

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

884

KA 15-01393

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSEPH M. LACROSS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON 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 (Thomas E. Moran, J.), rendered July 16, 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: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [3]). We reject defendant's contention that the photo array from which a witness identified him was unduly suggestive, thereby tainting that witness's subsequent in-court identification of defendant. "[A]lthough []defendant was the only person depicted in a red shirt in the photo array, it was 'not so distinctive as to be conspicuous' " (*People v Lundy*, 165 AD3d 1626, 1627 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]; *see People v Mead*, 41 AD3d 1306, 1307 [4th Dept 2007], *lv denied* 9 NY3d 963 [2007]).

Defendant's challenge to the legal sufficiency of the evidence with respect to whether he used or threatened to use a dangerous instrument is also without merit. "[T]he victim's testimony that defendant removed a knife from his pocket immediately before asking for money is legally sufficient to establish that defendant possessed a dangerous instrument" (*People v Simmons*, 128 AD3d 1379, 1379 [4th Dept 2015], *lv denied* 26 NY3d 935 [2015]). Further, the jury could have reasonably concluded that, by doing so, defendant was making an implied threat to use the knife against the victim (*see id.* at 1380; *People v Espada*, 94 AD3d 451, 452 [1st Dept 2012], *lv denied* 19 NY3d 1025 [2012]; *People v Mitchell*, 59 AD3d 739, 739-740 [2d Dept 2009], *lv denied* 12 NY3d 918 [2009]). "[A]ny inconsistency between the victim's trial testimony and the victim's testimony from prior

proceedings was not so great as to render his trial testimony incredible as a matter of law" (*Simmons*, 128 AD3d at 1380). Contrary to defendant's additional contention, 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 conclude that the verdict is not against the weight of the evidence (*see People v Johnson*, 105 AD3d 1452, 1452-1453 [4th Dept 2013], *lv denied* 21 NY3d 1016 [2013]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, the sentence is not unduly harsh or severe.