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

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KA 19-01169
PRESENT: CENTRA, J.P., NEMOYER, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL SMYRE, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered January 18, 2019. The judgment convicted defendant upon a jury verdict of murder in the second degree and burglary in the first 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 murder in the second degree (Penal Law § 125.25 [3]) and burglary in the first degree (§ 140.30 [1]). We reject defendant's contention that Supreme Court erred in refusing to admit in evidence a statement of a codefendant as a declaration against penal interest. The portions of the codefendant's statement regarding defendant's involvement in the crime were not against the codefendant's penal interest (*see People v Ennis*, 11 NY3d 403, 412-413 [2008], *cert denied* 556 US 1240 [2009]; *People v Arias*, 243 AD2d 309, 309 [1st Dept 1997], *lv denied* 91 NY2d 1004 [1998]; *see generally People v Brensic*, 70 NY2d 9, 16 [1987]). Moreover, there was no showing that the codefendant's statement is reliable (*see Ennis*, 11 NY3d at 413; *People v Roberts*, 288 AD2d 403, 403-404 [2d Dept 2001], *lv denied* 97 NY2d 760 [2002]; *see generally People v Shabazz*, 22 NY3d 896, 898 [2013]). Inasmuch as "the statement was properly excluded as inadmissible hearsay, the defendant's contention that his constitutional right to present a defense was violated is without merit" (*People v Simmons*, 84 AD3d 1120, 1121 [2d Dept 2011], *lv denied* 18 NY3d 928 [2012]; *see generally People v Jones*, 129 AD3d 477, 477-478 [1st Dept 2015], *lv denied* 26 NY3d 931 [2015]).

We reject defendant's further contention that the court erred in denying his *Batson* challenge with respect to two prospective jurors. The People gave race-neutral reasons for the peremptory challenges,

and defendant did not meet his ultimate burden of establishing that those reasons were pretextual (*see People v Switts*, 148 AD3d 1610, 1611 [4th Dept 2017], *lv denied* 29 NY3d 1087 [2017]; *People v Johnson*, 38 AD3d 1327, 1328 [4th Dept 2007], *lv denied* 9 NY3d 866 [2007]). "[T]he court was in the best position to observe the demeanor of the prospective juror[s] and the prosecutor, and its [implicit] determination that the prosecutor's explanation[s were] race-neutral and not pretextual is entitled to great deference" (*People v Dandridge*, 26 AD3d 779, 780 [4th Dept 2006], *lv denied* 9 NY3d 1032 [2008] [internal quotation marks omitted]), and we see no reason to disturb that determination.

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), and affording great deference to the jury's credibility determinations (*see People v Romero*, 7 NY3d 633, 644 [2006]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Finally, the sentence is not unduly harsh or severe.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court