

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

D27933
H/kmg

_____AD3d_____

Argued - May 17, 2010

FRED T. SANTUCCI, J.P.
DANIEL D. ANGIOLILLO
THOMAS A. DICKERSON
LEONARD B. AUSTIN, JJ.

2007-01917

DECISION & ORDER

The People, etc., respondent,
v Darwin Roque, appellant.

(Ind. No. 2550/04)

Mischel & Horn, P.C., New York, N.Y. (Richard E. Mischel and Lisa R. Marlow Wolland of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano and Karen Wigle Weiss of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Eng, J.), rendered February 7, 2007, convicting him of murder 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.

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 contention that he was deprived of a fair trial by certain remarks made by the prosecutor during summation is unreserved for appellate review (*see* CPL 470.05[2]; *People v Brewster*, 69 AD3d 750; *People v Miller*, 59 AD3d 463, 464). In any event, most of the challenged

remarks were fair comment on the evidence, permissible rhetorical comment, or responsive to the defense counsel's summation (*see People v Ashwal*, 39 NY2d 105, 109-110; *People v Torres*, 72 AD3d 709; *People v Charles*, 57 AD3d 556). "To the extent that the prosecutor may have exceeded the bounds of permissible rhetorical comment, any error was harmless" (*People v Carter*, 36 AD3d 624, 624; *see People v Crimmins*, 36 NY2d 230; *People v Charles*, 57 AD3d at 556-557).

The defendant was not denied the effective assistance of counsel, as the record reveals that defense counsel provided meaningful representation (*see People v Henry*, 95 NY2d 563; *People v Benevento*, 91 NY2d 708; *People v Martinez*, 69 AD3d 958, 959, *lv denied* 14 NY3d 842).

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

The defendant's remaining contentions either are without merit or relate to harmless error.

SANTUCCI, J.P., ANGIOLILLO, DICKERSON and AUSTIN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court