SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 21-01067

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND F. NEWTON, DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR DEFENDANT-APPELLANT.

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (MATTHEW J. BELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered June 30, 2021. The judgment convicted defendant upon a jury verdict of burglary in the second degree and petit larceny.

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 burglary in the second degree (Penal Law § 140.25 [2]) and petit larceny (§ 155.25). Defendant contends that he was denied due process of law when the prosecutor failed to correct a witness's statement that he did not receive a favorable plea deal in an unrelated case as an incentive for his testimony in this case. Defendant failed to preserve that contention for our review (*see People v Golson*, 93 AD3d 1218, 1219-1220 [4th Dept 2012], *lv denied* 19 NY3d 864 [2012]). In any event, his contention is without merit inasmuch as the prosecutor asked additional questions that clarified the witness's equivocal testimony regarding the plea deal (*see People v Rositas*, 187 AD3d 608, 608-609 [1st Dept 2020], *lv denied* 36 NY3d 1053 [2021]; *see generally People v Colon*, 13 NY3d 343, 349 [2009], *rearg denied* 14 NY3d 750 [2010]; *People v Reed*, 151 AD3d 1821, 1823 [4th Dept 2017], *lv denied* 30 NY3d 952 [2017]). Moreover, to the extent that the witness's testimony was still unclear, any error was harmless inasmuch as the evidence is overwhelming and there is no reasonable possibility that the error contributed to the conviction (*see Colon*, 13 NY3d at 349; *People v Pressley*, 91 NY2d 825, 827 [1997]). In his summation, the prosecutor noted that the witness was offered a plea deal, and County Court instructed the jury that the witness was offered a plea to a lesser offense in exchange for his testimony (*see Golson*, 93 AD3d at 1220).

Defendant next contends that the conviction of burglary in the

second degree is not supported by legally sufficient evidence that he was the perpetrator. By failing to renew his motion for a trial order of dismissal at the close of his case, defendant failed to preserve that contention for our review (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]). In any event, his contention is without merit. "Viewing the evidence in the light most favorable to the People, and giving them the benefit of every reasonable inference" (*People v Bay*, 67 NY2d 787, 788 [1986]; *see People v Delamota*, 18 NY3d 107, 113 [2011]), we conclude that there is a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion" that defendant was the perpetrator of the burglary (*People v Bleakley*, 69 NY2d 490, 495 [1987]; *see People v McKoy*, 213 AD3d 1269, 1269-1270 [4th Dept 2023]; *People v Colon*, 211 AD3d 1613, 1614 [4th Dept 2022], *lv denied* 39 NY3d 1141 [2023]). The victim testified that a window of her house had been broken and several items inside the home were missing, including three distinctive swords and 40 to 50 dolls. Defendant's DNA matched a sample taken from that interior windowsill. Defendant admitted that he was depicted on several surveillance videos walking from the direction of the victim's home carrying items to a shed next door to the victim's home, where he was staying temporarily. In addition, two witnesses testified that they went to the shed on the day of the incident and observed the swords and dolls. Viewing the evidence in light of the elements of the crime of burglary in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict with respect to that count is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant's contention that the court erred in granting the People's motion to compel a DNA buccal swab because the application was not supported by probable cause is not preserved for our review inasmuch as defendant did not oppose the motion or move to suppress the results (*see* CPL 470.05 [2]; *People v Easley*, 124 AD3d 1284, 1284 [4th Dept 2015], *lv denied* 25 NY3d 1200 [2015]). In any event, his contention is without merit inasmuch as the indictment provided the requisite probable cause (*see People v Hogue*, 133 AD3d 1209, 1212 [4th Dept 2015], *lv denied* 27 NY3d 1152 [2016]; *see generally* CPL 245.40 [1] [e]; *Matter of Abe A.*, 56 NY2d 288, 291 [1982]), and we therefore reject defendant's further contention that he was denied effective assistance of counsel based on defense counsel's failure to oppose the motion or move to suppress the results (*see People v Caban*, 5 NY3d 143, 152 [2005]; *People v Johnson*, 81 AD3d 1428, 1428-1429 [4th Dept 2011], *lv denied* 16 NY3d 896 [2011]). Defendant's contention that he was denied due process of law because the People failed to comply with CPL 245.50 is not preserved for our review (*see* CPL 245.50 [4] [a]; 470.05 [2]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's contention, the court did not abuse its discretion in granting the People's request for an adjournment after the trial had begun. " '[T]he granting of an adjournment for any

purpose is a matter resting within the sound discretion of the trial court' " (*People v Diggins*, 11 NY3d 518, 524 [2008]; *see People v Lashway*, 25 NY3d 478, 484 [2015]). Here, the court granted a short adjournment after the People identified a material witness and demonstrated diligence and good faith for the request, and there was minimal prejudice to defendant based on the short adjournment (*see generally People v Singleton*, 41 NY2d 402, 406 [1977]; *People v Schafer*, 152 AD3d 1228, 1229 [4th Dept 2017], *lv denied* 30 NY3d 1022 [2017]).

Defendant failed to preserve for our review his contention that the court, in determining the sentence to be imposed, penalized him for exercising his right to a jury trial because the sentence imposed is longer than the pretrial plea offer (*see People v Hendricks*, 214 AD3d 1466, 1467 [4th Dept 2023], *lv dismissed* 40 NY3d 929 [2023]; *People v Tetro*, 181 AD3d 1286, 1290 [4th Dept 2020], *lv denied* 35 NY3d 1070 [2020]), as well as his conclusory contention that the sentence constitutes cruel and unusual punishment (*see People v Pena*, 28 NY3d 727, 730 [2017]; *People v Suprunchik*, 208 AD3d 1058, 1059 [4th Dept 2022]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *Suprunchik*, 208 AD3d at 1059; *People v Elmore*, 195 AD3d 1575, 1577 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]). The sentence is not unduly harsh or severe.

Finally, the certificate of conviction must be amended to reflect that defendant was sentenced as a second violent felony offender (*see McKoy*, 213 AD3d at 1270).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court