APPENDIX A

MANDATE

E.D.N.Y.–Bklyn.
18-cv-5568
Kuntz, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of June, two thousand twenty-one.

Present:

Rosemary S. Pooler,
Raymond J. Lohier, Jr.,
Circuit Judges,
Lewis A. Kaplan,
*District Judge.**

Denworth Davidson,

Petitioner-Appellant,

v. 20-4251

Thomas R. Griffin, Barbara Underwood,

Respondents-Appellees.

Appellant moves for a certificate of appealability and in forma pauperis status. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (discussing certificate of appealability standard).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

* Judge Lewis A. Kaplan, of the United States District Court for the Southern District of New York, sitting by designation.

MANDATE ISSUED ON 06/22/2021

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DENWORTH DAVIDSON,

Petitioner,

v.

THOMAS R. GRIFFIN,

Respondent.

----------X

DECISION & ORDER
18-CV-5568 (WFK)

WILLIAM F. KUNTZ, II, United States District Judge: Denworth Davidson ("Petitioner"), proceeding *pro se*, brings this petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254 (the "Petition"), challenging his conviction for Murder in the First Degree, Criminal Possession of a Weapon in the Second Degree, and Conspiracy in the Fourth Degree. Pet. at 1, ECF No. 1. Petitioner claims violation of his due process right to a fair trial under the 14th Amendment due to prosecutorial misconduct and the trial court's erroneous admission of evidence and jury charge, and ineffective assistance of trial counsel for failure to object to these errors. Pet. at 6–9. For the reasons discussed below, the Petition is DENIED.

BACKGROUND

I. Conviction and Sentencing

On October 7, 2004, around 11:30 A.M., Petitioner and Jerome Fletcher drove to Titlebaum Cleaners in Astoria, Queens. Aff. of William H. Branigan in Opp'n to Pet. ¶ 3, ECF No. 8 ("Branigan Aff."). Fletcher previously worked at Titlebaum and knew Bruce Levy, the owner, paid his employees in cash around this time. *Id.* Fletcher waited in his car as Petitioner shot and killed Levy and then took thousands of dollars in payroll envelopes from him. *Id.* Petitioner and Fletcher split the proceeds from the robbery. *Id.*

Petitioner was arrested and charged with Murder in the First Degree, in violation of N.Y. Penal Law § 125.27(1)(a)(vii); Murder in the Second Degree, in violation of N.Y. Penal Law § 125.25(3); two counts of Robbery in the First Degree, in violation of N.Y. Penal Law § 160.15(1), (2); Criminal Possession of a Weapon in the Second Degree, in violation of N.Y. Penal Law § 265.03; Criminal Possession of a Weapon in the Third Degree, in violation of N.Y.

Penal Law § 265.02(4); and Conspiracy in the Fourth Degree, in violation of N.Y. Penal Law § 105.10(1). *Id.* ¶ 4. Prior to trial, Petitioner moved to suppress statements made to the police and the Honorable Robert J. Hanophy of the New York State Supreme Court (the "trial court") held a suppression hearing. *Id.* ¶ 5. In a post-hearing memorandum, Petitioner argued there was a violation under *Payton v. New York*, 445 U.S. 573 (1980) as he was unlawfully arrested in his home, and thus his statements must be suppressed. *Id.* The State opposed this motion. *Id.* On July 26, 2006 the trial court held there was no *Payton* violation as Petitioner's mother allowed the police inside the home. *Id.* ¶ 6. Further, the trial court held Petitioner was properly read his *Miranda* warnings, subsequent statements were made voluntarily, and statements made before Petitioner had his *Miranda* warning were spontaneous and therefore admissible. *Id.*

