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

1080

KA 15-00840

PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN FLEMING, DEFENDANT-APPELLANT.

SESSLER LAW PC, GENESEO (STEVEN D. SESSLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered April 21, 2015. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child and sexual abuse in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of predatory sexual assault against a child (Penal Law § 130.96) and sexual abuse in the second degree (§ 130.60 [2]), defendant contends that County Court failed to comply with the requirements of CPL 310.30, as set forth in *People v O'Rama* (78 NY2d 270, 276-277), in responding to an inquiry by the jury during deliberations. We conclude that defendant failed to preserve his contention for our review (*see generally* CPL 470.05 [2]), and we reject his assertion that preservation was not required under these circumstances (*see People v Williams*, 142 AD3d 1360, 1362, *lv denied* 28 NY3d 1128). It is well settled that "[c]ounsel's knowledge of the precise content of the [jury] note . . . removes the claimed error from the very narrow class of mode of proceedings errors for which preservation is not required" (*People v Morris*, 27 NY3d 1096, 1098) and, here, the court "read the precise content of the note into the record in the presence of counsel, defendant, and the jury" (*id.* at 1097; *see People v Nealon*, 26 NY3d 152, 154). We likewise reject defendant's further contention that the court's response to a juror's one-word inquiry was a mode of proceedings error. "Defense counsel was aware of the content of the juror['s] comment[], which [was] made out loud in open court, and did not object to anything the judge or prosecutor did in response" (*People v Mays*, 20 NY3d 969, 971; *see People v Mostiller*, 145 AD3d 1466, 1467-1468, *lv denied* 29 NY3d 951). Therefore, the court did not violate its core *O'Rama* responsibilities,

and preservation was required (*see Mostiller*, 145 AD3d at 1467-1468). We decline to exercise our power to review defendant's *O'Rama* contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court