

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

D24032
Y/prt

_____AD3d_____

Argued - June 9, 2009

A. GAIL PRUDENTI, P.J.
HOWARD MILLER
JOSEPH COVELLO
LEONARD B. AUSTIN, JJ.

2004-09066

DECISION & ORDER

The People, etc., respondent,
v Jamie Jacobs, appellant.

(Ind. No. 03-00876)

Anthony M. Giordano, Ossining, N.Y., for appellant.

Janet DiFiore, District Attorney, White Plains, N.Y. (Raffaelina Gianfrancesco,
Richard Longworth Hecht, and Anthony J. Servino of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Westchester County (Smith, J.), rendered October 6, 2004, convicting him of attempted murder in the second degree, assault in the first degree, criminal use of a firearm in the first degree, criminal possession of a weapon in the second degree, and criminal possession of a weapon in the third 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 County Court properly denied the defendant's motion pursuant to CPL 330.30(3) to set aside the verdict based on the ground of newly-discovered evidence. The court found the testimony of a new witness presented by the defendant at the hearing on the motion to be lacking in credibility, and that determination is entitled to deference on appeal (*see People v Britton*, 49 AD3d 893). The record supports the County Court's assessment of the witness's credibility, as well as its determination that the witness's testimony was not "of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant" (CPL 330.30[3]; *see People v Hicks*, 6 NY3d 737, 739; *People v Rivera*, 108 AD2d 829).

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At a *Rodriguez* hearing (*see People v Rodriguez*, 79 NY2d 445), the People established that the complaining witness had sufficient familiarity with the defendant so that his photographic identification was merely confirmatory. The People properly established this prior knowledge through the testimony of a police officer (*see People v Waterman*, 56 AD3d 329).

Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. In fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see CPL 470.15[5]; People v Danielson*, 9 NY3d 342), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383, 410, *cert denied* 542 US 946; *People v Bleakley*, 69 NY2d 490, 495). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of evidence (*see People v Romero*, 7 NY3d 633).

Contrary to the defendant's contention, he was not denied his right to the effective assistance of counsel (*see People v Baldi*, 54 NY2d 137, 147; *see also Strickland v Washington*, 466 US 668).

The defendant's contention that the County Court erroneously failed to deliver a missing witness charge is unpreserved for appellate review (*see CPL 470.05[2]*). In any event, this contention is without merit inasmuch as the defendant never established that the witness in question was in the People's control or that his whereabouts could have been ascertained with due diligence (*see People v Williams*, 47 AD3d 854).

The defendant's remaining contention is without merit.

PRUDENTI, P.J., MILLER, COVELLO and AUSTIN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court