

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

1058

KA 22-00855

PRESENT: SMITH, J.P., CURRAN, BANNISTER, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

EDWARD SHOLTZ, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered November 29, 2021. The judgment convicted defendant upon a plea of guilty of attempted rape in the first degree, sexual abuse in the first degree, criminal obstruction of breathing or blood circulation, assault in the second degree, endangering the welfare of a child (two counts) and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [1]), sexual abuse in the first degree (§ 130.65 [1]), and assault in the second degree (§ 120.05 [12]), arising out of the assault of a woman who was jogging on a trail. We affirm.

Defendant contends that the showup identification procedure involving the victim was unduly suggestive and that County Court thus erred in refusing to suppress the showup identification of him by the victim. To the extent that it is preserved for our review (see CPL 470.05 [2]; *People v Ortiz*, 90 NY2d 533, 536-537 [1997]; *People v Johnson*, 192 AD3d 1612, 1613 [4th Dept 2021], *lv denied* 38 NY3d 1071 [2022]), we reject defendant's contention. "The showup procedure was reasonable under the circumstances because it was conducted in geographic and temporal proximity to the crime" (*People v Nance*, 132 AD3d 1389, 1390 [4th Dept 2015], *lv denied* 26 NY3d 1091 [2015] [internal quotation marks omitted]). Moreover, the showup procedure was not rendered unduly suggestive by the fact that defendant was in handcuffs and was in a police vehicle (see *People v Desmond*, 213 AD3d 1356, 1356 [4th Dept 2023]; *People v Wilson*, 104 AD3d 1231, 1232-1233 [4th Dept 2013], *lv denied* 21 NY3d 1011 [2013], *reconsideration denied*

21 NY3d 1078 [2013]). Defendant's further contention that the police officer who transported the victim to the showup procedure made suggestive or improper comments to the victim on the ride to the procedure is purely speculative and unsupported by the hearing record (*see generally People v Suber*, 256 AD2d 1086, 1086 [4th Dept 1998], *lv denied* 93 NY2d 979 [1999]; *People v Celestin*, 231 AD2d 736, 736 [2d Dept 1996], *lv denied* 89 NY2d 920 [1996]).

Finally, defendant's sentence is not unduly harsh or severe.