

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

D12430  
Y/hu

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - September 14, 2006

THOMAS A. ADAMS, J.P.  
PETER B. SKELOS  
STEVEN W. FISHER  
JOSEPH COVELLO, JJ.

2004-04143

DECISION & ORDER

The People, etc., respondent,  
v Joseph Russell, appellant.

(Ind. No. 2741/02)

---

Lynn W. L. Fahey, New York, N.Y. (M. Chris Fabricant of counsel), for appellant,  
and appellant pro se.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano,  
Jeanette Lifschitz, and Vered Adoni of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County  
(Erlbaum, J.), rendered May 3, 2004, convicting him of assault in the first degree and assault in the  
second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is modified, as a matter of discretion in the interest of  
justice, by vacating the defendant's conviction of assault in the first degree and the sentence imposed  
thereon, and dismissing that count; as so modified, the judgment is affirmed.

The evidence at trial established that, in an act of domestic violence, the defendant  
punched the complainant some 20 times, causing, inter alia, the loss of her right eye. Without  
objection, the trial court submitted to the jury, inter alia, one count of assault in the first degree  
charging that the defendant caused the victim serious physical injury by recklessly engaging in  
conduct creating a grave risk of death under circumstances evincing a depraved indifference to human  
life (*see* Penal Law § 120.10[3]), and one count of assault in the second degree charging that he  
intentionally inflicted serious physical injury (*see* Penal Law § 120.05[1]). The jury convicted the

November 28, 2006

Page 1.

PEOPLE v RUSSELL, JOSEPH

defendant of both counts and the defendant was sentenced, as a persistent violent felony offender, to two concurrent terms of 20 years to life imprisonment.

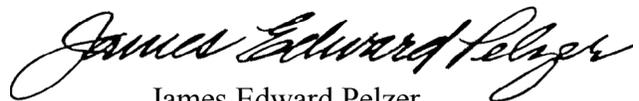
Although unpreserved for appellate review (*see* CPL 470.05[2]), the defendant's contention that the evidence at trial was legally insufficient to establish the crime of depraved indifference assault has merit and, under the circumstances of this case, we reach it in the exercise of our interest of justice jurisdiction. The Court of Appeals has taught that, except in rare and extraordinary circumstances, not present here, one person's attack on another, no matter how violent or how great the risk of harm it creates, does not rise to the level of depravity and indifference to life contemplated by the statutes defining crimes committed under circumstances evincing a depraved indifference to human life (*see People v Suarez*, 6 NY3d 202; *People v McMillon*, 31 AD3d 136). Thus, the defendant did not commit the assault in the first degree of which he was convicted (*see People v Swinton*, 7 NY3d 776).

Moreover, evidence that the defendant punched the complainant 20 times was legally insufficient to establish that he recklessly, rather than intentionally, caused her injuries (*see People v Gonzalez*, 1 NY3d 464; *People v Hafeez*, 100 NY2d 253), and therefore, under the circumstances presented, we do not reduce the assault in the first degree conviction to one of assault in the third degree (*cf. People v Swinton, supra; People v Atkinson*, 7 NY3d 765).

The defendant's remaining contentions, including those raised in his supplemental pro se brief, are either without merit or need not be reached in light of our determination.

ADAMS, J.P., SKELOS, FISHER and COVELLO, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court