

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

D14441
W/gts

_____AD3d_____

Submitted - February 20, 2007

HOWARD MILLER, J.P.
ROBERT A. SPOLZINO
DAVID S. RITTER
MARK C. DILLON, JJ.

2005-08516

DECISION & ORDER

The People, etc., respondent,
v Isaias Leal, appellant.

(Ind. No. 04-01470)

Stephen J. Pittari, White Plains, N.Y. (Jacqueline F. Oliva of counsel), for appellant.

Janet DiFiore, District Attorney, White Plains, N.Y. (Laurie Sapakoff, Richard Longworth Hecht, and Anthony J. Servino of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Westchester County (Alessandro, J.), rendered July 27, 2005, convicting him of robbery in the second degree (two counts), assault in the second degree, assault in the third degree, and criminal possession of stolen property in the fifth degree, and imposing sentence.

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

The defendant contends, and the People correctly concede, that his conviction of assault in the second degree under Penal Law 120.05(6) must be vacated, and that count of the indictment dismissed, as it is an inclusory concurrent count of robbery in the second degree under Penal Law §160.10(2)(a) (*see* CPL 300.30[4]; CPL 300.40[3][b]; *People v Tucker*, 221 AD2d 670).

Although the defendant further contends that the verdict of guilt on the remaining charges was against the weight of the evidence, resolution of issues of credibility is primarily a matter to be determined by the jury, which saw and heard the witnesses, and its determination should be

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accorded great deference on appeal (*see People v Romero*, 7 NY3d 633, 644-45; *People v Mateo*, 2 NY3d 383, 410, *cert denied* 542 US 946). Upon the exercise of our factual review power (*see* CPL 470.15[5]), we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero, supra*).

The defendant's remaining contentions are unpreserved for appellate review, and in any event, are without merit.

MILLER, J.P., SPOLZINO, RITTER and DILLON, 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