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

575

KA 22-01635

PRESENT: SMITH, J.P., CURRAN, MONTOUR, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM L. HUFNAGLE, DEFENDANT-APPELLANT.

KEEM APPEALS, PLLC, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANTHONY J. DIMARTINO, JR., DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Karen M. Brandt Brown, J.), rendered May 3, 2022. The judgment convicted defendant, after a nonjury trial, of sexual abuse in the first degree (two counts) and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him, after a nonjury trial, of two counts of sexual abuse in the first degree (Penal Law § 130.65 [3]) and one count of endangering the welfare of a child (§ 260.10 [1]). Initially, we conclude that defendant " 'failed to preserve for our review his contention that he did not knowingly, voluntarily and intelligently waive the right to a jury trial inasmuch as he did not challenge the adequacy of his allocution with respect to the waiver' " (*People v Evans*, 206 AD3d 1613, 1614 [4th Dept 2022], *lv denied* 38 NY3d 1133 [2022]; *see People v Barnett*, 221 AD3d 1421, 1422 [4th Dept 2023], *lv denied* 41 NY3d 964 [2024]). In any event, defendant's contention lacks merit. The record establishes that defendant " 'was advised of, understood and knowingly waived his right to a jury trial, after discussing it with counsel and signing a written waiver of jury trial in open court' " (*Evans*, 206 AD3d at 1614; *see generally People v Smith*, 6 NY3d 827, 828 [2006], *cert denied* 548 US 905 [2006]). Inasmuch as defendant's mental competency was established by a CPL article 730 examination, there is "no reason to doubt his capacity to waive a jury trial" (*People v Sanchez*, 201 AD3d 599, 600 [1st Dept 2022], *lv denied* 38 NY3d 1009 [2022]; *see People v Campos*, 93 AD3d 581, 582-583 [1st Dept 2012], *lv denied* 19 NY3d 971 [2012]).

Contrary to defendant's contention, we conclude that the evidence, viewed in the light most favorable to the People (*see People*

v Delamota, 18 NY3d 107, 113 [2011]), is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The sworn testimony of the minor victim that defendant inappropriately touched her vagina is legally sufficient to support the conviction of sexual abuse in the first degree (*see* Penal Law § 130.65 [3]; *People v Russell*, 50 AD3d 1569, 1569 [4th Dept 2008], *lv denied* 10 NY3d 939 [2008]; *see also People v Scerbo*, 74 AD3d 1730, 1731-1732 [4th Dept 2010], *lv denied* 15 NY3d 757 [2010]), and "[b]ecause the evidence . . . [is] legally sufficient with respect to [defendant's] conviction of sexual abuse, it necessarily also [is] legally sufficient with respect to the conviction of endangering the welfare of a child" (*Scerbo*, 74 AD3d at 1732; *see generally* § 260.10 [1]).

Furthermore, 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 conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "In a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented are entitled to great deference" (*People v Kouao*, 177 AD3d 1335, 1335 [4th Dept 2019], *lv denied* 34 NY3d 1160 [2020] [internal quotation marks omitted]; *see People v McCoy*, 100 AD3d 1422, 1422 [4th Dept 2012]). Although a different verdict would not have been unreasonable (*see Danielson*, 9 NY3d at 348), we see no basis to reject County Court's credibility and weight determinations here (*see People v McMillian*, 158 AD3d 1059, 1061 [4th Dept 2018], *lv denied* 31 NY3d 1119 [2018]; *People v Beauharnois*, 64 AD3d 996, 998-999 [3d Dept 2009], *lv denied* 13 NY3d 834 [2009]).

Defendant also contends that he was denied effective assistance of counsel. " 'To prevail on his claim, defendant must demonstrate the absence of strategic or other legitimate explanations for [defense] counsel's failure to pursue colorable claims' " (*People v Wills*, 224 AD3d 1329, 1330 [4th Dept 2024], *lv denied* 41 NY3d 1005 [2024]), and " '[t]here can be no denial of effective assistance of . . . counsel arising from [defense] counsel's failure to make a motion or argument that has little or no chance of success' " (*id.* at 1331). Defendant's mental competency had been previously established by a CPL article 730 examination, and thus defense counsel was not ineffective in failing to request a second examination, which would have had "little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]); nor was defense counsel ineffective in failing to pursue a defense of mental disease or defect, which was not supported by the record (*see People v Hurlbert*, 81 AD3d 1430, 1430-1431 [4th Dept 2011], *lv denied* 16 NY3d 896 [2011]). Defendant's argument that defense counsel was ineffective in failing to request an adjournment to allow him time to prepare, or obtain an expert to prepare, a sentencing memorandum lacks merit because defendant has not shown that defense counsel "could have articulated some [additional] basis for leniency" (*People v Adams*, 247 AD2d 819, 819 [4th Dept 1998], *lv denied* 91 NY2d 1004 [1998]) or that "[an expert opinion] was available, that it would have assisted the

[court] in its determination [and] that [defendant] was prejudiced by its absence" (*People v Englert*, 130 AD3d 1532, 1533 [4th Dept 2015], *lv denied* 26 NY3d 967 [2015], 26 NY3d 1144 [2016] [internal quotation marks omitted]). Defendant's argument that defense counsel should have requested an adjournment to ensure that defendant's participation in the proceedings—including, inter alia, his decision to forgo a plea and his waiver of a jury trial—were knowing and voluntary " 'implicates his relationship with his trial attorney and is to be proved, if at all, by facts outside the trial record in a proceeding maintainable under CPL 440.10' " (*People v Magnano*, 158 AD2d 979, 979 [4th Dept 1990], *affd* 77 NY2d 941 [1991]; *see People v Dallas*, 119 AD3d 1362, 1364 [4th Dept 2014], *lv denied* 24 NY3d 1083 [2014]).

Finally, the sentence is not unduly harsh or severe.

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court