

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

**141**

**KA 25-00087**

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, SMITH, AND DELCONTE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASON MITCHELL, DEFENDANT-APPELLANT.

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THE LAW OFFICES OF MATTHEW ALBERT, DARIEN CENTER (MATTHEW ALBERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. KEANE, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered September 3, 2024. The judgment convicted defendant upon a jury verdict of burglary in the first degree (two counts), criminal contempt in the first degree (two counts), criminal contempt in the second degree (three counts) and endangering the welfare of a child (three counts).

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, two counts of burglary in the first degree (Penal Law § 140.30 [2], [3]), arising out of an incident in which defendant, in violation of a stay-away order of protection, cut off the power to his wife's residence, broke into the residence using a sledgehammer and, during the course of the break-in, caused his wife to sustain physical injury. We affirm.

Defendant contends that he was deprived of a fair trial because Supreme Court made a predetermination concerning defendant's guilt, which purportedly tainted subsequent evidentiary determinations with respect to the trial. Defendant's contention that he was denied a fair trial by the court's alleged misconduct is unpreserved for our review (see *People v Tohafijian*, 216 AD3d 1410, 1413 [4th Dept 2023], lv denied 40 NY3d 937 [2023]; *People v Price*, 129 AD3d 1484, 1484 [4th Dept 2015], lv denied 26 NY3d 970 [2015]; see generally CPL 470.05 [2]). 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]).

Although defendant preserved his specific challenges to the court's evidentiary rulings (see generally CPL 470.05 [2]), we

conclude that none of those challenges warrants modification or reversal of the judgment. Contrary to defendant's contention, the court did not abuse its discretion in precluding defendant from cross-examining his wife about an alleged extramarital affair inasmuch as defendant's proposed cross-examination of his wife on that topic "was too speculative to establish a motive for fabrication" (*People v Poole*, 55 AD3d 1349, 1350 [4th Dept 2008], *lv denied* 11 NY3d 929 [2009]; see *People v Hamm*, 96 AD3d 1482, 1483 [4th Dept 2012], *affd* 21 NY3d 708 [2013]; see generally *People v Carroll*, 95 NY2d 375, 385 [2000]). Similarly, we conclude that the court did not abuse its discretion in precluding defendant from offering evidence about his military training and experience for purposes of establishing that, during the alleged burglary, he could have harmed the occupants of his wife's house had he really wanted to do so; that evidence was irrelevant (see generally *Carroll*, 95 NY2d at 385). We further conclude that any error in limiting defendant's use of that evidence was harmless (see generally *People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Defendant further contends that the court erred in precluding him from cross-examining one of the People's witnesses about a prior inconsistent statement. Even assuming, arguendo, that the court erred in limiting defendant's cross-examination of that witness (see *People v Bishop*, 206 AD2d 884, 885 [4th Dept 1994], *lv denied* 84 NY2d 933 [1994]; see generally *People v Savage*, 50 NY2d 673, 679 [1980], *cert denied* 449 US 1016 [1980]), we conclude that any such error was harmless inasmuch as "the evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant otherwise would have been acquitted" (*People v Robinson*, 111 AD3d 1358, 1359 [4th Dept 2013], *lv denied* 22 NY3d 1141 [2014] [internal quotation marks omitted]; see generally *Crimmins*, 36 NY2d at 241-242).

We reject defendant's contention that the court erred in precluding him from presenting a psychiatric defense at trial. Defendant did not move for permission to file a late notice of his intent to introduce psychiatric evidence until about a week before trial, which—as defendant correctly concedes—was well after the 30-day statutory deadline for filing a notice of intention to present such evidence (see CPL 250.10 [2]). We conclude that the court did not abuse its discretion in denying defendant's request based on its determination that defendant failed to show good cause to allow the late filing (see *id.*; *People v Sidbury*, 42 NY3d 497, 507 [2024]; *People v Silburn*, 31 NY3d 144, 160 [2018]; *People v Berk*, 88 NY2d 257, 265-266 [1996], *cert denied* 519 US 859 [1996]). In making its determination, the court properly balanced the prejudice to the People against defendant's constitutional right to present a defense (see *Sidbury*, 42 NY3d at 508; *Berk*, 88 NY2d at 266), particularly in light of the prejudice that the People would have sustained given that the matter was to proceed to trial within a week. Indeed, we note that defendant had several years in which to serve a CPL 250.10 notice, yet failed to do so until the eve of trial. Moreover, inasmuch as defendant was initially evaluated by several mental health providers who determined that he was competent to stand trial, it cannot be said

that the People were aware that defendant's mental health would be an issue in this case (*cf. People v Gracius*, 6 AD3d 222, 225 [1st Dept 2004], *lv denied* 2 NY3d 800 [2004]). We further note that, although the court did not permit defendant to introduce psychiatric evidence, it did allow him, in presenting his defense, to testify about his feelings on the date of the underlying offenses and to explain his conduct.

Defendant further contends that the court erred in denying his request to charge criminal trespass in the second degree as a lesser included offense of burglary in the first 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 [the defendant] 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]). Although there is no dispute that criminal trespass in the second degree (Penal Law § 140.15 [1]) is a lesser included offense of burglary in the first degree (§ 140.30) (*see People v Logan*, 198 AD2d 439, 440 [2d Dept 1993]; *see also People v Lugo*, 87 AD3d 1403, 1404 [4th Dept 2011], *lv denied* 18 NY3d 860 [2011]; *see generally People v Green*, 56 NY2d 427, 430-431 [1982], *rearg denied* 57 NY2d 775 [1982]), the court properly refused to charge the requested lesser included offense inasmuch as no reasonable view of the evidence would support a finding that defendant committed the lesser but not the greater offense.

"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 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 [the defendant] guilty of the lesser one" (*Van Norstrand*, 85 NY2d at 136; *see People v Hull*, 27 NY3d 1056, 1058 [2016]). 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 at trial in the light most favorable to defendant (*see Rivera*, 23 NY3d 120-121), we conclude that there is no reasonable view of the evidence that defendant had a noncriminal purpose when he entered his wife's residence inasmuch as he had just jumped the fence to the residence's backyard, cut the power to the residence, and used a sledgehammer to repeatedly pound on the residence's steel door until it caved in, allowing him to enter (*see People v Haynes*, 177 AD3d 1194, 1198 [3d Dept 2019], *lv denied* 34 NY3d 1128 [2020]; *People v Sterina*, 108 AD3d 1088, 1089 [4th Dept 2013];

*cf. Logan*, 198 AD2d at 440). Further, to the extent defendant asserts that his lack of criminal purpose in entering the residence was demonstrated by evidence that, upon entering, he essentially surrendered and did not try to force his way further into the home, we note the undisputed evidence that defendant stopped only because his father-in-law hit him on the head with a pipe and because he knew the police were on their way. In other words, there is no reasonable view of the evidence that, in this case, defendant "entered the [dwelling] unlawfully but for an innocent purpose" and, to the extent that he committed any crime inside, that he "developed the intent to commit a crime therein [only] after his entry" (*People v Lynch*, 191 AD3d 1476, 1477 [4th Dept 2021], *lv denied* 37 NY3d 958 [2021] [internal quotation marks omitted]; see *People v Mercado*, 294 AD2d 805, 805 [4th Dept 2002], *lv denied* 98 NY2d 731 [2002]).

Finally, the sentence is not unduly harsh or severe.