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

1039

KA 05-00257

PRESENT: MARTOCHE, J.P., CARNI, GREEN, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LATEIK MITCHELL, DEFENDANT-APPELLANT.

KRISTIN SPLAIN, CONFLICT DEFENDER, ROCHESTER (KIMBERLY J. CZAPRANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

LATEIK MITCHELL, DEFENDANT-APPELLANT PRO SE.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered January 14, 2005. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (four counts), criminal possession of a weapon in the third degree (ten counts), reckless endangerment and unlawful wearing of a body vest.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the sentences imposed on counts 1 through 4 of the indictment shall run concurrently with respect to each other, that the sentence imposed on count 9 of the indictment shall run concurrently with the sentences imposed on counts 1 through 4 of the indictment, that the sentence imposed on count 11 of the indictment shall run concurrently with the sentences imposed on counts 1 through 4 and count 9 of the indictment, and that the sentence imposed on count 16 of the indictment shall run concurrently with the sentences imposed on counts 1 through 4 and counts 9 and 11 of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of, inter alia, four counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [former (2)]). Defendant failed to preserve for our review his contention that meaningful appellate review of his *Batson* challenge is foreclosed by the failure to make a stenographic record of the bench conferences during which peremptory challenges were discussed (*see* CPL 470.05 [2]). In any event, the record belies that contention inasmuch as the voir dire of prospective jurors was in fact transcribed, and a record of the *Batson* challenge by defendant was made at his request, thus

allowing meaningful appellate review of that challenge. Indeed, we do not review the propriety of County Court's denial of defendant's *Batson* challenge because defendant does not raise any such issue on appeal.

We reject defendant's further contention that the court erred in failing to charge criminal possession of a weapon in the fourth degree as a lesser included offense of the charges of criminal possession of a weapon in the second degree. Under the facts of this case, there is no reasonable view of the evidence that would support a finding, without "resort[ing] to sheer speculation," that defendant committed the lesser offense but not the greater offense (*People v Butler*, 84 NY2d 627, 632 [internal quotation marks omitted]; *see People v Johnson*, 24 AD3d 958, *lv denied* 6 NY3d 814; *cf. People v Pulley*, 302 AD2d 899, *lv denied* 100 NY2d 565; *see generally People v Glover*, 57 NY2d 61, 63).

We agree with defendant, however, that the court erred in directing that the sentences imposed for criminal possession of a weapon in the second degree under counts 1 through 4 of the indictment shall run consecutively with respect to each other, that the sentence imposed for criminal possession of a weapon in the third degree under count 9 shall run consecutively with the sentences imposed on counts 1 through 4, that the sentence imposed for criminal possession of a weapon in the third degree under count 11 shall run consecutively with the sentences imposed on counts 1 through 4 and count 9, and that the sentence imposed for unlawful wearing of a body vest (Penal Law § 270.20 [1]) under count 16 shall run consecutively with the sentences imposed on counts 1 through 4 and counts 9 and 11. We therefore modify the judgment accordingly. The evidence at trial established only that defendant constructively possessed the firearms with respect to the criminal possession of a weapon counts of which he was convicted, and thus the People proved only a single actus reus (*see People v Laureano*, 87 NY2d 640, 643; *People v Hunt*, 52 AD3d 1312, *lv denied* 11 NY3d 737; *People v Rogers*, 111 AD2d 665, *lv denied* 66 NY2d 614, 617). Further, the actus reus of the counts of criminal possession of a weapon is a material element of the offense of unlawful wearing of a body vest (*see generally Laureano*, 87 NY2d at 643). Thus, that sentence must also run concurrently with the sentences imposed on the criminal possession of a weapon counts. We have reviewed the remaining contentions of defendant, including those raised in his pro se supplemental brief, and conclude that they are without merit.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court