

163 A.D.3d 1168
 Supreme Court, Appellate Division,
 Third Department, New York.

The PEOPLE of the State of New York, Respondent,

v.

Henzlee MIRANDA, Appellant.

108192

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 Calendar Date: June 7, 2018

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 Decided and Entered: July 12, 2018

Synopsis

Background: Defendant was convicted, following a jury trial in the County Court, Schenectady County, [Sypniewski, J.](#), of two counts of second-degree **assault** and tampering with physical evidence. He appealed.

[Holding:] The Supreme Court, Appellate Division, [McCarthy, J.](#), held that weight of the evidence supported finding that defendant acted recklessly, supporting conviction for second-degree **assault**.

Affirmed.

West Headnotes (5)

[1] Criminal Law

🔑 Renewal of motion

Defendant failed, in prosecution for two counts of second-degree **assault** and tampering with physical evidence, to preserve for appellate review his challenge to sufficiency of the evidence, where he failed, at close of all proof, to renew his motion for a trial order of dismissal.

[Cases that cite this headnote](#)

[2] Criminal Law

🔑 Weight and sufficiency of evidence

Appellate Division, in reviewing defendant's argument that the verdict was against weight of the evidence, had to ensure that the People established each of the elements of the crimes of which defendant was convicted.

[Cases that cite this headnote](#)

[3] Criminal Law

🔑 Particular offenses

Criminal Law

🔑 Conclusiveness of Verdict

To address defendant's weight of the evidence argument, in prosecution for two counts of second-degree **assault** and tampering with physical evidence, where an acquittal would not have been unreasonable, Appellate Division was required to view the evidence in a neutral light, give deference to jury's credibility determinations, and weigh the relative strength of conflicting testimony and inferences that might be drawn from that testimony.

[Cases that cite this headnote](#)

[4] Criminal Law

🔑 Error Waived in Appellate Court

By failing on appeal to raise any argument regarding his conviction of tampering with physical evidence, defendant abandoned any challenge to that conviction.

[Cases that cite this headnote](#)

[5] Assault and Battery

🔑 Dangerous or deadly weapons in general

Although the evidence could have supported a finding that defendant acted intentionally, weight of the evidence supported finding that he acted recklessly, supporting conviction for second-degree **assault**; defendant testified that he had a knife because he was scared that the victims were going to attack him and he wanted to scare them, not injure them, and that he swung the knife at them when they were very close to him, though he did not remember whether he

used a slashing or stabbing motion, and medical personnel testified that the victims had puncture or stab wounds, but that they also had more superficial wounds consistent with a slashing motion. [N.Y. Penal Law §§ 15.05\(3\), 120.05\(4\)](#).

[Cases that cite this headnote](#)

Attorneys and Law Firms

Brian M. Callahan, Albany, for appellant.

[Robert M. Carney](#), District Attorney, Schenectady ([Tracey A. Brunecz](#) of counsel), for respondent.

Before: [Garry](#), P.J., [McCarthy](#), [Lynch](#), [Devine](#) and [Mulvey](#), JJ.

MEMORANDUM AND ORDER

[McCarthy](#), J.

*1 Appeal from a judgment of the County Court of Schenectady County (Sypniewski, J.), rendered December 15, 2015, upon a verdict convicting defendant of the crimes of **assault** in the second degree (two counts) and tampering with physical evidence.

Defendant was charged in a five-count indictment with the crimes of **assault** in the first degree (two counts), **assault** in the second degree (two counts) and tampering with physical evidence. These charges arose out of an incident in which defendant stabbed two victims during a fight, causing them serious physical injuries. After a jury trial, defendant was convicted of two counts of **assault** in the second degree and one count of tampering with physical evidence. Defendant appeals.

[1] [2] [3] [4] Initially, because defendant failed, at the close of all proof, to renew his motion for a trial order of dismissal, he has not preserved for our review his challenge to the legal sufficiency of the evidence (*see* [People v. Hines](#), 97 N.Y.2d 56, 61, 736 N.Y.S.2d 643, 762 N.E.2d 329 [2001]). Nevertheless, in reviewing defendant's argument that the verdict is against the weight of the evidence, we necessarily must ensure that the People established each of the elements of the crimes of which defendant was convicted (*see* [People v. Green](#), 141 A.D.3d 1036,

1037, 36 N.Y.S.3d 312 [2016], *lv denied* 28 N.Y.3d 1072, 47 N.Y.S.3d 231, 69 N.E.3d 1027 [2016]).¹ To address defendant's weight of the evidence argument, where an acquittal would not have been unreasonable, we must view the evidence in a neutral light, give deference to the jury's credibility determinations and weigh the relative strength of conflicting testimony and inferences that may be drawn from that testimony (*see* [People v. Bleakley](#), 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672 [1987]; [People v. Gagnier](#), 146 A.D.3d 1019, 1020, 46 N.Y.S.3d 672 [2017], *lv denied* 29 N.Y.3d 1079, 64 N.Y.S.3d 169, 86 N.E.3d 256 [2017]).

As relevant here, “[a] person is guilty of **assault** in the second degree when ... [h]e [or she] recklessly causes serious physical injury to another person by means of ... a dangerous instrument” ([Penal Law § 120.05\[4\]](#)). “A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he [or she] is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation” ([Penal Law § 15.05\[3\]](#)).

[5] The pertinent facts are not in dispute. Defendant essentially concedes that the two victims suffered serious physical injuries as a result of him stabbing them with a knife. The only element truly at issue is his state of mind, that is, whether he acted recklessly. The record contains evidence that supports the jury's finding that defendant acted recklessly. Defendant testified that he had the knife because he was scared that the victims were going to attack him and he wanted to scare them, not injure them. He also testified that he swung the knife at them when they were very close to him, though he did not remember whether he used a slashing or stabbing motion. Medical personnel testified that the victims had puncture or stab **wounds**, but they also had more superficial **wounds** consistent with a slashing motion. Although the evidence could have supported a finding that defendant acted intentionally, record evidence also supports a finding that, by swinging the knife in close proximity to the victims, defendant was aware of and consciously disregarded a substantial and unjustifiable risk that he would seriously injure someone (*see* [Penal Law § 15.05\[3\]](#); [People v. Burnett](#), 100 A.D.3d 1561, 1562, 954 N.Y.S.2d 391 [2012]). Accordingly, the

weight of the evidence supports his convictions of **assault** in the second degree.

Garry, P.J., Lynch, Devine and Mulvey, JJ., concur.

*2 ORDERED that the judgment is affirmed.

All Citations

--- N.Y.S.3d ----, 163 A.D.3d 1168, 2018 WL 3384163, 2018 N.Y. Slip Op. 05229

Footnotes

- 1 Because defendant does not raise any argument regarding his conviction of tampering with physical evidence, he has abandoned any challenge to that conviction.