

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

D34579
H/mv

_____AD3d_____

Argued - March 20, 2012

MARK C. DILLON, J.P.
THOMAS A. DICKERSON
L. PRISCILLA HALL
LEONARD B. AUSTIN, JJ.

2006-11850

DECISION & ORDER

The People, etc., respondent,
v Ricardo Lyons, appellant.

(Ind. No. 1819/04)

Easton Thompson Kasperek Shiffrin, LLP, Rochester, N.Y. (Brian Shiffrin and Donald M. Thompson of counsel), for appellant.

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

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Eng, J.), rendered December 12, 2006, convicting him of murder in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant's contention that the Supreme Court failed to administer the "oath of truthfulness" (*People v Hoffler*, 53 AD3d 116, 121) to prospective jurors, as required by CPL 270.15(1)(a), is unpreserved for appellate review (*see People v Cobb*, 77 AD3d 673, 673; *People v Schrock*, 73 AD3d 1429, 1432). The defendant did not draw the Supreme Court's "attention to the purported error and has failed to present an adequate record in support of his claim" (*People v Hampton*, 64 AD3d 872, 877; *see People v Melendez*, 205 AD2d 392, 393; *cf. People v Hoffler*, 53 AD3d at 121).

The defendant contends that the evidence was legally insufficient to establish his guilt of murder in the second degree, as the People failed to prove beyond a reasonable doubt that he shared a common intent with the shooter to kill the victim. However, 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 that the defendant, with the intent to cause the victim's death, acted in concert with, and intentionally aided, the shooter (*see* Penal Law §§ 20.00, 125.25[1]; *People v Cancel*, 70 AD3d 960, 960; *People v James*, 198 AD2d 146, 147; *People v McClary*, 138 AD2d 413, 413-414). 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 that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633).

The Supreme Court did not improvidently exercise its discretion in denying the defendant's request for an adverse inference charge as a sanction for the prosecution's failure to preserve a gun that allegedly belonged to the victim. The defendant's contention that the prosecution violated its obligation to preserve and disclose the gun under the Federal and New York Constitutions (*see California v Trombetta*, 467 US 479; *Brady v Maryland*, 373 US 83; *see also* CPL 240.20[1][h]) is without merit, since the defendant has not shown that the gun "possesse[d] an exculpatory value evident before its destruction, loss, or failure to preserve" (*People v Jardin*, 88 NY2d 956, 958; *see California v Trombetta*, 467 US at 489-490; *People v Radesi*, 11 AD3d 1007, 1007; *see also People v Crandall*, 38 AD3d 996, 997; *People v Hernandez*, 291 AD2d 263, 264; *People v McDonald*, 287 AD2d 655, 656).

Further, the Supreme Court properly denied the defendant's request for a justification charge concerning his use of ordinary physical force to restrain the victim at the time when the shooter fired the fatal shot (*see* Penal Law § 35.15[1]).

The defendant failed to preserve for appellate review his contention that the Supreme Court's evidentiary rulings violated his constitutional rights (*see People v Lane*, 7 NY3d 888, 889; *People v Haddock*, 79 AD3d 1148, 1149; *People v Martinez*, 68 AD3d 1757, 1757-1758).

The defendant's remaining contentions are without merit.

DILLON, J.P., DICKERSON, HALL and AUSTIN, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court