

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

724

KA 21-00898

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, GREENWOOD, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIAM COMBS, DEFENDANT-APPELLANT.

SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (STEPHANIE M. STARE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered June 2, 2021. The judgment convicted defendant upon a jury verdict of assault in the second degree and 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 assault in the second degree (Penal Law § 120.05 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [1] [b]). The conviction stems from defendant's use of a firearm to shoot his then-girlfriend in the arm during an argument over money. At trial, the victim testified that defendant was standing four to six feet away from her when he pulled the trigger, and a recording of two open-line 911 calls made by the victim during the altercation was admitted in evidence. The evidence also established that, when a police officer arrived at the scene in response to the 911 calls, defendant pointed the gun at the officer before running away. Defendant testified that the gun accidentally discharged when he attempted to take it away from the victim.

Defendant contends that Supreme Court erred in admitting in evidence the recording of the 911 calls made by the victim, for two reasons. First, defendant contends that the People failed to establish that the recording had not been altered, and thus failed to lay a proper foundation for admission of the evidence. Defendant's general objection to the admission of the 911 calls on the basis that they lacked a proper foundation was insufficient to preserve the specific contention now advanced on appeal with respect to alteration (*see People v Everson*, 100 NY2d 609, 610 [2003]; *People v Vidal*, 26 NY2d 249, 254 [1970]; *People v Howard*, 234 AD3d 1366, 1367 [4th Dept

2025], *lv denied* 43 NY3d 944 [2025]; *see generally* CPL 470.05 [2]), and we decline to exercise our power to address that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Second, during oral argument on appeal, defendant contended for the first time that the victim did not have the cell phone to her ear and thus could not verify that the recording accurately reflected what the 911 operator had said during the calls. Defendant also failed to preserve that contention for our review (*see* CPL 470.05 [2]) and, considering that it is unclear from the record whether the victim could hear the operator, whose statements in any event were not prejudicial to defendant, we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant also failed to preserve his further contention concerning the court's jury instructions (*see People v Morales*, 160 AD3d 1414, 1417-1418 [4th Dept 2018], *lv denied* 32 NY3d 939 [2018]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (CPL 470.15 [6] [a]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, *arguendo*, that a different verdict would not have been unreasonable, we cannot conclude "that the jury failed to give the evidence the weight it should be accorded" (*People v Maull*, 167 AD3d 1465, 1467 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019] [internal quotation marks omitted]; *see generally Bleakley*, 69 NY2d at 495).

Finally, we reject defendant's contention that the sentence is unduly harsh and severe.