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publication in the New York Reports.

No. 80 SSM 28
The People &c.,
Respondent,
v.
Michael Edwards,
Appellant.

Submitted by Grazina Myers, for appellant.
Submitted by Roseann B. MacKechnie, for respondent.

Memorandum:

The order of the Appellate Division should be affirmed.
Whether a particular request for counsel "is or is not
unequivocal is a mixed question of law and fact," which, if
supported by record evidence, is beyond further review by this
Court (People v Glover, 87 NY2d 838, 839 [1995]). Such record

evidence exists here.

A missing witness charge is warranted for a party's failure to produce a witness, under its control, where his or her testimony would have been material and non-cumulative of other testimony or evidence (see People v Macana, 84 NY2d 173, 177 [1994]; People v Gonzalez, 68 NY2d 424, 427 [1986]). "The party seeking the missing witness charge must sustain an initial burden of showing that the opposing party has failed to call a witness who could be expected to have knowledge regarding a material issue in the case and to provide testimony favorable to the opposing party" (Macana, 84 NY2d at 177). Here, defendant argued that the uncalled witness could have either contradicted or corroborated the complaining witness, but did not demonstrate that her testimony would have been non-cumulative or expected to be favorable to the People.

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On review of submissions pursuant to section 500.11 of the Rules, order affirmed, in a memorandum. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided February 11, 2010