

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

710

KA 22-01638

PRESENT: SMITH, J.P., CURRAN, BANNISTER, OGDEN, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASON WEEKS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Kristina Karle, J.), rendered May 4, 2022. The judgment convicted defendant upon a jury verdict of predatory sexual assault against a child, endangering the welfare of a child (two counts), and sexual abuse in the third degree (two counts).

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 one count of predatory sexual assault against a child (Penal Law § 130.96), two counts of endangering the welfare of a child (§ 260.10 [1]), and two counts of sexual abuse in the third degree (§ 130.55). Defendant failed to preserve his contention that County Court should have recused itself (*see* CPL 470.05 [2]; *People v Strohman*, 66 AD3d 1334, 1335-1336 [4th Dept 2009], *lv dismissed* 13 NY3d 911 [2009]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's further contention, the court did not abuse its discretion in denying his motion for a mistrial based on the testimony of one of the victims concerning her recollection of certain lyrics to a song that defendant played during an act of sexual abuse (*see generally* *People v Urrutia*, 181 AD3d 1338, 1338 [4th Dept 2020], *lv denied* 36 NY3d 1054 [2021]). Under the circumstances of this case, the victim's testimony regarding the lyrics "shed light on the circumstances under which" defendant played and listened to the music and was properly admitted inasmuch as it was relevant to show his intent, his consciousness of guilt, and the victim's recollection of the incident and the probative value of that testimony was not outweighed by its prejudicial effect (*People v Wallace*, 59 AD3d 1069,

1070 [4th Dept 2009], *lv denied* 12 NY3d 861 [2009]; *see People v Green*, 92 AD3d 953, 956 [2d Dept 2012], *lv denied* 19 NY3d 864 [2012]; *see generally People v James*, 176 AD3d 1492, 1495 [3d Dept 2019], *lv denied* 34 NY3d 1078 [2019]).

We reject defendant's contention that he received ineffective assistance of counsel. Although defendant contends that defense counsel was ineffective for failing to challenge a prospective juror, defendant "failed to establish that defense counsel lacked a legitimate strategy in choosing not to challenge th[e] prospective juror[]" (*People v Carpenter*, 187 AD3d 1556, 1557 [4th Dept 2020], *lv denied* 36 NY3d 970 [2020]; *see generally People v Piasta*, 207 AD3d 1054, 1055 [4th Dept 2022], *lv denied* 38 NY3d 1190 [2022]). Defendant's contention that defense counsel failed to adequately cross-examine the victim at trial "involves a simple disagreement[] with strategies, tactics or the scope of possible cross-examination," and thus does not establish ineffective assistance of counsel (*People v Powell*, 81 AD3d 1307, 1307 [4th Dept 2011], *lv denied* 17 NY3d 799 [2011] [internal quotation marks omitted]). Further, although defendant contends that defense counsel was ineffective for failing to request that the court recuse itself, the record does not establish a basis for recusal (*see People v Holley*, 188 AD3d 1644, 1646-1647 [4th Dept 2020], *lv denied* 37 NY3d 965 [2021]), and defense counsel cannot be deemed ineffective for failing to make a motion that would have had little to no chance of success (*see generally People v Nary*, 209 AD3d 1275, 1276 [4th Dept 2022], *lv denied* 39 NY3d 1079 [2023]).

Viewing "the evidence in the light most favorable to the People, and giving them the benefit of every reasonable inference" (*People v Bay*, 67 NY2d 787, 788 [1986]; *see People v Delamota*, 18 NY3d 107, 113 [2011]; *People v Brown*, 204 AD3d 1390, 1392 [4th Dept 2022], *lv denied* 39 NY3d 985 [2022]), we reject defendant's contention that the evidence was legally insufficient to support his conviction. In addition, although "a different verdict would not have been unreasonable inasmuch as this case rests largely on the jury's credibility findings" (*People v Roman*, 107 AD3d 1441, 1442 [4th Dept 2013], *lv denied* 21 NY3d 1045 [2013]), 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]), and affording the requisite deference to the jury's opportunity to view the witnesses (*see Roman*, 107 AD3d at 1442), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Zeitz*, 148 AD3d 1636, 1637 [4th Dept 2017], *lv denied* 29 NY3d 1089 [2017]).

Contrary to defendant's further contention, the court did not err in permitting the mother of one of the victims to make a statement at sentencing. Although the mother, under the circumstances of this case, did not qualify as a "victim" pursuant to CPL 380.50 (2) (a), that did not preclude the court from allowing, in its discretion, the mother's statement (*see People v Hemmings*, 2 NY3d 1, 6 [2004], *rearg denied* 2 NY3d 824 [2004]; *People v Iovinella*, 295 AD2d 753, 753 [3d Dept 2002], *lv denied* 99 NY2d 536 [2002]), and we perceive no abuse of

discretion here (*see generally People v Minemier*, 124 AD3d 1408, 1409 [4th Dept 2015]).

Finally, we conclude that the sentence is not unduly harsh or severe.