

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

1228

KA 16-01154

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSEPH P. GANT, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered August 12, 2015. The judgment convicted defendant upon a jury verdict of murder in the second degree, attempted murder in the second degree (three counts) and criminal possession of a weapon 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, inter alia, murder in the second degree (Penal Law § 125.25 [1]) and three counts of attempted murder in the second degree (§§ 110.00, 125.25 [1]). We affirm.

Defendant initially contends that he was convicted of three counts of what he characterizes as the "non-existent crime" of "transferred intent attempted murder." Although exempt from the preservation requirement (see *People v Martinez*, 81 NY2d 810, 812 [1993]), defendant's argument was expressly rejected by the Court of Appeals in *People v Fernandez* (88 NY2d 777, 782-783 [1996]; see also *People v Wells*, 7 NY3d 51, 55-57 [2006]).

Contrary to defendant's further contention, the evidence is legally sufficient to support the conviction of murder in the second degree and attempted murder in the second degree, and the verdict on those crimes is not against the weight of the evidence when viewed in light of the elements of the crimes and the justification instruction as given to the jury (see generally *People v Danielson*, 9 NY3d 342, 348-349 [2007]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Indeed, the trial evidence overwhelmingly disproved defendant's justification defense (see *People v Cruz*, 175 AD3d 1060, 1060-1061 [4th Dept 2019], lv denied 34 NY3d 1016 [2019]; *People v Newland*, 83 AD3d 1202, 1204-

1205 [3d Dept 2011], *lv denied* 17 NY3d 798 [2011]), and an acquittal on justification grounds would have been unreasonable on this record (see *People v Durand*, 188 AD2d 747, 747 [3d Dept 1992], *lv denied* 81 NY2d 884 [1993]). We note, however, that the People's brief incorrectly asserts that reversal on weight of the evidence grounds "is warranted only where the verdict is 'plainly unjustified by the evidence' " (see *People v Sanchez*, 32 NY3d 1021, 1022-1023 [2018]). The proper standard for conducting weight of the evidence review is set forth in *People v Delamota* (18 NY3d 107, 116-117 [2011]) and *Danielson* (9 NY3d at 349).

Defendant waived his challenge to the jury instructions concerning mens rea by expressly consenting to the subject charge (see *People v Capella*, 180 AD3d 498, 499 [1st Dept 2020], *lv denied* 35 NY3d 968 [2020]; *People v Speed*, 226 AD2d 1090, 1091 [4th Dept 1996], *lv denied* 88 NY2d 969 [1996]). Defendant's related claim of ineffective assistance is raised for the first time in his reply brief and thus is not properly before us (see *People v Jones*, 300 AD2d 1119, 1120 [4th Dept 2002], *lv denied* 2 NY3d 801 [2004]). The sentence is not unduly harsh or severe. Defendant's remaining contention does not warrant modification or reversal of the judgment.