

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

D27638  
H/hu

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

Argued - May 14, 2010

WILLIAM F. MASTRO, J.P.  
RANDALL T. ENG  
JOHN M. LEVENTHAL  
SHERI S. ROMAN, JJ.

2007-11379

DECISION & ORDER

The People, etc., respondent,  
v John Freeman, appellant.

(Ind. No. 2807/06)

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Lynn W. L. Fahey, New York, N.Y. (Sarah J. Berger of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano,  
Sharon Y. Brodt, and Danielle S. Fenn of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Latella, J.), rendered November 29, 2007, convicting him of robbery in the first degree, robbery in the second degree (two counts), and criminal possession of a weapon in the fourth degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is modified, on the law, by vacating the conviction of robbery in the first degree, in violation of Penal Law § 160.15(3), as charged in count one of the indictment, vacating the sentence imposed thereon, and dismissing that count of the indictment; as so modified, the judgment is affirmed.

The defendant's conviction of robbery in the first degree (*see* Penal Law § 160.15[3]) must be vacated, as the People failed to present legally sufficient evidence that an electronic stun gun which was used by a codefendant, was a "dangerous instrument" (Penal Law 160.15[3]). Under the circumstances here, the People failed to offer evidence that a device of this type "under the circumstances in which it [was] used, attempted to be used or threatened to be used, [was] readily capable of causing death or other serious physical injury" (Penal Law § 10.00[13]; *see People v Maio*

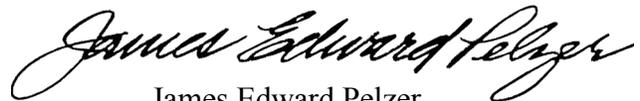
*Ni*, 293 AD2d 552; *People v Nelson*, 292 AD2d 397; *cf. People v MacCary*, 173 AD2d 646). Accordingly, the count of the indictment charging robbery in the first degree must be dismissed.

Contrary to the defendant's contention, he was not entitled to a missing witness charge (see generally *People v Savinon*, 100 NY2d 192, 196; *People v Gonzalez*, 68 NY2d 424, 427; see also *People v Evans*, 56 AD3d 572; *People v Marino*, 21 AD3d 430, 432, *cert denied* 548 US 908).

The defendant's remaining contentions are without merit.

MASTRO, J.P., ENG, LEVENTHAL and ROMAN, 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