SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

796

KA 21-01079

PRESENT: WHALEN, P.J., CURRAN, MONTOUR, OGDEN, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DALE J. FINSTER, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, SYRACUSE (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Brian D. Dennis, J.), rendered July 10, 2018. The judgment convicted defendant upon a jury verdict of criminal sexual act in the second degree (four 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 upon a jury verdict of four counts of criminal sexual act in the second degree (Penal Law § 130.45 [1]) and one count of endangering the welfare of a child (§ 260.10 [1]). The conviction arises from defendant's actions in engaging in oral sexual conduct with a 14-year-old victim, whom defendant supplied with alcohol and marihuana.

Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence inasmuch as his motion for a trial order of dismissal was not "specifically directed at" any alleged shortcoming in the evidence now raised on appeal (*People v Ford*, 148 AD3d 1656, 1657 [4th Dept 2017], *lv denied* 29 NY3d 1079 [2017] [internal quotation marks omitted]; *see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Simmons*, 133 AD3d 1227, 1227 [4th Dept 2015]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*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]). The resolution of issues of credibility and the weight to be accorded to the evidence are primarily questions to be determined by the jury (*see People v Abon*, 132 AD3d 1235, 1236 [4th Dept 2015], *lv denied* 27 NY3d 1127 [2016]). Here, the jury had the opportunity to see and hear the

victim's testimony about the encounters with defendant. It also had an opportunity to hear from defendant through the admission in evidence of an audio recording of a police interview. "Great deference is accorded to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor" (*Bleakley*, 69 NY2d at 495; *see People v Mateo*, 2 NY3d 383, 410 [2004], *cert denied* 542 US 946 [2004]; *People v Gay*, 105 AD3d 1427, 1428 [4th Dept 2013]), and we perceive no basis for disturbing the jury's determination in this case.

We reject defendant's contention that he was deprived of a fair trial by misconduct on the part of the prosecutor during the opening statement. Even assuming, arguendo, that the prosecutor's comments were improper, we conclude that they were "not so egregious as to deprive defendant of a fair trial" (*People v Love*, 134 AD3d 1569, 1570-1571 [4th Dept 2015], *lv denied* 27 NY3d 967 [2016]; *see People v Figgins*, 72 AD3d 1599, 1600 [4th Dept 2010], *lv denied* 15 NY3d 893 [2010]; *People v Sweney*, 55 AD3d 1350, 1351 [4th Dept 2008], *lv denied* 11 NY3d 901 [2008]), and that County Court's instructions during the jury charge ameliorated any prejudice to defendant (*see People v Morgan*, 148 AD3d 1590, 1591 [4th Dept 2017], *lv denied* 29 NY3d 1083 [2017]; *see also People v Warmley*, 179 AD3d 1537, 1538 [4th Dept 2020], *lv denied* 35 NY3d 945 [2020]).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court