

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

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KA 13-02191

PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES D. BRADBERRY, DEFENDANT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered September 8, 2011. The judgment convicted defendant, upon a nonjury verdict, of course of sexual conduct against a child in the first degree (two counts) and incest 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 after a nonjury trial of two counts of course of sexual conduct against a child in the first degree (Penal Law § 130.75) as a lesser included offense of predatory sexual assault against a child (§ 130.96) and one count of incest in the second degree (§ 255.26). We reject defendant's contention that Supreme Court erred in refusing to dismiss the indictment based on its lack of specificity with respect to the time frames alleged in the two counts of predatory sexual assault against a child. It is well settled that the crime of predatory sexual assault against a child "is a continuing offense to which 'the usual requirements of specificity with respect to time do not apply' " (*People v Muhina*, 66 AD3d 1397, 1398, *lv denied* 13 NY3d 909; *see People v Colf*, 286 AD2d 888, 888-889, *lv denied* 97 NY2d 655). Here, the time periods of 7.5 months and one year alleged in the indictment were "sufficient to give defendant adequate notice of the charges to enable him to prepare a defense, to ensure that the crimes for which he was tried were in fact the crimes with which he was charged, and 'to protect [his] right not to be twice placed in jeopardy for the same conduct' " (*People v McLoud*, 291 AD2d 867, 868, *lv denied* 98 NY2d 678).

We reject defendant's further contention that the court erred in refusing to suppress statements that he made during a police-monitored telephone conversation with the victim. There is no merit to his

contention that the statements were admitted in violation of CPLR 4506 (1). It is well established that one of the parties to a telephone conversation may consent to the wiretapping or recording of the conversation (see *People v Phillips*, 55 AD2d 661, 661, lv denied 41 NY2d 868, citing *United States v White*, 401 US 745, reh denied 402 US 990; cf. *Pica v Pica*, 70 AD2d 931, 931-932), and here the victim gave her consent. Defendant failed to preserve for our review his contention that the victim, as a minor, could not consent to the recording of her own conversations (see generally *People v Furlong*, 4 AD3d 839, 840, lv denied 2 NY3d 739). We note in any event that the victim's mother consented to the recording, and we conclude that the "vicarious consent" exemption applies under the circumstances presented such that the admission of the subject recording was not barred by CPLR 4506 (see *People v Badalamenti*, 124 AD3d 672, 674, lv granted 25 NY3d 949; *People v Hills*, 176 AD2d 375, 375; *People v Bastian*, 125 AD2d 909, 909-910, lv denied 69 NY2d 824). Also contrary to defendant's contention, his statements in the controlled telephone call were not inadmissible pursuant to CPL 60.45. Even assuming, arguendo, that the victim was acting as an agent of the police when she telephoned defendant, the calls were recorded with the victim's consent (see *People v Taplin*, 1 AD3d 1044, 1045, lv denied 1 NY3d 635), and "the victim did not make a threat that would create a substantial risk that defendant might falsely incriminate himself" (*People v Stroman*, 286 AD2d 974, 975, lv denied 97 NY2d 688; see *Taplin*, 1 AD3d at 1045). We reject defendant's further contention that the controlled telephone call constituted an unconstitutionally deceptive police tactic. "Deceptive police stratagems in securing a statement 'need not result in involuntariness without some showing that the deception was so fundamentally unfair as to deny due process or that a promise or threat was made that could induce a false confession' " (*People v Dishaw*, 30 AD3d 689, 690, lv denied 7 NY3d 787, quoting *People v Tarsia*, 50 NY2d 1, 11), and there was no such showing here.

We reject defendant's further contention that the court erred in permitting the prosecutor to elicit testimony concerning the fact that defendant was incarcerated at a particular point in time. Such evidence was inextricably interwoven with and provided a relevant temporal reference for one of the crimes charged in the indictment (see *People v Vails*, 43 NY2d 364, 368; *People v Gantz*, 104 AD2d 692, 692-693).

Contrary to defendant's contention, we conclude that the conviction is supported by legally sufficient evidence (see generally *People v Bleakley*, 69 NY2d 490, 495; *People v Lashway*, 112 AD3d 1222, 1224-1225). We reject defendant's further contention that his conviction of incest was in violation of Penal Law § 130.75 (2), which provides that "[a] person may not be subsequently prosecuted for any other sexual offense involving the same victim unless the other charged offense occurred outside the time period charged under this section." The statute prohibits only a "subsequent" prosecution and not, as here, a simultaneous prosecution (see *People v Vanlare*, 77 AD3d 1313, 1313-1314, lv denied 15 NY3d 956; see also *People v Harris*,

32 Misc 3d 479, 489-490, *affd* 98 AD3d 420).

Finally, contrary to defendant's contention, the court properly allowed the People's expert to testify regarding child sexual abuse accommodation syndrome and delayed disclosure of sexual abuse (see *People v Williams*, 20 NY3d 579, 583-584; *People v Black*, 124 AD3d 1365, 1366-1367).

Entered: August 19, 2015

Frances E. Cafarell
Clerk of the Court