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

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KA 20-01032

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY C. KEANE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TODD G. MONAHAN, LITTLE FALLS, FOR DEFENDANT-APPELLANT.

TIMOTHY C. KEANE, DEFENDANT-APPELLANT PRO SE.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (MORGAN R. MAYER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered July 19, 2019. The judgment convicted defendant upon a jury verdict of unlawful manufacture of methamphetamine in the third degree.

It is hereby ORDERED that the case is held, the decision is reserved, and the matter is remitted to Jefferson County Court for further proceedings in accordance with the following memorandum: In appeal No. 1, defendant was convicted following a jury trial of unlawful manufacture of methamphetamine in the third degree (Penal Law § 220.73 [1]) and, in appeal No. 2, he was convicted following the same jury trial of sexual abuse in the first degree (§ 130.65 [4]), attempted use of a child in a sexual performance (§§ 110.00, 263.05), forcible touching (§ 130.52 [1]), and endangering the welfare of a child (§ 260.10 [1]). The criminal investigation of defendant initially focused on his suspected involvement in a methamphetamine manufacturing operation at a property where he had recently resided. While investigators were searching the vacant property, a neighbor approached one of the detectives and reported his concern about prior contact between defendant and the neighbor’s 11-year-old daughter. The child was subsequently interviewed and reported that defendant had shown her pornographic videos and sexually assaulted her on the front porch of the property under investigation for drug activity. Two indictments were then filed against defendant, one charging him with unlawful manufacture of methamphetamine in the third degree and the other charging him with multiple sex offenses involving the child.

Defendant contends in his main and pro se supplemental briefs that County Court erred in granting the People’s motion to consolidate the indictments. We reject that contention. The indictments were

consolidated for trial pursuant to CPL 200.20, which permits a court to consolidate indictments against a defendant when they charge offenses that involve "different criminal transactions" but "are of such nature that either proof of the first offense [or set of offenses] would be material and admissible as evidence in chief upon a trial of the second, or proof of the second would be material and admissible as evidence in chief upon a trial of the first" (CPL 200.20 [2] [b]; *see* 200.20 [4]; *People v Bongarzone*, 69 NY2d 892, 895 [1987]). Contrary to defendant's contention, the evidence of the drug offense and the evidence of the sex offenses were each material and admissible to help establish the identity of defendant as the perpetrator of the other offense or set of offenses (*see People v Murphy*, 28 AD3d 1096, 1097 [4th Dept 2006], *lv denied* 7 NY3d 760 [2006]; *see also People v Nelson*, 233 AD2d 926, 926-927 [4th Dept 1996]). Specifically, inter alia, defendant's recorded interview with a detective inculpated him in both the drug offense and the sex offenses, and the testimony of two detectives, the victim, and the victim's father was necessary to establish that defendant was residing on the property at the time that methamphetamine was being manufactured there and the course of his interactions with the victim at the same property. We reject defendant's contention in his pro se supplemental brief that consolidating the indictments for trial was contrary to *People v Molineux* (168 NY 264 [1901]) and its progeny, inasmuch as *Molineux* applies to prior uncharged crimes and bad acts committed by a defendant, not to charged crimes (*see People v Cass*, 18 NY3d 553, 559 [2012]).

Defendant next contends in his main and pro se supplemental briefs that he was denied effective assistance of counsel. We reject that contention. To establish a claim of ineffective assistance of counsel, a defendant must show that defense counsel did not provide "meaningful representation," based upon "the evidence, the law, and the circumstances of [the] particular case, viewed in totality and as of the time of the representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]). Defendant's contentions that his counsel was too harsh in cross-examining the victim, inadvertently elicited damaging testimony from a witness on redirect examination, and should not have called two of the defense witnesses but should have called another witness, "involve 'simple disagreement[s] with strategies, tactics or the scope of possible cross-examination, weighed long after the trial,' and thus are insufficient to establish ineffective assistance of counsel" (*People v Kranz*, 215 AD3d 1253, 1254 [4th Dept 2023], *lv denied* 40 NY3d 997 [2023], quoting *People v Flores*, 84 NY2d 184, 187 [1994]). Defendant's contention regarding his own direct testimony cannot form the basis for an ineffective assistance of counsel claim, because "[t]he fundamental decision whether to testify at trial is reserved to the defendant, not defense counsel" (*People v Cosby*, 82 AD3d 63, 66 [4th Dept 2011], *lv denied* 16 NY3d 857 [2011]), and his disagreements with the scope of the questioning itself relate to strategy (*see People v Gibson*, 173 AD3d 1785, 1786 [4th Dept 2019], *lv denied* 34 NY3d 931 [2019]). Defense counsel's failure to renew defendant's motion for a trial order of dismissal at the close of the defense case did not amount to ineffective assistance because the court had

