

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

D25556  
C/kmg

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Argued - December 3, 2009

JOSEPH COVELLO, J.P.  
DANIEL D. ANGIOLILLO  
PLUMMER E. LOTT  
SHERI S. ROMAN, JJ.

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2006-09756

DECISION & ORDER

The People, etc., respondent,  
v Justin Avila, appellant.

(Ind. No. 3177/04)

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Lynn W. L. Fahey, New York, N.Y. (Melissa S. Horlick of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (Gary Fidel and Ayelet Sela of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Aloise, J.), dated September 21, 2006, convicting him of criminal possession of a weapon in the third degree (three counts), upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

Contrary to the defendant's contention, the trial court's *Sandoval* ruling (*see People v Sandoval*, 34 NY2d 371) that allowed inquiry into his prior conviction for assault involving a weapon was not an improvident exercise of discretion. The mere fact that the defendant has committed a crime similar to the one for which he is currently being tried does not preclude inquiry into the prior crime (*see People v Hayes*, 97 NY2d 203, 208; *People v White*, 60 AD3d 1095, 1096; *People v Boseman*, 161 AD2d 601, 602).

The prosecutor's reason for exercising a peremptory challenge to exclude a potential juror based on his youth relative to the other jurors did not violate the defendant's constitutional rights (*see Batson v Kentucky*, 476 US 79; *People v Payne*, 88 NY2d 172). Age is not a cognizable protected category where the reason for the challenge was related to the facts of the case (*see People*

*v Smalls*, 249 AD2d 495; *People v McMichael*, 218 AD2d 671; *People v Manigo*, 165 AD2d 660).

The prosecutor's comments on summation either were made in response to the arguments of defense counsel which attacked the credibility of the prosecution witnesses, were fair comments on the evidence (*see People v Galloway*, 54 NY2d 396; *People v McHarris*, 297 AD2d 824; *People v Cariola*, 276 AD2d 800), or were harmless in light of the court's curative instructions, which obviated any prejudice to the defendant (*see People v Ferguson*, 82 NY2d 837; *People v Cabrera*, 11 AD3d 552).

COVELLO, J.P., ANGIOLILLO, LOTT and ROMAN, JJ., concur.

ENTER:

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

James Edward Pelzer  
Clerk of the Court