State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 12, 2012 103486

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
v MEMORANDUM AND ORDER

CARL D. STROUD,
Appellant.

Calendar Date: November 22, 2011

Before: Mercure, Acting P.J., Peters, Rose, Lahtinen and Garry, JJ.

Craig Meyerson, Latham, for appellant.

Gerald F. Mollen, District Attorney, Binghamton (Brian Leeds of counsel), for respondent.

Mercure, Acting P.J.

Appeal from a judgment of the County Court of Broome County (Cawley, J.), rendered December 14, 2009, upon a verdict convicting defendant of the crimes of criminal possession of a weapon in the third degree and menacing in the first degree (two counts).

Defendant became embroiled in a violent encounter with Bonnie Rivenburg and Ernest Rivenburg, a married couple, who were moving his former girlfriend out of the apartment she shared with him. Defendant attacked Ernest Rivenburg in the front yard of the building and, in the ensuing fight, brandished a knife and threatened to "gut [him] right where [he] stood." After the two men separated, defendant approached Bonnie Rivenburg, waving the

knife in a threatening manner as he did so. When she was unimpressed by the display, defendant went inside the building and then re-emerged with a handgun, which he pointed at her head. The police had been called by that time, however, and defendant fled when he heard the approaching sirens.

Defendant was thereafter apprehended and charged in a five-count indictment with various offenses. Following a jury trial, he was convicted of criminal possession of a weapon in the third degree and two counts of menacing in the first degree. County Court imposed an aggregate prison sentence of 4½ to 9 years, and defendant appeals.

We affirm. Defendant initially argues that the evidence was insufficient to support his conviction upon the menacing count based upon his display of the knife to Bonnie Rivenburg. He failed to make a factually specific motion to dismiss that count of the indictment at trial and, thus, his challenge to the legal sufficiency of the evidence presented is unpreserved (see People v Danford, 88 AD3d 1064, 1065 [2011]). Moreover, reversal in the interest of justice is not required inasmuch as, contrary to defendant's contention, the People were not required to show that he actually instilled a reasonable fear of physical injury in Bonnie Rivenburg; rather, an intentional attempt to do so would suffice (see Penal Law §§ 120.13, 120.14 [1]). In that regard, she testified that defendant "came at" her with a "crazed" expression and made cutting gestures with the knife, and the jury could readily determine that defendant intentionally attempted to place her in reasonable fear of physical injury by doing so (see People v Bryant, 13 AD3d 1170, 1171 [2004], lv denied 4 NY3d 884 [2005]; People v Baum, 143 AD2d 1024, 1024 [1988], lv denied 73 NY2d 919 [1989]).

Defendant next contends that counsel was ineffective in failing to timely argue that the jury's verdict convicting him of criminal possession of a weapon in the third degree while acquitting him of attempted assault in the first degree was repugnant. A defendant will not be permitted to second-guess a legitimate trial strategy, however, and counsel's failure to raise the issue prior to the jury's discharge may well have been motivated by concern that resubmitting the matter to the jury

would result in guilty verdicts being returned on both counts (see People v Bartlett, 89 AD3d 1453, ___, 933 NYS2d 145, 147 [2011]; People v Perry, 27 AD3d 952, 953 [2006], lv denied 8 NY3d 883 [2007]). In any event, "no inconsistency [exists] between acquittal on assault charges and conviction for weapons possession," given the differing results that must be intended to commit those crimes (People v Rust, 233 AD2d 778, 779-780 [1996], lv denied 89 NY2d 988 [1997]; see People v Hart, 266 AD2d 584, 585 [1999], lv denied 94 NY2d 903 [2000]; see also People v Baker, 14 NY3d 266, 270-272 [2010]; People v Carter, 7 NY3d 875, 876-877 [2006]).

As a final matter, defendant's menacing convictions arose from acts separate and distinct from those underlying his weapons possession conviction, and County Court was thus free to impose consecutive sentences thereon (see People v McKnight, 16 NY3d 43, 48 [2010]; People v Rouse, 4 AD3d 553, 557 [2004], lv denied 2 NY3d 805 [2004]).

Peters, Rose, Lahtinen and Garry, JJ., concur.

ORDERED that the judgment is affirmed.

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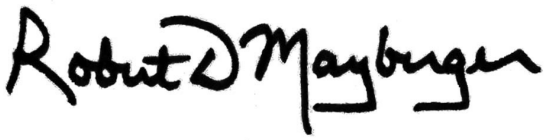

Robert D. Mayberger
Clerk of the Court