

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

D35479
O/kmb

_____AD3d_____

Submitted - May 31, 2012

REINALDO E. RIVERA, J.P.
RANDALL T. ENG
PLUMMER E. LOTT
JEFFREY A. COHEN, JJ.

2009-03039

DECISION & ORDER

The People, etc., respondent,
v Dwayne Boucher, appellant.

(Ind. No. 60/07)

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

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Thomas M. Ross, and Kimberly Zelnick of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Guzman, J.), rendered March 23, 2009, convicting him of robbery in the first degree and assault in the second degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing (Gerges, J.), of that branch of the defendant's omnibus motion which was to suppress physical evidence.

ORDERED that the judgment is affirmed.

The defendant's contention that a detective's entry into his apartment was unlawful is unpreserved for appellate review to the extent that the defendant now argues that his consent to the entry was not voluntary (*see* CPL 470.05[2]; *People v Jones*, 48 AD3d 1116, 1116, *aff'd* 11 NY3d 822; *People v Philips*, 30 AD3d 618, 619). In any event, any error in failing to suppress the physical evidence seized from the defendant's apartment was harmless beyond a reasonable doubt. The evidence of the defendant's guilt, without reference to the alleged error, was overwhelming, and there is no reasonable possibility that the alleged error might have contributed to the defendant's conviction (*see People v Crimmins*, 36 NY2d 230, 237).

The defendant contends that the evidence of "physical injury," an element of the

crime of assault in the second degree (Penal Law § 120.05[6]), was legally insufficient. This contention is unpreserved for appellate review (*see* CPL 470.05[2]; *People v Hawkins*, 11 NY3d 484, 492; *People v Rambali*, 27 AD3d 582, 583). 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 that the complainant sustained a physical injury (*see* Penal Law § 10.00[9]; *People v Chiddick*, 8 NY3d 445, 447-448; *People v Valencia*, 50 AD3d 1163, 1164; *People v Ricco*, 11 AD3d 343, 344; *People v Pike*, 173 AD2d 649, 650). Moreover, upon our independent review pursuant to CPL 470.15(5), we are satisfied that the verdict of guilt with respect to assault in the second degree was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633; *People v Velasquez*, 79 AD3d 1153, 1154; *People v Valencia*, 50 AD3d at 1164).

The defendant's remaining contentions either are without merit or have been rendered academic in light of our determination.

RIVERA, J.P., ENG, LOTT and COHEN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court