

State of New York Court of Appeals

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

No. 58
The People &c.,
Respondent,
v.
James R. McIntosh,
Appellant.

James A. Hobbs, for appellant.
Scott Myles, for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed.

Even assuming the court erred in denying defendant's request to submit the crimes of manslaughter in the second degree and criminally negligent homicide to the jury as lesser included offenses of the charged crimes of murder in the second degree and

manslaughter in the first degree, the error was harmless (People v Johnson, 87 NY2d 357, 361 [1996]; People v Boettcher, 69 NY2d 174, 180 [1987]; People v Brown, 203 NY 44, 50-51 [1911]; People v Granger, 187 NY 67, 73 [1907]). The Appellate Division properly concluded that defendant’s conviction of the lesser inclusory count of first-degree manslaughter, which it dismissed as required by CPL 300.40 (3) (b), did not change the harmless error analysis. Under the circumstances presented here, the jury’s guilty verdict on the indictment’s highest count despite the availability of the next lesser included offense for their consideration, “forecloses [defendant’s] challenge to the court’s refusal to charge the remote lesser included offenses” (Boettcher, 69 NY2d at 180), because it dispels any speculation as to whether the jury might have reached a guilty verdict on “still lower degree[s] of homicide” (Brown, 203 NY at 50).

* * * * *

Order affirmed, in a memorandum. Chief Judge DiFiore and Judges Rivera, Stein, Fahey, Garcia, Wilson and Feinman concur.

Decided June 27, 2019