

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

D36275
T/kmb

_____AD3d_____

Argued - September 13, 2012

MARK C. DILLON, J.P.
RUTH C. BALKIN
LEONARD B. AUSTIN
JEFFREY A. COHEN, JJ.

2010-06397

DECISION & ORDER

The People, etc., respondent,
v Cory Cromwell, appellant.

(Ind. No. 2871/09)

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

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Johnnette Traill, and Danielle Hartman of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Lasak, J.), rendered June 23, 2010, convicting him of robbery in the first degree (three counts) and attempted robbery in the first degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

Contrary to the defendant's contention, he was not deprived of the effective assistance of counsel due to his counsel's failure to argue that the lineup identifications should have been suppressed because the complainants were together before and after the lineup, so they "may" have spoken to one another. As the contention that the complainants may have spoken to one another is purely speculative and unsupported by the hearing record, the defendant has not met his burden of proving that he was deprived of the effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147; *see People v Reyes*, 60 AD3d 873, 874; *People v Celestin*, 231 AD2d 736; *People v Morales*, 134 AD2d 292). Similarly, the defendant was not deprived of the effective assistance of counsel by counsel's alleged failure to move to re-open the *Wade* hearing (*see United States v Wade*, 388 US 218). "A lawyer is not ineffective for failing to make a motion that is unlikely to succeed" (*People v Mack*, 91 AD3d 794, 795, quoting *People v Ennis*, 41 AD3d 271, 274, *affd*, 11 NY3d 403, *cert denied* _____US_____, 129 S Ct 2383; *see generally* CPL 710.40[4]; *People v Barrett*, 17

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AD3d 688). Such is the case here.

Contrary to the defendant's contention, the Supreme Court providently exercised its discretion in denying his pretrial motion for severance and in granting the People's motion to consolidate (*see* CPL 200.20[2][c], 200.20[3][a], 200.20[4]; *People v Lane*, 56 NY2d 1, 8-9; *People v Montalvo*, 34 AD3d 600; *People v Berta*, 213 AD2d 659, 660).

The defendant's contention that he was deprived of a fair trial because the prosecutor made allegedly improper remarks during his summation is unpreserved for appellate review, as the defendant either did not object to the remarks or made only general objections (*see* CPL 470.05[2]; *People v Heide*, 84 NY2d 943, 944; *People v Osorio*, 49 AD3d 562; *People v Muniz*, 44 AD3d 1074; *People v Salnave*, 41 AD3d 872, 874). In any event, the challenged remarks either were responsive to arguments made by defense counsel, constituted fair comment on the evidence, or otherwise did not deprive the defendant of a fair trial (*see People v Hudson*, 54 AD3d 774; *People v Olivo*, 23 AD3d 584).

DILLON, J.P., BALKIN, AUSTIN and COHEN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court