

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

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Argued - December 18, 2007

REINALDO E. RIVERA, J.P.  
DAVID S. RITTER  
MARK C. DILLON  
EDWARD D. CARNI, JJ.

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2006-08896

DECISION & ORDER

The People, etc., respondent,  
v Billy Witherspoon, appellant.

(Ind. No. 2525/06)

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Pamela D. Hayes, New York, N.Y., for appellant.

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

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Chun, J.), rendered September 5, 2006, convicting him of operating a motor vehicle while under the influence of alcohol or drugs (two counts), aggravated unlicensed operation of a motor vehicle in the first degree, and driving without a seat belt, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant's contention that the evidence was legally insufficient to support his convictions is unpreserved for appellate review (*see* CPL 470.05[2]; *People v Gray*, 86 NY2d 10). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620), 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 NY2d 633, 644-645).

The defendant's claim that the Justice who presided at his trial should have recused himself is without merit. Since no basis for disqualification pursuant to Judiciary Law § 14 was

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presented, it was up to the discretion of the Justice to decide whether or not to recuse himself (*see People v Rolle*, 37 AD3d 624, 624-625; *People v Daly*, 20 AD3d 542). Based upon the record before us, we conclude that the Justice properly declined to recuse himself.

The defendant's contention that the prosecutor's summation deprived him of a fair trial is unpreserved for appellate review, as defense counsel only made general, unspecified objections (*see* CPL 470.05[2]; *People v Romero*, 7 NY3d 911). In any event, a review of the challenged comments reveals that they were primarily fair comment on the evidence adduced at trial or responsive to defense counsel's summation (*see People v McHarris*, 297 AD2d 824; *People v Cariola*, 276 AD2d 800). Moreover, even if some of these comments arguably were improper, under the circumstances, the defendant was not denied a fair trial (*see People v Vallee*, 21 AD3d 502).

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

The defendant's remaining contentions are without merit.

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

ENTER:



James Edward Pelzer  
Clerk of the Court