

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

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KA 08-00218

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JEREMY MILLER, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered January 14, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the second degree and making a punishable false written statement.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him of, inter alia, murder in the second degree (Penal Law § 125.25 [1]), defendant contends that County Court erred in admitting in evidence the grand jury testimony and out-of-court statements of two witnesses following a *Sirois* hearing (see *Matter of Holtzman v Hellenbrand*, 92 AD2d 405). We reject that contention. The People established that the witnesses were unavailable based on the misconduct of individuals acting on defendant's behalf, with defendant's acquiescence (see *People v Major*, 251 AD2d 999, *lv denied* 92 NY2d 927). Indeed, we further note that the People presented circumstantial evidence that threats made to the witnesses were in fact made at defendant's request (see *People v Washington*, 34 AD3d 1193). 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 with respect to the murder count (see generally *People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's contention, the People presented evidence establishing the elements of identity and intent with respect to that count (see *People v Nieves*, 15 AD3d 868; *People v Pagan*, 12 AD3d 1143, *lv denied* 4 NY3d 766). We have considered defendant's remaining contentions and conclude that

they are without merit.

Entered: April 24, 2009

Patricia L. Morgan  
Deputy Clerk of the Court