

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

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KA 24-01126

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DENNIS JONES, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CASEY S. DUFFY OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DAVID D. BASSETT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Theodore H. Limpert, J.), rendered June 28, 2024. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, and a new trial is granted on counts 6 and 7 of the indictment.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of one count of criminal possession of a controlled substance (CPCS) in the third degree (Penal Law § 220.16 [1]) and one count of CPCS in the fourth degree (§ 220.09 [1]).

Defendant was tried with his codefendant and contends that County Court erred in permitting the codefendant to unilaterally exercise peremptory challenges. We agree. The court's process of allowing defendant and codefendant to each unilaterally exercise their shared peremptory challenges was in violation of CPL 270.25 former (3) and resulted in defendant and codefendant exhausting their shared peremptory challenges before all jurors were selected (see *Ruzas v Sullivan*, 1988 WL 83377, *5 [SD NY, Aug. 2, 1988, No. 85 CIV. 4801 (CBM)]; see also *People v Wilkins*, 175 AD3d 867, 868 [4th Dept 2019], *affd* 37 NY3d 371 [2021]). A court's mistaken denial of a defendant's peremptory challenge "under New York law mandates automatic reversal" (*People v Hecker*, 15 NY3d 625, 661 [2010], *cert denied* 563 US 947 [2011]; see *People v Viera*, 164 AD3d 1277, 1279 [2d Dept 2018]; *lv denied* 32 NY3d 1179 [2019], *reconsideration denied* 33 NY3d 982 [2019]; *People v Parrales*, 105 AD3d 871, 872 [2d Dept 2013]).

We further agree with defendant that reversal is required on the

additional ground that the court erred in denying his request to subpoena records regarding the latent print examiner. To obtain a third-party subpoena, a "defendant[] must proffer a good faith factual predicate sufficient for a court to draw an inference that specifically identified materials are reasonably likely to contain information that has the potential to be both relevant and exculpatory" (*People v Kozlowski*, 11 NY3d 223, 241 [2008], *rearg denied* 11 NY3d 904 [2009], *cert denied* 556 US 1282 [2009]). The subpoena request should have been granted because the additional materials sought by defendant related to the examiner's previous errors and bore on the reliability of her identification of defendant's fingerprints in this case (*cf. People v Gissendanner*, 48 NY2d 543, 550 [1979]). That error is not harmless because the proof of guilt is not overwhelming (*see People v Wildrick*, 83 AD3d 1455, 1457 [4th Dept 2011], *lv denied* 17 NY3d 803 [2011]; *see generally People v Myers*, 22 NY3d 1010, 1011 [2013]).

Contrary to defendant's contention, the court did not abuse its discretion in denying that part of defendant's motion seeking severance of his trial from that of the codefendant. The defenses of defendant and codefendant were not in irreconcilable conflict, nor was there a significant danger that any alleged conflict led the jury to infer either defendant's guilt (*see People v Isaac*, 195 AD3d 1410, 1411 [4th Dept 2021], *lv denied* 37 NY3d 992 [2021]). We also conclude that the court "properly refused to suppress the physical evidence" (*People v Davis*, 199 AD3d 1331, 1332 [4th Dept 2021], *lv denied* 38 NY3d 926 [2022]).

To the extent that defendant preserved for our review his contention that the conviction is not supported by legally sufficient evidence of possession, we conclude that it lacks merit (*see People v Chourb*, 232 AD3d 1272, 1273 [4th Dept 2024], *lv denied* 42 NY3d 1079 [2025]; *People v Tulloch*, 83 AD3d 1558, 1559 [4th Dept 2011], *lv denied* 17 NY3d 802 [2011]). Although defendant failed to preserve any further challenge to the legal sufficiency of the evidence (*see generally People v Gray*, 86 NY2d 10, 19 [1995]), we necessarily review the evidence adduced as to each of the elements of the crimes in the context of his contention that the verdict is against the weight of the evidence (*see People v Exford*, 234 AD3d 1252, 1253 [4th Dept 2025]). 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 conclude that, although a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

In light of our determination, we do not address defendant's remaining contention.