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

1425

KA 01-01182

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAJUAN PAUL, DEFENDANT-APPELLANT.

THOMAS THEOPHILOS, BUFFALO, FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered May 15, 2001. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), assault in the first degree, robbery in the first degree (eight counts), burglary in the second degree (two counts), criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is affirmed.

Memorandum: Defendant was convicted upon a jury verdict of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [3]). On a prior appeal, we modified the judgment with respect to the sentence and otherwise affirmed (*People v Paul*, 298 AD2d 849 [4th Dept 2002], *lv denied* 99 NY2d 562 [2002]). We subsequently granted defendant's motion for a writ of error coram nobis on the ground that appellate counsel failed to raise an issue that may have merit — specifically, whether the *Antommarchi* waiver proffered by defendant's trial counsel was valid (*People v Paul [Tajuan]*, 148 AD3d 1723 [4th Dept 2017]), and we vacated our prior order. We now consider the appeal de novo.

We reject defendant's contention that his *Antommarchi* waiver, i.e., his waiver of the right to be present at sidebar conferences during jury selection (*see People v Antommarchi*, 80 NY2d 247, 250 [1992], *rearg denied* 81 NY2d 759 [1992]), was invalid. At the beginning of jury selection, County Court held a bench conference with counsel for defendant and counsel for the codefendant, at which defendant was not present. The court stated, "The record will reflect that [counsel for the codefendant and counsel for defendant] have indicated [that] they . . . wish to waive their clients' presence at

the bench." In response, defendant's counsel said, "That's correct."

"It is well settled that a defendant's attorney may waive [the *Antommarchi*] right," which is what occurred here (*People v Lewis*, 140 AD3d 1593, 1594 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]). Contrary to defendant's contention, "a court need not engage in any '*pro forma* inquisition in each case on the off-chance that a defendant who is adequately represented by counsel . . . may nevertheless not know what he [or she] is doing' " (*id.*, quoting *People v Francis*, 38 NY2d 150, 154 [1975]). Nor is it necessary for the waiver to occur in defendant's presence inasmuch as "a lawyer may be trusted to explain rights to his or her client, and to report to the court the result of that discussion" (*People v Flinn*, 22 NY3d 599, 602 [2014], *rearg denied* 23 NY3d 940 [2014]). "To the extent defendant argues that his off-the-record conversations with counsel did not sufficiently apprise him of his rights, he relies on matters dehors the record and beyond review by this Court on direct appeal. Such claims are more appropriately considered on a CPL 440.10 motion" (*People v Jackson*, 29 NY3d 18, 24 [2017]; *see People v Shegog*, 32 AD3d 1289, 1290 [4th Dept 2006], *lv denied* 7 NY3d 929 [2006]).

Defendant's additional contention that he was deprived of his right to be present at trial conflates the statutory *Antommarchi* rights with the constitutional rights protected by *Parker* warnings (*see People v Vargas*, 88 NY2d 363, 375-376 [1996]; *People v Sprowal*, 84 NY2d 113, 116-117 [1994]; *see generally People v Parker*, 57 NY2d 136, 140 [1982]), and is without merit because he was not deprived of his right to be present in the courtroom.

