

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

D13181  
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Submitted - November 17, 2006

ROBERT W. SCHMIDT, J.P.  
FRED T. SANTUCCI  
GABRIEL M. KRAUSMAN  
REINALDO E. RIVERA, JJ.

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2004-07192

DECISION & ORDER

The People, etc., respondent,  
v Samuel Beverly, appellant.

(Ind. No. 1250/03)

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Lynn W. L. Fahey, New York, N.Y. (Winston McIntosh of counsel), for appellant,  
and appellant pro se.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano,  
Sharon Y. Brodt, and John F. McGoldrick of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Eng,  
J.), rendered August 5, 2004, convicting him of burglary in the first degree, burglary in the second  
degree, menacing in the second degree (two counts), criminal mischief in the fourth degree, and  
criminal possession of a weapon in the fourth degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is modified, on the law, by vacating the conviction of  
burglary in the second degree, vacating the sentence imposed thereon, and dismissing that count of  
the indictment; as so modified, the judgment is affirmed.

Contrary to the defendant's contention, the trial court providently exercised its  
discretion in making its *Sandoval* ruling (*see People v Sandoval*, 34 NY2d 371, 374-374), as it struck  
a proper balance between the probative worth of the evidence of the defendant's criminal history and  
the possible prejudice to him (*see People v Barmore*, 11 AD3d 629; *People v Powell*, 4 AD3d 489).

As the People correctly concede, the defendant's conviction of burglary in the second

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degree and the sentence imposed thereon must be vacated and that count of the indictment must be dismissed, as it is a lesser-included offense of burglary in the first degree (*see People v Vega*, 262 AD2d 589).

The defendant's claim of ineffective assistance of counsel, raised in his supplemental pro se brief, is without merit, and his remaining contention is unpreserved for appellate review.

SCHMIDT, J.P., SANTUCCI, KRAUSMAN and RIVERA, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer  
Clerk of the Court