

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

D21469
W/kmg

_____AD3d_____

Argued - November 24, 2008

REINALDO E. RIVERA, J.P.
DANIEL D. ANGIOLILLO
RANDALL T. ENG
ARIEL E. BELEN, JJ.

2002-04670

DECISION & ORDER

The People, etc., respondent,
v Conrad Marhone, appellant.

(Ind. No. 3023/99)

Lynn W. L. Fahey, New York, N.Y. (Barry Stendig of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano and
Emil Bricker of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Buchter, J.), rendered April 22, 2002, convicting him of murder in the second degree (two counts), robbery in the first degree (two counts), robbery in the second degree, and criminal possession of a weapon in the fourth degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is modified, as a matter of discretion in the interest of justice, by vacating the conviction of murder in the second degree under count one of the indictment (Penal Law § 125.25[2]), vacating the sentence imposed thereon, and dismissing that count of the indictment; as so modified, the judgment is affirmed.

The defendant was convicted of both felony murder (Penal Law 125.25[3]) and depraved indifference murder (Penal Law 125.25[2]). The defendant's legal insufficiency claim as to depraved indifference murder is unpreserved for appellate review since he did not object with the necessary specificity at trial (*see e.g. People v Ferraro*, 49 AD3d 550, 551; *People v Fields*, 37 AD3d 733). We nonetheless reach the issue pursuant to our interest of justice jurisdiction and conclude, as the People correctly concede, that the evidence was legally insufficient to support the defendant's conviction of depraved indifference murder (*see People v Feingold*, 7 NY3d 288, 296; *People v*

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Payne, 3 NY3d 266, 271; *People v Hawthorne*, 35 AD3d 499).

The defendant's remaining contentions are without merit.

RIVERA, J.P., ANGIOLILLO, ENG and BELEN, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style with a large initial "J".

James Edward Pelzer
Clerk of the Court