

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D55426
C/htr

_____AD3d_____

Argued - January 30, 2018

REINALDO E. RIVERA, J.P.
ROBERT J. MILLER
SYLVIA O. HINDS-RADIX
JOSEPH J. MALTESE, JJ.

2013-05582

DECISION & ORDER

The People, etc., respondent, v Brian Stewart,
appellant.

(Ind. No. 12-00313)

Lipsitz Green Scime Cambria LLP, Buffalo, NY (Erin E. McCampbell of counsel),
for appellant.

Anthony A. Scarpino, Jr., District Attorney, White Plains, NY (Christine DiSalvo
and Steven A. Bender of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Westchester County
(Barry Warhit, J.), rendered April 16, 2013, convicting him of rape in the third degree and
endangering the welfare of a child, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

We agree with the County Court's *Molineux* ruling (*see People v Molineux*, 168 NY
264). The evidence at issue was admissible as relevant background material to explain to the jury
the relationship between the defendant and the complainant, as evidence of the defendant's identity
as the perpetrator, as evidence of his motive and intent, and as evidence of his consciousness of guilt
(*see People v Smalls*, 145 AD3d 802, 802; *People v Maxey*, 129 AD3d 1664, 1665; *People v Griffin*,
126 AD2d 743, 744). The defendant's argument that the court's limiting instructions regarding this
evidence were insufficient is unpreserved for appellate review (*see People v Devaughn*, 84 AD3d
1394, 1395; *People v Norman*, 40 AD3d 1128, 1129-1130), and, in any event, without merit.

Furthermore, we agree with the County Court's determination to permit the admission
into evidence of an audio recording of a telephone conversation the defendant had with the victim,

May 23, 2018

Page 1.

PEOPLE v STEWART, BRIAN

and a transcript of that conversation, which the defendant contends were subject to a CPL 160.50 sealing order in a Rockland County prosecution of the defendant. “Evidence obtained as the result of a statutory violation lacking constitutional implications has long been held admissible as evidence of guilt” (*People v Torres*, 291 AD2d 273, 274; *see People v Afrika*, 13 AD3d 1218, 1220; *People v Peterkin*, 190 AD2d 825, 826). Here, the violation of CPL 160.50 did “not implicate constitutional considerations,” and, therefore, did not warrant suppression (*People v Patterson*, 78 NY2d 711, 716-718; *see People v Torres*, 291 AD2d at 274; *People v Williams*, 271 AD2d 363, 364; *People v Peterkin*, 190 AD2d at 826).

The defendant’s claim that he was deprived of the constitutional right to the effective assistance of counsel is based, in part, on matter appearing on the record and, in part, on matter outside the record, and, thus, constitutes a “mixed claim” of ineffective assistance (*People v Maxwell*, 89 AD3d 1108, 1109; *see People v Evans*, 16 NY3d 571, 575 n 2). In this case, it is not evident from the matter appearing on the record that the defendant was deprived of the effective assistance of counsel (*see People v Taylor*, 1 NY3d 174, 176-177; *People v Cruz*, 127 AD3d 987, 988; *People v Crandall*, 199 AD2d 867, 869; *cf. People v Robinson*, 118 AD3d 1028, 1028; *People v Salazar*, 1 AD3d 387, 388). Since the defendant’s claim of ineffective assistance cannot be resolved without reference to matter outside the record, a CPL 440.10 proceeding is the appropriate forum for reviewing the claim in its entirety (*see People v Freeman*, 93 AD3d 805, 806; *People v Maxwell*, 89 AD3d at 1109; *People v Rohlehr*, 87 AD3d 603, 604).

RIVERA, J.P., MILLER, HINDS-RADIX and MALTESE, JJ., concur.

ENTER: 

Aprilanne Agostino
Clerk of the Court