

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

D14953
O/cb

_____AD3d_____

Argued - March 27, 2007

WILLIAM F. MASTRO, J.P.
REINALDO E. RIVERA
MARK C. DILLON
EDWARD D. CARNI, JJ.

2003-05715

DECISION & ORDER

The People, etc., respondent,
v Dwayne Reed, appellant.

(Ind. No. 0470/02)

Roger S. Kraminitz, Croton-on-Hudson, N.Y., 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 (Adler, J.), rendered July 8, 2003, convicting him of murder in the second degree, attempted murder in the second degree, criminal possession of a weapon in the second degree (two counts), criminal possession of a weapon in the third degree (three counts), reckless endangerment in the first degree, and unlawful wearing of a body vest, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant's contention that it was error to submit to the jury a count of depraved indifference murder (*see* Penal Law § 125.25[2]) as an alternative to intentional murder (*see* Penal Law § 125.25[1]) is foreclosed because the defendant was convicted of intentional murder and the jury, pursuant to the court's instructions, did not consider the depraved indifference murder count (*see People v Griffin*, 28 AD3d 578, 579; *cf. People v Falcon*, 281 AD2d 368, 369). As a result, any error in submitting the depraved indifference murder count was harmless (*cf. People v Speight*, 158 AD2d 729, 729-730).

May 1, 2007

PEOPLE v REED, DWAYNE

Page 1.

The Supreme Court properly denied the defendant's request for a jury charge on the affirmative defense of extreme emotional disturbance. The defendant presented no evidence that he suffered from a mental infirmity not rising to the level of insanity at the time of the homicide, and his conduct was inconsistent with the loss of control associated with extreme emotional disturbance (*see People v Smith*, 1 NY3d 610, 612; *People v Buckner*, 23 AD3d 492; *People v Zamora*, 309 AD2d 957, 958; *People v McDonald*, 199 AD2d 420; *People v Tulloch*, 179 AD2d 794, 795).

The defendant's remaining contention is without merit.

MASTRO, J.P., RIVERA, DILLON and CARNI, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court