February 7, 2020. The judgment convicted defendant, upon a guilty plea, of attempted robbery in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [2]) and criminal possession of a weapon in the second degree (§ 265.03 [3]).

We agree with defendant that he did not validly waive his right to appeal (*see People v Franklin*, 217 AD3d 1427, 1427 [4th Dept 2023]; *see generally People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]). Nevertheless, we reject defendant's contention that Supreme Court erred in refusing to suppress identification evidence on the ground that the photo array from which a witness identified him was unduly suggestive. Although defendant was the only person depicted in a red shirt in the photo array, the shirt was "not so distinctive as to be conspicuous" (*People v LaCross*, 175 AD3d 1838, 1838 [4th Dept 2019], *lv denied* 34 NY3d 1130 [2020]). Nor did slight differences in the background color of the photographs taint the photo array. The mere fact that defendant's photograph "has a slightly [darker] background than [some of] the others does not support the conclusion that the identification procedure was unduly suggestive" (*People v Evans*, 137 AD3d 1683, 1683 [4th Dept 2016], *lv denied* 27 NY3d 1131 [2016]). Finally, contrary to

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

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court