

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

D36621
C/kmb

_____AD3d_____

Submitted - November 2, 2012

DANIEL D. ANGIOLILLO, J.P.
SANDRA L. SGROI
JEFFREY A. COHEN
ROBERT J. MILLER, JJ.

2010-10817

DECISION & ORDER

The People, etc., respondent,
v Nicholas Kenny, appellant.

(Ind. No. 2222/09)

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 and Jeanette Lifschitz of counsel; Lorrie A. Zinno on the brief), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Latella, J.), rendered October 21, 2010, convicting him of burglary in the second degree, assault in the second degree, reckless endangerment in the second degree, unauthorized use of a vehicle in the first degree, grand larceny in the third degree, grand larceny in the fourth degree, reckless driving, driving on a designated one-way street in the wrong direction (two counts), unsafe lane change, disobedience of official traffic control devices, leaving the scene of an incident without reporting, unlawful fleeing of a police officer in a motor vehicle in the second degree, criminal possession of stolen property in the third degree, criminal possession of stolen property in the fourth degree, criminal possession of stolen property in the fifth degree, and criminal possession of a controlled substance in the seventh degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

Contrary to the People's contention, the defendant's contention that the Supreme Court erred in refusing to charge burglary in the third degree as a lesser-included offense of burglary in the second degree is preserved for appellate review (*see* CPL 470.05[2]). We agree with the People, however, that the defendant's contention is without merit. Viewing the evidence in the light most favorable to the defendant (*see People v Johnson*, 45 NY2d 546, 549; *People v Henderson*, 41

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NY2d 233, 236), there is no reasonable view of the evidence that supports the conclusion that the defendant committed the lesser offense but not the greater (*see* CPL 300.50[1]; *People v Negrón*, 91 NY2d 788, 792; *People v Magnum*, 88 AD3d 467; *People v Holloway*, 45 AD3d 477; *People v Camara*, 44 AD3d 492; *People v Watson*, 187 AD2d 743, 745).

ANGIOLILLO, J.P., SGROI, COHEN and MILLER, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court