

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

D27612
Y/ct/hu

_____AD3d_____

Submitted - May 11, 2010

REINALDO E. RIVERA, J.P.
ANITA R. FLORIO
DANIEL D. ANGIOLILLO
LEONARD B. AUSTIN, JJ.

2008-08865

DECISION & ORDER

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

(Ind. No. 7165/07)

Lynn W. L. Fahey, New York, N.Y. (Reyna E. Marder of counsel), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Sholom J. Twersky, Lisa M. White, and Yavar Bathaee of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Carroll, J.), rendered September 10, 2008, convicting him of robbery in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is modified, as a matter of discretion in the interest of justice, by vacating the sentence imposed; as so modified, the judgment is affirmed, and the matter is remitted to the Supreme Court, Kings County, for resentencing.

Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), we find that it was legally sufficient to establish the defendant's guilt of robbery in the second degree beyond a reasonable doubt. 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 are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633). It was the jury's province to weigh the reliability of the complainant against that of alibi witnesses (*see People v Calabria*, 3 NY3d 80, 82). It was reasonable for the jury to credit the complainant's testimony identifying the defendant as one of the assailants and to reject the testimony of the defendant and his alibi witnesses.

August 10, 2010

PEOPLE v HARVEY, ANTHONY

Page 1.

However, the remarks of the sentencing court demonstrated that it improperly considered a crime of which the defendant was acquitted as a basis for sentencing (*see People v Pacquette*, 73 AD3d 1088; *People v Romero*, 71 AD3d 795, 796; *People v Schrader*, 23 AD3d 585; *People v Errington*, 307 AD2d 325; *People v Smith*, 305 AD2d 432). Accordingly, the matter must be remitted to the Supreme Court, Kings County, for resentencing.

RIVERA, J.P., FLORIO, ANGIOLILLO and AUSTIN, 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