

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

798

**KA 23-00500**

PRESENT: MONTOUR, J.P., SMITH, GREENWOOD, NOWAK, AND KEANE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TAJI S. HUNT, DEFENDANT-APPELLANT.

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ADAM AMIRALT, BUFFALO, FOR DEFENDANT-APPELLANT.

TODD C. CARVILLE, DISTRICT ATTORNEY, UTICA (MICHAEL A. LABELLA OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered November 29, 2022. The judgment convicted defendant upon a jury verdict of falsely reporting an incident in the second degree and exposure of a person.

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, *inter alia*, falsely reporting an incident in the second degree (Penal Law § 240.55 [1]). We affirm.

We reject defendant's contention that the verdict with respect to the count of falsely reporting an incident in the second degree is against the weight of the evidence. In determining whether a verdict is against the weight of the evidence, we must first determine whether, "based on all the credible evidence[,] a different finding would not have been unreasonable" and, if so, "then [we] must, like the trier of fact below, 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony' " (*People v Bleakley*, 69 NY2d 490, 495 [1987]). Here, even assuming, *arguendo*, that an acquittal would not have been unreasonable (*see People v Danielson*, 9 NY3d 342, 348 [2007]), upon acting, in effect, as a second jury by independently reviewing the evidence in light of the elements of the crime of falsely reporting an incident in the second degree as charged to the jury (*see People v Kancharla*, 23 NY3d 294, 302-303 [2014]; *People v Delamota*, 18 NY3d 107, 116-117 [2011]; *Danielson*, 9 NY3d at 348-349), we conclude that the verdict with respect to that crime is not against the weight of the evidence (*see People v DeShields*, 169 AD3d 823, 823-824 [2d Dept 2019], *lv denied* 33 NY3d 1030 [2019]; *see generally Bleakley*, 69 NY2d at 495). As County Court instructed the jury, "[a] person is guilty of falsely reporting an incident in the

second degree when, knowing the information reported, conveyed or circulated to be false or baseless, [the person] . . . [i]nitiates or circulates a false report or warning of an alleged occurrence or impending occurrence of a fire . . . under circumstances in which it is not unlikely that public alarm or inconvenience will result" (Penal Law § 240.55 [1]). The testimony, video surveillance footage, and other exhibits admitted in evidence at trial established that defendant, minutes after being released from a police station following his arrest on unrelated charges, reentered the vestibule of the police station, knocked on the locked internal door, and then went over to a pull station on the wall marked "FIRE ALARM" and activated it, thereby causing the fire alarm to sound. There were, however, no signs of any fire at the police station. Contrary to defendant's assertion, we conclude that such evidence, coupled with defendant's subsequent statement to the police apologizing "for pulling the fire alarm" while knowing "that there was not a fire" in order to express his anger toward the police for his earlier arrest, supports the inference that defendant initiated a false report or warning of an alleged occurrence or impending occurrence of a fire while knowing that the information reported was false or baseless (see § 240.55 [1]; see generally *DeShields*, 169 AD3d at 823-824). Furthermore, although firefighters dispatched to the police station were aware that they were responding to a false alarm, we conclude that "[b]y communicating the report of [a] fire in a manner that required the fire department to respond, defendant made it 'not unlikely' that public alarm or inconvenience would result" because, among other things, "requiring [an] unnecessary response to an alarm may inconvenience and indeed endanger the public[ ] by placing rapidly moving emergency vehicles on public roads and keeping firefighters from attending a genuine emergency elsewhere" (*People v Bayes*, 78 NY2d 546, 550 [1991]).

Defendant further contends that the court erred in denying his request to charge falsely reporting an incident in the third degree as a lesser included offense of falsely reporting an incident in the second degree. We reject that contention.

