

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

D33908
W/kmb

_____AD3d_____

Argued - January 17, 2012

PETER B. SKELOS, J.P.
RUTH C. BALKIN
SHERI S. ROMAN
SANDRA L. SGROI, JJ.

2010-00813

DECISION & ORDER

The People, etc., respondent,
v James Wall, appellant.

(Ind. No. 2117/08)

Langone & Associates, PLLC, Hempstead, N.Y. (Richard M. Langone of counsel;
Robert P. Schwartz on the brief), for appellant.

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Glenn Green of counsel), for
respondent.

Appeal by the defendant from a judgment of the Supreme Court, Suffolk County (R.
Doyle, J.), rendered December 13, 2009, convicting him of murder in the second degree (two
counts), kidnapping in the first degree (two counts), and kidnapping 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 establish his
guilt of two counts of murder in the second degree is unpreserved for appellate review since he did
not raise in the Supreme Court the specific ground that he now raises on appeal (*see* CPL 470.05[2];
People v Hawkins, 11 NY3d 484, 492; *People v Burgess*, 75 AD3d 650). In any event, the
contention is without merit. Viewing the evidence in the light most favorable to the prosecution (*see*
People v Contes, 60 NY2d 620, 621), we find that it was legally sufficient to establish the
defendant's guilt of two counts of murder in the second degree beyond a reasonable doubt.
Moreover, upon our independent review pursuant to CPL 470.15(5), we are satisfied that the verdict
of guilt as to murder in the second degree, kidnapping in the first degree, and kidnapping in the

second degree was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633).

The defendant's contention that he was entitled to a charge on circumstantial evidence is unpreserved for appellate review (*see CPL 470.05[2]*; *People v Capehart*, 61 AD3d 885, 886) and, in any event, is without merit. Where proof of all elements of a charge is based wholly on circumstantial evidence, the jury should be given a circumstantial evidence charge (*see People v Daddona*, 81 NY2d 990; *People v Johnson*, 293 AD2d 489). However, where a charge is supported with both circumstantial and direct evidence, the trial court need not so instruct the jury (*see People v Daddona*, 81 NY2d 990; *People v Washington*, 45 AD3d 880; *People v Johnson*, 293 AD2d 489). Here, there was direct evidence of the defendant's guilt provided by the testimony of the surviving kidnapping victim and the codefendant.

The defendant was, as a matter of fundamental fairness, entitled to a copy of a prior statement of a witness who testified on his behalf at trial, as the prosecutor used that prior statement to impeach the witness during cross-examination (*see People v Barbera*, 220 AD2d 601, 602; *People v Gladden*, 72 AD2d 568, 569). Under the circumstances of this case, however, the error does not require reversal (*see People v Barbera*, 220 AD2d at 602; *People v Gladden*, 72 AD2d at 569; *cf. People v Delosanto*, 307 AD2d 298).

The defendant's contention that the counts of murder in the second degree and kidnapping in the first degree were multiplicitous is unpreserved for appellate review (*see CPL 470.05[2]*; *People v Clymer*, 26 AD3d 443) and, in any event, without merit (*see People v Saunders*, 290 AD2d 461, 463).

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80, 85-86).

The defendant's remaining contentions are without merit.

SKELOS, J.P., BALKIN, ROMAN and SGROI, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court