

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

D15480
X/gts

_____AD3d_____

Argued - April 27, 2007

WILLIAM F. MASTRO, J.P.
JOSEPH COVELLO
DANIEL D. ANGIOLILLO
THOMAS A. DICKERSON, JJ.

2005-01463

DECISION & ORDER

The People, etc., respondent,
v Kenny Whitely, appellant.

(Ind. No. 6024/02)

Lynn W. L. Fahey, New York, N.Y. (Barry Stendig and Orrick, Herrington & Sutcliffe LLP [Mayotta H. Anderson, Jay K. Musoff, and Stephane Valat] of counsel), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Anthea H. Bruffee, and Kaye Scholer LLP [Steven R. Wirth] of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Demarest, J.), rendered January 6, 2005, convicting him of attempted robbery in the first degree and attempted robbery in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The Supreme Court providently exercised its discretion in denying the defendant's motion for a mistrial. The decision whether to grant a motion for mistrial rests within the sound discretion of the trial court (*see People v Ortiz*, 54 NY2d 288, 292), which is in the best position to determine if it is necessary to protect the defendant's right to a fair trial (*see People v Cooper*, 173 AD2d 551). Although one of the prosecution's witnesses testified on cross-examination that she knew the defendant "for robbing other people," the Supreme Court struck the testimony, gave a curative instruction, and, upon the defendant's motion for a mistrial, gave further curative instructions (*see People v Hernandez*, 11 AD3d 479).

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80).

MASTRO, J.P., COVELLO, ANGIOLILLO and DICKERSON, 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