

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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O/hu

_____AD3d_____

Argued - May 7, 2007

STEPHEN G. CRANE, J.P.
GLORIA GOLDSTEIN
JOSEPH COVELLO
THOMAS A. DICKERSON, JJ.

2001-03266

DECISION & ORDER

The People, etc., respondent,
v Darnell Tomlin, appellant.

(Ind. No. 2270/00)

Pamela D. Hayes, New York, N.Y., for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Howard B. Goodman of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Chambers, J.), rendered April 5, 2001, convicting him of murder in the second degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to suppress identification testimony.

ORDERED that the judgment is affirmed.

The record of the *Rodriguez* hearing (*see People v Rodriguez*, 79 NY2d 445) supports the hearing court's determination that the witnesses were impervious to police suggestion, and thus that their identifications were confirmatory (*see People v Rodriguez, supra; People v Garner*, 27 AD3d 764, 764; *People v James*, 259 AD2d 709, 710; *People v Russo*, 243 AD2d 658, 659; *People v Miller*, 232 AD2d 247; *People v Jenkins*, 230 AD2d 806, 807; *Matter of Bruce C.*, 224 AD2d 685, 686; *People v Terry*, 224 AD2d 202).

The defendant's contention that the evidence was legally insufficient to prove depraved indifference murder beyond a reasonable doubt is unpreserved for appellate review (*see CPL 470.05[2]; People v Gray*, 86 NY2d 10, 19). In any event, viewing the evidence in the light

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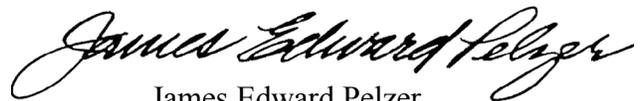
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most favorable to the prosecution (*see People v Contes*, 60 NY2d 620), we find that it was legally sufficient to establish the elements of depraved indifference murder beyond a reasonable doubt (*see People v Fenner*, 61 NY2d 971; *People v Campbell* 33 AD3d 716; *People v Webb*, 31 AD3d 796; *People v Summerville* 22 AD3d 692, 692). Further, the evidence was legally sufficient to establish the defendant's identity as the perpetrator.

Moreover, resolution of issues of credibility is primarily a matter to be determined by the jury, which saw and heard the witnesses, and its determination should be accorded great deference on appeal (*see People v Romero*, 7 NY3d 633, 644-645; *People v Mateo*, 2 NY3d 383, 410, *cert denied* 542 US 946). Upon the exercise of our factual review power (*see* CPL 470.15[5]), we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero, supra*).

CRANE, J.P., GOLDSTEIN, COVELLO and DICKERSON, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court