

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

D26783
W/prt

_____AD3d_____

Argued - March 1, 2010

PETER B. SKELOS, J.P.
FRED T. SANTUCCI
DANIEL D. ANGIOLILLO
CHERYL E. CHAMBERS, JJ.

2008-01818

DECISION & ORDER

The People, etc., respondent,
v Orlando Cintron, appellant.

(Ind. No. 4678/07)

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

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Rhea A. Grob, and Davis Polk & Wardwell, LLP [Ciaran P. A. Connelly], of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Guzman, J.), rendered February 19, 2008, convicting him of assault in the second degree and criminal possession of a weapon in the fourth degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

Contrary to the defendant's contention, the Supreme Court providently exercised its discretion in denying his untimely request for a missing witness charge with respect to a 911 emergency caller, based on its finding that the unidentified caller was not available to the People to testify at trial (*see People v Gonzalez*, 68 NY2d 424, 428-429; *People v Perry*, 218 AD2d 818, 819; *cf. People v Gladden*, 180 AD2d 747, 748).

The defendant's contention that the People did not disprove his justification defense by legally sufficient evidence is unpreserved for appellate review (*see CPL 470.05[2]*; *People v Hawkins*, 11 NY3d 484, 492-493; *People v Boyle*, 289 AD2d 251, 252). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621),

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we find that it was legally sufficient to disprove the defendant's justification defense beyond a reasonable doubt (*see* Penal Law § 35.15[2][a]; *People v Lemaire*, 187 AD2d 532, 533; *People v Henegan*, 150 AD2d 606, 607; *People v Troche*, 147 AD2d 513, 514; *People v Rosado*, 123 AD2d 649; *see also* *People v Lee*, 185 AD2d 824). 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).

The defendant's remaining contention does not require reversal.

SKELOS, J.P., SANTUCCI, ANGIOLILLO and CHAMBERS, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court