

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

D24416
G/prt

_____AD3d_____

Submitted - September 8, 2009

ROBERT A. SPOLZINO, J.P.
HOWARD MILLER
DANIEL D. ANGIOLILLO
THOMAS A. DICKERSON, JJ.

2007-10099

DECISION & ORDER

The People, etc., respondent,
v Concepcion Velasquez, appellant.

(Ind. No. 1021/06)

Alan Katz, Garden City, N.Y., for appellant.

Kathleen M. Rice, District Attorney, Mineola, N.Y. (Tammy J. Smiley and Jason P. Weinstein of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Nassau County (Brown, J.), rendered October 22, 2007, convicting him of driving while intoxicated, driving while ability impaired, and driving without a license, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

Contrary to the People's assertion, the defendant's legal sufficiency claim was preserved for appellate review (*see* CPL 470.05[2]). However, there is no merit to the defendant's contention that the evidence was legally insufficient to prove, beyond a reasonable doubt, the element of intoxication. Moreover, upon our independent review pursuant to 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 crime of driving while intoxicated requires a showing that the defendant 'is incapable of employing the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver'" (*People v McNamara*, 269 AD2d 544, 545, quoting *People v Cruz*, 48 NY2d 419, 428). Here, the three police witnesses, the arresting officers and the officer who administered the breathalyzer test, all testified that, on the morning of November 12, 2005, the defendant had glassy, bloodshot eyes, slurred speech, and an odor of alcohol on his breath, staggered when he walked, and was unable to perform parts of the field sobriety test. Additionally,

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the arresting officers testified that the defendant admitted to being drunk, and the defendant himself testified that he had consumed approximately five 12-ounce bottles of beer at a bar. This was sufficient to prove, beyond a reasonable doubt, that the defendant was intoxicated for purposes of Vehicle and Traffic Law § 1192(3) at the time of his arrest (*see People v Scroger*, 35 AD3d 1218, 1219; *People v Silvestri*, 34 AD3d 986; *People v Hamm*, 29 AD3d 1079, 1080; *People v Lundell*, 24 AD3d 569, 570).

The defendant's remaining contentions are unpreserved for appellate review and, in any event, are without merit.

SPOLZINO, J.P., MILLER, ANGIOLILLO and DICKERSON, 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