

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

D27262
H/ct

_____AD3d_____

Submitted - April 6, 2010

STEVEN W. FISHER, J.P.
MARK C. DILLON
THOMAS A. DICKERSON
RANDALL T. ENG, JJ.

2008-04137

DECISION & ORDER

The People, etc., respondent,
v Anthony Rodriguez, appellant.

(Ind. No. 2094N/07)

Steven A. Feldman, Uniondale, N.Y. (Arza Feldman of counsel), for appellant.

Kathleen M. Rice, District Attorney, Mineola, N.Y. (Robert A. Schwartz and Ilisa T. Fleischer of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Nassau County (Honorof, J.), rendered April 24, 2008, convicting him of assault in the first degree and assault in the second degree, upon a jury verdict, and imposing sentence, including restitution in the sum of \$17,274.40.

ORDERED that the judgment is modified, on the law, by vacating the provision of the sentence directing the defendant to pay restitution in the sum of \$17,274.40; as so modified, the judgment is affirmed, and the matter is remitted to the Supreme Court, Nassau County, for a hearing and new determination concerning the proper amount of restitution and the manner of payment thereof.

Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620), we find that it was legally sufficient to disprove the defendant's justification defense and to establish his guilt of assault in the first and second degrees beyond a reasonable doubt (*see Penal Law § 35.15; People v Hall*, 65 AD3d 1377; *People v Pickens*, 60 AD3d 699, 701; *People v Chung*, 39 AD3d 558; *People v Wimberly*, 19 AD3d 518, 519; *People v Briggs*, 285 AD2d 514).

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Moreover, 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 trial court properly denied the defendant's request to charge assault in the third degree (*see* Penal Law § 120.00[1]) as a lesser-included offense of assault in the second degree (*see* Penal Law § 120.05[4]). Viewing the evidence in the light most favorable to the defendant, there is no reasonable view of the evidence that would support a finding that he assaulted the victims but did not use a deadly weapon or dangerous instrument (*see People v Hercules*, 47 AD3d 835; *People v Vaughn*, 36 AD3d 434, 436, *cert denied* _____US_____, 128 S Ct 1711; *People v Smith*, 235 AD2d 558; CPL 300.50[1]), or that the injury the defendant caused was anything less than a serious physical injury (*see People v Figueroa*, 57 AD3d 1003, 1003-1004; *People v Eagleston*, 194 AD2d 623).

Furthermore, the trial court properly denied the defendant's request for a jury charge on the justifiable use of "physical force" (Penal Law § 35.25). Viewed in the light most favorable to the defendant, no reasonable view of the evidence supported a finding that the force he used was anything less than deadly physical force (*see People v Magliato*, 68 NY2d 24, 29; *People v Figueroa*, 57 AD3d at 1004; *People v Beckford*, 49 AD3d 547, 548; *People v Hyc*, 240 AD2d 431, 432; Penal Law §§ 10.00[11], 35.15[1]).

The defendant's contention that the trial court improperly allowed the People to admit his grand jury testimony as part of the case-in-chief is unpreserved for appellate review (*see* CPL 470.05[2]) since the defendant's objection at trial was based upon grounds different from those raised on appeal (*see People v Clas*, 54 AD3d 770; *People v Saladana*, 208 AD2d 872, 873). In any event, the grand jury testimony was properly admitted as an admission by the defendant (*see People v Spurgeon*, 264 AD2d 401; *People v Rose*, 224 AD2d 643; *People v Rodriguez*, 191 AD2d 597, 598; *People v Koestler*, 176 AD2d 1207, 1208).

Contrary to the defendant's contention, the fact that the sentence imposed after trial was greater than the sentence offered during plea negotiations is no indication that the defendant was punished for asserting his right to proceed to trial (*see People v Pena*, 50 NY2d 400, 411, *cert denied* 449 US 1087; *People v Brock*, 69 AD3d 644; *People v DeHaney*, 66 AD3d 1040, 1041; *People v Garcia*, 66 AD3d 699, 701; *People v Smith*, 49 AD3d 904, 906). Moreover, the sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80).

However, we agree that the Supreme Court erred in relying upon a preliminary fact-finding report prepared by the Nassau County Probation Department in fixing the amount of restitution. "While the sentencing court 'acted properly in employing the Probation Department as a preliminary fact finder to ascertain the appropriate amount of restitution . . . the court should have conducted a hearing upon receipt of the Probation Department's report'" since the trial record and presentence report did not contain sufficient information to accurately determine the proper

amount of restitution (*People v Jackson*, 261 AD2d 636, 637-638, quoting *People v James*, 186 AD2d 679, 680 [internal quotation marks omitted]; see Penal Law § 67.27[2]; *People v Myron*, 28 AD3d 681, 684, *cert denied* 549 US 1326; *People v Vella*, 176 AD2d at 768-769). Accordingly, the matter must be remitted to the Supreme Court, Nassau County, for a hearing on the proper amount of restitution and the manner in which it is to be paid (see Penal Law § 60.27[2]).

FISHER, J.P., DILLON, DICKERSON and ENG, 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