

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

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KA 05-00504

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GREGORY A. MONTANO, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (GRAZINA MYERS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered January 20, 2005. The judgment convicted defendant, upon a jury verdict, of assault in the second 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 second degree (Penal Law § 120.05 [1]). Contrary to the contention of defendant, Supreme Court properly denied his request for an intoxication charge. Such a charge "should be given if there is sufficient evidence of intoxication in the record for a reasonable person to entertain a doubt as to the element of intent on that basis" (*People v Perry*, 61 NY2d 849, 850). Here, there was no such evidence, i.e., there was no evidence " 'concerning the number of drinks consumed by defendant; the time period during which he may have consumed them; whether the drinks contained alcohol; or the physical effects, if any, that the consumption of alcohol may have had on defendant's behavior or mental state' " (*People v Shaw*, 8 AD3d 1106, 1107, lv denied 3 NY3d 681).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court