

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

Decided and Entered: May 16, 2024

112199

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THE PEOPLE OF THE STATE OF  
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

ROMMIE BANKS,

Appellant.

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Calendar Date: March 25, 2024

Before: Egan Jr., J.P., Lynch, Reynolds Fitzgerald, Ceresia and Powers, JJ.

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*Adam G. Parisi*, Schenectady, for appellant.

*Andrew J. Wylie*, District Attorney, Plattsburgh (*Jaime A. Douthat* of counsel), for respondent.

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Egan Jr., J.P.

Appeal from a judgment of the County Court of Clinton County (Timothy J. Lawliss, J.), rendered August 14, 2019, upon a verdict convicting defendant of the crimes of promoting prison contraband in the first degree and criminal possession of a weapon in the third degree.

On February 21, 2018, correction officers responded to a fight involving multiple incarcerated individuals in the north yard of the Clinton Correctional Facility. Defendant was one of those individuals and, per facility procedure, he was placed in mechanical restraints and escorted to the prison hospital. Correction officers conducted a strip frisk of defendant at the hospital and, during the frisk, a "golf ball size chunk of toilet paper" that

had been located between his buttocks fell onto the floor. One of the officers took control of the toilet paper and, upon examination, found that it contained "a cutting-type weapon in a sheath" that resembled a scalpel with a very short handle.

As a result of the incident, an indictment was handed up in August 2018 charging defendant with promoting prison contraband in the first degree (*see* Penal Law § 205.25 [2]) and criminal possession of a weapon in the third degree (*see* Penal Law § 265.02 [1]). The matter proceeded to a trial where, prior to jury selection, defendant admitted to a special information alleging that he had previously been convicted of an offense and was confined at a detention facility at the time of the charged offenses (*see* CPL 200.60). No reference was therefore made at trial to the fact that defendant had "been previously convicted of any crime" as required to commit criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]; *see* CPL 200.60 [3] [a]). At the trial's conclusion, the jury found defendant guilty as charged. County Court sentenced defendant, as a second felony offender, to 3½ to 7 years in prison on both counts and directed that those sentences run concurrently to each other and consecutively to the sentence he was already serving. Defendant appeals.

We affirm. Defendant first argues that the verdict is against the weight of the evidence. In that regard, the trial evidence included the testimony of two correction officers who described in detail how they responded to the fight in the prison yard, how they transported defendant to the prison hospital in restraints, and how the scalpel was recovered as a result of the strip frisk. Defendant further stipulated at trial that the item was a "scalpel" and dangerous contraband. Nevertheless, defendant now argues that the weight of the evidence does not support the findings that he possessed the scalpel in a "detention facility" for purposes of the promoting prison contraband conviction (Penal Law § 205.25 [2]) and that it was a "dangerous . . . instrument" as required to support the weapon possession conviction (Penal Law §§ 265.01 [2]; 265.02 [1]). With regard to the first contention, it was "deemed established" that defendant had previously committed an offense as a result of his admission to the special information (CPL 200.60 [3] [a]), and the testimony of the two correction officers detailing "the incident underlying the charges necessarily put the jury on notice that defendant was incarcerated" in a detention facility (*People v Reynolds*, 283 AD2d 771, 772 [3d Dept 2001], *lv denied* 96 NY2d 866 [2001]; *see People v Carroll*, 158 AD2d 704, 705 [2d Dept 1990]). As for the second contention, the jury credited the proof reflecting that the scalpel had been recovered from defendant and, in view of his stipulation that the item was a scalpel and dangerous contraband, as well as trial evidence that included the scalpel itself and the testimony describing the circumstances of its recovery, the jury was free to determine that the scalpel was "readily

capable of causing death or other serious physical injury" and that defendant kept it with that aim in mind (Penal Law § 10.00 [13]; *see People v Barzee*, 190 AD3d 1016, 1019-1020 [3d Dept 2021], *lv denied* 36 NY3d 1094 [2021]; *People v Andrade*, 172 AD3d 1547, 1551 [3d Dept 2019], *lv denied* 34 NY3d 928 [2019]).<sup>1</sup> Accordingly, "when we view the foregoing evidence in a neutral light and accord deference to the jury's credibility determinations, we find that the jury's verdict as to both convictions is supported by the weight of the evidence" (*People v Barzee*, 190 AD3d at 1019).

