

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

286

**KA 07-02576**

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID WILMOT, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (RAYMOND C. HERMAN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered November 30, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [former (2)]), defendant contends that the verdict is against the weight of the evidence based on the jury's rejection of his justification defense. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The People met their burden of establishing beyond a reasonable doubt that defendant did not believe that deadly force was necessary "or that a reasonable person in the same situation would not have perceived that deadly force was necessary" (*People v Umali*, 10 NY3d 417, 425, *rearg denied* 11 NY3d 744). The jury was entitled to credit the testimony of those witnesses who did not support the justification defense (*see generally Bleakley*, 69 NY2d at 495). Defendant further contends that he was deprived of a fair trial by prosecutorial misconduct on summation. Defendant preserved for our review his contention only with respect to one of the prosecutor's comments on summation, and "we conclude that, in any event, '[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Diaz*, 52 AD3d 1230, 1231, *lv denied* 11 NY3d 831).

We have reviewed defendant's remaining contentions and conclude

that they are without merit.

Entered: March 27, 2009

JoAnn M. Wahl  
Clerk of the Court