

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

1651

KA 08-01366

PRESENT: SCUDDER, P.J., HURLBUTT, SMITH, AND CENTRA, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BASIL PAYNE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, J.), rendered June 19, 2008. The judgment convicted defendant, upon a jury verdict, of attempted murder in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [i]; [b]) and criminal possession of a weapon in the second degree (§ 265.03 [former (2)]). Defendant failed to preserve for our review his contention that Supreme Court failed to conduct an adequate inquiry concerning the issue whether certain jurors were grossly unqualified to serve (*see People v Fortino*, 61 AD3d 1410, *lv denied* 12 NY3d 925; *People v Clark*, 28 AD3d 1190), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*). Contrary to the further contention of defendant, defense counsel was not ineffective in failing to preserve that contention with respect to the jurors for our review. Defendant failed to demonstrate the absence of strategic or other legitimate explanations for the alleged omission by defense counsel (*see generally People v Benevento*, 91 NY2d 708, 712).

We reject the contention of defendant that the evidence is legally insufficient to establish his intent to kill the police officer and to use a weapon against that officer (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (*People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at

495), and the sentence is not unduly harsh or severe. We have considered defendant's remaining contention and conclude that it is without merit.

Entered: December 30, 2009

Patricia L. Morgan
Clerk of the Court