

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

D23815
G/hu

_____AD3d_____

Argued - March 16, 2009

REINALDO E. RIVERA, J.P.
ROBERT A. SPOLZINO
DANIEL D. ANGIOLILLO
RUTH C. BALKIN, JJ.

2005-11716

DECISION & ORDER

The People, etc., respondent,
v Desmond Tapper, appellant.

(Ind. No. 993/03)

Steven Banks, New York, N.Y. (Kerry Elgarten of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano,
Nicoletta J. Caferri, and Jennifer Hagan of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Cooperman, J.), rendered November 21, 2005, convicting him of criminal possession of a weapon in the third degree and unlawful wearing of a body vest, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

Contrary to the defendant's contention, the trial court properly granted the People's reverse-*Batson* challenge (*see Batson v Kentucky*, 476 US 79; *People v Luciano*, 10 NY3d 499, 502-503). The trial court's determination that the proffered reason for challenging the juror in question, that she had previously served on a jury, was pretextual, is entitled to great deference and is supported by the record (*see People v Quito*, 43 AD3d 411, 412-413; *People v Richie*, 217 AD2d 84, 89).

The trial court providently exercised its discretion in denying the defendant's challenge for cause to a potential juror (*see People v Franklin*, 7 AD3d 966, 967). Even if a prima facie showing of actual bias had been made (*see People v Torpey*, 63 NY2d 361, 367), her unequivocal

July 7, 2009

Page 1.

PEOPLE v TAPPER, DESMOND

answers demonstrated that she could be fair and impartial (*see People v Chambers*, 97 NY2d 417, 419; *People v Johnson*, 278 AD2d 245).

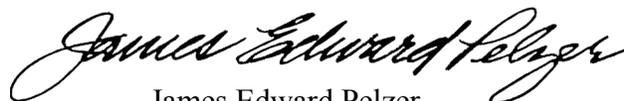
The defendant's contention that the prosecutor violated the unsworn witness rule during the prosecutor's cross-examination of him and during summation is unpreserved for appellate review and, in any event, is without merit (*see People v Paperno*, 54 NY2d 294, 302; *People v Rivera*, 27 AD3d 491, 492; *People v Blackwood*, 295 AD2d 292, 293).

The defendant's challenge to certain remarks made by the prosecutor during summation is unpreserved for appellate review (*see People v Hollenquest*, 48 AD3d 592, 593). In any event, the remarks either were fair comment, were within the permissible bounds of rhetorical comment, or do not warrant reversal (*see People v Galloway*, 54 NY2d 396, 401; *People v Wright*, 40 AD3d 1021; *People v Heide*, 206 AD2d 875, *affd* 84 NY2d 943).

On this record, we cannot conclude that the defendant was denied effective assistance of counsel (*see Strickland v Washington*, 466 US 668; *People v Steele*, 135 AD2d 673).

RIVERA, J.P., SPOLZINO, ANGIOLILLO and BALKIN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court