

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

D16177
X/nl

_____AD3d_____

Argued - June 12, 2007

STEPHEN G. CRANE, J.P.
DAVID S. RITTER
MARK C. DILLON
EDWARD D. CARNI, JJ.

2005-04752

DECISION & ORDER

The People, etc., respondent,
v Mario Roberto Flores, appellant.

(Ind. No. 736N/03)

Richard J. Barbuto, Babylon, N.Y., for appellant.

Kathleen M. Rice, District Attorney, Mineola, N.Y. (Peter A. Weinstein and Laurie K. Spinella of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Nassau County (Brown, J.), rendered April 29, 2005, convicting him of murder in the second degree, criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree, and tampering with physical evidence, upon a jury verdict, and imposing sentence.

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

The defendant's conviction of depraved indifference murder (*see* Penal Law § 125.25[2]) must be vacated, as that count of the indictment had been dismissed by another judge prior to trial and was later mistakenly submitted to the jury by the trial judge (*see People v Shampine*, 31 AD3d 1163, 1164; *People v Romero*, 309 AD2d 953, 954; *People v Smiley*, 303 AD2d 425, 426; *People v Harris*, 229 AD2d 595, 595).

The defendant's contention that the evidence against him was legally insufficient to establish his guilt of criminal possession of a weapon in the second degree is unpreserved for appellate

review (*see* CPL 470.05[2]; *People v Daniels*, 35 AD3d 495, 496). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), the evidence as to this charge was legally sufficient to establish the defendant's guilt beyond a reasonable doubt (*see People v Daniels, supra; People v Edwards*, 29 AD3d 818, 819).

The sentences imposed on the remaining counts of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree, and tampering with physical evidence were not excessive (*see People v Suitte*, 90 AD2d 80).

In light of the foregoing, the defendant's remaining contentions regarding the conviction for depraved indifference murder have been rendered academic.

CRANE, J.P., RITTER, DILLON and CARNI, 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