

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

427

KA 19-00323

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DWAYNE MACON, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (BRADLEY E. KEEM OF COUNSEL),
FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered December 28, 2018. The judgment convicted defendant upon a jury verdict of assault 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 assault in the first degree (Penal Law § 120.10 [1]), arising from an incident in which he repeatedly hit the victim with what appeared to be a metal pipe. Defendant failed to preserve for our review his challenge to County Court's *Sandoval* ruling (see *People v Noonan*, 202 AD3d 1469, 1470 [4th Dept 2022], *lv denied* 38 NY3d 1009 [2022]; *People v Brown*, 159 AD3d 1415, 1416 [4th Dept 2018], *lv denied* 31 NY3d 1115 [2018]). 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]).

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 defendant's contention that the verdict is against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's contention, "the fact that the [metal pipe purportedly used] by defendant during the incident was not recovered does not render . . . the verdict against the weight of the evidence" (*People v Cohens*, 81 AD3d 1442, 1444 [4th Dept 2011], *lv denied* 16 NY3d 894 [2011]). In addition, although an acquittal would not have been unreasonable in light of certain conflicting witness testimony, based upon our independent review of the evidence, and giving "[g]reat deference . . . to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor" (*People v Massey*, 140 AD3d 1736, 1738 [4th Dept 2016], *lv denied* 28 NY3d 972

[2016] [internal quotation marks omitted]), we conclude that the jury's rejection of the justification defense is not contrary to the weight of the evidence (*see id.*; *see also People v DeCamp*, 211 AD3d 1121, 1124 [3d Dept 2022], *lv denied* 39 NY3d 1077 [2023]; *People v Cruz*, 175 AD3d 1060, 1061 [4th Dept 2019], *lv denied* 34 NY3d 1016 [2019]).

Finally, the sentence is not unduly harsh or severe.