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

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KA 18-01613

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA BURNS, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (SHIRLEY A. GORMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Sam L. Valleriani, J.), rendered August 9, 2018. 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 following a jury trial of murder in the second degree (Penal Law § 125.25 [1]). Contrary to defendant's initial contention, County Court did not err in granting the People's request to dismiss for cause a prospective juror who stated during voir dire that she would be distracted from the proceedings due to her impending examination for board certification in a medical field (*see People v Frierson*, 214 AD3d 1083, 1084 [3d Dept 2023], *lv denied* 40 NY3d 928 [2023]; *People v Williams*, 44 AD3d 326, 326 [1st Dept 2007], *lv denied* 9 NY3d 1010 [2007]; *cf. People v Manning*, 180 AD3d 605, 606 [1st Dept 2020]; *see generally* CPL 270.20 [1] [b]; *People v DeFreitas*, 116 AD3d 1078, 1080-1081 [3d Dept 2014], *lv denied* 24 NY3d 960 [2014]). The prospective juror's comments gave rise to a legitimate concern that her attention could be diverted from the evidence and testimony should the trial take longer than anticipated to be completed, thus conflicting with her examination and desire to study. Under the circumstances, we cannot conclude that the court abused its discretion in granting the People's for cause challenge to the prospective juror in question and replacing her with another prospective juror.

Defendant further contends that the court erred in admitting in evidence at trial autopsy photographs and portions of a recorded telephone call between defendant and another person. We reject those contentions. The autopsy photographs were properly admitted because they were not offered for the sole purpose of arousing emotions (*see*

People v Wood, 79 NY2d 958, 960 [1992]; *People v Spencer*, 181 AD3d 1257, 1261 [4th Dept 2020], *lv denied* 35 NY3d 1029 [2020]). Rather, the photographs were relevant to establish defendant's intent to kill inasmuch as they helped to establish that the victim was shot directly in the face and neck from close range (*see People v Brooks*, 214 AD3d 1425, 1426-1427 [4th Dept 2023], *lv denied* 39 NY3d 1153 [2023]; *Spencer*, 181 AD3d at 1261).

With respect to the recorded telephone conversation, it is well settled "that all relevant evidence is admissible unless its admission violates some exclusionary rule" (*People v Scarola*, 71 NY2d 769, 777 [1988]). Nevertheless, even relevant evidence "may still be excluded by the trial court in the exercise of its discretion if its probative value is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury" (*id.*; *see People v McCullough*, 117 AD3d 1415, 1416 [4th Dept 2014], *lv denied* 23 NY3d 1040 [2014]; *see generally People v Harris*, 26 NY3d 1, 5 [2015]). Here, defendant's statements that he "kn[e]w what [he] did and [he was] sorry" and that he would not talk any further because the call was being recorded, were relevant inasmuch as they evinced a consciousness of guilt (*see People v Moore*, 118 AD3d 916, 918 [2d Dept 2014], *lv denied* 24 NY3d 1086 [2014]). Further, "[a]ny ambiguity as to the defendant's intended meaning of his statements affected only the weight to be given to the recordings, not their admissibility" (*People v Sales*, 189 AD3d 1617, 1618 [2d Dept 2020], *lv denied* 36 NY3d 1123 [2021]; *see People v McKenzie*, 161 AD3d 703, 704 [1st Dept 2018], *lv denied* 32 NY3d 1113 [2018]).

We also reject defendant's contention that the People's firearms expert was not qualified to provide expert testimony. "The qualification of a witness to testify as an expert rests in the discretion of the court, and its determination will not be disturbed in the absence of serious mistake, an error of law or an abuse of discretion" (*People v Johnson*, 153 AD3d 1606, 1606 [4th Dept 2017], *lv denied* 30 NY3d 1020 [2017] [internal quotation marks omitted]; *see People v Tisdale*, 270 AD2d 917, 917 [4th Dept 2000], *lv denied* 95 NY2d 839 [2000]).

