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

1302

KA 14-00841

PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MYLES D. TAYLOR, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered April 28, 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]). We reject defendant's contention that he did not knowingly and intelligently waive his right to be present at sidebar conferences during jury selection (*see People v Antommarchi*, 80 NY2d 247, 250, *rearg denied* 81 NY2d 759). Defendant's *Antommarchi* waiver was made explicitly by and through his attorney (*see People v Velasquez*, 1 NY3d 44, 47-50; *People v Keen*, 94 NY2d 533, 538-539), in open court while defendant was present, and after the court "had articulated the substance of the *Antommarchi* right" (*Keen*, 94 NY2d at 538-539). To the extent that defendant contends that defense counsel failed to adequately explain the waiver to him or to obtain his consent to the waiver, we conclude that those contentions are based on matters outside of the record on appeal and are therefore not reviewable on direct appeal (*see People v Balenger*, 70 AD3d 1318, 1318, *lv denied* 14 NY3d 885).

Inasmuch as defendant made only a general motion for a trial order of dismissal, he failed to preserve for our review his challenge to the legal sufficiency of the evidence (*see People v Gray*, 86 NY2d 10, 19). In any event, we conclude that defendant's challenge lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Moreover, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see*

generally Bleakley, 69 NY2d at 495). We reject defendant's further contention that the sentence imposed by the court constitutes cruel and unusual punishment. "Regardless of its severity, a sentence of imprisonment which is within the limits of a valid statute ordinarily is not a cruel and unusual punishment in the constitutional sense" (*People v Jones*, 39 NY2d 694, 697). Here, the sentence imposed by the court, i.e., an indeterminate term of imprisonment of 13 years to life, is less than the maximum possible sentence (*see* Penal Law § 70.05 [1], [2] [a]; [3] [a]). Moreover, although defendant was a juvenile at the time he committed the crime, we conclude that the sentence is not "grossly disproportionate" to the crime, and it therefore does not violate the prohibitions against cruel and unusual punishment under the State and Federal Constitutions (*People v Thompson*, 83 NY2d 477, 479; *see People v Broadie*, 37 NY2d 100, 111, *cert denied* 423 US 950). Finally, the sentence is not unduly harsh or severe (*see* CPL 470.15 [6] [b]).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court