

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

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KA 18-00449

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RONNA J. NARY, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (CLEA WEISS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KAYLAN C. PORTER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered November 16, 2016. 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 her upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). Contrary to defendant's contention, we conclude that the jury's rejection of the affirmative defense of extreme emotional disturbance is not against the weight of the evidence (*see People v Whittemore*, 185 AD3d 1528, 1529 [4th Dept 2020], *lv denied* 36 NY3d 977 [2020]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Among other things, the jury "was entitled to consider the conduct of defendant before and after the homicide[] and to reject [her] explanation for [her] conduct" (*People v Steen*, 107 AD3d 1608, 1608 [4th Dept 2013], *lv denied* 22 NY3d 959 [2013] [internal quotation marks omitted]; *see generally People v Drake*, 216 AD2d 873, 873 [4th Dept 1995], *lv denied* 87 NY2d 900 [1995]).

Contrary to defendant's further contention, she was not denied effective assistance of counsel based on defense counsel's opening statement, his cross-examination of certain law enforcement witnesses regarding the defense of intoxication, his cross-examination of the victim's sister, and his determination to elicit from defendant testimony regarding post-arrest incidents while in jail. Those contentions amount to mere second-guessing of defense counsel's trial strategy and do not establish ineffectiveness (*see People v Moore*, 185 AD3d 1544, 1545 [4th Dept 2020], *lv denied* 35 NY3d 1096 [2020]; *People v Adams*, 59 AD3d 928, 929 [4th Dept 2009], *lv denied* 12 NY3d 813

[2009]). We likewise reject defendant's contention that defense counsel was ineffective in failing to move for a mistrial without prejudice based on testimony given by the victim's sister. Defense counsel objected to that testimony, Supreme Court struck it, and defense counsel made an unsuccessful motion for a mistrial with prejudice. Defense counsel was not ineffective for failing to move instead for a mistrial without prejudice inasmuch as that motion also would have had "little to no chance of success" (*People v Briggs*, 124 AD3d 1320, 1321 [4th Dept 2015], *lv denied* 25 NY3d 1198 [2015]). Defendant's contention that defense counsel was ineffective in failing to seek pretrial suppression of certain evidence as the product of a warrantless search relies on matters that have not been included in the record on appeal and thus cannot be reviewed on direct appeal (see *People v Marcial*, 41 AD3d 1308, 1308-1309 [4th Dept 2007], *lv denied* 9 NY3d 878 [2007]; see generally *People v Lopez-Mendoza*, 33 NY3d 565, 573 [2019]).

Finally, the sentence is not unduly harsh or severe.