

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

917

KA 10-01432

PRESENT: CENTRA, J.P., CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHARLES M. THOMAS, SR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), rendered April 21, 2010. The judgment convicted defendant, upon a jury verdict, of robbery in the third degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the third degree (Penal Law § 160.05). Contrary to defendant's contention, he is not entitled to summary reversal of the conviction based upon the People's posttrial loss of the recording of the robbery victim's 911 call that was admitted in evidence at trial (*see People v Yavru-Sakuk*, 98 NY2d 56, 59). The content of the 911 call, however, is significant to several of the contentions raised on appeal, and the information contained in the missing recording cannot otherwise be obtained from the record on appeal (*cf. People v Melendez*, 71 AD3d 530, 531, *affd* 16 NY3d 869; *Yavru-Sakuk*, 98 NY2d at 61). Inasmuch as the present record on appeal does not permit us to review those contentions, we hold the case, reserve decision and remit the matter to Supreme Court to conduct a reconstruction hearing with respect to the missing recording (*see People v Glass*, 43 NY2d 283, 286; *People v Lopez*, 176 AD2d 218, 219; *see also People v Fullen*, 118 AD3d 1297, 1298).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court