After five days of deliberations, Petitioner's first trial ended in a hung jury. Pet.'s Mem. of Law in Supp. at 2, ECF No. 1-2 ("Pet. Mem."). After a second trial, a jury convicted Petitioner of first-degree murder, second-degree weapon-possession, and fourth-degree conspiracy charges. Branigan Aff. ¶ 49. On January 9, 2008, the trial court sentenced Petitioner to a prison term of life without parole on his first-degree murder conviction, a determinate term of imprisonment of fifteen years, plus five years' post-release supervision, on his second-degree weapon-possession conviction, and an indeterminate prison term of from two to four years on his fourth-degree conspiracy conviction, and ordered all sentences to run concurrently. State Court Record ("R.") at 9-8:101–02.[1]

[1] As the State Court Record is comprised of multiple documents without consistent pagination, in this Opinion & Order page citations to the State Court Record refer to the ECF docket entry followed by the PDF page number of the document to which the citation refers.

II. Post-Conviction Activity

In March 2015, Petitioner through counsel filed a brief in the New York State Appellate Division, Second Department ("Appellate Division"). R. at 9:1–98. Petitioner claimed: (1) the first-degree murder verdict was against the weight of the evidence, R. at 9:53–57; (2) the prosecutor improperly cross-examination of Petitioner regarding prior bad acts and argued a propensity for crime during summation and the court improperly charged the jury regarding Petitioner's testimony, R. at 9:58–81; (3) this misconduct denied Petitioner a fair trial, R. at 9:82–91; and (4) excessive sentence, R. at 9:92–96. In a footnote, Petitioner also claimed trial counsel was ineffective for failing to object to the allegedly improper questions, summation comments, and court charge. R. at 9:80–81 n.26. On July 2, 2015, the State filed a respondent's brief. R. at 9:99–180. In February 2016, Petitioner filed a *pro se* supplemental brief arguing his statement to the police was involuntary as he was tricked into signing it, the State failed to corroborate his confession, and conviction was against the weight of the evidence. R. at 9-1:41–74. On June 8, 2016, the State filed a brief in response. R. at 9-1:7–40.

On November 16, 2016, the Appellate Division affirmed Petitioner's conviction holding the hearing court properly denied Petitioner's motion to suppress statements, the weight of the evidence claims were meritless and unpreserved, the State improperly impeached Petitioner yet this did not deprive Petitioner of a fair trial, jury charge claims were meritless and unpreserved, and all remaining claims were meritless. *People v. Davidson*, 144 A.D.3d 938, 939 (N.Y. App. Div. 2d Dep't 2016).

On February 16, 2017, Petitioner sought leave to appeal the decision to the New York State Court of Appeals, R. at 11:6–9, which was denied on July 10, 2017. *People v. Davidson,* 85 N.E.3d 102 (N.Y. 2017).

On October 4, 2018, Petitioner filed the instant Petition for a writ of *habeas corpus* in this Court. ECF No. 1. Respondent filed opposition on March 29, 2019. ECF No. 8. Petitioner filed his reply to the State's opposition on June 11, 2019. ECF No. 14.

DISCUSSION

I. Legal Standard

The Court's review of the Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. A federal *habeas* court may only consider whether a person is in custody pursuant to a state court judgment "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). AEDPA requires federal courts to apply a "highly deferential standard" when conducting *habeas corpus* review of state court decisions and "demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (internal quotation marks and citations omitted).

Strickland v. Washington, 466 U.S. 668 (1984), sets forth the relevant federal law governing ineffective assistance of counsel claims. In reviewing a state court's application of the *Strickland* standard, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard. Were that the inquiry, the analysis would be no different than if, for example, [the district court] were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States [D]istrict [C]ourt." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). However, as an initial matter, the Court may evaluate whether defense counsel's performance was sufficient under *Strickland*, as a finding defense counsel met the *Strickland* standard is dispositive of Petitioner's AEDPA claim for ineffective assistance of counsel. *Moreno v. Smith*, 06-CV-4602, 2010 WL 2975762, at *15 (E.D.N.Y. July 26, 2010) (Matsumoto, J.).

