

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

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**KA 19-01367**

PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, GREENWOOD, AND DELCONTE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JUAN COLON, DEFENDANT-APPELLANT.

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JESSICA KULPIT, BUFFALO, FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered April 16, 2019. The judgment convicted defendant upon a jury verdict of manslaughter in the first 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 manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to defendant's contention, County Court did not err in denying defendant's request to charge the jury on manslaughter in the second degree (§ 125.15 [1]). Although manslaughter in the second degree is a lesser included offense of murder in the second degree (§ 125.25 [1]), i.e., the charge for which defendant was originally indicted (see CPL 1.20 [37]; *People v Rivera*, 23 NY3d 112, 120 [2014]; *People v Alvaradoajcuc*, 142 AD3d 1094, 1094 [2d Dept 2016], *lv denied* 28 NY3d 1122 [2016]; see generally *People v Benson*, 265 AD2d 814, 815 [4th Dept 1999], *lv denied* 94 NY2d 860 [1999], *cert denied* 529 US 1076 [2000]), there is no reasonable view of the evidence that would support the idea that defendant's conduct in firing seven rounds into a vehicle at close range was reckless and did not evidence an intent to kill or to cause serious physical injury (see generally *People v Glover*, 57 NY2d 61, 64 [1982]). Three of the bullets struck the victim, killing him almost instantly, while the other bullets struck the victim's vehicle in close proximity to where the victim was sitting.

Generally, where a defendant fires multiple shots at a victim from close range, there is no reasonable view of the evidence that the defendant's conduct was unintentional (see e.g. *People v Bailey*, 181 AD3d 1172, 1174 [4th Dept 2020], *lv denied* 35 NY3d 1025 [2020]; *People v Ware*, 303 AD2d 173, 174 [1st Dept 2003], *lv denied* 100 NY2d 543 [2003]). Here, however, defendant contends that, inasmuch as shots

were fired from one moving vehicle into another moving vehicle, there is a reasonable view of the evidence that would support the determination that his acts were reckless. We reject that contention. The testimony and other evidence established that defendant saw the victim's vehicle traveling on a roadway, sped up and strategically positioned his vehicle next to the victim's moving vehicle, matched his vehicle's speed to the speed of the victim's vehicle, rolled down his passenger window and, from close range, fired up to seven times at the victim (see e.g. *Bailey*, 181 AD3d at 1174; *People v Stanford*, 87 AD3d 1367, 1368 [4th Dept 2011], *lv denied* 18 NY3d 886 [2012]; *People v Seeler*, 63 AD3d 1595, 1596 [4th Dept 2009], *lv denied* 13 NY3d 838 [2009]; cf. *People v Quick*, 187 AD3d 1612, 1612-1613 [4th Dept 2020], *lv denied* 36 NY3d 1053 [2021]). In our view, those actions evidence an intent to kill or seriously injure the victim and not, as defendant suggests, an intent to merely scare him.

We reject defendant's further contention that the court erred in denying his motion for a mistrial after a prosecution witness provided *Molineux* testimony that had not been the subject of any pretrial notices or hearings. "[T]he decision [whether] to grant or deny a motion for a mistrial is within the trial court's discretion" (*People v Ortiz*, 54 NY2d 288, 292 [1981]; see *People v Brooks*, 214 AD3d 1425, 1426 [4th Dept 2023], *lv denied* 39 NY3d 1153 [2023]; *People v McGee*, 194 AD3d 1454, 1455 [4th Dept 2021], *lv denied* 37 NY3d 973 [2021]). Here, we conclude that "the court did not abuse its discretion in denying defendant's motion for a mistrial and instead sustaining defendant's objection to the improper testimony, striking it from the record, and providing the jury with a curative instruction directing them to disregard the improper testimony, which the jury is presumed to have followed" (*Brooks*, 214 AD3d at 1426 [internal quotation marks omitted]; see *McGee*, 194 AD3d at 1455).

Finally, we conclude that the evidence, viewed in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to support the conviction of manslaughter in the first degree (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]) and, viewing the evidence in light of the elements of the crime 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 *Bleakley*, 69 NY2d at 495).