

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

D17897
G/prt

_____AD3d_____

Submitted - December 17, 2007

ROBERT A. SPOLZINO, J.P.
PETER B. SKELOS
ANITA R. FLORIO
DANIEL D. ANGIOLILLO, JJ.

2005-03512

DECISION & ORDER

The People, etc., respondent,
v Anthony Cusimano, appellant.

(Ind. No. 2027/03)

Steven Banks, New York, N.Y. (Cheryl Williams of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano,
Sharon Y. Brodt, and Jennifer S. Michael of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Rotker, J.), rendered March 25, 2005, convicting him of robbery in the third degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing (Grosso, J.), of that branch of the defendant's omnibus motion which was to suppress lineup identification evidence.

ORDERED that the judgment is affirmed.

The hearing court properly denied that branch of the defendant's omnibus motion which was to suppress lineup identification evidence (*see People v Chipp*, 75 NY2d 327, 335, *cert denied* 498 US 833; *People v Arroyo*, 38 AD3d 792, 793). Contrary to the defendant's contention, he was not the only one in the lineup wearing a black T-shirt. Moreover, the defendant's clothing did not figure prominently in the complainant's description of him, and there was no testimony adduced at the *Wade* hearing (*see United States v Wade*, 388 US 218) that the complainant relied on clothing in identifying the defendant in the lineup (*see People v Tinnen*, 238 AD2d 615, 616).

Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620), we find that it was legally sufficient to establish the defendant's guilt of

robbery in the third degree beyond a reasonable doubt (*see People v Andolina*, 23 AD3d 573; *People v Cannon*, 1 AD3d 606; *People v Brown*, 309 AD2d 871).

SPOLZINO, J.P., SKELOS, FLORIO and ANGIOLILLO, 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