

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

D32729  
Y/mv

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - October 11, 2011

WILLIAM F. MASTRO, J.P.  
RANDALL T. ENG  
ARIEL E. BELEN  
L. PRISCILLA HALL, JJ.

---

2010-02400

DECISION & ORDER

The People, etc., respondent,  
v Pheod Khan, appellant.

(Ind. No. 10126/06)

---

Jack G. Goldberg, New York, N.Y. (Donald Yannella of counsel), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Diane R. Eisner, and Adam M. Koelsch of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Walsh, J.), rendered February 18, 2010, convicting him of criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant's contention that the evidence was legally insufficient to support his conviction of criminal possession of a weapon in the second degree is unpreserved for appellate review (*see* CPL 470.05[2]; *People v Hawkins*, 11 NY3d 484, 491-492). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620), we find that it was legally sufficient to establish the defendant's guilt of criminal possession of a weapon in the second degree beyond a reasonable doubt. Moreover, 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

November 1, 2011

Page 1.

PEOPLE v KHAN, PHEOD

that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633).

In addition, the defendant's contention that the Supreme Court erred in failing to instruct the jury on the defense of justification with respect to the charge on criminal possession of a weapon in the second degree is unpreserved for appellate review (*see People v Albritton*, 69 AD3d 866; *People v Smith*, 54 AD3d 421, 422; *People v Herring*, 282 AD2d 546) and, in any event, is without merit (*see People v Pons*, 68 NY2d 264, 267; *People v Jenkins*, 81 AD3d 662, 663).

Contrary to the defendant's contention, the Supreme Court did not improvidently exercise its discretion in refusing to disqualify a sworn juror who expressed apprehension after one member of a group of five or six individuals, who were seen inside the courtroom, had approached the juror to talk. Upon questioning, the juror unequivocally stated that she could reach a fair and impartial decision. The Supreme Court properly determined that the juror was not grossly unqualified to serve as a member of the jury (*see CPL 270.35; People v Parnell*, 60 AD3d 1087; *People v Guzman*, 257 AD2d 630; *People v Attanasio*, 191 AD2d 447, 448).

Furthermore, the defendant's contention that the Supreme Court improperly considered charges of which he was acquitted as a basis for imposing sentence is without merit (*see People v Morgan*, 27 AD3d 579, 580; *People v Robinson*, 250 AD2d 629).

The defendant's contention that his sentence violated the Eighth Amendment prohibition against cruel and unusual punishment is without merit, as there are no exceptional circumstances present here warranting modification of the challenged sentence, which was within the permissible statutory limit (*see People v Jones*, 39 NY2d 694, 695; *People v Cruz*, 54 AD3d 962). Moreover, the sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80).

The defendant's remaining contention is unpreserved for appellate review and, in any event, without merit.

MASTRO, J.P., ENG, BELEN and HALL, JJ., concur.

ENTER:

  
Matthew G. Kiernan  
Clerk of the Court