

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

D22998
C/kmg

_____AD3d_____

Submitted - March 27, 2009

WILLIAM F. MASTRO, J.P.
PETER B. SKELOS
FRED T. SANTUCCI
L. PRISCILLA HALL, JJ.

2007-04395

DECISION & ORDER

The People, etc., respondent,
v Frank Fernandes, appellant.

(Ind. No. 1967/06)

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

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Thomas M. Ross of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Leventhal, J.), rendered May 8, 2007, convicting him of attempted assault in the second degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to suppress his statement to law enforcement officials.

ORDERED that the judgment is affirmed.

The record supports the hearing court's determination that the defendant's statement, taken after he was placed in custody but before *Miranda* warnings (*see Miranda v Arizona*, 384 US 436) were given, was made voluntarily and spontaneously and was not the product of police interrogation or its functional equivalent (*see People v Lynes*, 49 NY2d 286, 294; *People v Nevone*, 258 AD2d 944; *People v Harrison*, 251 AD2d 681; *People v Zanders*, 241 AD2d 531).

Contrary to the defendant's contention, the court properly admitted into evidence a statement made by the complainant's then-10-year-old daughter shortly after she witnessed the subject

May 5, 2009

Page 1.

PEOPLE v FERNANDES, FRANK

crime and struggled with the defendant over the weapon used in the crime, under the excited utterance exception to the hearsay rule (*see People v Edwards*, 47 NY2d 493, 497; *People v Donahue*, 50 AD3d 820, 821; *People v Rodriguez*, 306 AD2d 686, 688).

MASTRO, J.P., SKELOS, SANTUCCI and HALL, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court