

160 A.D.3d 1406

Supreme Court,

Appellate Division, Fourth Department, New York.

The PEOPLE of the State of New York, Respondent,

v.

Shawn T. GRANT, Defendant–

Appellant. (Appeal No. 1.)

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KA 10–01822

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Entered: April 27, 2018

Appeal from a judgment of the Supreme Court, Monroe County ([Francis A. Affronti](#), J.), rendered July 20, 2010. The judgment **convicted** defendant, upon a jury verdict, of arson in the first degree and arson in the second degree.

#### Attorneys and Law Firms

[TIMOTHY P. DONAHER](#), PUBLIC DEFENDER, ROCHESTER ([KIMBERLY F. DUGUAY](#) OF COUNSEL), FOR DEFENDANT–APPELLANT.

[SANDRA DOORLEY](#), DISTRICT ATTORNEY, ROCHESTER ([NANCY GILLIGAN](#) OF COUNSEL), FOR RESPONDENT.

PRESENT: [CENTRA](#), J.P., [CARNI](#), [NEMOYER](#), [CURRAN](#), AND [WINSLOW](#), JJ.

#### MEMORANDUM AND ORDER

Memorandum:

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In appeal No. 1, defendant appeals from a judgment **convicting** him upon a jury verdict of arson in the first degree ([Penal Law § 150.20\[1\]](#)) and arson in the second degree (§ 150.15). In appeal No. 2, defendant appeals from an order denying his pro se motion seeking to vacate the judgment in appeal No. 1 pursuant to [CPL 440.10](#) and, in appeal No. 3, defendant appeals from an order denying a similar motion pursuant to [CPL 440.10](#) made by defense counsel. We note at the outset that we dismiss the appeal from the order in appeal No. 2 because defendant raises no contentions with respect thereto (*see* [People v. Scholz](#),

[125 A.D.3d 1492](#), [1492](#), [3 N.Y.S.3d 860](#) [4th Dept. 2015], *lv denied* [25 N.Y.3d 1077](#), [12 N.Y.S.3d 628](#), [34 N.E.3d 379](#) [2015]).

With respect to appeal No. 1, defendant failed to preserve for our review his contention that he was denied a fair trial as a result of prosecutorial misconduct (*see* [People v. Balenger](#), [70 A.D.3d 1318](#), [1318](#), [895 N.Y.S.2d 623](#) [4th Dept. 2010], *lv denied* [14 N.Y.3d 885](#), [903 N.Y.S.2d 773](#), [929 N.E.2d 1008](#) [2010]). In any event, that contention lacks merit inasmuch as any improper comments made by the prosecutor on summation were isolated and not so egregious that defendant was deprived of a fair trial (*see generally* [People v. Romero](#), [7 N.Y.3d 911](#), [912](#), [828 N.Y.S.2d 274](#), [861 N.E.2d 89](#) [2006]). Contrary to defendant's further contention, “neither defense counsel's failure to object to the alleged instances of prosecutorial misconduct nor any of defense counsel's other alleged shortcomings constituted ineffective assistance of counsel” ([Balenger](#), [70 A.D.3d at 1318](#), [895 N.Y.S.2d 623](#)). Rather, “‘the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation’ ” ([People v. Benevento](#), [91 N.Y.2d 708](#), [712](#), [674 N.Y.S.2d 629](#), [697 N.E.2d 584](#) [1998]). Defendant further contends that Supreme Court erred in permitting, over his objection, the presence of uniformed firefighters in the courtroom on the first day of trial. Inasmuch as the record fails to establish the number of uniformed firefighters present on that day, there is no basis for us to conclude that defendant was denied his right to a fair trial by the court's ruling or that the court abused its discretion in determining that no curative action was warranted (*see generally* [People v. Nguyen](#), [156 A.D.3d 1461](#), [1462](#) [4th Dept. 2017]). We reject defendant's contention that the sentence is unduly harsh and severe. We have considered defendant's remaining contentions in appeal No. 1 and conclude that none warrants **reversal** or modification of the judgment.

With respect to appeal No. 3, defendant contends that the court erred in summarily denying that part of his [CPL 440.10](#) motion to vacate the judgment insofar as he was **convicted** of arson in the second degree. We agree. The motion was based on the affidavit of a prosecution witness who recanted her trial testimony that defendant admitted to her that he started a certain house fire. That testimony formed the basis for defendant's **conviction** of arson in the

second degree. Notably, the witness averred that, “Before the trial[,] the police investigator told me if I testified on [defendant's] behalf they would take my daughter away. I am still concerned about this.” The People did not submit an opposing affidavit from any of the police officers involved in the case. The court denied the motion without a hearing upon finding that the witness's recantation was unreliable.

\*2 We conclude based on the totality of the circumstances that the court erred in denying that part of the motion with respect to the conviction of arson in the second degree without first holding a hearing (*see People v. Jenkins*, 84 A.D.3d 1403, 1407, 923 N.Y.S.2d 706 [2d Dept. 2011], *lv denied* 19 N.Y.3d 1026, 953 N.Y.S.2d 560, 978 N.E.2d 112 [2012]; *see generally People v. Martinez*, 126 A.D.3d 1350, 1351, 5 N.Y.S.3d 645 [4th Dept. 2015]). The witness's “trial testimony, if false, was extremely prejudicial to defendant inasmuch as, without that testimony, there would have been no basis for the jury

to convict defendant” for setting the fire at issue in the arson in the second degree count (*Martinez*, 126 A.D.3d at 1351, 5 N.Y.S.3d 645; *see generally People v. Lane*, 100 A.D.3d 1540, 1541, 954 N.Y.S.2d 363 [4th Dept. 2012], *lv denied* 20 N.Y.3d 1063, 962 N.Y.S.2d 613, 985 N.E.2d 923 [2013]). We therefore reverse the order in appeal No. 3 insofar as appealed from, vacate that part of the order denying the motion with respect to the conviction of arson in the second degree and remit the matter to Supreme Court to conduct a hearing pursuant to CPL 440.30(5) on that part of the motion.

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

#### All Citations

--- N.Y.S.3d ----, 160 A.D.3d 1406, 2018 WL 1994772, 2018 N.Y. Slip Op. 02951