

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

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KA 23-00046

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIAM HEFFERNAN, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCCHILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ELISABETH DANNAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered August 17, 2020. The judgment convicted defendant upon a nonjury verdict of assault in the second degree, criminal possession of a weapon in the third degree (two counts), unlawful imprisonment in the first degree, criminal obstruction of breathing or blood circulation and resisting arrest.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of two counts of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]), and one count each of assault in the second degree (§ 120.05 [12]), unlawful imprisonment in the first degree (§ 135.10), criminal obstruction of breathing or blood circulation (§ 121.11) and resisting arrest (§ 205.30). The conviction arises out of an incident in which defendant allegedly, inter alia, pushed and kicked the victim down a staircase in her home, dragged her to defendant's basement apartment, threatened her with a knife, choked her, tied her up, and beat her with a chair.

We reject defendant's contention that County Court erred when it denied his motion pursuant to CPL 245.30 (2) seeking access to the premises to inspect and photograph the stairs. Upon a motion pursuant to CPL 245.30 (2), the "court may deny access to the premises when the probative value of access to such location has been or will be preserved by specified alternative means." Here, we conclude that the condition of the stairs was sufficiently preserved by alternative means, including crime scene photographs and body camera footage recorded by officers when they arrived at the crime scene.

Defendant contends that his conviction is not supported by legally sufficient evidence. Defendant failed to preserve that contention for our review with respect to the crime of resisting arrest (see *People v Gray*, 86 NY2d 10, 19 [1995]), and we reject defendant's contention with respect to the remaining crimes (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). With respect to the crime of assault in the second degree under Penal Law § 120.05 (12), a person is guilty of that offense when, "with intent to cause physical injury to a person who is [65] years of age or older, [they] cause[] such injury, and [are] more than [10] years younger than such person." Here, the People presented evidence that the 66-year-old defendant struck the 82-year-old victim, bound her wrists and ankles with wires, and pressed very hard between her jawbone and her neck and throat, which caused the victim to suffer physical injuries including bruising, a subdural hematoma, and a small nose fracture.

With respect to the two counts of criminal possession of a weapon in the third degree, a person is guilty of that offense when, as relevant here, they "possess[] any dagger, dangerous knife . . . or any other dangerous or deadly instrument or weapon with intent to use the same unlawfully against another" (Penal Law § 265.01 [2]) and that person has been previously convicted of any crime (§ 265.02 [1]). The element of possession may be satisfied by eyewitness testimony that defendant possessed the weapon (see *People v Miller*, 137 AD3d 1712, 1712-1713 [4th Dept 2016], *lv denied* 27 NY3d 1153 [2016]), and intent can "be established by defendant's conduct and the circumstances" (*People v Gordon*, 23 NY3d 643, 650 [2014]). Here, the People presented testimony and photographs demonstrating that defendant used a knife to threaten the victim.

With respect to unlawful imprisonment in the first degree, a person is guilty of that offense when they restrain another person under circumstances which expose the latter to a risk of serious physical injury (see Penal Law § 135.10). Here, the People presented evidence that defendant bound and restrained the victim with wires, which prevented her from leaving the basement and, given the 82-year-old victim's physical condition, exposed her to a risk of serious physical injury (see *People v Parham*, 156 AD2d 946, 946 [4th Dept 1989]). With respect to criminal obstruction of breathing or blood circulation, a person is guilty of that offense when, with intent to impede the normal breathing or blood circulation of another person, they: (a) apply pressure on the throat or neck of such person; or (b) block the nose or mouth of such person (see § 121.11). The People presented evidence establishing that defendant used his hand to cover the victim's face and pressed very hard against the victim's throat, which caused the victim to choke.

Thus, to the extent that defendant preserved his challenge to the sufficiency of the evidence, viewing the evidence in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that "there is a valid line of reasoning and permissible inferences from which a rational [factfinder] could have found the elements of [those] crime[s] proved beyond a reasonable

doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]). Moreover, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see id.*), we conclude that the verdict is not against the weight of the evidence with respect to all of the crimes of which defendant was convicted (*see generally Bleakley*, 69 NY2d at 495). "In a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented are entitled to great deference" (*People v O'Neill*, 169 AD3d 1515, 1515 [4th Dept 2019] [internal quotation marks omitted]). While the police body camera footage showing many items present on the staircase contradicts the victim's account of the events on the staircase, the victim's testimony with respect to the assault in defendant's apartment was not "so inconsistent or unbelievable as to render it incredible as a matter of law" (*People v Black*, 38 AD3d 1283, 1285 [4th Dept 2007], *lv denied* 8 NY3d 982 [2007]), and we see no basis for disturbing the court's credibility determinations regarding that testimony.

Finally, the sentence is not unduly harsh or severe.