Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D29578
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_____AD3d_____ Submitted - November 1, 2010

STEVEN W. FISHER, J.P.
ANITA R. FLORIO
JOHN M. LEVENTHAL
L. PRISCILLA HALL, JJ.

2008-07133 DECISION & ORDER

The People, etc., respondent,
v Jose Toxtle, appellant.

(Ind. No. 2812N/07)

Martin Geduldig, Garden City, N.Y., for appellant.

Kathleen M. Rice, District Attorney, Mineola, N.Y. (Donald Berk and Cristin N. Connell of counsel; Lisa Pollack on the brief), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Nassau County (Sullivan, J.), rendered July 14, 2008, convicting him of murder in the second degree and criminal possession of a weapon in the fourth degree, upon a jury verdict, and sentencing him to an indeterminate term of 25 years to life imprisonment on the conviction of murder in the second degree and a determinate term of one year imprisonment on the conviction of criminal possession of a weapon in the fourth degree, with the sentences to run concurrently.

ORDERED that the judgment is modified, as a matter of discretion in the interest of justice, by reducing the sentence imposed on the conviction of murder in the second degree from 25 year to life imprisonment to 20 years to life imprisonment; as so modified, the judgment is affirmed.

The defendant's contention regarding the jury instruction on extreme emotional disturbance is unpreserved for appellate review (*see* CPL 470.05[2]; *People v Gray,* 86 NY2d 10, 19). In any event, the jury instruction at issue did not direct the jury to consider matters relating to sentencing or punishment (*see* CJI2d[NY] Penal Law § 125.25[1][a]).

The defendant was not deprived of the effective assistance of counsel (*see People v Benevento,* 91 NY2d 708; *People v Baldi,* 54 NY2d 137).

The sentence imposed was excessive to the extent indicated.

The defendant's remaining contention is without merit.

FISHER, J.P., FLORIO, LEVENTHAL and HALL, JJ., concur.

ENTER:

Matthew G. Kiernan
Clerk of the Court