

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

1177

KA 17-00905

PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BOBBY L. DAVIS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (A. VINCENT BUZARD OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (John J. Ark, J.), rendered March 24, 2017. The judgment convicted defendant upon a jury verdict of burglary in the second 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 burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that Supreme Court erred in denying his motion to reopen the *Wade* hearing after the victim testified at trial that she believed that a police officer presented her stolen cell phone to her prior to administering the show-up identification. Contrary to defendant's contention, the totality of the victim's testimony reveals some confusion, whereas the police officer's testimony was clear and consistent that, after the victim identified defendant, a police officer showed her the cell phone and asked if she recognized it. Consequently, we conclude that the court did not abuse its discretion in denying defendant's motion to reopen the *Wade* hearing (*see People v Gilley*, 163 AD3d 1156, 1159 [3d Dept 2018], *lv denied* 33 NY3d 948 [2019]). In any event, inasmuch as there is overwhelming evidence of defendant's guilt and no reasonable possibility that defendant otherwise would have been acquitted, any error in the court's denial of defendant's motion is harmless (*see People v Fuentes*, 52 AD3d 1297, 1298 [4th Dept 2008], *lv denied* 11 NY3d 736 [2008]; *see generally People v Crimmins*, 36 NY2d 230, 237 [1975]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court