

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

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**KA 14-02210**

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CLAYTON S. WHITTEMORE, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered August 5, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]). Contrary to defendant's contention, the jury's rejection of the affirmative defense of extreme emotional disturbance (EED) was not against the weight of the evidence (*see People v Steen*, 107 AD3d 1608, 1608 [4th Dept 2013], *lv denied* 22 NY3d 959 [2013]). Contrary to defendant's further contention, the purportedly flawed understanding of EED exhibited by the People's psychiatric expert went "to the weight to be given the evidence rather than its admissibility" (*People v Taylor*, 75 NY2d 277, 291 [1990]). Thus, Supreme Court properly refused to strike the testimony of the People's expert based on his purportedly flawed understanding of EED (*see People v Pascuzzi*, 173 AD3d 1367, 1375 [3d Dept 2019], *lv denied* 34 NY3d 953 [2019]; *People v Boice*, 89 AD2d 33, 35 [3d Dept 1982]). Moreover, given the court's instructions to the jury on EED—the accuracy of which are not challenged on appeal—the court was not obligated to "tell the jury that [the People's expert] had incorrectly stated the criteria for [EED]" (*see People v Samuels*, 99 NY2d 20, 25-26 [2002]; *People v Radcliffe*, 232 NY 249, 254-255 [1921]). Finally, defendant did not preserve his contention that the People violated his due process rights by failing to correct their expert's ostensibly inaccurate testimony about EED (*see People v Rivera*, 70 AD3d 1484, 1484 [4th Dept 2010], *lv denied* 15 NY3d 756 [2010]), and we decline to exercise our power to review that contention as a matter of discretion in the

interest of justice (see CPL 470.15 [6] [a]).

Entered: July 24, 2020

Mark W. Bennett  
Clerk of the Court