

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

735

KA 06-03475

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LAMAR J. ROUNDTREE, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (DONALD M. THOMPSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered July 19, 2006. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the second degree, and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the sentences imposed for criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree shall run concurrently with the sentence imposed for murder in the second degree and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), criminal possession of a weapon in the second degree (§ 265.03 [former (2)]), and criminal possession of a weapon in the third degree (§ 265.02 [former (4)]). Defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence inasmuch as he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678; *People v Pearson*, 26 AD3d 783, *lv denied* 6 NY3d 851). In any event, we reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). Moreover, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "Defendant's further contention concerning the legal sufficiency of the evidence before the grand jury 'is not reviewable on an appeal from an ensuing judgment based upon legally sufficient trial evidence' " (*People v Lee*, 56 AD3d 1250, 1251, *lv denied* 12 NY3d 818; *see CPL 210.30 [6]*).

Contrary to the contention of defendant, he was not denied effective assistance of counsel (see generally *People v Baldi*, 54 NY2d 137, 147). In view of our determination that the evidence is legally sufficient to support the conviction, defendant was not denied effective assistance of counsel based on defense counsel's failure to renew the motion for a trial order of dismissal inasmuch as he failed to show that the motion, "if made, would have been successful" (*People v Marcial*, 41 AD3d 1308, 1308, lv denied 9 NY3d 878; see *People v Bassett*, 55 AD3d 1434, 1437-1438, lv denied 11 NY3d 922). With respect to the remaining alleged shortcomings of defense counsel, we conclude that defendant has failed " 'to demonstrate the absence of strategic or other legitimate explanations' for [those] alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712).

We agree with defendant, however, that the sentences imposed for criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree must run concurrently with the sentence imposed for murder in the second degree, and we therefore modify the judgment accordingly. Pursuant to Penal Law § 70.25 (2), "[w]hen more than one sentence of imprisonment is imposed on a person for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other," the sentences, with an exception not relevant here, must run concurrently. Based on the evidence presented at trial, and as correctly conceded by the People, "the court has no discretion; concurrent sentences are mandated" (*People v Hamilton*, 4 NY3d 654, 658).

The sentence imposed for murder in the second degree is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that they are lacking in merit.