

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

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**KA 08-01127**

PRESENT: HURLBUTT, J.P., MARTOCHE, CARNI, GREEN, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

STEPHEN M. HOLBERT, DEFENDANT-APPELLANT.

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DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered May 29, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), defendant contends that the sentence of a determinate term of incarceration of 15 years constitutes cruel and unusual punishment. We reject that contention, inasmuch as it cannot be said that the sentence is "grossly disproportionate to the crime" (*People v Broadie*, 37 NY2d 100, 111, cert denied 423 US 950; see generally *People v Thompson*, 83 NY2d 477, 484). Also contrary to defendant's contention, the bargained-for sentence is not unduly harsh or severe. Defendant failed to preserve for our review his further contention that the prosecutor's sentencing recommendation was "illusory" (see *People v Harris*, 4 AD3d 770, lv denied 2 NY3d 762) and, in any event, defendant's contention is without merit. The record establishes that the prosecutor complied with the plea agreement in recommending that defendant be sentenced to a determinate term of incarceration of 15 years (see *People v Hannig* [appeal No. 1], 258 AD2d 908, lv denied 93 NY2d 853).

Entered: March 20, 2009

JoAnn M. Wahl  
Clerk of the Court