

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

D29632
Y/hu

_____AD3d_____

Argued - November 19, 2010

WILLIAM F. MASTRO, J.P.
ANITA R. FLORIO
JOHN M. LEVENTHAL
SANDRA L. SGROI, JJ.

2008-11014

DECISION & ORDER

The People, etc., respondent,
v Derek Simmons, appellant.

(Ind. No. 2362/05)

Randall D. Unger, Bayside, N.Y., 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 (Lewis, J.), rendered November 19, 2008, convicting him of manslaughter in the first degree and criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

In order for a statement to be admissible under the exception to the hearsay rule for declarations against penal interest, a four-part test must be satisfied: (1) the declarant must be unavailable to testify at the defendant's trial, (2) the declarant must have competent knowledge of the facts, (3) the declarant must have known at the time the statement was made that it was against his or her penal interest, and (4) there must be independent supporting proof indicating that the statement is trustworthy and reliable (*see People v Ennis*, 11 NY3d 403, 412-413, *cert denied* _____US_____, 129 S Ct 2383; *People v Brensic*, 70 NY2d 9, 15; *People v Settles*, 46 NY2d 154, 167; *People v Toussaint*, 74 AD3d 846; *People v Singh*, 47 AD3d 733, 734, *cert denied* _____US_____, 129 S Ct 570). Here, the Supreme Court properly declined to admit into evidence a statement offered by the defendant because the statement, made by a nontestifying witness, that the

witness “did what he had to do,” was too ambiguous to be against penal interest or to be judged either trustworthy or reliable. Since the statement was properly excluded as inadmissible hearsay, the defendant’s contention that his constitutional right to present a defense was violated is without merit (see *People v Cepeda*, 208 AD2d 364).

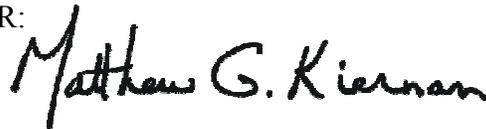
Contrary to the defendant’s contention, the Supreme Court properly denied his *Batson* challenge (see *Batson v Kentucky*, 476 US 79), as he failed to establish a prima facie case of discrimination. A disproportionate number of challenges to prospective jurors who are members of a particular racial group or gender, without more, is rarely dispositive on the issue of an impermissible discriminatory motive (see *People v Brown*, 97 NY2d 500, 507; *People v Childress*, 81 NY2d 263, 267). “In the absence of a record demonstrating other circumstances supporting a prima facie showing, the Supreme Court correctly found that the defendant failed to establish a pattern of purposeful exclusion sufficient to raise an inference of racial discrimination” (*People v Scott*, 70 AD3d 977, 977; see *People v Robert G.*, 241 AD2d 499, 500).

Although the prosecutor failed to correct inaccurate trial testimony of one of the People’s witnesses (see *Napue v Illinois*, 360 US 264, 269-270; *People v Baxley*, 84 NY2d 208, 213-214; *People v Pelchat*, 62 NY2d 97, 99, 107), the error was harmless (see *People v Steadman*, 82 NY2d 1, 8-9; *People v Jones*, 31 AD3d 666, 667), as there was overwhelming evidence of the defendant’s guilt, and no significant probability that the defendant would have been acquitted if the prosecutor had corrected the inaccurate testimony (see *People v Crimmins*, 36 NY2d 230, 241-242; *People v Rivera*, 192 AD2d 561, 596; *People v Gerbino*, 132 AD2d 566).

The defendant’s remaining contention is without merit.

MASTRO, J.P., FLORIO, LEVENTHAL and SGROI, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court