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

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KA 22-00114
PRESENT: WHALEN, P.J., LINDLEY, OGDEN, GREENWOOD, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TARKEEM L. JONES, DEFENDANT-APPELLANT.

CAMBARERI & BRENNECK, SYRACUSE (MELISSA K. SWARTZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

TODD C. CARVILLE, DISTRICT ATTORNEY, UTICA (MICHAEL A. LABELLA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered July 8, 2021. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child, rape in the first degree, criminal sexual act in the first degree (two counts), and assault in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reversing those parts convicting defendant of predatory sexual assault against a child under count 1 of the indictment and criminal sexual act in the first degree under count 5 of the indictment and dismissing those counts, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of predatory sexual assault against a child (Penal Law former § 130.96), rape in the first degree (former § 130.35 [1]), two counts of criminal sexual act in the first degree (former § 130.50 [1], [4]), and assault in the third degree (§ 120.00 [1]).

We agree with defendant that the evidence is legally insufficient to establish that defendant was 18 years old or more at the time of the crimes. Although defendant failed to preserve that contention for our review (*see People v VanGorden*, 147 AD3d 1436, 1438 [4th Dept 2017], *lv denied* 29 NY3d 1037 [2017]; *People v Castro*, 286 AD2d 989, 989 [4th Dept 2001], *lv denied* 97 NY2d 680 [2001]), we exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Here, two counts in the indictment include an age element that required the People to establish that defendant was at least 18 years old at the time of the crimes in June 2020 (*see* Penal Law former § 130.96; former § 130.50 [4]). Defendant was in fact 33 years old in June 2020, and the jury naturally had the

opportunity to observe his appearance during the trial in 2021, but that opportunity "does not, by itself, satisfy the People's obligation to prove defendant's age" (*Castro*, 286 AD2d at 990; *see People v Blodgett*, 160 AD2d 1105, 1106 [3d Dept 1990], *lv denied* 76 NY2d 731 [1990]), and there was no evidence at trial bearing on his age (*cf. People v Kessler*, 122 AD3d 1402, 1403 [4th Dept 2014], *lv denied* 25 NY3d 990 [2015]; *People v Perryman*, 178 AD2d 916, 917-918 [4th Dept 1991], *lv denied* 79 NY2d 1005 [1992]). We therefore modify the judgment by reversing those parts convicting defendant of predatory sexual assault against a child under count 1 of the indictment and criminal sexual act in the first degree under count 5 of the indictment and dismissing those counts of the indictment.

Contrary to defendant's further contention, 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 conclude that the verdict is not against the weight of the evidence with respect to defendant's identity as the perpetrator (*see People v Renaldo*, 239 AD3d 1470, 1471 [4th Dept 2025], *lv denied* 44 NY3d 1013 [2025]; *People v Thomas*, 176 AD3d 1639, 1640 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]), particularly in light of the overwhelming circumstantial evidence presented by the People establishing defendant's identity as the perpetrator (*see People v Lacey*, 229 AD3d 1270, 1273 [4th Dept 2024], *lv denied* 42 NY3d 971 [2024]; *People v Malone*, 196 AD3d 1054, 1054-1055 [4th Dept 2021], *lv denied* 37 NY3d 1028 [2021]; *People v Isaac*, 195 AD3d 1410, 1410 [4th Dept 2021], *lv denied* 37 NY3d 992 [2021]).

We also reject defendant's contention that he was denied effective assistance of counsel. A defendant has not been deprived of effective assistance of counsel when "the evidence, the law, and the circumstances of [the] particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]). The focus is on whether defense counsel's acts or omissions were such that defendant did not receive a fair trial (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]) and, for a defendant to prevail on an ineffective assistance claim, defense counsel's conduct must be "egregious and prejudicial" (*People v Williams*, 273 AD2d 824, 826 [4th Dept 2000], *lv denied* 95 NY2d 893 [2000] [internal quotation marks omitted]).

Contrary to defendant's contention, the record before us does not establish that defense counsel's comments during his opening statement improperly shifted the burden of proof onto defendant (*see generally People v Kohmescher*, 228 AD3d 1334, 1335 [4th Dept 2024]). Contrary to defendant's additional contentions, we conclude that he was not deprived of effective assistance by defense counsel's failure to call defendant to testify or by defense counsel's questioning of a witness inasmuch as those decisions were " 'a matter of trial strategy and cannot be characterized as ineffective assistance of counsel' " (*People v Atkins*, 107 AD3d 1465, 1465 [4th Dept 2013], *lv denied* 21 NY3d 1040 [2013]; *see People v Keane*, 221 AD3d 1586, 1588 [4th Dept

2023]; *People v Irvine*, 197 AD3d 988, 991 [4th Dept 2021], *lv denied* 37 NY3d 1060 [2021]). Nor was defense counsel ineffective in failing to object to alleged hearsay testimony. Even assuming, arguendo, that the testimony at issue constituted inadmissible hearsay, we conclude that "the single error by defense counsel in failing to object to its admission was not so egregious as to deprive defendant of a fair trial" (*People v Escobar*, 181 AD3d 1194, 1198 [4th Dept 2020], *lv denied* 35 NY3d 1044 [2020] [internal quotation marks omitted]). Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see Baldi*, 54 NY2d at 147).

Finally, the sentence is not unduly harsh or severe.

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court