

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

D30556
H/nl

_____AD3d_____

Submitted - March 1, 2011

DANIEL D. ANGIOLILLO, J.P.
ANITA R. FLORIO
ARIEL E. BELEN
ROBERT J. MILLER, JJ.

2009-03132

DECISION & ORDER

The People, etc., respondent,
v Vernon Mingo, appellant.

(Ind. No. 08-00451)

Harold, Salant, Strassfield & Spielberg, White Plains, N.Y. (Rachel J. Filasto of counsel), for appellant.

Janet DiFiore, District Attorney, White Plains, N.Y. (Maria I. Wager, Lois Cullen Valerio, and Richard Longworth Hecht of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Westchester County (Loehr, J.), rendered March 4, 2009, convicting him of criminal possession of a controlled substance in the third degree, escape in the first degree, criminal possession of a controlled substance in the seventh degree, and resisting arrest, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

Contrary to the People's contention, the defendant preserved his contention that the trial court erred in failing to give a missing witness instruction with respect to a potential witness for the People. Although the trial court should have given a missing witness instruction, the failure to do so was harmless (*see People v Crimmins*, 36 NY2d 230, 242; *People v Beltry*, 235 AD2d 546; *compare People v Marsalis*, 22 AD3d 866, 869).

With respect to the missing witness instruction regarding a witness for the defense, the defendant failed to rebut the People's prima facie showing that they were entitled to that instruction (*see People v Edwards*, 14 NY3d 733, 735; *People v Savinon*, 100 NY2d 192, 200-201;

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People v Gonzalez, 68 NY2d 424, 427-431). Likewise, since the defendant chose to present affirmative proof in his defense, the fact that he failed to call a material witness under his control was properly brought to the jury's attention and did not impermissibly shift the burden of proof (*see People v Rivera*, 292 AD2d 549; *People v Wood*, 271 AD2d 705; *People v Shaw*, 112 AD2d 958, 959-960; *see generally People v Savinon*, 100 NY2d at 199-200).

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 is without merit (*see People v Halm*, 81 NY2d 819, 821; *People v Tardbania*, 72 NY2d 852, 853; *People v Galloway*, 54 NY2d 396, 399; *People v Ashwal*, 39 NY2d 105, 109; *People v White*, 5 AD3d 511; *compare People v Williams*, 65 AD3d 484, 489).

ANGIOLILLO, J.P., FLORIO, BELEN and MILLER, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan
Clerk of the Court