> Under *Strickland*, in order to prevail on an ineffective-assistance-of-counsel claim, a defendant must meet a two-pronged test: (1) he "must show that counsel's performance was deficient," 466 U.S. at 687, 104 S.Ct. 2052, so deficient that, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance," *id.* at 690, 104 S.Ct. 2052; and (2) he must show that "the deficient performance prejudiced the defense," *id.* at 687, 104 S.Ct. 2052, in the sense that "there is a reasonable possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694, 104 S.Ct. 2052.

Bennett v. United States, 663 F.3d 71, 84 (2d Cir. 2011). "It is the accused's 'heavy burden' to demonstrate a constitutional violation under *Strickland*." *Moreno*, 2010 WL 2975762 at *15 (quoting *United States v. Gaskin*, 364 F.3d 438, 468 (2d Cir. 2004)).

Under the first prong, "[j]udicial scrutiny of counsel's performance must be highly deferential. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (internal quotation marks and citations omitted).

Under the second prong, to establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law." *Id.* at 694.

Because the Court of Appeals and the trial court adjudicated Petitioner's claims and properly considered the federal jurisprudence of *Strickland*, the Court's "review is extremely deferential: a state court's determination that a claim lacks merit precludes federal habeas relief

so long as fairminded jurists could disagree on the correctness of the state court's decision." *Chrysler v. Guiney*, 806 F.3d 104, 118 (2d Cir. 2015) (internal quotation marks omitted).

II. Due Process Claims

"The appropriate standard of review for a claim of prosecutorial misconduct on a writ of habeas corpus is 'the narrow one of due process, and not the broad exercise of supervisory power.'" *Floyd v. Meachum*, 907 F.2d 347, 353 (2d Cir. 1990) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). Petitioner contends the prosecutor committed misconduct by (1) arguing Petitioner had a propensity to commit gunpoint robberies and other crimes, (2) cross-examining Petitioner about his prior bad acts, (3) conveying to the jury her disbelief in Petitioner's testimony, and (4) in her summation accusing defense counsel of racism and offering unsworn testimony. Pet. Mem. at 39. On direct appeal, the Appellate Division rejected Petitioner's arguments concerning the prosecutor's allegedly improper conduct as follow:

> The defendant correctly contends that the People failed to provide adequate notice to him of their intention to impeach his credibility based on a prior uncharged bad act, and that the Supreme Court erred in overruling his objection and allowing cross-examination about the prior bad act. Nevertheless, under the circumstances of this case, the error did not deprive the defendant of his right to a fair trial.
>
> . . . His challenge to the prosecutor's conduct is unpreserved for appellate review and, in any event, the challenged conduct did not deprive the defendant of a fair trial.
>
> *Davidson*, 144 A.D.3d at 939 (internal citations omitted).

Petitioner also contends the jury charge deprived him of a fair trial in violation of his due process. Pet. Mem. at 56–59. The Appellate Division rejected this argument stating, Petitioner's "challenge to the jury charge is unpreserved for appellate review and, in any event, without merit." *Davidson*, 144 A.D.3d at 939.

A. Petitioner's Claims Are Partially Barred

Respondent argues the prosecutorial misconduct claim and jury charge claim are procedurally barred under the adequate and independent state ground doctrine because the state court held these claims were not preserved for appellate review. Mem. Opp'n to Pet. at 23–43, ECF No. 8 ("Mem. Opp."); *See, e.g., Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989).

> [F]ederal habeas review is precluded as long as the state court explicitly invokes a state procedural bar rule as a separate basis for decision. The rule that an adequate and independent finding of procedural default will bar federal habeas review of the federal claim applies, absent a showing of cause for the default and resulting prejudice or a demonstration that failure to consider the federal claim will result in a fundamental miscarriage of justice.

