

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

D21672  
O/cb

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Argued - November 13, 2008

REINALDO E. RIVERA, J.P.  
MARK C. DILLON  
JOSEPH COVELLO  
WILLIAM E. McCARTHY, JJ.

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2007-09869

DECISION & ORDER

The People, etc., respondent,  
v Jason Figueroa, appellant.

(Ind. No. 1274-07)

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Jerry Garguilo, St. James, N.Y., for appellant.

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Karla Lato of counsel), for  
respondent.

Appeal by the defendant from a judgment of the County Court, Suffolk County (Hinrichs, J.), rendered October 10, 2007, convicting him of assault in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed and the matter is remitted to the County Court, Suffolk County, for further proceedings pursuant to CPL 460.50(5).

The trial court properly denied the defendant's 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[1]). Contrary to the defendant's contention, viewing the evidence in the light most favorable to him (*see People v Randolph*, 81 NY2d 868, 869; *People v Martin*, 59 NY2d 704, 705), no reasonable view of the evidence supported a finding that the injury he caused was anything less than a serious physical injury (*see People v Vasquez*, 25 AD3d 465, 466; Penal Law § 10.00[9], [10]).

The trial court's charge properly limited the application of the defense of justification to those circumstances in which the use of deadly physical force would be justified (*see* Penal Law § 35.15[2]). Contrary to the defendant's contention, viewing the evidence in the light most favorable to him (*see People v McManus*, 67 NY2d 541, 549), no reasonable view of the evidence supported a finding that the force he used was anything less than deadly physical force (*see People v Hyc*, 240 AD2d 431, 432; *People v McCabe*, 237 AD2d 380, 380-381; *People v Samuels*, 198 AD2d 384; Penal Law §§ 10.00[11], 35.15[1]).

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

The defendant's remaining contentions are unpreserved for appellate review (*see* CPL 470.05 [2]) and, in any event, are without merit.

RIVERA, J.P., DILLON, COVELLO and McCARTHY, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court