

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

D25302  
C/kmg

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - November 16, 2009

PETER B. SKELOS, J.P.  
RANDALL T. ENG  
ARIEL E. BELEN  
LEONARD B. AUSTIN, JJ.

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2006-09513

DECISION & ORDER

The People, etc., respondent,  
v Robert Kelly, appellant.

(Ind. No. 6167/05)

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Lynn W. L. Fahey, New York, N.Y. (Warren S. Landau of counsel), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Sholom J. Twersky of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Walsh, J., at sentence; Heffernan, J., at hearing and trial), rendered September 26, 2006, convicting him of robbery in the first degree and burglary in the first 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 motion which was to suppress identification evidence.

ORDERED that the judgment is affirmed.

Following the suppression of the victim's lineup identification of the defendant, the People established by clear and convincing evidence at an independent source hearing that the in-court identification of the defendant was based upon the witness's independent observation of the defendant during the commission of the crime (*see People v Marte*, 12 NY3d 583, 586; *People v Adelman*, 36 AD3d 926, 927; *People v Ortiz*, 7 AD3d 544; *People v Radcliffe*, 273 AD2d 483, 484).

The defendant's contention that the trial court violated his constitutional right to a jury trial and the statutory mandate of CPL 310.10 that the jurors be continuously kept together is not preserved for appellate review (*see People v Ramon*, 291 AD2d 511, 512; *People v Johnson*, 224

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AD2d 635). In any event, under the circumstances, there was no violation of the defendant's rights (see *People v Cabot*, 294 AD2d 444, 445; *People v Ramon*, 291 AD2d at 512; *People v Johnson*, 224 AD2d 635).

The defendant's argument that the persistent violent felony offender sentencing scheme under Penal Law § 70.08 violates the holding in *Apprendi v New Jersey* (530 US 466), is also unpreserved for appellate review (see CPL 470.05[2]; *People v Washington*, 26 AD3d 400; *People v Black*, 23 AD3d 490) and, in any event, is without merit (see *People v Rivera*, 5 NY3d 61, cert denied 546 US 984; *People v Winfield*, 63 AD3d 969, 970; *People v Wells*, 63 AD3d 967, 969; *People v Mitchell*, 59 AD3d 739, 741).

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

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer  
Clerk of the Court