

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

779

**KA 03-02419**

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSE GUITIERREZ, DEFENDANT-APPELLANT.

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KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (ANNEMARIE DILS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), rendered May 15, 2003. The judgment convicted defendant, upon a jury verdict, of assault in the first 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 assault in the first degree (Penal Law § 120.10 [1]). The record does not support defendant's contention that Supreme Court limited the jury to considering defendant's guilt under a theory of accessorial liability only. We note that, even if the court had done so, defendant would not have been prejudiced by that limitation inasmuch as the court would have removed the possibility of conviction as a principal, leaving only one theory of liability, i.e., accomplice liability, under which defendant could be convicted (*cf. People v Dockery*, 272 AD2d 247, 248, *lv denied* 95 NY2d 934). We reject defendant's further contention that the court erred in charging a theory of accessorial liability, in view of the fact that the evidence presented at trial supports that theory (*see generally People v Rivera*, 84 NY2d 766, 769-770; *People v Duncan*, 46 NY2d 74, 79-80, *rearg denied* 46 NY2d 940, *cert denied* 442 US 910, *rearg dismissed* 56 NY2d 646). Contrary to defendant's further contention, the court did not abuse its discretion in permitting the prosecutor to recall a witness well before the close of the People's case and, after a limited cross-examination of that witness, to address an identification issue that the prosecutor failed to address during his direct examination of that witness (*see People v Guiterrez*, 270 AD2d 184; *People v Ketchmore*, 132 AD2d 889, 891 n, *lv denied* 70 NY2d 752, 756; *see generally People v Dennis*, 55 AD3d 385, *lv denied* 12 NY3d

783).

Entered: June 11, 2010

Patricia L. Morgan  
Clerk of the Court