

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

D33373
C/kmb

_____AD3d_____

Argued - December 5, 2011

PETER B. SKELOS, J.P.
ARIEL E. BELEN
PLUMMER E. LOTT
JEFFREY A. COHEN, JJ.

2009-07969

DECISION & ORDER

The People, etc., respondent,
v Anthony Nelson, appellant.

(Ind. No. 3821/07)

Lynn W. L. Fahey, New York, N.Y. (Joshua M. Levine of counsel), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Camille O'Hara Gillespie, and Bruce Alderman of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Ingram, J.), rendered August 10, 2009, convicting him of criminal possession of marijuana in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The court did not improvidently exercise its discretion in denying the defendant's request for an adverse inference charge as a sanction for the People's failure to provide to the defense an allegedly missing photograph of a bag of marijuana taken by a detective. The defendant failed to develop a record establishing a factual basis that the alleged photograph existed (*see People v Banks*, 74 AD3d 1214, 1215; *People v Young*, 61 AD3d 786; *People v Smith*, 33 AD3d 462; *People v Brown*, 286 AD2d 340).

The prosecutor improperly went outside of the four corners of the evidence when, in summation, he made the inflammatory and unsupported remarks that the defendant and his codefendant had brought their children onto their "team" with respect to a "business plan" involving their possession of marijuana (*see People v Ashwal*, 39 NY2d 105, 110; *People v Parker*, 178 AD2d

665, 665-666). The prosecution “may not . . . try to convey to the jury, by insinuation, suggestion or speculation, the impression that the defendant is guilty of other crimes not in issue at the trial” (*People v Ashwal*, 39 NY2d at 110). The defendant’s contentions regarding other improper questioning and summation comments by the prosecutor are not preserved for appellate review (*see* CPL 470.05[2]; *see also* *People v Teeter*, 47 NY2d 1002). In any event, a new trial is not warranted because we find that the cumulative effect of all of the alleged errors was harmless, as the evidence of the defendant’s guilt, without reference to the alleged errors, was overwhelming, and there is no significant probability that the alleged errors might have contributed to the defendant’s conviction (*see* *People v Crimmins*, 36 NY2d 230, 241-242).

The sentence imposed was not excessive (*see* *People v Suitte*, 90 AD2d 80, 86).

SKELOS, J.P., BELEN, LOTT and COHEN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court