

State of New York Court of Appeals

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

No. 95 SSM 15
The People &c.,
Respondent,
v.
Don P. Sipp,
Appellant.

Submitted by J. Scott Porter, for appellant.
Submitted by Mark S. Sinkiewicz, for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed. At a jury trial, defendant was convicted of assault in the second degree for slashing his former girlfriend's face and neck with a sharp instrument and repeatedly stomping on her head with his boot-clad foot.

His counsel requested that the court charge the jury with assault in the third degree as a lesser-included offense; the court declined to do so.

Both live and photographic evidence at trial, ten months after the attack, demonstrated that the victim’s face was disfigured with scars above one eyebrow, under the other eye, on her lip and across her neck, and that apart from the scars, her facial structure and appearance had changed significantly. Testimony from her treating physician established that she suffered at least five displaced fractures around her eye sockets and nose, which were left to heal as displaced. Viewed in a light most favorable to defendant (see People v Van Norstrand, 85 NY2d 131, 135 [1995]; People v Henderson, 41 NY2d 233, 236 [1976]), we agree that no reasonable view of the evidence could support a finding that the victim sustained anything less than a serious physical injury (see Penal Law § 10.00 [10]; People v McKinnon, 15 NY3d 311, 315 [2010]). Accordingly, defendant was not entitled to an instruction on a lesser-included charge of assault in the third degree.

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On review of submissions pursuant to section 500.11 of the Rules, order affirmed, in a memorandum. Chief Judge DiFiore and Judges Rivera, Stein, Fahey, Garcia, Wilson and Feinman concur.

Decided August 29, 2019