

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

D33787
H/ct

_____AD3d_____

Argued - January 12, 2012

ANITA R. FLORIO, J.P.
CHERYL E. CHAMBERS
L. PRISCILLA HALL
ROBERT J. MILLER, JJ.

2009-05645

DECISION & ORDER

The People, etc., respondent,
v Efrain Rivera, appellant.

(Ind. No. 7122/08)

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

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Lori Glachman of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Dowling, J.), rendered June 3, 2009, convicting him of robbery in the second degree and burglary in the second degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial (Marrus, J.), after a hearing, of that branch of the defendant's omnibus motion which was to suppress his oral statement made to law enforcement officers.

ORDERED that the judgment is affirmed.

Contrary to the defendant's contention, the trial court did not, in effect, deprive him of the right to challenge the voluntariness of a statement he made at a hospital by precluding certain evidence. In this regard, the trial court providently exercised its discretion in precluding the defendant's hospital record and photographs taken of him hours after he made his statement, as any probative value that evidence may have had would have been substantially outweighed by its prejudicial effect (*see People v Scarola*, 71 NY2d 769, 777; *People v Jessamy*, 282 AD2d 288, 289).

The defendant correctly contends that his statement made at the scene of the crime, which was made without the benefit of *Miranda* warnings (*see Miranda v Arizona*, 384 US 436), and

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after he had been handcuffed and subject to express questioning, should have been suppressed (*see People v O'Connor*, 6 AD3d 738, 739-740; *People v Hardy*, 5 AD3d 792, 793; *People v Rifkin*, 289 AD2d 262, 263; *People v Soto*, 183 AD2d 926, 927). Nevertheless, the admission of that statement was harmless beyond a reasonable doubt, particularly in light of the defendant's own admissions during his testimony at trial (*see People v Crimmins*, 36 NY2d 230, 237; *People v Graham*, 48 AD3d 265, 266; *People v Reid*, 34 AD3d 1273, 1273).

The defendant's contentions that the prosecutor's allegedly improper questions during cross-examination of him and comments during summation constitute reversible error are unpreserved for appellate review (*see CPL 470.05 [2]*; *People v West*, 86 AD3d 583, 584; *People v Prowse*, 60 AD3d 703, 704; *People v Crawford*, 54 AD3d 961, 962). In any event, the questions the prosecutor asked the defendant were either proper or do not warrant reversal (*see People v Bryant*, 39 AD3d 768, 769; *People v Siriani*, 27 AD3d 670, 670; *People v Overlee*, 236 AD2d 133, 136). The prosecutor's remarks during summation were mostly either fair comment on the evidence, permissible rhetorical comment, or responsive to defense counsel's summation (*see People v Ashwal*, 39 NY2d 105, 109-110). Although some of the remarks were improper, they were not sufficiently prejudicial to require reversal (*see People v Galloway*, 54 NY2d 396, 401; *People v Valerio*, 70 AD3d 869).

The defendant was afforded meaningful representation (*see People v Benevento*, 91 NY2d 708).

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

FLORIO, J.P., CHAMBERS, HALL and MILLER, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court