reserved decision on the motion and, therefore, the claim of insufficiency was preserved (*see People v Payne*, 3 NY3d 266, 273 [2004], *rearg denied* 3 NY3d 767 [2004]; *People v Nowlin*, 145 AD3d 1447, 1449 [4th Dept 2016], *lv denied* 29 NY3d 1035 [2017]). Contrary to defendant's contention in his pro se supplemental brief, his defense counsel elicited trial testimony in support of the conclusion that defendant did not have constructive possession over methamphetamine manufacturing materials at his former residence. Defendant's contentions in his pro se supplemental brief that his counsel gave him false information, failed to call expert and alibi witnesses, failed to argue that defendant had an alibi, and failed to pursue arguments that defendant was framed all concern matters outside the record, and thus must be raised in a motion pursuant to CPL 440.10 (*see People v Johnson*, 195 AD3d 1420, 1421-1422 [4th Dept 2021], *lv denied* 37 NY3d 1146 [2021]). To the extent that defendant contends in his pro se supplemental brief that he was denied effective assistance of appellate counsel, that contention is premature and must be raised in an error coram nobis proceeding (*see People v Forsythe*, 105 AD3d 1430, 1431 [4th Dept 2013]).

Defendant also contends in his main brief that the court erred in permitting two detectives to testify regarding defendant's internet search history and text messages involving sexual role-play, arguing that the testimony was so inflammatory that its prejudicial effect exceeded its probative value. Trial courts have broad discretion in deciding whether to admit evidence challenged as unduly prejudicial, and a trial court's decision will be disturbed only where it has "either abused its discretion or exercised none at all" (*People v Walker*, 83 NY2d 455, 459 [1994] [internal quotation marks omitted]). Here, the evidence elicited during the People's direct case regarding defendant's sexual proclivities based upon his internet search history and text messages was admitted for the nonpropensity purpose of corroborating the victim's testimony (*see People v Brewer*, 129 AD3d 1619, 1620 [4th Dept 2015], *affd* 28 NY3d 271 [2016]), and the similar testimony of the detective offered in rebuttal was admitted to contradict defendant's direct testimony (*see generally People v Serrano*, 196 AD3d 1134, 1137 [4th Dept 2021], *lv denied* 37 NY3d 1061 [2021], *reconsideration denied* 38 NY3d 930 [2022]). We conclude that in both instances the court properly balanced the probative value of the evidence and the prejudice arising from it (*see generally People v Bullard-Daniel*, 203 AD3d 1630, 1632 [4th Dept 2022], *lv denied* 38 NY3d 1069 [2022]).

Defendant further contends in his main brief that his offenses were treated as a single criminal transaction at trial and therefore the consecutive sentence imposed in appeal No. 1 was improperly ordered, and, in addition, that the sentences are unduly harsh and severe. We reject those contentions. Although the drug offense indictment was consolidated with the sex offenses indictment for trial pursuant to CPL 200.20, the statutory elements of the drug offense do not overlap with those of the sex offenses, and thus a consecutive sentence was not improper (*see People v Burton*, 83 AD3d 1562, 1563 [4th Dept 2011], *lv denied* 17 NY3d 805 [2011]). We also conclude that

the sentence in each appeal is not unduly harsh or severe.

Defendant contends in his pro se supplemental brief that his conviction of unlawful manufacture of methamphetamine in the third degree and attempted use of a child in a sexual performance is not supported by legally sufficient evidence. We may not address that contention, however, because the court did not rule on defendant's motion for a trial order of dismissal (*cf.* CPL 290.10 [1]). The failure of a trial court to rule on a motion for a trial order of dismissal cannot be deemed a denial of that motion, and thus we must hold the case, reserve decision, and remit the matter to County Court for a ruling on defendant's motion (*see People v Johnson*, 192 AD3d 1612, 1616 [4th Dept 2021]; *cf. People v DuBois*, 200 AD3d 1601, 1601 [4th Dept 2021], *lv denied* 38 NY3d 949 [2022]). In light of our determination, we do not address defendant's contention that the verdict is against the weight of the evidence.

Finally, we have reviewed the remaining contentions in defendant's main and pro se supplemental briefs and conclude that none warrants modification or reversal of the judgment.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court