

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

D32119
G/prt

_____AD3d_____

Submitted - June 24, 2011

REINALDO E. RIVERA, J.P.
JOSEPH COVELLO
ANITA R. FLORIO
PLUMMER E. LOTT, JJ.

2009-09096

DECISION & ORDER

The People, etc., respondent,
v David Greene, appellant.

(Ind. No. 08-01318)

Judith E. Permutt, Scarsdale, N.Y., for appellant.

Janet DiFiore, District Attorney, White Plains, N.Y. (William C. Milaccio, Lois Cullen Valerio, and Richard Longworth Hecht of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Westchester County (Wetzel, J.), rendered August 14, 2009, convicting him of murder in the second degree, criminal possession of a weapon in the second degree, and criminal possession of a weapon in the third degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to suppress identification testimony.

ORDERED that the judgment is affirmed.

Contrary to the defendant's contention, the second photographic array was not unduly suggestive. "Two separate showings of a suspect's picture in successive photographic arrays are not per se impermissibly suggestive," particularly where, as here, a different photograph of the defendant was used and his photograph was placed in different locations in the successive arrays (*People v Dunlap*, 9 AD3d 434, 435). Moreover, the fillers in the second photo array were similar enough to the defendant in age and general appearance that there was little likelihood he would be singled out for identification based on particular characteristics (*see People v Avent*, 29 AD3d 601; *People v*

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Wright, 297 AD2d 391; *People v Rivera*, 265 AD2d 509). Accordingly, the hearing court properly denied that branch of the defendant's omnibus motion which was to suppress identification testimony.

The trial court properly refused to instruct the jury with respect to manslaughter in the second degree as a lesser-included offense of intentional murder (*see* CPL 300.50; *People v Bey*, 71 AD3d 1156). Under no reasonable view of the evidence could the jury have found that the defendant committed the lesser offense but not the greater (*see* *People v Bey*, 71 AD3d at 1156; *People v Rivera*, 2 AD3d 542, 543; *People v Jackson*, 202 AD2d 518, 519).

The trial court's response to the jury's note asking for a fuller explanation of the element of intent was meaningful and proper (*see* *People v Steinberg*, 79 NY2d 673, 684). Additionally, a missing witness charge was not warranted in light of the witness's lack of cooperation with law enforcement officials and refusal to testify or effectively communicate with the prosecution or police (*see* *People v Bryant*, 11 AD3d 630, 631; *People v Porter*, 268 AD2d 538). The defendant's contention that he was deprived of a fair trial by the trial court's comments, made upon ruling on the People's objections to two of defense counsel's summation remarks, is not preserved for appellate review (*see* CPL 470.05[2]; *People v Balls*, 69 NY2d 641, 642; *cf.* *People v Salnave*, 41 AD3d 872, 874) and, in any event, is without merit.

The defendant's remaining contentions are without merit.

RIVERA, J.P., COVELLO, FLORIO and LOTT, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court