Appendix A

State of New York
Court of Appeals

BEFORE: LESLIE E. STEIN, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

KYLE A. BOX,

Appellant.

ORDER DENYING LEAVE

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

Dated: June 10, 2020
at Albany, New York

Leslie E. Stein
Associate Judge

*Description of Order: Order of the Appellate Division, Fourth Department, entered March 13, 2020, modifying a judgment of the County Court, Jefferson County, rendered March 3, 2017, and as so modified, affirming the judgment.

Appendix C

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

1198

KA 17-01328

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KYLE A. BOX, DEFENDANT-APPELLANT.

DANIELLE C. WILD, ROCHESTER, FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered March 3, 2017. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, assault in the first degree, arson in the second degree, arson in the third degree, reckless endangerment in the first degree, tampering with physical evidence (two counts), grand larceny in the fourth degree, criminal possession of stolen property in the fourth degree and criminal possession of a weapon in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law and the facts by reversing those parts convicting defendant of arson in the third degree, reckless endangerment in the first degree, grand larceny in the fourth degree, and criminal possession of stolen property in the fourth degree and dismissing counts four, five, eight, and nine of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]), assault in the first degree (§ 120.10 [1]), arson in the second degree (§ 150.15), arson in the third degree (§ 150.10 [1]), reckless endangerment in the first degree (§ 120.25), grand larceny in the fourth degree (§ 155.30 [8]), criminal possession of stolen property in the fourth degree (§ 165.45 [5]), and two counts of tampering with physical evidence (§ 215.40 [2]). Defendant's conviction stems from his conduct in stabbing the victim 46 times in the victim's home, setting fire to the house, and then stealing the victim's vehicle. Defendant gave a statement to the police admitting that he stabbed the victim, but claimed he did so in self-defense. Defendant also pursued an extreme emotional disturbance (EED) affirmative defense during the trial.

We reject defendant's contention that County Court erred in refusing to suppress his statements to the police. Prior to the

generally Bleakley, 69 NY2d at 495). "A person is guilty of arson in the second degree when he [or she] intentionally damages a building . . . by starting a fire, and when (a) another person who is not a participant in the crime is present in such building . . . at the time, and (b) the defendant knows that fact or the circumstances are such as to render the presence of such a person therein a reasonable possibility" (Penal Law § 150.15). "[T]he definition of person contemplates a living human being," and thus section 150.15 requires that such a person be alive when the fire is started (*People v Taylor*, 158 AD3d 1095, 1103 [4th Dept 2018], *lv denied* 32 NY3d 941 [2018], *reconsideration denied* 32 NY3d 1178 [2019]). Here, the medical examiner testified that the autopsy showed that the victim was still alive when the fire was started and, contrary to defendant's contention, the jury could infer from the evidence that defendant was aware that such was a reasonable possibility.

We agree with defendant, however, that the verdict finding him guilty of reckless endangerment in the first degree is against the weight of the evidence. "A person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he [or she] recklessly engages in conduct which creates a grave risk of death to another person" (Penal Law § 120.25). Count five of the indictment alleged that defendant recklessly engaged in conduct creating a grave risk of death to emergency responders when he intentionally started the fire. We agree with defendant that the verdict on that count is against the weight of the evidence because the People did not prove beyond a reasonable doubt that defendant acted with depraved indifference to human life when he set the fire (*see People v Harvin*, 75 AD3d 559, 561 [2d Dept 2010]; *see also People v Jean-Philippe*, 101 AD3d 1582, 1583 [4th Dept 2012]; *see generally People v Williams*, 111 AD3d 1435, 1435-1436 [4th Dept 2013], *affd* 24 NY3d 1129 [2015]; *People v Feingold*, 7 NY3d 288, 296 [2006]). Inasmuch as defendant is challenging only the weight of the evidence with respect to that count and does not challenge the legal sufficiency of the evidence with respect to that count, we cannot reduce the conviction to the lesser included offense of reckless endangerment in the second degree (*see People v Cooney* [appeal No. 2], 137 AD3d 1665, 1668-1669 [4th Dept 2016], *appeal dismissed* 28 NY3d 957 [2016]). We therefore modify the judgment by reversing that part convicting defendant of reckless endangerment in the first degree and dismissing count five of the indictment.

We further agree with defendant that the verdict finding him guilty of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree is against the weight of the evidence. With respect to each of those counts, the People were required to establish that the value of the stolen motor vehicle exceeded $100 (*see* Penal Law §§ 155.30 [8]; 165.45 [5]). It is well settled that a witness "must provide a basis of knowledge for his [or her] statement of value before it can be accepted as legally sufficient evidence of such value" (*People v Lopez*, 79 NY2d 402, 404 [1992]; *see People v Guarnieri*, 122 AD3d 1078, 1079 [3d Dept 2014]). "Conclusory statements and rough estimates of value are not

Finally, we note that the certificate of conviction incorrectly reflects that defendant was convicted of two counts of tampering with physical evidence pursuant to Penal Law § 215.50 (2), and it must therefore be amended to reflect that he was convicted of two counts of tampering with physical evidence pursuant to section 215.40 (2) (*see People v Cruz-Rivera*, 174 AD3d 1512, 1514 [4th Dept 2019]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court