

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

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KA 15-01680

PRESENT: CENTRA, J.P., CARNI, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL A. HEAD, DEFENDANT-APPELLANT.

NANCY J. BIZUB, BUFFALO, FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, SPECIAL DISTRICT ATTORNEY, BATAVIA, AND NEW YORK PROSECUTORS TRAINING INSTITUTE, INC., ALBANY (LAUREN D. KONSUL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered July 8, 2015. The judgment convicted defendant, upon a jury verdict, of assault in the second degree (two counts).

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 two counts of assault in the second degree (Penal Law § 120.05 [3], [7]). Defendant's conviction stems from an altercation he had with correction officers while he was an inmate at a correctional facility. Defendant contends that County Court erred in ordering that defendant's inmate witnesses remain shackled while testifying without giving a reason for such restraints and without providing any curative instructions to the jury. As defendant correctly concedes, he did not preserve his contention for our review (*see* CPL 470.05 [2]; *see generally* *People v Cooke*, 24 NY3d 1196, 1197 [2015], *cert denied* – US –, 136 S Ct 542 [2015]; *People v Rouse*, 79 NY2d 934, 935 [1992]; *People v Morales*, 132 AD3d 1410, 1410 [4th Dept 2015], *lv denied* 27 NY3d 1072 [2016]), 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]). We reject defendant's contention that he was denied effective assistance of counsel on the ground that defense counsel failed to preserve this issue for our review. Defendant failed " 'to demonstrate the absence of strategic or other legitimate explanations' for counsel's allegedly deficient conduct" (*People v Atkins*, 107 AD3d 1465, 1465 [4th Dept 2013], *lv denied* 21 NY3d 1040 [2013], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]). Viewing the evidence, the law, and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally* *People v Baldi*, 54 NY2d 137, 147 [1981]).

We reject defendant's contention that the evidence is legally insufficient because the People failed to disprove his justification defense. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to disprove the justification defense (*see People v Williams*, 134 AD3d 1572, 1573 [4th Dept 2015]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court