SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 22-00420

PRESENT: SMITH, J.P., BANNISTER, OGDEN, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN D. LAWRENCE, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered December 21, 2021. The judgment convicted defendant, upon a jury verdict, of rape in the first degree and criminal trespass 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 rape in the first degree (Penal Law § 130.35 [1]) and criminal trespass in the second degree (§ 140.15 [1]). The charges arose from an incident during which defendant, who had previously been in a long-term relationship with the victim, allegedly entered the victim's apartment without permission, attempted to speak with her about emotional and family issues that he was experiencing, and then forcibly raped her after displaying anger when the victim rebuffed his attempts to speak with her. We affirm.

Defendant first contends that he was denied his constitutional right to present a complete defense because the prosecutor, through a discussion with defense counsel and County Court outside the presence of the jury, intimidated two defense witnesses into limiting their testimony by threatening criminal prosecution for, among other things, committing perjury. Defendant failed to preserve that contention for our review (*see* CPL 470.05 [2]; *People v Hasan*, 165 AD3d 1606, 1607 [4th Dept 2018], *lv denied* 32 NY3d 1125 [2018]; *People v Barry*, 288 AD2d 1, 1 [1st Dept 2001], *lv denied* 97 NY2d 701 [2002]; *see generally People v Lane*, 7 NY3d 888, 889 [2006]; *People v Allen*, 88 NY2d 831, 833 [1996]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *Hasan*, 165 AD3d at 1607; *Barry*, 288 AD2d at 1).

Defendant next contends that the court denied him his

constitutional right to present a complete defense and committed an evidentiary error by limiting the testimony of another defense witness about statements allegedly made by the victim. Defendant failed to preserve for our review that part of his contention asserting that he was denied the right to present a defense because he "did not raise th[at] constitutional claim[ ] in the trial court" (*Lane*, 7 NY3d at 889; *see People v Burton*, 126 AD3d 1324, 1325 [4th Dept 2015], *lv denied* 25 NY3d 1199 [2015]), and we decline to exercise our power to review that part of his contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to the People's assertion, however, we conclude that defendant's arguments to the court were sufficient to preserve for our review that part of his contention asserting that the entire alleged statement of the victim was admissible to establish her motive to fabricate (*see* CPL 470.05 [2]; *cf. People v Robinson* [appeal No. 1], 267 AD2d 1031, 1031 [4th Dept 1999], *lv denied* 95 NY2d 802 [2000]). Nonetheless, upon "rel[ying] on the record to discern the unarticulated predicate for the trial court's evidentiary ruling" (*People v Nicholson*, 26 NY3d 813, 817 [2016]), we further conclude that the court did not abuse its discretion when it allowed defense counsel to elicit testimony from the defense witness that the victim had expressed a motive to fabricate the allegation of rape in this particular case, i.e., "to get [her] life back," but precluded defense counsel from eliciting testimony that would have required "inquiry into a speculative and remote matter" concerning a purported prior bad act of the victim (*People v Jones*, 184 AD3d 751, 753 [2d Dept 2020], *lv denied* 35 NY3d 1113 [2020]; *see People v Poole*, 55 AD3d 1349, 1350 [4th Dept 2008], *lv denied* 11 NY3d 929 [2009]; *cf. People v Grant*, 60 AD3d 865, 865 [2d Dept 2009]; *People v McFarley*, 31 AD3d 1166, 1167 [4th Dept 2006]). Even assuming, arguendo, that defendant preserved for our review his related contention that the precluded testimony was admissible as character evidence, we conclude that his contention lacks merit. "Character evidence is strictly limited to testimony concerning the [party's] reputation in the community . . . , and thus a character witness may not testify to specific acts in order to establish character" (*People v Jimmeson*, 101 AD3d 1678, 1679 [4th Dept 2012], *lv denied* 21 NY3d 944 [2013] [internal quotation marks omitted]).

Defendant contends that the court committed reversible error in its *Sandoval* ruling by allowing the prosecutor to ask him on cross-examination whether he had a prior out-of-state conviction because, defendant asserts, the "adjudication withheld" disposition upon his plea of no contest to a robbery offense in Florida did not constitute a conviction as a matter of law and there was no documentation provided by the People that the adjudication was ever considered a conviction under Florida law. Initially, contrary to the People's assertion, defendant's contention is preserved for our review. Defendant "expressly [or impliedly] requested, without success on the ground now advanced on appeal, a ruling that the People not be permitted to cross-examine him regarding the [ostensible] prior conviction, and he 'is deemed to have thereby protested the court's ultimate disposition of the matter or failure to rule . . .

accordingly sufficiently to raise a question of law with respect to such disposition or failure regardless of whether any actual protest thereto was registered' " (*People v Fuller*, 174 AD3d 1335, 1336 [4th Dept 2019], *lv denied* 34 NY3d 951 [2019], quoting CPL 470.05 [2]; *see People v Herman*, 217 AD3d 1469, 1471 [4th Dept 2023], *lv denied* 40 NY3d 997 [2023]; *see generally People v Jackson*, 29 NY3d 18, 23-24 [2017]). Nonetheless, even assuming, arguendo, that the court erred in allowing the challenged question because "a plea nolo contendere with adjudication withheld in Florida . . . does not constitute a conviction under Florida law" (*Matter of Farabell v Town of Macedon*, 62 AD3d 1246, 1247 [4th Dept 2009]), we conclude that the error is harmless inasmuch as "the proof of guilt was overwhelming and there was no significant probability that the jury would have acquitted had the error not occurred" (*People v Grant*, 7 NY3d 421, 424 [2006]; *see People v Rivera*, 132 AD2d 956, 957 [4th Dept 1987]; *People v Grossman*, 125 AD2d 985, 986 [4th Dept 1986], *lv denied* 69 NY2d 881 [1987]).

Contrary to defendant's further contention, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction (*see People v Carlson*, 184 AD3d 1139, 1140 [4th Dept 2020], *lv denied* 35 NY3d 1064 [2020]). Furthermore, 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 reject defendant's contention that the verdict is against the weight of the evidence (*see Carlson*, 184 AD3d at 1141; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We also reject defendant's contention that the sentence is unduly harsh and severe. Finally, we have considered defendant's remaining contention and conclude that it does not warrant any relief.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court