

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

69

KA 22-01206

PRESENT: CURRAN, J.P., BANNISTER, SMITH, OGDEN, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ELMARIOUS HONEYCUTT, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLISON V. MCMAHON OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. KEANE, DISTRICT ATTORNEY, BUFFALO (JERRY MARTI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Suzanne Maxwell Barnes, J.), rendered June 13, 2022. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second 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 criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]).

Viewing the evidence in the light most favorable to the People, as we must when reviewing the legal sufficiency of the evidence (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude, contrary to defendant's contention, that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). 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 generally Bleakley*, 69 NY2d at 495).

Even assuming, *arguendo*, that the video evidence was not sufficiently authenticated and that County Court thus erred in admitting it in evidence, we conclude that "the admission of such evidence was harmless [inasmuch] as the evidence of . . . defendant's guilt was overwhelming, and there was no significant probability that the [alleged] error contributed to . . . defendant's conviction[]" (*People v Upson*, 186 AD3d 1270, 1271 [2d Dept 2020], *lv denied* 36 NY3d 1054 [2021]; *see People v Cardoza*, 218 AD3d 1291, 1293 [4th Dept 2023], *lv denied* 40 NY3d 996 [2023]; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Defendant failed to object to many of the alleged instances of prosecutorial misconduct that he raises on appeal, and thus he failed to preserve his contentions for our review with respect to those instances (see CPL 470.05 [2]). We decline to exercise our power to review those unpreserved contentions as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). Regardless, with respect to the alleged instances of prosecutorial misconduct that are preserved, we conclude that "[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Torres*, 125 AD3d 1481, 1484 [4th Dept 2015], *lv denied* 25 NY3d 1172 [2015] [internal quotation marks omitted]).

Defendant failed to preserve for our review his contention that, in sentencing him, the court penalized him for exercising his right to a trial (see *People v Mohamed*, 224 AD3d 1271, 1271-1272 [4th Dept 2024], *lv denied* 41 NY3d 984 [2024]). In any event, that contention lacks merit. "The imposition of a more severe sentence after trial than that offered to defendant pursuant to a plea offer that he rejected, without more, does not support the contention of defendant that he was penalized for exercising his right to go to trial" (*People v Taplin*, 1 AD3d 1044, 1046 [4th Dept 2003], *lv denied* 1 NY3d 635 [2004] [internal quotation marks omitted]; see *People v Tetro*, 181 AD3d 1286, 1290 [4th Dept 2020], *lv denied* 35 NY3d 1070 [2020]). Finally, defendant's sentence is not unduly harsh or severe.