

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

D28108
G/kmg

_____AD3d_____

Argued - June 3, 2010

WILLIAM F. MASTRO, J.P.
ANITA R. FLORIO
ARIEL E. BELEN
SHERI S. ROMAN, JJ.

2007-11203

DECISION & ORDER

The People, etc., respondent,
v Anthony Fortunato, appellant.

(Ind. No. 8607/06)

Mischel & Horn, P.C., New York, N.Y. (Richard E. Mischel of counsel), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Seth M. Lieberman of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Konviser, J.), rendered November 20, 2007, convicting him of manslaughter in the second degree as a hate crime and attempted petit larceny, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant's contention that the evidence was legally insufficient to establish his guilt of manslaughter in the second degree as a hate crime beyond a reasonable doubt is unpreserved for appellate review (*see* CPL 470.05[2]; *People v Hawkins*, 11 NY3d 484). 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 of that crime beyond a reasonable doubt (*see People v Hart*, 8 AD3d 402). Moreover, upon our independent review pursuant to CPL 470.15(5), 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 did not preserve for appellate review his claim that the Supreme Court

July 13, 2010

Page 1.

PEOPLE v FORTUNATO, ANTHONY

should have charged the jury that the testifying accomplice's plea of guilty to attempted robbery in the second degree as a hate crime in the instant matter does not constitute evidence of the defendant's guilt. In any event, any error was harmless (*see People v Crimmins*, 36 NY2d 230; *People v Hernandez*, 11 AD3d 349; *People v Weinberg*, 183 AD2d 932, 934).

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

MASTRO, J.P., FLORIO, BELEN and ROMAN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court