

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

D36079
C/kmb

_____AD3d_____

Argued - September 7, 2012

DANIEL D. ANGIOLILLO, J.P.
ANITA R. FLORIO
ARIEL E. BELEN
SHERI S. ROMAN, JJ.

2010-10583

DECISION & ORDER

The People, etc., respondent,
v Damian Young, appellant.

(Ind. No. 2372/08)

Lynn W. L. Fahey, New York, N.Y. (Leila Hull of counsel), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Victor Barall, and David O. Leiwant of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Ingram, J.), rendered October 4, 2010, convicting him of robbery in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is modified, on the law, by reducing the defendant's conviction of robbery in the second degree under the first count of the indictment to robbery in the third degree, and vacating the sentence imposed under the first count of the indictment; as so modified, the judgment is affirmed, and the matter is remitted to the Supreme Court, Kings County, for resentencing on the conviction of robbery in the third degree.

Contrary to the defendant's contention, the Supreme Court did not improperly curtail the right of his counsel to participate in the jury selection process (*see* CPL 270.15[1]; *see also* *People v Jean*, 75 NY2d 744; *People v Thompson*, 45 AD3d 876, 877).

However, we agree with the defendant that the People failed to present legally sufficient evidence of "physical injury" to sustain his conviction of robbery in the second degree (*see* Penal Law § 160.10[2][a]; *People v Contes*, 60 NY2d 620, 621). "Physical injury" is defined as "impairment of physical condition or substantial pain" (Penal Law § 10.00[9]). Although the

question of whether physical injury has been established is generally for the jury to decide, “there is an objective level . . . below which the question is one of law” (*Matter of Philip A.*, 49 NY2d 198, 200).

The complainant testified, inter alia, that during the subject incident, the defendant either “punched” or “pushed” her, causing her to fall to the ground. The complainant went to a hospital after the incident and underwent X-rays, but she did not receive treatment, apart from receiving Tylenol. The complainant testified that after this incident, she experienced generalized pain and soreness in her neck, arms, legs, and feet. The complainant did not testify to the degree or duration of the pain, other than generally describing the pain as having “intensified” after she returned to work one week after the incident.

Under these circumstances, there was insufficient evidence from which a jury could infer that the complainant suffered substantial pain or impairment of physical condition as a result of the subject incident (*see Matter of Philip A.*, 49 NY2d at 200; *People v Bedford*, 95 AD3d 1226, *lv denied* 19 NY3d 944; *People v Taylor*, 83 AD3d 1105, 1106; *People v Pierrot*, 31 AD3d 582; *People v Almonte*, 23 AD3d 392, 393-394). Accordingly, the defendant’s conviction of robbery in the second degree under the first count of the indictment must be reduced to the lesser-included offense of robbery in the third degree (*see Penal Law* §§ 160.10[2][a]; 160.05), and the matter must be remitted to the Supreme Court, Kings County, for resentencing on the conviction of robbery in the third degree.

In light of our determination, we need not reach the defendant’s remaining contention.

ANGIOLILLO, J.P., FLORIO, BELEN and ROMAN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court