

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

1125

**KA 09-02345**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JUAN DIAZ, DEFENDANT-APPELLANT.

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NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (NEAL J. MAHONEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

GERALD L. STOUT, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered August 13, 2009. The judgment convicted defendant, upon a jury verdict, of assault in the first degree, promoting prison contraband in the third degree and criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him of, inter alia, assault in the first degree (Penal Law § 120.10 [1]), defendant contends that the evidence presented by the People at trial with respect to the crime of assault varied from the allegations set forth in the indictment, as amplified by the bill of particulars, rendering the evidence legally insufficient to support the assault conviction. We reject that contention. The bill of particulars alleged that defendant "attacked the victim from behind and stabbed him several times in the abdomen and chest area." At trial, the victim testified that he did not recall the details of the attack and did not see his assailant. He further testified, however, that he informed a police officer following the attack that the assailant "reached around from my behind and stabbed me in the front." In addition, although several correction officers testified that they observed defendant and the victim facing each other during the altercation, those witnesses also testified that they did not observe the commencement of the altercation. Thus, neither the testimony of the victim nor of the correction officers can be said to conflict with the allegation in the bill of particulars that defendant initially attacked the victim from behind, and we conclude under the circumstances of this case that "defendant received the requisite fair notice of the accusations against him" (*People v McCallar*, 53 AD3d 1063, 1065, lv denied 11 NY3d 833 [internal quotation marks omitted]; see *People v Grega*, 72 NY2d

489, 495-496).

Entered: October 1, 2010

Patricia L. Morgan  
Clerk of the Court