

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

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KA 22-00395

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT SIMS, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS OF COUNSEL),
FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AERON SCHWALLIE OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Michael L. Dollinger, J.), rendered February 9, 2022. The judgment convicted defendant upon a jury verdict of grand larceny in the fourth degree and robbery 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 grand larceny in the fourth degree (Penal Law § 155.30 [5]) and robbery in the second degree (§ 160.10 [2] [b]). Defendant contends that the evidence is legally insufficient to establish that the victim perceived the "display[]" of a firearm. To establish the "display" element of the robbery statute, "[t]he People must show that the defendant consciously displayed something that could reasonably be perceived as a firearm, with the intent of forcibly taking property, and that the victim actually perceived the display" (*People v Lopez*, 73 NY2d 214, 220 [1989]; see *People v Nelson*, 177 AD3d 1258, 1259 [4th Dept 2019], lv denied 34 NY3d 1161 [2020]). "[T]he display requirement has been construed broadly to cover a wide range of actions which might reasonably create the impression in the mind of the victim that the robber is armed with a firearm" (*Lopez*, 73, NY2d at 220-221). Thus, it has been held that a hand consciously concealed in clothing may satisfy the display requirement "if under all the circumstances the defendant's conduct could reasonably lead the victim to believe that a gun is being used during the robbery" (*id.* at 220; see *People v Smith*, 29 NY3d 91, 97-99 [2017]; *People v Williams*, 100 AD3d 1444, 1445 [4th Dept 2012], lv denied 20 NY3d 1015 [2013]). 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, during the course of the robbery, "by his

actions, consciously manifest[ed] the presence of an object to the victim in such a way that the victim reasonably perceive[d] that" defendant had a firearm (*Lopez*, 73 NY2d at 222; see *People v Moody*, 278 AD2d 862, 862-863 [4th Dept 2000]; *People v Van Voorhis*, 207 AD2d 1023, 1023-1024 [4th Dept 1994], *lv denied* 84 NY2d 1016 [1994]). Furthermore, although a finding that defendant did not display a firearm would not have been unreasonable (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]), we conclude that, upon viewing the evidence in light of the elements of the crime of robbery in the second degree as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), it cannot be said that the jury failed to give the evidence the weight it should be accorded (see generally *Bleakley*, 69 NY2d at 495).

Defendant further contends that the victim's identification testimony should have been suppressed because the pretrial identification procedure was unduly suggestive. Even assuming, *arguendo*, that the identification procedure was unduly suggestive, we conclude that any error in admitting the victim's identification of defendant is harmless beyond a reasonable doubt (see *People v Howard*, 209 AD2d 1014, 1014 [4th Dept 1994], *affd* 87 NY2d 940 [1996]; *People v Owens*, 74 NY2d 677, 678 [1989]; *People v Burton*, 191 AD3d 1311, 1313-1314 [4th Dept 2021], *lv denied* 36 NY3d 1095 [2021]).