

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

D17449
W/kmg

_____AD3d_____

Argued - December 4, 2007

ROBERT A. SPOLZINO, J.P.
DAVID S. RITTER
HOWARD MILLER
THOMAS A. DICKERSON, JJ.

2005-09449

DECISION & ORDER

The People, etc., respondent,
v Marcin Matyszewski, appellant.

(Ind. No. 4604/04)

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

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Anthea H. Bruffee, and Joseph Huttler of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Collini, J.), rendered September 20, 2005, convicting him of assault in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The Supreme Court did not improvidently exercise its discretion in refusing to admit into evidence a recording of the defendant's telephone call to 911 as an exception to the hearsay rule. The record indicates that the defendant made his exculpatory statements to the 911 operator after he had the time to reflect and possibly fabricate a story (*see People v Sostre*, 51 NY2d 958, 960; *People v Dalton*, 217 AD2d 587, 588, *affd sub nom. People v Vasquez*, 88 NY2d 561; *People v Wilson*, 123 AD2d 457, 457-458). Accordingly, the recording was not admissible into evidence either as an excited utterance or a present sense impression (*see People v Vasquez*, 88 NY2d 561, 574-575; *People v Dalton*, 217 AD2d at 588).

SPOLZINO, J.P., RITTER, MILLER and DICKERSON, JJ., concur.

ENTER:


James Edward Pelzer

January 8, 2008

PEOPLE v MATYSZEWSKI, MARCIN

Clerk of the Court

January 8, 2008

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