

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

D13573
W/nl

_____AD3d_____

Argued - December 19, 2006

REINALDO E. RIVERA, J.P.
GABRIEL M. KRAUSMAN
GLORIA GOLDSTEIN
ROBERT J. LUNN, JJ.

2004-03436

DECISION & ORDER

The People, etc., respondent,
v Joseph P. Fermin, appellant.

(Ind. No. 728/03)

Steven Banks, New York, N.Y. (Natalie Rea of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano,
Nicoletta J. Cafferri, and Jennifer Hagan of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Kohm, J.), rendered March 25, 2004, convicting him of assault in the first degree, criminal possession of a weapon in the third degree, 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 assault in the first degree and the sentence imposed thereon; as so modified, the judgment is affirmed, and a new trial is ordered on the charge of assault in the first degree, as charged in Count Two of Indictment No. 728/03 as to the defendant.

The defendant correctly argues that the Supreme Court erred in refusing to charge the jury as to justification pursuant to Penal Law § 35.15(2) with respect to the assault charge of which he was convicted under an acting in concert theory (*see People v Fermin*, _____AD3d_____ [Appellate Division Docket No. 2004-03433, decided herewith]). Contrary to the People's contention, the issue is preserved for appellate review (*see CPL 470.05[2]*; *People v Edwards*, 95 NY2d 486, 491 n 2; *People v Duncan*, 177 AD2d 187, 191).

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Contrary to the defendant's contention, the defendant's guilt was proven by legally sufficient evidence.

In view of our determination, we do not reach the defendant's remaining contentions.

RIVERA, J.P., KRAUSMAN, GOLDSTEIN and LUNN, 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