

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

D28698
G/kmg

_____AD3d_____

Argued - September 30, 2010

WILLIAM F. MASTRO, J.P.
JOSEPH COVELLO
THOMAS A. DICKERSON
SHERI S. ROMAN, JJ.

2008-01817

DECISION & ORDER

The People, etc., respondent,
v Rafael Perez, appellant.

(Ind. No. 10930/06)

Lynn W. L. Fahey, New York, N.Y. (Lisa Napoli of counsel), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Jodi L. Mandel, and Rhiana L. Swartz of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Parker, J.), rendered February 21, 2008, convicting him of burglary in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant failed to preserve for appellate review his contention that he was deprived of a fair trial as a result of prosecutorial misconduct during summation. The defendant raised no objection during summation to the comments challenged on appeal, and failed to move for a mistrial (*see* CPL 470.05[2]; *People v Garguilio*, 57 AD3d 797, 798). In any event, most of the challenged remarks were within the broad bounds of rhetorical comment permissible in closing arguments, fair comment on the evidence, or responsive to arguments and theories presented in the defense summation (*see People v Halm*, 81 NY2d 819, 821; *People v Gordon*, 306 AD2d 422; *People v Turner*, 214 AD2d 594). Any error resulting from the remaining challenged remarks was harmless (*see People v Smalls*, 65 AD3d 708; *People v Dorgan*, 42 AD3d 505).

In light of his counsel's zealous and competent defense throughout the course of the

October 26, 2010

Page 1.

PEOPLE v PEREZ, RAFAEL

trial, we reject the defendant's contention that his counsel's failure to object to the challenged summation remarks constituted ineffective assistance of counsel (see *People v Williams*, 8 NY3d 854, 855-856; *People v Taylor*, 1 NY3d 174, 176; *People v Tonge*, 93 NY2d 838, 840; *People v Gonzalez*, 44 AD3d 790, 791).

Finally, the sentence imposed was not excessive (see *People v Martinez*, 58 AD3d 754, 756; *People v Jordan*, 36 AD3d 948; *People v Ochoa*, 179 AD2d 689, 690; *People v Marti*, 131 AD2d 597, 598).

MASTRO, J.P., COVELLO, DICKERSON and ROMAN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court