To establish entitlement to a charge on a lesser included offense, "a defendant must show both that the greater crime cannot be committed without having concomitantly committed the lesser by the same conduct, and that a reasonable view of the evidence supports a finding that [they] committed the lesser, but not the greater, offense" (*People v James*, 11 NY3d 886, 888 [2008]; see *People v Van Norstrand*, 85 NY2d 131, 135 [1995]; *People v Glover*, 57 NY2d 61, 63 [1982]; see also CPL 1.20 [37]; 300.50 [1]). With respect to the first prong, it is undisputed that the requested charge of falsely reporting an incident in the third degree (Penal Law § 240.50 [1]) is a lesser included offense of falsely reporting an incident in the second degree (§ 240.55 [1]) inasmuch as "it is theoretically impossible to commit the greater crime without at the same time committing the lesser" (*Glover*, 57 NY2d at 64; see generally *People v Green*, 56 NY2d 427, 430-431 [1982], *rearg denied* 57 NY2d 775 [1982]; 1 Howard G. Leventhal, *Charges to the Jury and Requests to Charge in a Criminal Case in New York* § 36:18 [Nov. 2024 Update]).

The issue whether the court erred in refusing to charge the requested lesser included offense thus turns on the second prong, i.e., " 'whether on any reasonable view of the evidence it is possible for the trier of . . . fact[ ] to acquit the defendant on the higher count and still find [them] guilty on the lesser one' " (*People v Hull*, 27 NY3d 1056, 1058 [2016] [emphasis omitted]). "In assessing whether there is a 'reasonable view of the evidence,' the proof must be looked at 'in the light most favorable to [the] defendant' " (*People v Rivera*, 23 NY3d 112, 120-121 [2014], quoting *People v Martin*, 59 NY2d 704, 705 [1983]). The "inquiry is not directed at whether persuasive evidence of guilt of the greater crime exists . . . but [instead is directed at] whether, under any reasonable view of the evidence, it is possible for the trier of fact[ ] to acquit [the] defendant on the higher count and still find [them] guilty of the lesser one" (*Van Norstrand*, 85 NY2d at 136). Under that standard, "when an instruction on a lesser-included offense would direct the jury to resort to sheer speculation, it should not be given" (*People v Butler*, 84 NY2d 627, 632 [1994], *rearg denied* 85 NY2d 858 [1995] [internal quotation marks omitted]).

Here, viewing the evidence in the light most favorable to defendant (see *Rivera*, 23 NY3d 120-121), we conclude that, although there was some generalized testimony from the firefighters that people could use a pull station to report other emergencies and that the fire department was responsible for responding to more than just fires, nothing in the record supports the view that defendant, in undertaking the particular criminal conduct in this case, falsely reported some emergency other than a fire (see generally *Glover*, 57 NY2d at 64). The record establishes that defendant activated a pull station marked "FIRE ALARM" and that he thereafter specifically apologized to the police "for pulling the fire alarm" while knowing "that there was not a fire" (emphases added) in order to express his anger toward the police, without any indication that he had sought to falsely report a non-fire emergency. As the court properly determined, in the absence of evidence that defendant falsely reported some emergency other than a fire, there is no reasonable view of the evidence that would support a finding, without "resort[ing] to sheer speculation," that defendant committed the lesser offense but not the greater (*Butler*, 84 NY2d at 632 [internal quotation marks omitted]; see *People v McNeill*, 107 AD3d 1430, 1430 [4th Dept 2013], *lv denied* 22 NY3d 957 [2013]; *People v Saunders*, 292 AD2d 780, 781 [4th Dept 2002], *lv denied* 98 NY2d 681 [2002]).

Finally, although we agree with defendant that, contrary to the People's assertion, his release to parole supervision does not render his challenge to the severity of the sentence moot because he remains under the control of the Parole Board until his sentence has terminated (see *People v Maye*, 194 AD3d 1421, 1422 [4th Dept 2021];

*People v Paul*, 139 AD3d 1383, 1384 [4th Dept 2016], *lv denied* 28 NY3d 973 [2016]), we nevertheless conclude that the sentence is not unduly harsh or severe.