

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

D25204
O/prt

_____AD3d_____

Argued - October 30, 2009

PETER B. SKELOS, J.P.
RANDALL T. ENG
LEONARD B. AUSTIN
SHERI S. ROMAN, JJ.

2007-08764

DECISION & ORDER

The People, etc., respondent,
v David Mitchell, appellant.

(Ind. No. 132/07)

Lynn W. L. Fahey, New York, N.Y. (Andrew E. Abraham of counsel), for appellant.

Daniel M. Donovan, Jr., District Attorney, Staten Island, N.Y. (Morrie I. Kleinbart and Anne Grady of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Richmond County (Collini, J.), rendered September 5, 2007, convicting him of manslaughter in the first degree, assault in the second degree, and criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

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), 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 the evidence (*see People v Romero*, 7 NY3d 633).

While it was proper for the prosecutor to elicit testimony that the defendant attempted

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to procure a false alibi (*see People v Moses*, 63 NY2d 299, 308), eliciting the witness's reason for agreeing to provide one was error (*see People v Buzzi*, 238 NY 390, 398-399; *cf. People v Myrick*, 31 AD3d 668, 669). However, such error was harmless, as there was overwhelming evidence of the defendant's guilt, and no significant probability that the error contributed to his conviction (*see People v Crimmins*, 36 NY2d 230, 241-242).

Furthermore, the defendant's contention concerning a comment made by the prosecutor during summation is unpreserved for appellate review, as he raised only a general objection to the contested remark, failed to request curative instructions, and did not timely move for a mistrial on that ground (*see CPL 470.05[2]*; *People v Dashosh*, 59 AD3d 731; *People v Miller*, 57 AD3d 568). In any event, the challenged portion of the prosecutor's summation constituted fair comment on, or reasonable inferences drawn from, the evidence (*see People v Ashwal*, 39 NY2d 105; *People v Hughley*, 43 AD3d 1180).

The defendant received the effective assistance of counsel (*see People v Benevento*, 91 NY2d 708, 712).

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80).

The defendant's remaining contentions are unpreserved for appellate review and, in any event, are without merit.

SKELOS, J.P., ENG, AUSTIN and ROMAN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court