

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

380

KA 09-00489

PRESENT: CENTRA, J.P., FAHEY, CARNI, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DEREK MCIVER, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (NEAL J. MAHONEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

GERALD L. STOUT, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael F. Griffith, J.), rendered December 16, 2008. The judgment convicted defendant, upon a jury verdict, of promoting prison contraband in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of promoting prison contraband in the first degree (Penal Law § 205.25 [2]). Contrary to the contention of defendant, County Court did not err in refusing to suppress his statement to a police investigator. The testimony of defendant at the suppression hearing that the statement was coerced by correction officers and thus was not voluntarily presented a credibility issue that the suppression court was entitled to resolve against defendant (*see People v Collins*, 302 AD2d 958, *lv denied* 99 NY2d 653). Here, "[t]he testimony of the [investigator] . . . supports the court's determination that defendant's statement[] [was] preceded by *Miranda* warnings and voluntarily made by defendant, without any promises, threats, or coercion on the part of [the correction officers]" (*People v Pennick*, 2 AD3d 1427, 1428, *lv denied* 1 NY3d 632).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see People v Livingston*, 262 AD2d 786, 787-788, *lv denied* 94 NY2d 881; *see generally People v Bleakley*, 69 NY2d 490, 495). Defendant preserved for our review his contention that he was denied a fair trial based on prosecutorial misconduct on summation only with respect to two of the prosecutor's comments (*see CPL 470.05 [2]*). In any event, that contention is

without merit inasmuch as all of the prosecutor's allegedly improper comments were either a fair response to defense counsel's summation or fair comment on the evidence (*see People v Anderson*, 52 AD3d 1320, 1321, *lv denied* 11 NY3d 733).

Entered: August 20, 2010

Patricia L. Morgan
Clerk of the Court