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

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KA 19-00517

PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GEOFFREY MARTIN, DEFENDANT-APPELLANT.

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered September 6, 2018. The judgment convicted defendant, after a nonjury trial, of forcible touching (two counts), sexual abuse in the third degree (two counts), and endangering the welfare of a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, following a bench trial, of two counts each of forcible touching (Penal Law § 130.52 [1]), sexual abuse in the third degree (§ 130.55), and endangering the welfare of a child (§ 260.10 [1]). "Viewing the evidence in light of the elements of the crimes in this nonjury trial" (*People v Hutchings*, 142 AD3d 1292, 1293 [4th Dept 2016], *lv denied* 28 NY3d 1124 [2016]; *see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). County Court "reasonably found defendant's exculpatory testimony incredible and rejected it . . . and, notwithstanding minor inconsistencies in the [victim's] testimony . . . , 'there is no basis for disturbing the [court's] determinations concerning credibility' " (*People v Sommerville*, 159 AD3d 1515, 1516 [4th Dept 2018], *lv denied* 31 NY3d 1121 [2018]).

Defendant's contention that the trial testimony rendered the indictment duplicitous is unpreserved for appellate review (*see People v Allen*, 24 NY3d 441, 449-450 [2014]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see e.g. People v Garner*, 145 AD3d 1573, 1574 [4th Dept 2016], *lv denied* 29 NY3d 1031 [2017]). Contrary to defendant's contention, defense counsel was not ineffective in failing to seek the

dismissal of the endangering the welfare of a child counts on statute of limitations grounds (*see People v Ambers*, 26 NY3d 313, 318-320 [2015]; *People v Evans*, 16 NY3d 571, 575-576 [2011], *cert denied* 565 US 912 [2011]; *People v St. Pierre*, 141 AD3d 958, 961-962 [3d Dept 2016], *lv denied* 28 NY3d 1031 [2016]). Even if, as defendant asserts, the court's admission of testimony about a missing photograph violated the best evidence rule, any such error is harmless (*see People v Haggerty*, 23 NY3d 871, 876 [2014]; *Hutchings*, 142 AD3d at 1294).

Defendant's challenges to the conditions of his probation are unpreserved for appellate review, and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see generally People v Graves*, 163 AD3d 16, 24-25 [4th Dept 2018]; *People v King*, 151 AD3d 1651, 1654 [4th Dept 2017], *lv denied* 30 NY3d 951 [2017]; *cf. generally People v Letterlough*, 86 NY2d 259, 261-269 [1995]; *People v Saraceni*, 153 AD3d 1559, 1560 [4th Dept 2017], *lv denied* 30 NY3d 913 [2018]). Finally, the incarceration component of the split sentence is not illegal (*see* Penal Law § 60.01 [2] [d]; *see generally People v Zephrin*, 14 NY3d 296, 300-301 [2010]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court