Velasquez v. Leonardo, 898 F.2d 7, 9 (2d Cir. 1990) (internal quotations and citations omitted). Failure to timely object to alleged instances of prosecutorial misconduct and the jury charge constitutes an adequate and independent basis for barring *habeas* review. *Id.*

"Federal courts may address the merits of a claim that was procedurally defaulted in state court only upon a showing of cause for the default and prejudice to the petitioner," *Bossett v. Walker*, 41 F.3d 825, 829 (2d Cir. 1994), or if Petitioner establishes the existence of a fundamental miscarriage of justice, *Murray v. Carrier*, 477 U.S. 478, 496 (1986). "Cause may be demonstrated with a showing that . . . the procedural default is the result of ineffective assistance of counsel." *Bossett*, 41 F.3d at 829. "[A] procedurally defaulted ineffective-assistance-of-counsel claim can serve as cause to excuse the procedural default of another habeas claim only if the habeas petitioner can satisfy the 'cause and prejudice' standard with respect to the ineffective-assistance claim itself." *Edwards v. Carpenter*, 529 U.S. 446, 450–51 (2000). Unless Petitioner has a meritorious claim of ineffective assistance of trial counsel, he cannot use trial counsel's errors as "cause" to excuse the procedural default. As discussed below, Petitioner's claim of ineffective assistance of trial counsel fails. Plaintiff's "failure to

demonstrate cause obviates the need for the Court to undertake an analysis of whether any purported cause proved prejudicial" regarding his defaulted claims of prosecutorial misconduct and faulty jury charge. *Jamison v. Smith*, 94-CV-3747, 1995 WL 468279, *3 (E.D.N.Y. July 26, 1995) (Block, J.).

Petitioner also fails to demonstrate a refusal to consider these claims on the merits would result in a fundamental miscarriage of justice. *Murray*, 477 U.S. at 486. The fundamental miscarriage of justice exception is reserved only for those cases "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* at 496. Petitioner can establish this exception only by demonstrating with "clear and convincing evidence that but for constitutional error, no reasonable juror would have found petitioner guilty." *Washington v. James*, 996 F.2d 1442, 1447 (2d Cir. 1993). Petitioner has failed to make such a demonstration and cannot assert a fundamental miscarriage of justice will occur. Therefore, Petitioner's prosecutorial misconduct claim and jury charge claim are barred from this Court's review.

B. Cross Examination With Prior Uncharged Bad Acts

Petitioner's remaining due process claim—the prosecutor asked him about a prior uncharged bad act without adequate notice—was preserved for appellate review and thus not procedurally barred. Petitioner argues the prosecution improperly cross-examined Petitioner about an intimate relationship with his fourteen-year-old girlfriend when he was in his twenties. Pet. Mem. at 48. While Petitioner is correct the prosecution acted improperly in this regard, the Court must give deference to the ruling of the Appellate Division finding:

> The defendant correctly contends that the People failed to provide adequate notice to him of their intention to impeach his credibility based on a prior uncharged bad act, and that the Supreme Court erred in overruling his objection and allowing cross-examination about the prior bad act. Nevertheless, under the circumstances of this case, the error did not deprive the defendant of his right to a fair trial.

Davidson, 144 A.D.3d at 939 (internal citations omitted). Further, Petitioner's argument is based in a violation of a state court rule, N.Y.C.P.L. § 240.43. A violation of state court rules does not merit *habeas* relief unless it renders Petitioner's trial fundamentally unfair. *Warren v. Miller*, 78 F. Supp. 2d 120, 135 (E.D.N.Y. 2000) (Wexler, J.). "Federal courts reviewing evidentiary matters may issue a writ of habeas corpus only if the petitioner demonstrates that the alleged evidentiary error violated a constitutional right and that the error 'was so extremely unfair that its admission violates fundamental conceptions of justice.'" *Jones v. Conway*, 09-CV-6045, 2011 WL 1356751, at *2 (W.D.N.Y. Apr. 4, 2011)

Petitioner has not shown the prosecutor's misconduct of failing to provide prior notice before cross-examining Petitioner regarding his consensual relationship with an underage girlfriend made Petitioner's murder trial fundamentally unfair. Accordingly, his claim regarding prior bad acts is dismissed.

