

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

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_____AD3d_____

Argued - April 5, 2007

HOWARD MILLER, J.P.
DANIEL D. ANGIOLILLO
EDWARD D. CARNI
THOMAS A. DICKERSON, JJ.

2004-02870

DECISION & ORDER

The People, etc., respondent,
v James Baston, appellant.

(Ind. No. 5422/02)

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

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Amy Appelbaum of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Feldman, J.), rendered March 24, 2004, convicting him of murder in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The substitution of an alternate juror during deliberations violates a defendant's fundamental right to a trial by jury, and therefore requires the consent of the defendant (*see* CPL 270.35[1]; *People v Page*, 88 NY2d 1). Here, however, there is no evidence that deliberations had already begun when the court made a substitution. The defendant's alternative contention that the trial court abused its discretion in discharging the juror prior to deliberations is unpreserved for appellate review (*see* CPL 470.05[2]) and, in any event, is without merit (*see People v Jeanty*, 94 NY2d 507; *People v Shelton*, 31 AD3d 791; *People v Aponte*, 28 AD3d 672; *People v Rodriguez*, 301 AD2d 616; *People v Merritt*, 299 AD2d 370).

The defendant's contention that the prosecutor's summation statements deprived him of a fair trial is also without merit. Viewed in the context of the entire summation and trial (*see People v Galloway*, 54 NY2d 396, 401), the challenged remarks were fair response to the defendant's summation (*see People v Marks*, 6 NY2d 67, 77-78; *People v Martinez*, 27 AD3d 665, 666; *People v West*, 237 AD2d 470, 472), fair comment on the evidence (*see People v Campbell*, 29 AD3d 601), or harmless in light of the overwhelming evidence of the defendant's guilt and the court's curative instructions (*see People v Crimmins*, 36 NY2d 230, 241-242).

The defendant's remaining contentions raised in his supplemental pro se brief are without merit.

MILLER, J.P., ANGIOLILLO, CARNI and DICKERSON, JJ., concur.

ENTER:

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

James Edward Pelzer
Clerk of the Court