

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

D13481
T/hu

_____AD3d_____

Argued - December 11, 2006

GABRIEL M. KRAUSMAN, J.P.
ANITA R. FLORIO
ROBERT J. LUNN
JOSEPH COVELLO, JJ.

2004-08029

DECISION & ORDER

The People, etc., respondent,
v Dennis Moses, appellant.

(Ind. No. 7047/03)

Lynn W. L. Fahey, New York, N.Y. (William Kastin of counsel), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Thomas M. Ross of counsel; Sabrina Thanse on the brief), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Del Giudice, J.), rendered August 4, 2004, convicting him of assault in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant contends that the prosecution failed to prove his guilt of assault in the second degree beyond a reasonable doubt because, inter alia, the complainant did not sustain a “physical injury” within the meaning of Penal Law § 10.00(9). However, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620), we find that it was legally sufficient to support the jury’s finding of physical injury (*see People v Terrero*, 31 AD3d 672, *lv denied* 7 NY3d 852; *People v Rambali*, 27 AD3d 582; *People v Clarke*, 250 AD2d 619; *People v Belk*, 241 AD2d 552). Viewed in this light, we also find that the evidence adduced at trial was legally sufficient to establish that the defendant used a dangerous instrument during the incident (*see* Penal Law § 10.00[13]; *People v Millett*, 26 AD3d 345; *People v Hallums*, 157 AD2d 800, 801). Moreover, upon the exercise of our factual review power, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see* CPL 470.15[5]).

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The defendant's claim that the jury's verdict was repugnant since the jury convicted him of assault in the second degree while acquitting him of criminal possession of a weapon in the second and third degrees is unpreserved for appellate review, as he failed to raise this issue before the discharge of the jury (*see People v Satloff*, 56 NY2d 745, 746; *People v Bennette*, 23 AD3d 489; *People v Salazar*, 16 AD3d 439). In any event, viewing the elements of the crimes as charged to the jury (*see People v Tucker*, 55 NY2d 1, 7), the verdict was not repugnant since the acquittal on the counts of criminal possession of a weapon in the second and third degrees did not negate any of the elements of assault in the second degree (*see People v Cruz*, 175 AD2d 212; *People v Hudson*, 163 AD2 418; *People v Garcia*, 72 AD2d 356, 361, *affd* 52 NY2d 716).

KRAUSMAN, J.P., FLORIO, LUNN and COVELLO, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court