Defendant next complains that the portion of the model charge specifically defining "dangerous instrument" was omitted by County Court in its instructions to the jury regarding the criminal possession of a weapon in the third degree count (*see* CJI2d[NY] Penal Law § 265.01 [2], [https://www.nycourts.gov/judges/cji/2-PenalLaw/265/265-01\(2\).pdf](https://www.nycourts.gov/judges/cji/2-PenalLaw/265/265-01(2).pdf) [last accessed May 10, 2024]; *see also* CJI2d[NY] Penal Law § 265.02 [1], [https://www.nycourts.gov/judges/cji/2-PenalLaw/265/265-02\(1\).pdf](https://www.nycourts.gov/judges/cji/2-PenalLaw/265/265-02(1).pdf) [last accessed May 10, 2024]). He failed to object to that omission before or after the charge was delivered, however, and the issue is unpreserved for our review as a result (*see People v Jones*, 215 AD3d 1123, 1133 [3d Dept 2023], *lv denied* 40 NY3d 935 [2023]; *People v Barzee*, 190 AD3d at 1020). In any event, County Court did instruct the jury that they could infer the requisite intent if it were proven that defendant "possessed a dangerous instrument designed, made or adapted for use primarily as a weapon" and, because defendant never contested the scalpel's status as a dangerous instrument, the omission of a more precise definition of the term did not prejudice defendant (*see* CJI2d[NY] Penal Law § 265.15 [4], [https://www.nycourts.gov/judges/cji/2-PenalLaw/265/AC.265.15\(4\).Presumption.pdf](https://www.nycourts.gov/judges/cji/2-PenalLaw/265/AC.265.15(4).Presumption.pdf) [last accessed May 10, 2024]; *see People v Lewis*, 92 AD3d 442, 443 [1st Dept 2012], *lv denied* 19 NY3d 963 [2012]). We therefore decline defendant's invitation to take corrective action on the issue in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Slade*, 140 AD2d 885, 887 [3d Dept 1988]).

Defendant further argues that he received ineffective assistance of counsel, but such requires a showing that he did not receive meaningful representation and, notably, "to establish ineffective assistance, a defendant must 'demonstrate the absence of strategic

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<sup>1</sup> By stipulating that the scalpel was dangerous contraband, defendant acknowledged that the scalpel's "particular characteristics are such that there is a substantial probability that the item will be used in a manner that is likely to cause death or other serious injury, to facilitate an escape, or to bring about other major threats to a detention facility's institutional safety or security" (*People v Finley*, 10 NY3d 647, 657 [2008]; *see* Penal Law § 205.00).

or other legitimate explanations' for counsel's allegedly deficient conduct" (*People v Caban*, 5 NY3d 143, 152 [2005], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]; see *People v Lekovic*, 200 AD3d 1501, 1505 [3d Dept 2021], *lv denied* 38 NY3d 1008 [2022]). Defendant first points to trial counsel's consent to a jury charge that specifically defined the prison as a detention facility rather than the statutory definition of "any place used for the confinement, pursuant to an order of a court, of a person . . . charged with or convicted of an offense" (Penal Law § 205.00 [1]; see Penal Law § 205.25). What he fails to articulate is how that decision lacked a legitimate explanation; indeed, County Court offered to define a detention facility as the prison because there had been no discussion of defendant's prior convictions at trial given his admission to the special information, and there was an obvious strategic reason for trial counsel to agree to defining "detention facility" in a manner that avoided calling additional attention to the reasons why defendant was confined. There was therefore nothing ineffective in consenting to that definition.

Defendant similarly fails to demonstrate the absence of a legitimate explanation for trial counsel's failure to object to the omission of the model charge defining dangerous instrument from its jury instruction. He overlooks that a bladed item with no innocent purpose like the scalpel "certainly could be found to be a dangerous . . . instrument" (*People v Slade*, 140 AD2d at 887), and no attempt was made at trial to suggest otherwise. To the contrary, defendant had already conceded that the item was a scalpel and dangerous contraband – thereby causing the People to cease questioning one of the correction officers regarding what he had seen incarcerated individuals do with similar items in the past – and trial counsel advanced a defense of undermining the proof that defendant had possessed it to begin with. Trial counsel may well have concluded that demanding further clarity on what constituted a dangerous instrument would have only been a distraction under those circumstances, and we cannot say that defendant demonstrated the lack of a strategic explanation for that decision or that it "equated to deficient representation" (*People v Bush*, 184 AD3d 1003, 1008 [3d Dept 2020], *lv denied* 35 NY3d 1093 [2020]). We are accordingly unpersuaded by defendant's arguments and, as the record as a whole "demonstrates that counsel presented a clear trial strategy, effectively cross-examined witnesses and made appropriate opening and closing statements, we are satisfied that defendant was provided with meaningful representation" (*People v Lekovic*, 200 AD3d at 1505 [internal quotation marks and citations omitted]).

Finally, as we are not persuaded by defendant's contention that his sentence is harsh or severe, we decline to modify it (see *People v Jones*, 212 AD3d 888, 891 [3d Dept 2023], *lv denied* 39 NY3d 1111 [2023]).

Lynch, Reynolds Fitzgerald, Ceresia and Powers, JJ., concur.

ORDERED that the judgment is affirmed.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style with a large initial 'R' and 'M'.

Robert D. Mayberger  
Clerk of the Court