

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

**426**

**KA 18-00854**

PRESENT: PERADOTTO, J.P., DEJOSEPH, NEMOYER, AND CURRAN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MARCUS A. DUBLINO, DEFENDANT-APPELLANT.

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KATHLEEN E. CASEY, BARKER, FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Niagara County (Matthew J. Murphy, III, A.J.), rendered July 26, 2017. The judgment convicted defendant, upon a nonjury verdict, of harassment 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 nonjury verdict of harassment in the second degree (Penal Law § 240.26 [1]). As defendant correctly concedes, he failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence (see *People v Gray*, 86 NY2d 10, 19 [1995]). In any event, we reject that contention. "A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person . . . [h]e or she strikes, shoves, kicks or otherwise subjects such other person to physical contact or attempts or threatens to do the same" (§ 240.26 [1]). "The crux of section 240.26 (1) is the element of physical contact: actual, attempted or threatened" (*People v Bartkow*, 96 NY2d 770, 772 [2001]). It is well established that a "defendant may be presumed to intend the natural and probable consequences of his [or her] actions . . . , and [that] intent may be inferred from the totality of conduct of the accused" (*People v Mollaie*, 81 AD3d 1448, 1449 [4th Dept 2011] [internal quotation marks omitted]). Here, the People presented evidence that, during an argument that began when the victim discovered a text message from another woman on defendant's phone, defendant grabbed the victim by the arm, shoved her to the ground, choked her, and threatened to kill her, and that defendant repeatedly threatened to physically harm and kill the victim after the initial physical altercation. In addition, the victim's testimony and photographs established that the victim suffered bruising, scratches, and marks on her arm. Viewing the evidence in the light most

favorable to the People (see *People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to establish that defendant, acting "with intent to harass, annoy or alarm [the victim,] . . . subject[ed her] . . . to physical contact, or attempt[ed] or threaten[ed]" to do so (§ 240.26 [1]; see *Mollaie*, 81 AD3d at 1449; see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime in this nonjury trial (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 Aikey*, 153 AD3d 1603, 1603-1604 [4th Dept 2017], lv denied 30 NY3d 1058 [2017]; *Mollaie*, 81 AD3d at 1449; see generally *Bleakley*, 69 NY2d at 495).