

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

D22289
G/hu

_____AD3d_____

Argued - February 3, 2009

ROBERT A. SPOLZINO, J.P.
DAVID S. RITTER
HOWARD MILLER
RUTH C. BALKIN, JJ.

2004-00125

DECISION & ORDER

The People, etc., respondent,
v Gary Benloss, appellant.

(Ind. No. 2485/02)

Stanley Neustadter, New York, N.Y., for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Karol B. Mangum, and Solomon Neubort of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Collini, J.), rendered November 20, 2003, convicting him of murder in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

In fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15[5]; *People v Danielson*, 9 NY3d 342), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383, 410, *cert denied* 542 US 946; *People v Bleakley*, 69 NY2d 490, 495). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633).

The prosecutor acted improperly in asking a witness if anyone else had been injured in the incident, resulting in testimony that a young girl also was shot. Such testimony was immaterial to the charges against the defendant, was elicited in violation of the prosecutor's obligations under

March 3, 2009

PEOPLE v BENLOSS, GARY

Page 1.

People v Ventimiglia (52 NY2d 350, 359), and was prejudicial to the defense. Nevertheless, the Supreme Court providently exercised its discretion in denying the defendant's request for a mistrial. The prejudice that resulted from the improper testimony was alleviated by the trial court's actions in immediately striking the testimony from the record and providing a curative instruction to the jury (see *People v Whitely*, 41 AD3d 622, 623; *People v Oliver*, 19 AD3d 512; *People v Kirk*, 12 AD3d 619), which the jury is presumed to have followed (see *People v Berg*, 59 NY2d 294, 299-300; *People v Hardy*, 22 AD3d 679, 680).

SPOLZINO, J.P., RITTER, MILLER and BALKIN, JJ., concur.

ENTER:

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

James Edward Pelzer
Clerk of the Court