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

604

KA 20-01176

PRESENT: WHALEN, P.J., CURRAN, SMITH, OGDEN, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAZMINE D.S., DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AERON SCHWALLIE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered July 22, 2020. The judgment convicted defendant upon a jury verdict of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is modified on the law by vacating that part of the sentence ordering restitution and as modified the judgment is affirmed and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). This case arises from an incident in which defendant killed the victim by stabbing and slashing him 76 times, including a stab injury to his jugular vein. Defendant did not notify anyone of the incident, and the victim's body was not discovered until several weeks later. In an interview with police, defendant admitted that she stabbed the victim, with whom she claimed she had an intimate relationship, but stated that she believed he was still alive when she left his apartment.

Defendant contends that Supreme Court erred in allowing a police witness to narrate certain surveillance footage that was played for the jury. We note that the witness did not identify defendant in the footage (*cf. People v Mosley*, 41 NY3d 640, 647 [2024]), and we conclude that any error in allowing the narration was harmless because the evidence of defendant's guilt was overwhelming and there is no significant probability that the jury would have acquitted defendant if the witness's testimony had been excluded (*see People v Robbs*, 233 AD3d 1456, 1458 [4th Dept 2024], *lv denied* 43 NY3d 1058 [2025]).

Defendant next contends that the court did not adequately instruct the jury to disregard statements made by a police officer during an interview with defendant, a recording of which was played

for the jury. Contrary to the People's assertion, defendant preserved her contention by submitting a proposed charge and objecting to the court's modification of the proposed charge (*see People v Fagan*, 24 AD3d 1185, 1186 [4th Dept 2005]). We nevertheless conclude that the court's charge adequately conveyed to the jury the proper standards (*see People v Johnson*, 140 AD2d 954, 954 [4th Dept 1988], *lv denied* 72 NY2d 920 [1988]; *see also People v Harris*, 98 NY2d 452, 493 n 19 [2002]).

We reject defendant's contention that the court erred in declining to sentence her pursuant to the Domestic Violence Survivors Justice Act (DVSJA) (*see* Penal Law § 60.12, as amended by L 2019, ch 31, § 1; L 2019, ch 55, part WW, § 1). Pursuant to the DVSJA, "[t]he court may impose an alternative sentence where it determines, upon a preponderance of the evidence following [a] hearing, that '(a) at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse, inflicted by a member of the same family or household as the defendant . . . ; (b) such abuse was a significant contributing factor to the defendant's criminal behavior; [and] (c) having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, that a sentence of imprisonment pursuant to [Penal Law §§ 70.00, 70.02, 70.06 or 70.71 (2) or (3)] would be unduly harsh' " (*People v Wendy B.-S.*, 229 AD3d 1317, 1319 [4th Dept 2024], *lv denied* 42 NY3d 1022 [2024], quoting Penal Law § 60.12 [1]).

At the DVSJA hearing, defendant testified that the victim had been jealous and controlling and that, on the night of the crime, he attacked her and refused to let her leave. A professor of psychiatry specializing in interpersonal violence also testified at the hearing. The professor opined, based on defendant's prior history as a victim of abuse and her "self-report" of her relationship with the victim, that "domestic violence played a role" on the night of the offense. At the close of the hearing, the court found that defendant's testimony regarding her relationship with the victim lacked credibility and that there was otherwise no evidence of abuse in her relationship with the victim. The court further declined to credit the professor's opinion inasmuch as it was based on defendant's self-report, which the court deemed incredible.

The court had "the benefit of observing defendant's testimony firsthand, including her demeanor and the manner in which she answered questions" (*People v Angela VV.*, 229 AD3d 955, 956-957 [3d Dept 2024], *affd* — NY3d — [2025]), and our independent review of the record has not revealed evidence that would undermine that determination. We therefore defer to the court's credibility determination (*see id.* at 957) and conclude that defendant failed to meet her burden of establishing "by a preponderance of the evidence that 'substantial physical, sexual or psychological abuse . . . was a significant contributing factor to [her] criminal behavior' " (*People v Gause*, 230 AD3d 1573, 1576 [4th Dept 2024], *lv denied* 43 NY3d 930 [2025]; *see People v Vilella*, 213 AD3d 1282, 1283 [4th Dept 2023], *lv denied* 39 NY3d 1157 [2023]). Given the circumstances of the crime as well as defendant's prior criminal history, which included three other

incidents in which she was charged for using a blade against a victim, we further conclude that the sentence is not unduly harsh or severe.

We agree with defendant, however, that the record does not contain "sufficient evidence to establish the amount of restitution imposed" (*People v Meyers*, 182 AD3d 1037, 1042 [4th Dept 2020], *lv denied* 35 NY3d 1028 [2020]). We therefore modify the judgment by vacating that part of the sentence ordering restitution, and we remit the matter to Supreme Court for a hearing to determine restitution in compliance with Penal Law § 60.27 (*see id.*).

All concur except OGDEN, J., who dissents and votes to further modify in accordance with the following memorandum: I respectfully dissent inasmuch as I agree with defendant that the sentence imposed is unduly harsh and severe. Defendant had a traumatic childhood, which included physical and sexual abuse. The presentence investigation report reveals that defendant was removed from her mother's care when she was approximately seven years old and that she was sexually abused by her mother's friend when her mother tried to trade sex with defendant and defendant's sister for money and drugs. Defendant attempted suicide after being raped when she was 17 years old. Defendant has a history of suffering with mental illness diagnoses, including bipolar disorder, ADHD, and PTSD. She also has a history of auditory and visual hallucinations and drug abuse. Although defendant did not establish entitlement to relief under the Domestic Violence Survivors Justice Act (DVSJA) (*see* Penal Law § 60.12, as amended by L 2019, ch 31, § 1; L 2019, ch 55, part WW, § 1), the evidence at trial and at the DVSJA hearing supports the conclusion that defendant was reliant on the 73-year-old victim for housing, food, and clothing and that she was, at the time of the instant offense, a victim of domestic violence. After committing the crime, defendant ultimately confessed, accepted responsibility for her actions, and showed remorse at sentencing. I would therefore further modify the judgment as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]) by reducing the sentence of imprisonment imposed to an indeterminate term of 15 years to life in prison (Penal Law § 70.00 [2] [a]; [3] [a] [i]).

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court