

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

D17427  
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Argued - September 17, 2007

ROBERT A. SPOLZINO, J.P.  
GABRIEL M. KRAUSMAN  
STEVEN W. FISHER  
DANIEL D. ANGIOLILLO, JJ.

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2005-01728

DECISION & ORDER

The People, etc., respondent,  
v Luis Torres, appellant.

(Ind. No. 507/04)

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Lynn W.L. Fahey, New York, N.Y. (Joshua M. Levine of counsel), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Morgan J. Dennehy, and Steven A. Mann of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Demarest, J.), rendered February 17, 2005, convicting him of murder in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Moreover, 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*, 7 NY3d 633, 644-645).

The defendant's challenge to certain allegedly improper remarks by the prosecutor during summation is unpreserved for appellate review (*see* CPL 470.05[2]; *People v Balls*, 69 NY2d 641). In any event, the challenged remarks did not deprive the defendant of a fair trial (*see People v Zivkovich*, 237 AD2d 473; *People v Yates*, 207 AD2d 567).

December 26, 2007

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The defendant's contention that the Supreme Court committed reversible error by instructing the jury that "[a] person is presumed, by law, to intend the natural and probable consequence of his acts" (*see Sandstrom v Montana*, 442 US 510) is unpreserved for appellate review (*see People v Thomas*, 50 NY2d 467; *People v Tate*, 200 AD2d 602, 602-603). In any event, the contention is without merit, as the court's charge, read as a whole, made clear that it was the jury's role to determine the defendant's intent, and that the People bore the burden of proving, beyond a reasonable doubt, that the defendant acted with the intent to kill (*see People v Green*, 50 NY2d 891, 893, *cert denied* 449 US 957; *People v Tate*, 200 AD2d at 603). We note, however, that trial courts should avoid using the challenged language (*see People v Green*, 50 NY2d at 893), and should, instead, use language similar to that recommended by the Committee on Criminal Jury Instructions (*see* CJI2d[NY] Culpable Mental States - Intent; *People v Getch*, 50 NY2d 456, 465).

To the extent that the defendant's claims of ineffective assistance of counsel involve matters dehors the record, they may not be reviewed on direct appeal (*see People v Campbell*, 6 AD3d 623, 624). Insofar as we are able to review the defendant's claims, we find that defense counsel provided meaningful representation (*see People v Baldi*, 54 NY2d 137, 146-147).

The sentence imposed was not excessive (*see* Penal Law § 70.04[3][b]; *People v Thompson*, 60 NY2d 513, 519; *People v Suitte*, 90 AD2d 80).

SPOLZINO, J.P., KRAUSMAN, FISHER and ANGIOLILLO, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court