

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

561

KA 19-00777

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DYDISCI MARTIN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIELLE E. PHILLIPS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered March 22, 2019. 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 unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). We reject defendant's contention that County Court erred in admitting in evidence a swab containing DNA. The testimony at trial established that the change in the swab's packaging was not " 'a material and prejudicial change in the condition or nature of the [swab]' " (*People v Jordan*, 154 AD3d 1176, 1178 [3d Dept 2017], quoting *People v Julian*, 41 NY2d 340, 344 [1977]), and any deficiencies in the chain of custody went to the weight, not the admissibility, of the evidence (*see People v Cleveland*, 273 AD2d 787, 788 [4th Dept 2000], *lv denied* 95 NY2d 864 [2000]).

We likewise reject defendant's contention that the court erred in refusing to suppress evidence seized pursuant to a warrantless search of his vehicle. Contrary to defendant's contention, the record establishes that he voluntarily provided the police with written consent to search his vehicle (*see People v Fioretti*, 155 AD3d 1662, 1663 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]).

Contrary to defendant's further contention, the conviction is supported by legally sufficient evidence, notwithstanding the fact that the People's case was based largely on circumstantial proof (*see People v Hernandez*, 79 AD3d 1683, 1683 [4th Dept 2010], *lv denied* 16 NY3d 895 [2011]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342,

349 [2007]), we reject defendant's additional contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant failed to preserve for our review his contention that the court erred in failing to excuse for cause a prospective juror (*see People v Stepney*, 93 AD3d 1297, 1297-1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant's contention that the court improperly imposed an enhanced sentence lacks merit because the court did not impose an enhanced sentence (*cf. People v Burns*, 279 AD2d 586, 587 [2d Dept 2001]; *People v Campbell*, 271 AD2d 63, 69-71 [4th Dept 2000], *lv denied* 95 NY2d 967 [2000]). Finally, the sentence is not unduly harsh or severe.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court