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

1547

KA 09-00200

PRESENT: SCUDDER, P.J., SMITH, GREEN, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HILLERY M. DUPLEASIS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered January 7, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the second degree, burglary in the first degree (two counts) and robbery in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on counts two through seven of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [3]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We agree with defendant, however, that reversal is required because Supreme Court failed to comply with CPL 310.30 during jury deliberations. Indeed, the court failed to fulfill its "core responsibility under the statute" in responding to a note from the jury at that time (*People v Kisson*, 8 NY3d 129, 134). "It is well settled that a 'substantive written jury communication . . . should be . . . read into the record in the presence of counsel' before the jury is summoned to the courtroom in response thereto" (*People v Piccione*, ___ AD3d ___, ___ [Nov. 12, 2010], quoting *People v O'Rama*, 78 NY2d 270, 277-278), and here the court responded to the jury's note in writing without providing notice thereof to the prosecutor or defense counsel. In light of our decision, we do not address defendant's remaining contentions except to note that, in view of the date on which the crimes were committed, the court erred in imposing the DNA databank fee (*see People v McCullen*, 63 AD3d 1708, 1710, *lv denied* 13

NY3d 747).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court