SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

622

KA 22-00806

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

M. ROBERT NEULANDER, DEFENDANT-APPELLANT.

SHAPIRO ARATO BACH LLP, NEW YORK CITY (ALEXANDRA A.E. SHAPIRO OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

PAUL SKIP LAISURE, GARDEN CITY, FOR NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMICUS CURIAE.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered May 2, 2022. The judgment convicted defendant upon a jury verdict of murder in the second degree and tampering with physical evidence.

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, following the reversal of his prior judgment of conviction and a retrial (*People v Neulander*, 162 AD3d 1763 [4th Dept 2018], *affd* 34 NY3d 110 [2019]), of murder in the second degree (Penal Law § 125.25 [1]) and tampering with physical evidence (§ 215.40 [2]). We affirm.

Defendant first contends that the evidence is legally insufficient and the verdict is against the weight of the evidence. We reject that contention. "It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is 'whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [jury] on the basis of the evidence at trial, viewed in the light most favorable to the People' " (*People v Hines*, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001], quoting *People v Williams*, 84 NY2d 925, 926 [1994]).

Here, the evidence establishes that the victim, defendant's wife, died of a complex, comminuted skull fracture. The People introduced the testimony of several expert witnesses who opined that the victim's

head injury was caused by multiple blows consistent with a homicide, and that her injuries were inconsistent with a simple fall. The People also introduced evidence of blood splatter and tissue that had been found around the victim's bed, consistent with the People's theory that the victim had been killed in the bedroom and then moved to the bathroom. In addition, testimony from the housekeeper that the sheets on the victim's bed had been recently changed and that a bed pillow was missing, coupled with evidence that defendant moved the victim's body, supported the inference that defendant was acting to conceal evidence of the crime. Viewing that evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a "valid line of reasoning and permissible inferences" from which the jury could find that defendant murdered his wife and then concealed evidence of that crime (*Williams*, 84 NY2d at 926).

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 reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Here, "[t]he jury was presented with conflicting expert testimony regarding the cause of death, and the record supports its decision to credit the People's expert testimony" (*People v Fields*, 16 AD3d 142, 142 [1st Dept 2005], *lv denied* 4 NY3d 886 [2005]).

Defendant next contends that County Court erred in granting the People's request for a missing witness instruction with respect to defendant's daughter inasmuch as she did not have direct knowledge regarding any of the issues on which defendant presented evidence. We reject that contention. A " 'missing witness' instruction allows a jury to draw an unfavorable inference based on a party's failure to call a witness who would normally be expected to support that party's version of events" (*People v Savinon*, 100 NY2d 192, 196 [2003]). "[T]he instruction rests on the commonsense notion that the nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause" (*id.* [internal quotation marks omitted]; *see People v Gonzalez*, 68 NY2d 424, 427 [1986]).

"The proponent [of a missing witness instruction] initially must demonstrate only three things via a prompt request for the charge: (1) 'that there is an uncalled witness believed to be knowledgeable about a material issue pending in the case,' (2) 'that such witness can be expected to testify favorably to the opposing party,' and (3) 'that such party has failed to call' the witness to testify" (*People v Smith*, 33 NY3d 454, 458-459 [2019], quoting *Gonzalez*, 68 NY2d at 427). Defendant did not call his daughter as a witness, and he concedes in his reply brief that his daughter "possessed material, non-cumulative knowledge regarding the case [and] that she was available and would be expected to testify favorably to him." We therefore conclude that the court did not abuse its discretion in giving the missing witness instruction (*see People v Macana*, 84 NY2d 173, 179-180 [1994]).

Contrary to defendant's contention, where, as here, a criminal defendant elects to either testify or "otherwise come forward with evidence at trial," a missing witness instruction may be given for any uncalled witness with knowledge of any material issue (*id.* at 177).

Defendant failed to preserve his contention that the missing witness instruction was impermissibly broad and should have been limited to a statement that the jury may infer that, if his daughter had been called as a witness, she would not have supported the defense testimony on the issue of which she possessed knowledge, and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see People v Davis*, 133 AD3d 911, 914 [3d Dept 2015]; *see generally* CPL 470.15 [6] [a]). To the extent defendant contends that the law governing the application of the missing witness instruction against criminal defendants should be changed, "it is not this Court's prerogative to overrule or disregard a precedent of the Court of Appeals" (*Calcano v Rodriguez*, 91 AD3d 468, 469 [1st Dept 2012]).

Defendant further contends that the court erred by allowing the People to introduce expert testimony with respect to the victim's cause of death that was based, in part, on nonmedical evidence, including blood splatter evidence and other investigative information. We reject that contention. It is not error for a court to admit in evidence expert testimony on cause of death that is based, in part, on nonmedical evidence (*see generally People v Ramsaran*, 154 AD3d 1051, 1055 [3d Dept 2017], *lv denied* 30 NY3d 1063 [2017]; *People v Forsha*, 151 AD2d 875, 876 [3d Dept 1989], *lv denied* 74 NY2d 809 [1989]), so long as the opinion is also based, in part, "on professional or medical knowledge" (*People v Eberle*, 265 AD2d 881, 881 [4th Dept 1999]).

Defendant also contends that he was denied a fair trial through numerous acts of prosecutorial misconduct, including improper cross-examination and editorializing to the jury. Contrary to defendant's contention, the prosecutor had "some reasonable basis for believing the truth of things he was asking about" in his cross-examination of defendant's expert witness (*People v Alamo*, 23 NY2d 630, 633 [1969], *cert denied* 396 US 879 [1969]; *see People v Rouse*, 34 NY3d 269, 277 [2019]). Moreover, although the prosecutor made a number of extraneous comments during the trial, "the court sustained defendant's objection[s] and gave curative instructions [where necessary], thereby alleviating any possible prejudice" (*People v Marzug*, 280 AD2d 974, 975 [4th Dept 2001], *lv denied* 96 NY2d 904 [2001]; *see People v Chizor*, 190 AD3d 763, 763 [2d Dept 2021], *lv denied* 37 NY3d 954 [2021]). Further, the evidence against defendant was overwhelming and "without the [challenged] conduct[,] the same result would undoubtedly have been reached" (*People v Mott*, 94 AD2d 415, 419 [4th Dept 1983]), and we therefore conclude that the alleged improprieties "[did] not substantially prejudice[ ] . . . defendant's trial" (*People v Galloway*, 54 NY2d 396, 401 [1981]).

Finally, contrary to defendant's contention, we conclude that the

sentence is not unduly harsh or severe.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court