

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

749

KA 15-01933

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL L. BELL, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BENJAMIN L. NELSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered September 15, 2015. 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 County Court erred in refusing to preclude identification testimony from an eyewitness to the crime. At a hearing, the People established that the witness had known defendant for at least nine months prior to the incident, and thus they established that the identification procedure was " 'merely confirmatory' " (*People v Rodriguez*, 79 NY2d 445, 452 [1992]; see *People v Carter*, 107 AD3d 1570, 1572 [4th Dept 2013], *lv denied* 23 NY3d 1019 [2014]). We decline to disturb the court's credibility determinations with respect to the testimony at the hearing (see generally *People v Donaldson*, 35 AD3d 1242, 1243 [4th Dept 2006], *lv denied* 8 NY3d 984 [2007]; *People v Jordan*, 242 AD2d 254, 255 [1st Dept 1997], *lv denied* 91 NY2d 875 [1997]).

The court did not abuse its discretion in denying defendant's request for a missing witness charge. Defendant failed to establish that the witness at issue could "be expected to testify favorably to the [People]" (*People v Gonzalez*, 68 NY2d 424, 427 [1986]), inasmuch as the witness initially gave a statement to the police that was favorable to the People, i.e., identifying defendant as the perpetrator, but the witness later gave a statement to a defense investigator that he could not identify defendant as the perpetrator (see generally *People v Vigliotti*, 270 AD2d 904, 905 [4th Dept 2000], *lv denied* 95 NY2d 839 [2000], *reconsideration denied* 95 NY2d 970

[2000]; *People v Congilaro*, 159 AD2d 964, 965 [4th Dept 1990]).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see generally 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]).

We have examined defendant's remaining contentions on appeal and conclude that none warrants reversal or modification of the judgment.

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court