

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

D24848
O/prt

_____AD3d_____

Submitted - October 6, 2009

WILLIAM F. MASTRO, J.P.
HOWARD MILLER
DANIEL D. ANGIOLILLO
LEONARD B. AUSTIN, JJ.

2003-08138

DECISION & ORDER

The People, etc., respondent,
v Starland Jean-Marie, appellant.

(Ind. No. 3931/02)

James Layton Koenig, New York, N.Y., for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Thomas M. Ross, and Judith Aarons of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Chambers, J.), rendered August 14, 2003, convicting him of robbery in the first degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant's challenge to the legal sufficiency of the identification evidence is unpreserved for appellate review (*see* CPL 470.05[2]; *People v Hawkins*, 11 NY3d 484, 492; *People v Finger*, 95 NY2d 894, 895; *People v Roberts*, 64 AD3d 796; *People v Arias*, 64 AD3d 786). In any event, 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. Moreover, 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, 348-349; *People v Alexis*, _____AD3d_____, 2009 NY Slip Op 06563 [2d Dept 2009]), 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; *People v David*, 65 AD3d 1163; *People v Silberzweig*, 58 AD3d 762, *lv denied* 12 NY3d 920). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633).

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The discrepancies and inconsistencies between the identification testimony of the complainant and statements in the police reports were properly for the jury to consider (*see People v Calabria*, 3 NY3d 80; *People v Stroman*, 60, AD3d 708, *lv denied* 12 NY3d 921; *People v Fields*, 28 AD3d 789, 790; *People v Almonte*, 23 AD3d 392; *People v White*, 192 AD2d 736, 736-737). Moreover, the minor discrepancies between the complainant's description of the defendant's height, weight, and clothing and his actual physical appearance were also a proper consideration for the jury (*see People v Colon*, 42 AD3d 549, 550; *People v Caballero*, 177 AD2d 496). Furthermore, the fact that one of the People's witnesses had an unsavory background and testified pursuant to a cooperation agreement did not render his testimony incredible (*see People v Manley*, 60 AD3d 870, *lv denied* 12 NY3d 927; *People v Adams*, 302 AD2d 601; *People v Harris*, 276 AD2d 562, 562-563; *People v Alston*, 243 AD2d 573).

The defendant was not deprived of his right to a fair trial by the prosecutor's comments during summation. Although the prosecutor's remark regarding defense counsel was improper (*see People v Torres*, 223 AD2d 741, 742), any prejudice that may have resulted from the remark was alleviated when the trial court sustained the defendant's objection and provided a curative instruction to the jury (*see People v Warren*, 27 AD3d 496, 498).

The defendant's challenges to the prosecutor's remarks on the issue of cross-racial identification were not preserved for appellate review, as defense counsel failed to seek further ameliorative action with respect to those comments after his objections were sustained (*see CPL 470.05[2]*; *People v Medina*, 53 NY2d 951, 953; *People v Gill*, 54 AD3d 965, 966; *People v Norman*, 40 AD3d 1130, 1131). In any event, the remarks were fair comment upon the evidence and permissive responses to arguments presented in summation by defense counsel (*see People v Halm*, 81 NY2d 819, 821; *People v Smalls*, 65 AD3d 708; *People v Maisonett*, 64 AD3d 794; *People v Pinckney*, 27 AD3d 581, 582; *People v Dyer*, 245 AD2d 299).

Given the circumstances of this case, any impropriety with respect to the remaining remarks was harmless in light of the overwhelming evidence of the defendant's guilt and the absence of a significant probability that, had the remarks not been made, the defendant would have been acquitted (*see People v Brosnan*, 32 NY2d 254, 262; *People v Tucker*, 27 AD3d 592).

The defendant's ineffective assistance of counsel claims are not reviewable on direct appeal because they involve matter outside the record (*see People v Madrid*, 52 AD3d 532, 533; *People v Alvarez*, 51 AD3d 470; *People v Staropoli*, 49 AD3d 568, 568-569; *People v Haynes*, 39 AD3d 562, 564; *People v Gillespie*, 36 AD3d 626, 627; *People v Zimmerman*, 309 AD2d 824; *People v Boyd*, 244 AD2d 497).

MASTRO, J.P., MILLER, ANGIOLILLO and AUSTIN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court