III. Petitioner's Ineffective Assistance of Counsel Claim Does Not Warrant *Habeas* Relief

Petitioner contends trial counsel was ineffective for failure to object to prosecutorial misconduct. Pet. Mem. at 67–70. Specifically, Petitioner argues the prosecutor committed misconduct when she (1) argued Petitioner had a propensity to commit gunpoint robberies and other crimes, (2) cross-examined Petitioner about his prior bad acts, (3) conveyed to the jury her disbelief in Petitioner's testimony, and (4) in her summation accused defense counsel of racism and offered unsworn testimony. Pet. Mem. at 39. In a footnote Petitioner's appellate counsel argued on appeal in state court trial counsel's failure to object to allegedly improper acts discussed above "rose to the ineffective assistance of counsel . . . as there was simply no strategic reason not to object to the prosecutor's improper tactics or not to request appropriate charges

central to the defense case." R. at 9:80–81. The Appellate Division denied this claim in stating "defendant's remaining contentions are without merit." *Davidson*, 144 A.D.3d at 939.

Where, as here, the "state court has already rejected an ineffective-assistance claim, a federal court may grant habeas relief if the decision was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (quoting 28 U.S.C. § 2254(d)(1)). Petitioner must show the state court's application of the governing Federal law, was not only erroneous, but objectively unreasonable. *Id.*

A. Failure to Object to Prosecutorial Misconduct

Petitioner argues trial counsel erred in failing to object to the prosecutor's misconduct in cross-examination and summation. The Court agrees much of the prosecutor's conduct was not exemplary. However, the Court cannot find the trial counsel's failure to object amounted to constitutionally ineffective assistance. First, it is possible counsel made a strategic decision not to object in order to avoid drawing undue attention. *See, e.g., Quinones v. Miller*, 1-CV-10752, 2003 WL 21276429, at *50 n.78 (S.D.N.Y. June 3, 2003) (Peck, Mag. J.) (collecting cases), *report and recommendation adopted*, 2005 WL 730171, at *1 (S.D.N.Y. Mar. 31, 2005) (Pauley, J.); *Buehl v. Vaughn*, 166 F.3d 163, 176 (3d Cir.) ("Because the [objectionable] statements were fleeting, . . . trial counsel may have wished to avoid emphasizing what might have gone relatively unnoticed by the jury.") (internal quotations omitted). Second, having thoroughly reviewed the record, it is apparent defense counsel's failure to object did not prejudice Petitioner. In the context of the entire trial, the prosecutorial misconduct did not reach the level of "egregious misconduct." *See Donnelly v. DeChristoforo*, 416 U.S. 637, 647–48. Given the strength of evidence against Petitioner, including his written confession, a witness identification

in court, and phone records corroborating his statement, there is no reasonable likelihood a properly-timed objection would have made a difference in the outcome of the trial.

B. Failure to Object to Jury Charge

Petitioner contends trial counsel's failure to object to the court's allegedly deficient charge to the jury constituted ineffective assistance of counsel. Pet. Mem. at 69–70. Specifically, Petitioner complains the charge incorrectly instructed the jury to "carefully very scrutinize" Petitioner's testimony, did not state the prior conviction was not evidence of Petitioner's guilty or dispositive of a tendency to commit crimes, and did not state the jury had to find "beyond a reasonable doubt" Petitioner was guilty. *Id.* at 70.

Petitioner has pointed the Court to no case law indicating the jury charge was incorrect. The state court found Petitioner's ineffective assistance claim meritless. *Davidson*, 144 A.D.3d at 939. This court cannot deem the state court's finding to be an "objectively unreasonable" application of *Strickland*. Petitioner did not establish failure to object to the charge "fell below an objective standard of reasonableness" measured under "prevailing professional norms." *Strickland*, 466 U.S. at 688. Further, Petitioner did not establish such a charge was improper under state law, thus it was reasonable for defense counsel not to object to it.

CONCLUSION

Petitioner's petition for a writ of *habeas corpus* is DENIED in its entirety. A certificate of appealability shall not issue. *See* 28 U.S.C. § 2253. The Clerk of the Court is directed to serve notice of entry of this Order on all parties and to close the case.

