

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

1151

KA 10-01053

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, SCONIERS, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HECTOR GONZALEZ, ALSO KNOWN AS "INDIO,"
DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF
COUNSEL), FOR DEFENDANT-APPELLANT.

HECTOR GONZALEZ, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered April 29, 2010. The judgment convicted defendant, upon a nonjury verdict, of murder in the second degree and criminal possession of a weapon 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 following a bench trial of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). County Court properly refused to suppress the testimony of a witness who identified defendant on the ground that the photo array presented to her was unduly suggestive. "Because 'the subjects depicted in the photo array [were] sufficiently similar in appearance so that the viewer's attention [was] not drawn to any one photograph in such a way as to indicate that the police were urging a particular selection,' the photo array was not unduly suggestive" (*People v Weston*, 83 AD3d 1511, 1511, lv denied 17 NY3d 823). The court also properly determined that a witness who testified concerning inculpatory statements made to him by defendant while they were both incarcerated was not acting as an agent of the police when defendant made the statements (*see People v McCray*, 66 AD3d 1338, 1339, lv denied 13 NY3d 908, 14 NY3d 803; *see generally People v Cardona*, 41 NY2d 333, 335). The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to support the conviction and, viewing the evidence in light of the elements of the crimes in this bench trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not

against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We reject defendant's further contention that the People failed to disclose *Brady* material in a timely manner. Even assuming, *arguendo*, that the witness statement at issue was exculpatory, we conclude that the alleged *Brady* violation does not require reversal because defendant received the statement " 'as part of the *Rosario* material provided to him and was given a meaningful opportunity to use the exculpatory evidence' " (*People v Green*, 74 AD3d 1899, 1901, *lv denied* 15 NY3d 852). Defendant waived his contention that he was denied his right to present a defense based upon alleged attempts by the police to intimidate a defense witness, inasmuch as the court granted the only relief sought by defendant in connection therewith and defendant did not further object (*see Delong v County of Chautauqua* [appeal No. 2], 71 AD3d 1580, 1580-1581; *see generally People v Kulakov*, 72 AD3d 1271, 1273-1274, *lv denied* 15 NY3d 775, *lv dismissed* 16 NY3d 896; *People v Miller*, 37 AD3d 1071). The sentence is not unduly harsh or severe. Finally, we have examined defendant's contentions in his *pro se* supplemental brief and conclude that none requires reversal or modification of the judgment.

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court