

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

860

KA 19-02346

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RYAN J. REEDER, DEFENDANT-APPELLANT.

CHARLES J. GREENBERG, AMHERST, FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (KAYLAN C. PORTER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Brian D. Dennis, J.), rendered June 11, 2019. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third 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 criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). We affirm.

Defendant contends that the verdict is contrary to the weight of the evidence in light of his acquittal of the first count of the indictment charging him with another sale of a controlled substance on a different day, and in light of the jury's apparent acceptance of his agency defense with respect to the first count. We reject that contention. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]) and according deference to the jury's credibility determinations (*see People v Romero*, 7 NY3d 633, 644 [2006]), we conclude that the People disproved the agency defense beyond a reasonable doubt with respect to the second count, of which defendant was convicted, and that the verdict is not contrary to the weight of the evidence (*see People v Walker*, 117 AD3d 1441, 1442 [4th Dept 2014], *lv denied* 23 NY3d 1044 [2014]; *see also People v Mineccia*, 185 AD3d 1407, 1407-1408 [4th Dept 2020]; *People v Fisher*, 101 AD3d 1786, 1787 [4th Dept 2012], *lv denied* 20 NY3d 1098 [2013]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We also reject defendant's contention that he was denied effective assistance of counsel. It is well settled that the "failure to 'make a motion or argument that has little or no chance of

success' " does not amount to ineffective assistance (*People v Caban*, 5 NY3d 143, 152 [2005]), and defendant otherwise has failed to show the absence of strategic or other legitimate explanations for his attorney's alleged shortcomings (see generally *People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Terborg*, 156 AD3d 1320, 1322 [4th Dept 2017], *lv denied* 31 NY3d 1018 [2018]). Defendant's assertion that defense counsel was ineffective in failing to call an unspecified exculpatory witness is based on matters outside the record on appeal and therefore must be raised by way of a motion pursuant to CPL 440.10 (see *People v Belton*, 199 AD3d 1373, 1374-1375 [4th Dept 2021], *lv denied* 37 NY3d 1159 [2022]; *People v Roman*, 107 AD3d 1441, 1443 [4th Dept 2013], *lv denied* 21 NY3d 1045 [2013]).

Defendant's contention that he was deprived of a fair trial due to prosecutorial misconduct "is unpreserved for our review inasmuch as defendant did not object to any of the alleged instances of misconduct" (*People v Pendergraph*, 150 AD3d 1703, 1703 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017]; see CPL 470.05 [2]), 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]; *People v Watts*, 218 AD3d 1171, 1174 [4th Dept 2023]). Defendant's further contention that the prosecutor engaged in misconduct during the grand jury proceedings is raised for the first time in defendant's reply brief and is thus not properly before us (see *People v Ford*, 69 NY2d 775, 777 [1987], *rearg denied* 69 NY2d 985 [1987]; *People v James*, 162 AD3d 1746, 1747 [4th Dept 2018], *lv denied* 32 NY3d 1112 [2018]).

Finally, contrary to defendant's contention, we conclude that the sentence is not unduly harsh or severe, and we decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (see CPL 470.15 [6] [b]).