

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

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**KA 07-02352**

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND GREEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROOSEVELT APPLETON, DEFENDANT-APPELLANT.

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BIANCO LAW OFFICE, SYRACUSE (RANDI J. BIANCO OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF  
COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Drury, J.), rendered June 27, 2007. The judgment convicted defendant, upon a jury verdict, of reckless endangerment in the first degree, assault in the second degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, reckless endangerment in the first degree (Penal Law § 120.25) and assault in the second degree (§ 120.05 [2]). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction of reckless endangerment and assault (see *People v Gray*, 86 NY2d 10, 19). Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to those counts is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). Defendant also failed to preserve for our review his contentions that he was denied a fair trial by the improper bolstering of the victim's identification (see *People v Simms*, 244 AD2d 920, lv denied 91 NY2d 897), that Supreme Court erred in admitting in evidence photographs of the victim's vehicle (see *People v Craven*, 48 AD3d 1183, 1184-1185, lv denied 10 NY3d 861), and that the court further erred in permitting the jurors to take notes without proper instructions (see *People v Green*, 35 AD3d 1197, lv denied 8 NY3d 922). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

The court properly denied defendant's motion to set aside the verdict pursuant to CPL 330.30 (3). The newly discovered evidence proffered in support of such a motion must be "of such nature that a different verdict probably would occur and, further, such [evidence] must not be cumulative or merely impeaching or contradicting of the trial evidence . . . Here, the proffered evidence does not create the probability of a different result if a new trial were granted and clearly constitutes evidence contradictory to certain of the trial evidence, thus tending to impeach the testimony of a trial witness" (*People v Hayes*, 295 AD2d 751, 752, *lv denied* 98 NY2d 730). Finally, we reject the contentions of defendant that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147), and that he was denied a fair trial by the cumulative effect of the alleged errors raised by defendant on appeal (*see People v McKnight*, 55 AD3d 1315, 1317).