

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

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KA 15-02009

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SYLVESTER E. BAXTRUM, JR., DEFENDANT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (CHARLES D. STEINMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered September 9, 2015. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (two counts) and assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of two counts of burglary in the first degree (Penal Law § 140.30 [2], [3]) and one count of assault in the second degree (§ 120.05 [2]), defendant contends that he was denied effective assistance of counsel because defense counsel failed to make a timely motion to sever his trial from that of his codefendant and failed to request a limiting instruction regarding testimony that defendant contends was relevant only to the issue of his codefendant's guilt. We reject defendant's contention. "Any motion to sever . . . would have had little or no chance of success," and thus counsel's failure to make such a motion does not indicate ineffectiveness of counsel (*People v Dozier*, 32 AD3d 1346, 1347 [4th Dept 2006], *lv dismissed* 8 NY3d 880 [2007] [internal quotation marks omitted], citing *People v Caban*, 5 NY3d 143, 152 [2005]). With respect to the limiting instruction, defendant failed to show the absence of strategic or other legitimate explanations for defense counsel's alleged deficiency (*see generally People v Benevento*, 91 NY2d 708, 712 [1998]). Moreover, we conclude that the evidence, the law and the circumstances of this case, viewed in totality and as of the time of representation, establish that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant's remaining contention is raised for the first time in defendant's reply brief and thus is not properly before us (*see People*

v Larkins, 153 AD3d 1584, 1586 [4th Dept 2017], *lv denied* 30 NY3d 1061 [2017]; *People v Sponburgh*, 61 AD3d 1415, 1416 [4th Dept 2009], *lv denied* 12 NY3d 929 [2009]; *People v Boatman*, 53 AD3d 1053, 1054 [4th Dept 2008]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court