

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

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**KA 08-02371**

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TIMOTHY AUSTIN, ALSO KNOWN AS KHALI ALI,  
DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF  
COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered September 5, 2008. The judgment convicted defendant, upon a nonjury verdict, of robbery 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 nonjury trial of robbery in the third degree (Penal Law § 160.05). Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence (*see People v Gray*, 86 NY2d 10, 19). We reject the contention of defendant that defense counsel was ineffective in failing to preserve that challenge for our review inasmuch as defendant failed to demonstrate that it would be meritorious (*see People v Bassett*, 55 AD3d 1434, 1438, *lv denied* 11 NY3d 922). Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Contrary to defendant's further contention, "the showup identification procedure, which was conducted in geographic and temporal proximity to the crime, was not unduly suggestive" (*People v Davis*, 48 AD3d 1120, 1122, *lv denied* 10 NY3d 957; *see People v Duuvon*, 77 NY2d 541, 545), despite the fact that defendant was seated in a police vehicle when viewed by the victim (*see People v Robinson*, 8 AD3d 1028, 1029-1030, *affd* 5 NY3d 738, *cert denied* 546 US 988; *Duuvon*,

77 NY2d at 545; *People v Ricks*, 270 AD2d 882, lv denied 95 NY2d 802).  
The sentence is not unduly harsh or severe.

Entered: May 7, 2010

Patricia L. Morgan  
Clerk of the Court