

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

D36134  
T/kmb

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Submitted - September 14, 2012

DANIEL D. ANGIOLILLO, J.P.  
THOMAS A. DICKERSON  
ARIEL E. BELEN  
ROBERT J. MILLER, JJ.

2006-05006

DECISION & ORDER

The People, etc., respondent, v Douglas Herrera,  
also known as Ronald Douglas Herrera-Castellanos,  
appellant.

(Ind. No. 05-00208)

Tully Rinckey, PLLC, Albany, N.Y. (Gregory T. Rinckey of counsel), for appellant.

Thomas P. Zugibe, District Attorney, New City, N.Y. (Carrie A. Ciganek of counsel),  
for respondent.

Appeal by the defendant from a judgment of the County Court, Rockland County (Kelly, J.), rendered May 15, 2006, convicting him of murder in the first degree (seven counts), rape in the first degree, robbery in the first degree, burglary in the first degree, criminal sexual act in the first degree, aggravated sexual abuse in the first degree, and sexual abuse in the first degree (two counts), upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant's claim that he was deprived of the effective assistance of counsel is based, in part, on matter appearing on the record and, in part, on matter outside the record, and thus constitutes a "mixed claim" of ineffective assistance" (*People v Maxwell*, 89 AD3d 1108, 1109, quoting *People v Evans*, 16 NY3d 571, 575 n 2, *cert denied* \_\_\_\_\_US\_\_\_\_\_, 132 S Ct 325). In this case, it is not evident from the matter appearing on the record that the defendant was deprived of the effective assistance of counsel (*cf. People v Crump*, 53 NY2d 824; *People v Brown*, 45 NY2d 852). Since the defendant's claim of ineffective assistance cannot be resolved without reference to matter outside the record, a CPL 440.10 proceeding is the appropriate forum for reviewing the claim

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in its entirety (*see People v Freeman*, 93 AD3d 805; *People v Maxwell*, 89 AD3d at 1109; *People v Rohlehr*, 87 AD3d 603, 604).

The defendant's claim that counts six and seven of the indictment, which both charge him with murder in the first degree while in the course of committing sexual abuse in the first degree, are multiplicitous, is unpreserved for appellate review (*see People v Cruz*, 96 NY2d 857, 858; *People v Clymer*, 26 AD3d 443; *People v Aarons*, 296 AD2d 508; *People v Webb*, 177 AD2d 524, 525), and we decline to review it in the exercise of our interest of justice jurisdiction.

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

ANGIOLILLO, J.P., DICKERSON, BELEN and MILLER, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court