

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

D32687
C/ct

_____AD3d_____

Argued - October 6, 2011

DANIEL D. ANGIOLILLO, J.P.
JOHN M. LEVENTHAL
LEONARD B. AUSTIN
SHERI S. ROMAN, JJ.

2010-00544

DECISION & ORDER

The People, etc., respondent,
v Luis Canales, appellant.

(Ind. No. 2183/08)

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

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Sharon Y. Brodt, and John F. McGoldrick of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Buchter, J.), rendered January 6, 2010, convicting him of robbery in the first degree, criminal contempt in the first degree (three counts), criminal contempt in the second degree, resisting arrest, and unlawful possession of marijuana, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant's challenges to the alleged instances of prosecutorial misconduct in summation are unpreserved for appellate review (*see People v Medina*, 53 NY2d 951, 953; *People v Beam*, 78 AD3d 1067, 1068; *People v McHarris*, 297 AD2d 824, 825). In any event, the prosecutor's comments constituted fair comment on the evidence, were responsive to the defendant's summation arguments and theories (*see People v Halm*, 81 NY2d 819, 821; *People v Spencer*, 87 AD3d 751, 753-754; *People v Sydnor*, 281 AD2d 499, 499), or were within the bounds of fair rhetorical comment (*see People v Galloway*, 54 NY2d 396, 399; *People v Flores*, 191 AD2d 306).

The defendant's contention that the trial court's *Allen* charge (*see Allen v United States*, 164 US 492) was coercive is also unpreserved for appellate review, since defense counsel did

not object to the instructions given by the court (*see* CPL 470.05[2]; *People v Valencia*, 80 AD3d 632, 633; *People v Coad*, 60 AD3d 963, 964). In any event, although the court “did not expressly instruct that each juror was entitled to maintain ‘conscientiously held opinions,’ the charge as a whole was balanced, proper, and encouraging rather than coercive” (*People v Kinard*, 215 AD2d 591, 591). “At no point did the court urge that a dissenting juror abandon his or her own conviction and join in the opinion of others, attempt to shame the jurors into reaching a verdict, or endeavor to compel the jurors to agree upon a particular result” (*id.*; *see People v Coad*, 60 AD3d at 965).

The defendant was not deprived of the effective assistance of counsel. Considering the totality of the evidence, the law, and the circumstances of the case, trial counsel provided meaningful representation (*see People v Benevento*, 91 NY2d 708, 712).

ANGIOLILLO, J.P., LEVENTHAL, AUSTIN and ROMAN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court