We reject defendant's contention that reversal is required based on alleged mode of proceedings errors with respect to the court's handling of certain jury notes. Two of the notes at issue, concerning a juror's request to meet privately with the judge, were ministerial in nature (*see People v Brito*, 135 AD3d 627, 627-628 [1st Dept 2016], *lv denied* 27 NY3d 1066 [2016]). "[T]he *O'Rama* procedure is not implicated [where, as here,] the jury's request is ministerial in nature and therefore requires only a ministerial response" (*People v Nealon*, 26 NY3d 152, 161 [2015]; *see People v Williams*, 142 AD3d 1360, 1362 [4th Dept 2016], *lv denied* 28 NY3d 1128 [2016]). We thus conclude that "there was no *O'Rama* error requiring this Court to reverse the judgment" based on those notes (*People v Hall*, 156 AD3d 1475, 1476 [4th Dept 2017], *lv denied* 11 NY3d 789 [2008]). Moreover, we note that even a ministerial response by the court was obviated by the fact that the second note at issue nullified the request contained in the first note (*see People v Albanese*, 45 AD3d 691, 692 [2d Dept 2007], *lv denied* 10 NY3d 761 [2008]). Because the rest of the jury notes in question were read into the record in the presence of counsel and the jury, the court "complied with its core responsibility to give counsel meaningful notice of the jury's notes . . . [and, t]hus, no mode of proceedings error occurred" (*Nealon*, 26 NY3d at 160). Consequently, defendant was required to object to preserve his contention that the court did not meaningfully respond to the relevant jury notes (*see id.*; *Williams*, 142 AD3d at 1362). Defendant failed to

do so, and we decline to exercise our power to review his contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant also contends that he was denied effective assistance of counsel by defense counsel's allegedly confusing presentation of alibi evidence. We reject that contention inasmuch as any possible confusion with respect to the date of the alibi was clarified on redirect examination and in defense counsel's summation (*cf. People v Jarvis*, 113 AD3d 1058, 1060-1061 [4th Dept 2014], *affd* 25 NY3d 968 [2015]). Defendant's remaining allegations of ineffective assistance of counsel lack merit. Defense counsel's alleged shortcomings resulted in little or no prejudice to defendant (*see generally People v Benevento*, 91 NY2d 708, 713-714 [1998]), and the failure to make certain objections did not constitute ineffective assistance inasmuch as any such objection would have had little or no chance of success (*see generally People v Caban*, 5 NY3d 143, 152 [2005]).

Defendant's challenge to the court's alibi charge is unpreserved (*see* CPL 470.05 [2]; *People v Robinson*, 142 AD3d 1302, 1304 [4th Dept 2016], *lv denied* 28 NY3d 1126 [2016]). In any event, the charge, as a whole, was proper because it included numerous warnings that the People had the burden of disproving defendant's alibi beyond a reasonable doubt and that the burden of proof never shifted (*see People v Castrechino*, 24 AD3d 1267, 1267-1268 [4th Dept 2005], *lv denied* 6 NY3d 810 [2006]). Defendant's remaining challenges to the court's jury instructions are unpreserved, and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Additionally, upon viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The quality of the witnesses and the existence of cooperation agreements "merely raise credibility issues for the jury to resolve" (*People v Barnes*, 158 AD3d 1072, 1072 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]). Moreover, we are satisfied that the accomplice testimony was sufficiently corroborated (*see People v Smith*, 150 AD3d 1664, 1665 [4th Dept 2017], *lv denied* 30 NY3d 953 [2017]; *People v Highsmith*, 124 AD3d 1363, 1364 [4th Dept 2015], *lv denied* 25 NY3d 1202 [2015]).

Defendant did not preserve his contentions that the jury was influenced by a potential prosecution witness, that certain counts were based on legally insufficient evidence, and that he was prejudiced by improper hearsay or bolstering testimony, and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

There is no merit to defendant's contention that the indictment should have been dismissed due to an inadequate grand jury notification. The People were under no obligation to serve a grand

jury notice about charges that were not included in the felony complaint (*see People v Clark*, 128 AD3d 1494, 1496 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015]; *People v Thomas*, 27 AD3d 292, 293 [1st Dept 2006], *lv denied* 6 NY3d 898 [2006]).

Finally, given defendant's resentencing, we do not consider defendant's challenge relating to his sentence, and we dismiss the appeal from the judgment to that extent (*see People v Linder*, — AD3d —, —, 2019 NY Slip Op 01965, *4 [4th Dept 2019]; *People v Haywood*, 203 AD2d 966, 966 [4th Dept 1994], *lv denied* 83 NY2d 967 [1994]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court