

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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Y/afa

_____AD3d_____

Argued - January 6, 2022

HECTOR D. LASALLE, P.J.
FRANCESCA E. CONNOLLY
ANGELA G. IANNACCI
PAUL WOOTEN, JJ.

2016-09977

DECISION & ORDER

The People, etc., respondent,
v Dupree Mayo, appellant.

(Ind. No. 9373/14)

Janet E. Sabel, New York, NY (David Crow and Schlam Stone & Dolan LLP [Michael A. Brodlied], of counsel), for appellant.

Eric Gonzalez, District Attorney, Brooklyn, NY (Leonard Joblove, Rhea A. Grob, Keith Dolan, and Jason Eldridge of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (John G. Ingram, J.), rendered September 9, 2016, convicting him of attempted assault in the first degree and criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is reversed, on the law, and a new trial is ordered.

The defendant was convicted, upon a jury verdict, of attempted assault in the first degree and criminal possession of a weapon in the second degree, stemming from an incident in which the complainant was shot outside of his home.

The Supreme Court erred in admitting into evidence a photograph downloaded from a Facebook account allegedly belonging to the defendant and allegedly depicting the defendant wearing certain clothing similar to that worn by the perpetrator. In order to admit a photograph into evidence, it must be authenticated by proof that it is genuine and that it has not been tampered with (*see People v Price*, 29 NY3d 472, 476). Here, the People failed to properly authenticate the photograph. The People's only authentication evidence consisted of the testimony of a police

witness who searched for the Facebook profile 1½ years after the crime. They did not proffer any evidence or testimony demonstrating that the photograph was “a fair and accurate representation of the scene depicted or that it was unaltered” (*id.* at 477-478 [citations omitted]). To the contrary, the police witness testified that he did not know whether the photograph had been altered. Furthermore, the People did not present any evidence “to establish that the web page belonged to, and was controlled by, [the] defendant” or any evidence as to when the photograph was created or posted (*id.* at 480; *cf. People v Goldman*, 35 NY3d 582, 595-596; *People v Kingsberry*, 194 AD3d 843; *People v Franzese*, 154 AD3d 706).

Accordingly, “admission of the photograph here lacked a proper foundation and, as such, constituted error as a matter of law” (*People v Price*, 29 NY3d at 480). The error cannot be deemed harmless in this case, which depended almost entirely on the testimony of the complainant whose credibility was significantly impeached (*see id.*; *see generally People v Crimmins*, 36 NY2d 230, 242).

The defendant’s remaining contentions need not be reached in light of our determination.

LASALLE, P.J., CONNOLLY, IANNACCI and WOOTEN, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Maria T. Fasulo". The signature is written in a cursive, flowing style.

Maria T. Fasulo
Clerk of the Court