A proposed "expert should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable" (*Matott v Ward*, 48 NY2d 455, 459 [1979]; *see People v Wyant*, 98 AD3d 1277, 1278 [4th Dept 2012]). As we have noted, however, "[p]ractical experience may properly substitute for academic training in determining whether an individual has acquired the training necessary to be qualified as an expert" (*People v Owens*, 70 AD3d 1469, 1470 [4th Dept 2010], *lv denied* 14 NY3d 890 [2010] [internal quotation marks omitted]; *see Wyant*, 98 AD3d at 1278). Here, the expert testified that he had a bachelor's degree in forensic science; had worked as a forensic firearms examiner for over 13 years; had been trained as a National Firearms Examiner using curriculum from the Bureau of Alcohol, Tobacco and Firearms; and had testified as a firearms expert in numerous prior cases, including cases that have

come before this Court. We therefore conclude that the court did not err in allowing that expert to testify regarding his analysis of ballistics evidence.

We further conclude that the court did not err in its response to a jury note. During deliberations, the jury sent a note requesting "[c]larification from the law." The jury note went on to ask whether, "[i]f you <u>intend</u> to shoot someone to cause harm but not death and that person dies would it constitute 2nd degree murder?" As a response to the note, the People requested that the court re-read the charge for murder in the second degree, but defense counsel requested that the court answer the exact question asked in the note, i.e., to respond "no" to the question. The court opted to re-read the entire instruction. Contrary to defendant's contention, the court's determination to re-read the instruction on murder in the second degree was appropriate and does not warrant reversal (*see People v Steinberg*, 79 NY2d 673, 684-685 [1992]; *People v Abdul-Jaleel*, 142 AD3d 1296, 1297-1298 [4th Dept 2016], *lv denied* 29 NY3d 946 [2017]; *People v Mobley*, 118 AD3d 1339, 1340 [4th Dept 2014], *lv denied* 24 NY3d 1121 [2015]).

We reject defendant's contention that the court erred in refusing to instruct the jury on the lesser included offense of manslaughter in the first degree. "A court 'may, in addition to submitting the greatest offense which it is required to submit, submit in the alternative any lesser included offense if there is a reasonable view of the evidence which would support a finding that the defendant committed' the lesser but not the greater offense (CPL 300.50 [1]). It is undisputed that manslaughter in the first degree is a lesser included offense of second-degree murder within the meaning of CPL 1.20 (37), so 'the question simply is whether on *any* reasonable view of the evidence it is possible for the trier of the facts to acquit the defendant on the higher count and still find him guilty on the lesser one' " (*People v Hull*, 27 NY3d 1056, 1058 [2016]; *see People v Ott*, 200 AD3d 1642, 1643 [4th Dept 2021], *lv denied* 38 NY3d 953 [2022], *cert denied* — US —, 143 S Ct 403 [2022]). Given that the victim was shot in the face and neck with a shotgun fired from less than six feet away, we conclude that there is no reasonable view of the evidence that would support a finding that the shooter, be it defendant or the codefendant, intended to cause serious physical injury instead of death, which is the only distinction between murder in the second degree (Penal Law § 125.25 [1]) and manslaughter in the first degree (§ 125.20 [1]). Either the shooter intended to kill the victim, as posited by the prosecution, or it was a reckless accident, as posited by defense counsel at trial during summation (*cf. People v Joyce*, 150 AD3d 1632, 1633 [4th Dept 2017], *lv denied* 31 NY3d 1118 [2018]). Here, "[t]he element of homicidal intent c[an] be inferred from [the] act of aiming at the victim and firing a shot at very close range, striking him in the vicinity of the [face and] neck" (*People v Thompson*, 153 AD3d 433, 433 [1st Dept 2017], *lv denied* 30 NY3d 984 [2017]; *see People v Warner*, 194 AD3d 1098, 1104 [3d Dept 2021], *lv denied* 37 NY3d 1030 [2021]; *People v Lewis*, 93 AD3d 1264, 1267 [4th Dept 2012], *lv denied* 19 NY3d 963 [2012]).

Defendant further contends that the verdict, convicting him of murder in the second degree (Penal Law § 125.25 [1]) is against the weight of the evidence. We reject that contention. Even if the codefendant was the actual shooter, the evidence at trial established that defendant and the codefendant had "a shared intent, or community of purpose" (*People v Lora*, 192 AD3d 1488, 1488 [4th Dept 2021], *lv denied* 37 NY3d 973 [2021] [internal quotation marks omitted]; *see* § 20.00; *People v Alcaraz-Ubiles*, 215 AD3d 1264, 1265-1266 [4th Dept 2023], *lv denied* 40 NY3d 927 [2023]). Viewing the evidence in light of the elements of the crime of murder in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to that crime is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court