SO ORDERED

s/ WFK

HON. WILLIAM F. KUNTZ, II
UNITED STATES DISTRICT JUDGE

Dated: December 4, 2020
Brooklyn, New York

APPENDIX C

July 10, 2017

29 N.Y.3d 1091
(The decision of the Court of Appeals of New York is referenced in the North Eastern Reporter and New York Supplement in a table entitled "Applications for Leave to Appeal - Criminal.")
Court of Appeals of New York

People

v.

Denworth Davidson

Synopsis

2d Dept.: 144 A.D.3d 938, 41 N.Y.S.3d 553 (Queens)

Opinion

DiFiore, C.J.

Denied.

All Citations

29 N.Y.3d 1091, 85 N.E.3d 102, 63 N.Y.S.3d 7 (Table)

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APPENDIX D

New York
Official Reports

144 A.D.3d 938, 41 N.Y.S.3d
553, 2016 N.Y. Slip Op. 07674

**1 The People of the State
of New York, Respondent,
v
Denworth Davidson, Appellant.

Supreme Court, Appellate Division,
Second Department, New York
161/05, 2008-00971
November 16, 2016

CITE TITLE AS: People v Davidson

Seymour W. James, Jr., New York, NY (Nancy E. Little of counsel), for appellant, and appellant pro se.
Richard A. Brown, District Attorney, Kew Gardens, NY (John M. Castellano, Johnnette Traill, Nicoletta J. Caferri, Laura T. Ross, and William H. Branigan of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Hanophy, J.), rendered January 9, 2008, convicting him of murder in the first degree, criminal possession of a weapon in the second degree, and conspiracy in the fourth degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials. *939

Ordered that the judgment is affirmed.

Contrary to the defendant's contention in his pro se supplemental brief, the hearing court properly denied that branch of his omnibus motion which was to suppress statements he made to law enforcement officials. The defendant's initial statement to law enforcement officials at the police station, made before *Miranda* warnings were given (*see Miranda v Arizona*, 384 US 436 [1966]), was spontaneous and not the product of custodial interrogation or its functional equivalent (*see People v Wilson*, 132 AD3d 786, 786 [2015]; *People v Latimer*, 75 AD3d 562, 563 [2010]). The defendant's remaining statements to law enforcement officials were made after he knowingly and intelligently waived his *Miranda* rights (*see People v Marsden*, 130 AD3d 945, 947 [2015]; *People v Latimer*, 75 AD3d at 563).

The defendant contends that the evidence was legally insufficient to support his conviction of murder in the first degree since the People failed to prove that he acted with intent to kill the victim. This contention is unpreserved for appellate review because the defendant, in moving for a trial order of dismissal, failed to specifically challenge the element of intent to kill (*see* CPL 470.05 [2]; *People v Powell*, 125 AD3d 1010, 1011 [2015]). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we find that it was legally sufficient to establish the defendant's guilt of this crime beyond a reasonable doubt. Moreover, upon our independent review pursuant to CPL 470.15 (5), we are satisfied that the verdict of guilt of this crime was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]).

**2 The defendant correctly contends that the People failed to provide adequate notice to him of their intention to impeach his credibility based on a prior uncharged bad act, and that the Supreme Court erred in overruling his objection and allowing cross-examination about the prior bad act (*see People v Slide*, 76 AD3d 1106, 1108 [2010]; *People v Montoya*, 63 AD3d 961, 963 [2009]). Nevertheless, under the circumstances of this case, the error did not deprive the defendant of his right to a fair trial.

The defendant's challenge to the jury charge is unpreserved for appellate review and, in any event, without merit. His challenge to the prosecutor's conduct is unpreserved for appellate review and, in any event, the challenged conduct did not deprive the defendant of a fair trial. The defendant's remaining contentions are without merit. Rivera, J.P., Leventhal, Roman and LaSalle, JJ., concur. *940

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