

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

956

KA 24-01050

PRESENT: CURRAN, J.P., BANNISTER, NOWAK, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOHN R. LITOLFF, DEFENDANT-APPELLANT.

MULLEN ASSOCIATES PLLC, BATH (ALAN P. REED OF COUNSEL), FOR
DEFENDANT-APPELLANT.

ASHLEY J. WILLIAMS, DISTRICT ATTORNEY, GENESEO (VICTOR D. ROWCLIFFE OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Jennifer M. Noto, J.), rendered February 15, 2024. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child and sexual abuse in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: In this prosecution arising from allegations that defendant, inter alia, vaginally raped the 10-year-old daughter of his girlfriend, defendant appeals from a judgment convicting him, upon a jury verdict, of predatory sexual assault against a child (Penal Law former § 130.96) and sexual abuse in the first degree (§ 130.65 [4]).

Defendant failed to preserve for our review his contention that County Court should have recused itself (*see People v Pett*, 74 AD3d 1891, 1892 [4th Dept 2010]; *People v Lebron*, 305 AD2d 799, 800 [3d Dept 2003], *lv denied* 100 NY2d 583 [2003]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*).

Although defendant made only a general motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Fowler*, 239 AD3d 1444, 1444 [4th Dept 2025], *lv denied* 44 NY3d 1011 [2025]), his contention that the People failed to present legally sufficient proof as to the counts of predatory sexual assault against a child and sexual abuse in the first degree is preserved inasmuch as " 'the question[s] now on appeal w[ere] expressly decided by the court' " in ruling on the motion (*People v Cleveland*, 217 AD3d 1346, 1348 [4th Dept 2023], *lv denied* 40 NY3d 933 [2023], *lv denied* 41 NY3d 942 [2024]). Defendant's contention nonetheless lacks merit. "Legal sufficiency review requires that we view the evidence in the light

most favorable to the prosecution, and, when deciding whether a jury could logically conclude that the prosecution sustained its burden of proof, [w]e must assume that the jury credited the People's witnesses and gave the prosecution's evidence the full weight it might reasonably be accorded" (*People v Allen*, 36 NY3d 1033, 1034 [2021] [internal quotation marks omitted]). Viewed in that light, contrary to defendant's contention, evidence at trial establishing his age at the time of the rape and the testimony of the victim that he engaged in vaginal sexual contact with her are legally sufficient to support the count of predatory sexual assault against a child (Penal Law former § 130.96). Similarly, contrary to defendant's contention, evidence that he touched the intimate part of the non-relative victim child gave rise to an "inference that defendant was seeking sexual gratification" (*People v Owens*, 149 AD3d 1561, 1563 [4th Dept 2017], *lv denied* 30 NY3d 982 [2017]) and was thus legally sufficient to support the count of sexual abuse in the first degree (Penal Law § 130.65 [4]; *see* § 130.00 [3]). The victim's inability to identify in precisely which month the sexual assault occurred did not render the evidence legally insufficient inasmuch as " '[t]he time of the offense is not a material element of the offense and the [potential] variance is relatively minor' " (*People v Jones*, 37 AD3d 1111, 1112 [4th Dept 2007], *lv denied* 8 NY3d 986 [2007]; *see People v Coapman*, 90 AD3d 1681, 1682 [4th Dept 2011], *lv denied* 18 NY3d 956 [2012]).

Contrary to defendant's contention, although "a different verdict would not have been unreasonable inasmuch as this case rests largely on the jury's credibility findings with respect to the testimony of the victim" (*People v Zeitz*, 148 AD3d 1636, 1637 [4th Dept 2017], *lv denied* 29 NY3d 1089 [2017] [internal quotation marks omitted]), we nevertheless conclude that, upon 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]), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Defendant's contention is based on the credibility of the victim, and we conclude that the issues of credibility were " 'properly considered' " (*People v Baez*, 175 AD3d 982, 986 [4th Dept 2019], *lv denied* 34 NY3d 1015 [2019]; *see People v Harrell*, 235 AD3d 1294, 1298 [4th Dept 2025], *lv denied* 43 NY3d 1009 [2025]; *People v Tetro*, 175 AD3d 1784, 1788 [4th Dept 2019]).

