

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

**667**

**KA 13-01471**

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT COTTON, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, THE ABBATOY LAW FIRM, PLLC (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered July 30, 2013. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree and 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 attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and assault in the first degree (§ 120.10 [1]). Contrary to defendant's contention, he was not denied his right to present a defense by the prosecutor's refusal to request that the court confer immunity on a defense witness who would not agree to testify without immunity. It is well settled that the decision of a District Attorney to request immunity for a witness is discretionary " 'and not reviewable unless the District Attorney acts with bad faith to deprive a defendant of his or her right to a fair trial' " (*People v Bolling*, 24 AD3d 1195, 1196 [4th Dept 2005], *affd* 7 NY3d 874 [2006]; *see People v Swank*, 109 AD3d 1089, 1090 [4th Dept 2013], *lv denied* 23 NY3d 968 [2014]; *see generally* CPL 50.30), and here the record is devoid of evidence of bad faith (*see People v Adams*, 53 NY2d 241, 247-248 [1981]). 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 People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's further contention that he was incorrectly sentenced as a second violent felony offender. Defendant's prior conviction of criminal possession of a weapon in the third degree pursuant to former Penal Law § 265.02 (4), which was recodified in 2006 as the crime of criminal possession of a weapon in the second

degree (see § 265.03 [3]), was properly considered a predicate violent felony conviction (see *People v Smith*, 27 NY3d 652, 670 [2016]).

Entered: June 15, 2018

Mark W. Bennett  
Clerk of the Court