

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

D17739
G/kmg

_____AD3d_____

Argued - December 7, 2007

FRED T. SANTUCCI, J.P.
ROBERT A. LIFSON
JOSEPH COVELLO
DANIEL D. ANGIOLILLO, JJ.

2004-03684

DECISION & ORDER

The People, etc., respondent,
v Augustine Hercules, appellant.

(Ind. No. 2282/03)

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

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Ruth E. Ross of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Feldman, J.), rendered March 25, 2004, convicting him of assault 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 of assault in the second degree beyond a reasonable doubt (*see People v Johnson*, 40 AD3d 1270, 1271-1272; *People v Millett*, 26 AD3d 345, 346). 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).

The trial court providently exercised its discretion in limiting the defendant's cross-examination of the complaining witnesses concerning an alleged cooperation agreement with the police (*see People v Rodriguez*, 191 AD2d 723, 723-724).

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The defendant contends that he was deprived of his right to a fair trial because of certain allegedly improper comments made by the prosecutor on summation. However, the defendant's arguments in this regard are not preserved for appellate review (*see* CPL 470.05[2]), as the defendant either failed to object to the challenged comments, made only a general objection, or failed to request curative instructions when the trial court sustained his objections (*see People v German*, 45 AD3d 861). In any event, the challenged remarks were proper because they constituted fair comment on the evidence, a fair response to the defense summation, or harmless error (*see People v Colon*, 45 AD3d 776; *People v Urena*, 24 AD3d 693).

The defendant's contention that he was deprived of his right to a fair trial because the trial court failed to give adequate limiting instructions regarding the purpose for which evidence of certain prior bad acts was received is unpreserved for appellate review (*see* CPL 470.05[2]). In any event, since the court did include such limiting instructions in its preliminary remarks and in its charge to the jury, the omission of such instructions at the time the evidence was admitted did not deprive the defendant of a fair trial (*see People v Norman*, 40 AD3d 1128, 1129-1130).

The defendant contends that the trial court erred in denying his request to charge assault in the third degree (*see* Penal Law § 120.00[1]) as a lesser-included offense of assault in the second degree (*see* Penal Law § 120.05[2]). However, the court properly denied the request, because even when viewing the evidence in the light most favorable to the defendant, no reasonable view of the evidence supported a finding that he assaulted the complaining witness but did not use a deadly weapon or dangerous instrument (*see People v Vaughn*, 36 AD3d 434, 436; CPL 300.50[1]).

The defendant's contention that he was deprived of his right to a fair trial by virtue of certain comments and questioning by the trial court is unpreserved for appellate review (*see* CPL 470.05[2]), and, in any event, is without merit (*see People v Moulton*, 43 NY2d 944, 945).

SANTUCCI, J.P., LIFSON, COVELLO and ANGIOLILLO, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court