

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

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**KA 12-01620**

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

EUGENE S. BROWN, ALSO KNOWN AS EUGENE NESMITH,  
DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF  
COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered May 3, 2012. The judgment convicted defendant, upon a jury verdict, of murder 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 murder in the second degree (Penal Law § 125.25 [1]). Defendant failed to preserve for our review his contention that County Court erred in failing to conduct an inquiry into whether jurors were sleeping during the trial (*see People v Lancaster*, 143 AD3d 1046, 1051 [3d Dept 2016], *lv denied* 28 NY3d 1147 [2017], *reconsideration denied* 29 NY3d 999 [2017]; *People v Quinones*, 41 AD3d 868, 868 [2d Dept 2007], *lv denied* 9 NY3d 1008 [2007]). We note that defendant asked the court to discharge one juror on the ground that he was "grossly unqualified" (CPL 270.35 [1]), the court granted his request and discharged the juror, and defendant did not request that the court inquire into the conduct of any other particular juror. Defendant also failed to preserve for our review his challenges to the court's *Sandoval* ruling (*see People v Huitt*, 149 AD3d 1481, 1482 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]), and its *Molineux* ruling (*see People v Pendergraph*, 150 AD3d 1703, 1704 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017]). We decline to exercise our power to review those unpreserved contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: March 16, 2018

Mark W. Bennett  
Clerk of the Court