

State of New York Court of Appeals

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

No. 54 SSM 4
The People &c.,
Appellant,
v.
Elsun Wheeler,
Respondent.

Submitted by Keith Dolan, for appellant.
Submitted by Tomoeh Murakami Tse, for respondent.

MEMORANDUM:

The Appellate Division order should be reversed, and the case remitted to the Appellate Division for consideration of the facts and issues raised but not determined on appeal to that Court. Defendant's challenge to the legal sufficiency of the evidence supporting his conviction for assault in the second degree was preserved and is reviewable by this Court (*see People v Epakchi*, 37 NY3d 39, 44 [2021]). The victim testified that

defendant delivered a very hard blow to his face, that he felt pain, and that he experienced bleeding and swelling. Hospital records describe the victim's pain as "aching" and indicate he was directed to take over-the-counter painkillers. Viewing the evidence in the light most favorable to the People, it was sufficient to establish physical injury for the purposes of Penal Law § 120.05 (3) (*see People v Chiddick*, 8 NY3d 445 [2007]).

On review of submissions pursuant to section 500.11 of the Rules, order reversed and case remitted to the Appellate Division, Second Department, for consideration of facts and issues raised but not determined on the appeal to that Court, in a memorandum. Chief Judge Wilson and Judges Rivera, Garcia, Singas, Cannataro, Troutman and Halligan concur.

Decided May 18, 2023