

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

1193

KA 15-02111

PRESENT: WHALEN, P.J., SMITH, CENTRA, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SPARTACUS BROWN, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (ELIZABETH RIKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered September 14, 2015. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [3]), defendant contends that the verdict is against the weight of the evidence. 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 reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Defendant's contention is primarily based on alleged variances among the witnesses' testimony and between the testimony and the physical evidence. Any inconsistencies in the witnesses' testimony, however, "merely presented issues of credibility for the jury to resolve" (*People v Ielfield*, 132 AD3d 1298, 1300 [4th Dept 2015], *lv denied* 27 NY3d 1152 [2016]), and we conclude that, "notwithstanding minor inconsistencies in the testimony of the People's witnesses, 'there is no basis for disturbing the jury's determinations concerning credibility' " (*People v Sommerville*, 159 AD3d 1515, 1516 [4th Dept 2018], *lv denied* 31 NY3d 1121 [2018]; *see People v McCallie*, 37 AD3d 1129, 1130 [4th Dept 2007], *lv denied* 8 NY3d 987 [2007]).

By failing to object on the grounds raised on appeal, defendant failed to preserve for our review his contention that County Court's consciousness-of-guilt instruction to the jury impermissibly shifted the burden of proof (*see CPL 470.05 [2]; People v Robinson*, 88 NY2d 1001, 1001-1002 [1996]; *People v Koberstein*, 262 AD2d 1032, 1033 [4th Dept 1999], *lv denied* 94 NY2d 798 [1999]). 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]).

The sentence is not unduly harsh or severe.