

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

D25347  
W/kmg

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - November 10, 2009

STEVEN W. FISHER, J.P.  
DANIEL D. ANGIOLILLO  
PLUMMER E. LOTT  
SANDRA L. SGROI, JJ.

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2004-09453

DECISION & ORDER

The People, etc., respondent,  
v Francis Weinsheimer, appellant.

(Ind. No. 2080/03)

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Bahn Herzfeld & Multer LLP, New York, N.Y. (Richard L. Herzfeld of counsel), for appellant.

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Ronnie Jane Lamm of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Suffolk County (Hinrichs, J.), rendered October 4, 2004, convicting him of burglary in the first degree and sexual abuse in the third degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

Viewing the evidence in the light most favorable to the prosecution (*see People v Hawkins*, 11 NY3d 484, 493; *People v Contes*, 60 NY2d 620, 621), we find that it was legally sufficient to prove the physical injury element of burglary in the first degree (*see Penal Law § 140.30[2]*; *People v Palmer*, 190 AD2d 564; *cf. People v Hernandez*, 82 NY2d 309, 318-319).

The trial court properly denied the defendant's request for a missing witness charge, as the uncalled witness was equally available to both parties, and was not under the control of the People (*see People v Jean-Baptiste*, 37 AD3d 852).

December 8, 2009

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PEOPLE v WEINSHEIMER, FRANCIS

“A presentence report may include any relevant information on the history of the defendant (*see* CPL 390.30) and may include history not only of prior offenses for which defendant has been convicted, but even offenses for which he has not been convicted” (*People v Whalen*, 99 AD2d 883, 884). However, the court “must assure itself that the information upon which it bases the sentence is reliable and accurate” (*People v Outley*, 80 NY2d 702, 712). Here, the trial court properly relied on the information in the presentence investigation report in sentencing the defendant.

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80, 85).

The defendant’s remaining contentions are without merit.

FISHER, J.P., ANGIOLILLO, LOTT and SGROI, 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