

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

D24237
T/kmg

_____AD3d_____

Submitted - June 22, 2009

ROBERT A. SPOLZINO, J.P.
PETER B. SKELOS
MARK C. DILLON
JOSEPH COVELLO, JJ.

2007-05801

DECISION & ORDER

The People, etc., respondent,
v Jermaine Smalls, appellant.

(Ind. No. 2540/06)

Lynn W. L. Fahey, New York, N.Y. (Melissa S. Horlick of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Ellen C. Abbot, and Marilyn Filingeri of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Kron, J.), rendered June 5, 2007, convicting him of burglary in the second degree and criminal mischief in the fourth degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant contends that various remarks made by the prosecutor on summation were improper, and denied him his right to a fair trial. However, the defendant's arguments regarding the prosecutor's summation, to the extent the prosecutor allegedly appealed to jurors' sympathies and inserted certain facts not in evidence, are unpreserved for appellate review (*see* CPL 470.05[2]; *People v Burke*, 72 NY2d 833, 836; *People v Williams*, 46 NY2d 1070, 1071; *People v Moore*, 50 AD3d 926, 927). In any event, most of the challenged remarks were within the broad bounds of rhetorical comment permissible in closing arguments, fair comment on the evidence, or responsive to arguments and theories presented in the defense summation (*see People v Halm*, 81 NY2d 819, 821; *People v Galloway*, 54 NY2d 396, 399; *People v Ashwal*, 39 NY2d 105, 109-110; *People v*

August 25, 2009

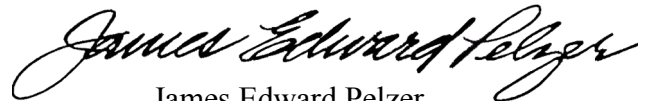
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Turner, 214 AD2d 594). Any error resulting from the remaining challenged remarks was harmless (see *People v Crimmins*, 36 NY2d 230, 241-242; *People v Ortiz*, 46 AD3d 580, 581; *People v Adamo*, 309 AD2d 808, 809).

SPOLZINO, J.P., SKELOS, DILLON and COVELLO, JJ., concur.

ENTER:

A handwritten signature in cursive script that reads "James Edward Pelzer".

James Edward Pelzer
Clerk of the Court