

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

959

KA 19-00535

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LANCE WILLIAMS, DEFENDANT-APPELLANT.

THE SAGE LAW FIRM GROUP PLLC, BUFFALO (KATHRYN FRIEDMAN 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 (Dennis S. Cohen, J.), rendered May 31, 2018. The judgment convicted defendant upon a jury verdict of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [3]). We affirm.

Contrary to defendant's contention, County Court did not err in refusing to preclude a statement he made immediately following the underlying incident. Defendant made the statement in a loud voice as he was being escorted by correction officers out of the prison's gymnasium during an event attended by the family members of inmates, and it is unclear to whom he was communicating. The statement was not made in response to any questioning by the correction officers. Although it is undisputed that the People failed to provide defendant with a timely CPL 710.30 notice with respect to the challenged statement, no such notice was required here because defendant made the statement to, inter alia, "private parties who were not police agents" (*People v Miranda*, 23 NY2d 439, 448 [1969]; see *People v Albert*, 171 AD3d 1519, 1520 [4th Dept 2019]; *People v Bryant*, 144 AD3d 1523, 1524 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]). Further, defendant's statement was not made subject to CPL 710.30 merely because the statement was "overheard by a [correction] officer" (*People v Pittman*, 160 AD3d 1130, 1130 [3d Dept 2018], *lv denied* 31 NY3d 1151 [2018]; see *People v Umana*, 76 AD3d 1111, 1112 [2d Dept 2010], *lv denied* 15 NY3d 924 [2010]).

Defendant further contends that he was deprived of a fair trial

by prosecutorial misconduct during summation. To the extent that defendant challenges the prosecutor's characterization of his trial testimony as "wild," the contention is not preserved for our review because defendant failed to object to that comment (see *People v Kerce*, 140 AD3d 1659, 1660 [4th Dept 2016], *lv denied* 28 NY3d 1028 [2016]), and we decline to exercise our power to review that part of the contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). With respect to defendant's challenge to the prosecutor's mischaracterization of a witness's testimony, the court "properly sustained defense counsel's objection to the prosecutor's statement and gave a curative instruction, which the jury is presumed to have followed," thereby alleviating any prejudice caused by the prosecutor's mischaracterization (*People v Flowers*, 151 AD3d 1843, 1844 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]). We conclude that the remainder of the comments challenged by defendant "were within the broad bounds of rhetorical comment permissible during summations . . . , and they were either a fair response to defense counsel's summation or fair comment on the evidence" (*People v Ali*, 89 AD3d 1412, 1414 [4th Dept 2011], *lv denied* 18 NY3d 881 [2012] [internal quotation marks omitted]; see *People v Bailey*, 181 AD3d 1172, 1175 [4th Dept 2020], *lv denied* 35 NY3d 1025 [2020]). Even assuming, arguendo, that any of the prosecutor's comments exceeded those bounds, we conclude that they "were not so egregious as to deprive defendant of a fair trial" (*Ali*, 89 AD3d at 1414 [internal quotation marks omitted]; see *People v Blackshell*, 178 AD3d 1355, 1356 [4th Dept 2019], *lv denied* 35 NY3d 968 [2020]; *Kerce*, 140 AD3d at 1660).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court