

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

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_____AD3d_____

Submitted - September 7, 2012

DANIEL D. ANGIOLILLO, J.P.
ANITA R. FLORIO
ARIEL E. BELEN
SHERI S. ROMAN, JJ.

2009-11389
2010-02890

DECISION & ORDER

The People, etc., respondent,
v Richard Thomas, appellant.

(Ind. No. 1269/04)

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

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Nicoletta J. Caferri, and William H. Branigan of counsel), for respondent.

Appeals by the defendant from (1) a judgment of the Supreme Court, Queens County (Hollie, J.), rendered November 17, 2009, and (2) and amended judgment of the same court rendered November 24, 2009, convicting him of rape in the first degree (two counts), robbery in the first degree (three counts), unlawful imprisonment in the first degree (three counts), criminal use of a firearm in the first degree, and endangering the welfare of a child, upon a jury verdict, and imposing sentence.

ORDERED that the appeal from the judgment rendered November 17, 2009, is dismissed, as that judgment was superseded by the amended judgment rendered November 24, 2009; and it is further,

ORDERED that the amended judgment is affirmed.

Photographic evidence “should be excluded only if its sole purpose is to arouse the emotions of the jury and to prejudice the defendant” (*People v Poblner*, 32 NY2d 356, 370, *cert denied* 416 US 905; *see People v Stevens*, 76 NY2d 833; *People v Sampson*, 67 AD3d 1031, 1032).

When inflammatory photographs are relevant to a material issue at trial, the court has broad

discretion to determine whether the probative value of the photographs outweighs any prejudice to the defendant (*see People v Stevens*, 76 NY2d at 833; *People v Upshaw*, 242 AD2d 548, 549; *People v Harrison*, 207 AD2d 359). The photographs at issue here were relevant to material issues in the case, and the Supreme Court did not improvidently exercise its discretion in admitting them into evidence. Contrary to the defendant's contentions, the photographs, as redacted by the court, were not so inflammatory as to have deprived him of a fair trial.

The defendant's remaining contentions are unpreserved for appellate review (*see* CPL 470.05[2]), and we decline to reach them in the exercise of our interest of justice jurisdiction.

ANGIOLILLO, J.P., FLORIO, BELEN and ROMAN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court