

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

790

**KA 19-00797**

PRESENT: WHALEN, P.J., SMITH, LINDLEY, BANNISTER, AND MONTOUR, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LEON G. ROACH, DEFENDANT-APPELLANT.

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MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (CAROLYN WALTHER OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Sam L. Valleriani, J.), rendered December 3, 2018. The appeal was held by this Court by order entered February 3, 2023, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (213 AD3d 1274 [4th Dept 2023]). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of attempted assault in the second degree and dismissing count one of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a bench trial of, inter alia, attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [1]), attempted assault in the first degree (§§ 110.00, 120.10 [1]), and assault in the second degree (§ 120.05 [2]). We previously held this case, reserved decision, and remitted the matter to County Court for a ruling on defendant's motion for a trial order of dismissal, on which the court had reserved decision but failed to rule (*People v Roach*, 213 AD3d 1274, 1274 [4th Dept 2023]). Upon remittal, the court denied the motion. Contrary to defendant's contention, we conclude that his conviction on the challenged counts is supported by legally sufficient evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Further, viewing the evidence in light of the elements of the crimes in this nonjury trial (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495).

As defendant contends and the People correctly concede, however, as charged here, attempted assault in the second degree is a lesser included offense of attempted assault in the first degree (see *People*

*v Argueta*, 194 AD3d 857, 860 [2d Dept 2021], *lv denied* 37 NY3d 970 [2021]), and thus should have been considered only in the alternative as a lesser inclusory concurrent count of attempted assault in the first degree (see CPL 300.40 [3] [b]; *People v Hamm*, 96 AD3d 1482, 1483-1484 [4th Dept 2012], *affd* 21 NY3d 708 [2013]; *People v Johnson*, 81 AD3d 1428, 1429 [4th Dept 2011], *lv denied* 16 NY3d 896 [2011]). We therefore modify the judgment accordingly. The sentence is not otherwise unduly harsh or severe.

Entered: November 17, 2023

Ann Dillon Flynn  
Clerk of the Court