Defendant's contention that he was denied his right to a trial by jury under *Apprendi v New Jersey* (530 US 466 [2000]) because the prosecutor, and not the jury, decided that he should be subjected to a greater penalty by prosecuting him for predatory sexual assault against a child (Penal Law former § 130.96) rather than rape in the first degree (former § 130.35), is not preserved for our review (*see People v Lawrence*, 81 AD3d 1326, 1326 [4th Dept 2011], *lv denied* 17 NY3d 797 [2011]; *People v Phillips*, 56 AD3d 1168, 1169 [4th Dept 2008], *lv denied* 11 NY3d 928 [2009]). In any event, that contention is without merit inasmuch as defendant's conviction under Penal Law former § 130.96 "did not increase the penalty for the crime of which defendant had been convicted based upon facts that [the jury] did not

find" (*People v Collins*, 85 AD3d 1678, 1679 [4th Dept 2011], *lv denied* 18 NY3d 993 [2012] [internal quotation marks omitted]; see *Lawrence*, 81 AD3d at 1327).

Contrary to defendant's further contention that he was denied his right to a trial by jury based on the testimony of an expert with respect to child sexual abuse accommodation syndrome (CSAAS), "expert testimony concerning CSAAS is admissible to explain the behavior of child sex abuse victims as long as it is general in nature and does not constitute an opinion that a particular alleged victim is credible or that the charged crimes in fact occurred" (*People v Lathrop*, 171 AD3d 1473, 1473 [4th Dept 2019], *lv denied* 33 NY3d 1106 [2019] [internal quotation marks omitted]; see *People v Ashton*, 229 AD3d 1322, 1324 [4th Dept 2024], *lv denied* 42 NY3d 1018 [2024]). Here, the expert's generalized testimony regarding the scientifically recognized pattern of secrecy, helplessness, entrapment and accommodation experienced by child victims did not exceed the permissible bounds (see *Ashton*, 229 AD3d at 1324; *People v Meyers*, 188 AD3d 1732, 1734 [4th Dept 2020]; see generally *People v Nicholson*, 26 NY3d 813, 828 [2016]).

Contrary to defendant's contention, we conclude that the evidence, the law, and the circumstances of the case, viewed in totality and as of the time of the representation, reveal that defense counsel provided meaningful representation (see generally *People v Baldi*, 54 NY2d 137, 147 [1981]). Assuming, arguendo, that any of the prosecutor's comments during summation were improper, we conclude that such improprieties "were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Holmes*, 210 AD3d 1510, 1512 [4th Dept 2022], *lv denied* 39 NY3d 1073 [2023] [internal quotation marks omitted]; see *People v Elmore*, 175 AD3d 1003, 1005 [4th Dept 2019], *lv denied* 34 NY3d 1158 [2020]), and that defense counsel's failure to object to those comments did not constitute ineffective assistance of counsel (see *Elmore*, 175 AD3d at 1005). We also reject defendant's claims that his original defense counsel and substitute defense counsel were ineffective for failing to make certain motions and preserve specific objections inasmuch as "it is well settled that [a] defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v Harris*, 147 AD3d 1328, 1330 [4th Dept 2017] [internal quotation marks omitted]; see *People v Williams*, 163 AD3d 1422, 1423 [4th Dept 2018]; *People v Williams*, 150 AD3d 1684, 1685 [4th Dept 2017], *lv denied* 29 NY3d 1095 [2017], *reconsideration denied* 30 NY3d 954 [2017]). The remaining claims of ineffective assistance set forth by defendant "are based largely on his hindsight disagreements with defense counsel's trial strategies, and defendant failed to meet his burden of establishing the absence of any legitimate explanations for those strategies" (*People v Vicks*, 232 AD3d 1255, 1256 [4th Dept 2024], *lv denied* 43 NY3d 947 [2025]; see *People v Avilez*, 56 AD3d 1176, 1177 [4th Dept 2008], *lv denied* 12 NY3d 755 [2009]).

Finally, defendant's sentence is not unduly harsh or severe.