

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

373

**KA 17-00059**

PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND TROUTMAN, JJ.

---

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIAM MCCULLOUGH, DEFENDANT-APPELLANT.

---

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

---

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered June 30, 2016. The judgment convicted defendant, upon a jury verdict, of burglary 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 burglary in the second degree (Penal Law § 140.25 [2]). Contrary to defendant's contention, County Court properly denied his request to charge criminal trespass in the second degree (§ 140.15 [1]) as a lesser included offense of burglary in the second degree. We conclude that "[t]here is no reasonable view of the evidence that defendant entered the building without the intent to commit a crime therein" (*People v Carter*, 111 AD3d 1324, 1324 [4th Dept 2013], *lv denied* 22 NY3d 1155 [2014]; *see People v Rickett*, 94 NY2d 929, 930 [2000]; *People v Ferguson*, 154 AD2d 706, 707 [2d Dept 1989], *lv denied* 76 NY2d 788 [1990], *cert denied* 498 US 947 [1990]) and that "the jurors would have had 'to resort to sheer speculation' to so conclude" (*People v Clarke*, 233 AD2d 831, 832 [4th Dept 1996], *lv denied* 89 NY2d 1010 [1997], *reconsideration denied* 90 NY2d 856 [1997]; *see People v Moore*, 60 AD3d 787, 787 [2d Dept 2009], *lv denied* 12 NY3d 918 [2009]).

Contrary to defendant's further contention, we conclude that he received effective assistance of counsel inasmuch as "the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that [his] attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, contrary to defendant's additional contention, we

conclude that "[t]he prosecutor's remarks on summation were within the broad bounds of rhetorical comment permissible during summations and did not shift the burden of proof" (*People v Rivera*, 133 AD3d 1255, 1256 [4th Dept 2015], *lv denied* 27 NY3d 1154 [2016] [internal quotation marks omitted]). The challenged remarks were responsive to defense counsel's opening statement (see *People v Kennedy*, 69 AD3d 881, 883 [2d Dept 2010], *lv denied* 15 NY3d 752 [2010]; *People v Lopez*, 255 AD2d 147, 148 [1st Dept 1998], *lv denied* 92 NY2d 1034 [1998]), as well as fair comment on the evidence (see *Rivera*, 133 AD3d at 1256). Even assuming, arguendo, that the prosecutor made certain inappropriate remarks, we conclude that they were "not so pervasive or egregious as to deny defendant a fair trial" (*People v Young*, 153 AD3d 1618, 1620 [4th Dept 2017], *lv denied* 30 NY3d 1065 [2017], *reconsideration denied* 31 NY3d 1123 [2018]; see *Rivera*, 133 AD3d at 1257).

Entered: April 26, 2019

Mark W. Bennett  
Clerk of the Court