

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

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KA 13-01131

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TOMMY DAVIS, DEFENDANT-APPELLANT.

BRUCE R. BRYAN, MANLIUS, 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 (Anthony F. Aloia, J.), rendered July 18, 2012. The judgment convicted defendant upon a jury verdict of murder in the second degree, endangering the welfare of a child, criminal possession of a weapon in the second degree and attempted 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, inter alia, murder in the second degree (Penal Law § 125.25 [1]) and attempted murder in the second degree (§§ 110.00, 125.25 [1]). Contrary to defendant's contention, his conviction on the murder and attempted murder counts is supported by legally sufficient evidence (*see People v Rouse*, 34 NY3d 269, 274-275 [2019]; *People v Alligood*, 192 AD3d 1508, 1508-1509 [4th Dept 2021], *lv denied* 37 NY3d 970 [2021]; *cf.* CPL 300.40). Furthermore, 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 conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's contentions, County Court properly refused to suppress identification testimony by the teenage eyewitnesses (*see People v Marte*, 12 NY3d 583, 586-589 [2009], *cert denied* 559 US 941 [2010]; *see also People v Jackson*, 90 AD3d 519, 519 [1st Dept 2011], *lv denied* 19 NY3d 997 [2012]; *People v Elliot*, 283 AD2d 183, 183-184 [1st Dept 2001], *lv denied* 96 NY2d 901 [2001]). Moreover, given the absence of any "substantial issues as to the constitutionality of the [subject identification procedures]," the court properly denied defendant's request to call those teenagers to testify at the suppression hearing (*People v Chipp*, 75 NY2d 327, 338 [1990], *cert denied* 498 US 833 [1990]). Indeed, defendant sought to

call those teenagers at the suppression hearing only to demonstrate suggestiveness arising from the actions of private citizens, which is not a cognizable basis for suppressing identification testimony on due process grounds (see *Marte*, 12 NY3d at 586-589).

Contrary to defendant's further contentions, the court's *Sandoval* ruling was not an abuse of discretion (see *People v Cotton*, 184 AD3d 1145, 1146-1147 [4th Dept 2020], *lv denied* 35 NY3d 1112 [2020]), and the imposition of consecutive terms of imprisonment on the murder and attempted murder counts was not illegal (see *People v McKnight*, 16 NY3d 43, 47-50 [2010]; *People v Smith*, 171 AD3d 1102, 1105-1106 [2d Dept 2019], *lv denied* 33 NY3d 1073 [2019]). Defendant's remaining contentions do not warrant reversal or modification of the judgment.

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court