

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

967

KA 13-01761

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

VAN K. COTTON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered June 27, 2013. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that County Court erred in granting the People's request to charge the jury on manslaughter in the first degree as a lesser included offense of murder in the second degree (§ 125.25 [1]). We reject that contention inasmuch as there is " 'a reasonable view of the evidence to support a finding that . . . defendant committed the lesser offense but not the greater' " (*People v Ingram*, 140 AD3d 1777, 1778, quoting *People v Van Norstrand*, 85 NY2d 131, 135), i.e., that he intended to cause serious physical injury to the victim rather than to kill him (*see People v Atkinson*, 21 AD3d 145, 147, 154, *mod on other grounds* 7 NY3d 765; *People v Straker*, 301 AD2d 667, 668, *lv denied* 100 NY2d 587; *People v Stevens*, 186 AD2d 832, 832-833, *lv denied* 81 NY2d 766).

Contrary to defendant's further contention, the court properly admitted the testimony of an eyewitness concerning his pretrial photo identification of defendant for the purpose of correcting "a misapprehension created by the defense regarding the issue of identification" (*People v Robinson*, 5 AD3d 1077, 1078, *lv denied* 2 NY3d 805 [internal quotation marks omitted]; *see People v Williams*, 142 AD3d 1360, 1361, *lv denied* 28 NY3d 1128). We agree with defendant that, under the circumstances of this case, the testimony of the investigator who administered the photo array was not necessary to

correct the misapprehension, and thus the court erred in admitting the testimony of the investigator with respect to the details of the photo identification made by the eyewitness (see *People v Melendez*, 55 NY2d 445, 452; see also *People v Massie*, 2 NY3d 179, 182-183; *People v Boyd*, 189 AD2d 433, 441, lv denied 82 NY2d 714). We nevertheless conclude that the error is harmless (see *Boyd*, 189 AD2d at 441-442; see generally *People v Crimmins*, 36 NY2d 230, 241-242).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court