People v Hughes
2012 NY Slip Op 31357(U)
May 22, 2012
Supreme Court, Albany County
Docket Number: 512-11
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

PATRICK HUGHES,

Defendant.

DECISION and ORDER
INDICTMENT NO. 3-3755
INDEX NO. DA 512-11

Supreme Court, Albany County, All Purpose Term, May 15, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

On March 6, 2012, at the close of the trial held in this matter, the jury rendered its verdict finding defendant guilty of Predatory Sexual Assault against a Child (PL §130.96), Rape in the First Degree (PL §130.35[1]), Rape in the Second Degree (PL §130.30[1]) and Endangering the Welfare of a Child (PL §260.10[1]) (three counts). Defendant now moves to set aside the verdict pursuant to Criminal Procedure Law §330.30(1). The People oppose the motion. Because the Defendant failed to demonstrate his entitlement to an order pursuant to CPL §330.30(1), his motion is denied.

[* 2]

A CPL §330.30(1) "motion may be granted only for issues of law that would require a reversal or modification of the judgment as a matter of law by an appellate court." (People v Sudler, 75 AD3d 901, 904 [3d Dept 2010] lv to appeal denied, 15 NY3d 956 [2010], quoting CPL §330.30[1]; People v. Carter, 63 NY2d 530 [1984]).

On this record, Defendant failed to demonstrate an error of law that requires reversal or modification by the Appellate Division - Third Department (hereinafter "Appellate Division").

First, Defendant's "duplicitous" challenge is denied because it was not preserved. Defendant argues that his Predatory Sexual Assault against a Child, Rape in the First Degree and Rape in the Second Degree convictions are all duplicitous. He failed, however, to raise such issue in his pretrial motions, his motion for a trial order of dismissal or at any time during the trial of this matter. This failure to preserve requires denial of this portion of his motion. (People v Tomlinson, 53 AD3d 798 [3d Dept 2008]; People v Wright, 22 AD3d 873 [3d Dept 2005]).

Defendant also failed to preserve his present constitutional and ex post facto challenges to his Predatory Sexual Assault against a Child charge. Again, because Defendant failed to raise the constitutional issue in his pretrial motions or at trial, this issue is unpreserved. (People v Davidson, 98 NY2d 738 [2002]).[1] Nor did Defendant sufficiently particularize and preserve his ex post facto argument before or at trial. (People v Carey, 92 AD3d 1224 [4th Dept 2012]; People v Bove, 52 AD3d 1124 [3d Dept 2008]). As such, neither issue requires reversal or modification at the Appellate Division.

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[1] Moreover, contrary to Defendant's constitutional arguments, this statute's constitutionality has been upheld by controlling authority. (People v Lawrence, 81 AD3d 1326 [4th Dept 2011] lv to appeal denied, 17 NY3d 797 [2011]; People v Collins, 85 AD3d 1678 [4th Dept 2011]).

Nor did Defendant preserve his current "sufficiency of the evidence" challenge to his Rape in the First Degree conviction. Although Defendant now claims that there was insufficient evidence of the "forcible compulsion" element of Rape in the First Degree, his motion for a trial order of dismissal was not "specifically directed" at such error. (People v Hawkins, 11 NY3d 484, 492 [2008], quoting People v Gray, 86 NY2d 10 [1995]). Instead, at trial he claimed insufficient evidence due to a lack of date and location proof, not "forcible compulsion" proof. This lack of preservation requires denial of this portion of his motion. Moreover, "forcible compulsion" was sufficiently established by proof of the "victim's fear of immediate physical injury" due to the victim and Defendant's age, size and strength disparity, the nature of their relationship, and the prior abuse. (People v Davis, 21 AD3d 590, 592 [3d Dept 2005]; People v Clairmont, 75 AD3d 920, 921 [3d Dept 2010] lv to appeal denied, 15 NY3d 919 [2010]; People v Blackman, 90 AD3d 1304 [3d Dept 2011]).

Similarly unavailing is Defendant's claim that the Predatory Sexual Assault against a Child count of the indictment provided him with insufficient notice. While Defendant correctly noted that such count did not allege the underlying Rape in the First Degree subdivision supporting it, the indictment did set forth the requisite facts for each element. Considering the indictment's facts (the victim and Defendant's ages, along with the allegation of sexual intercourse), the Predatory Sexual Assault against a Child charge was unmistakably based upon Subdivision Four of Rape in the First Degree. In all, the charge was "[s]ufficiently particularized to permit defendant to prepare a defense." (People v Griswold, __AD3d__ [3d Dept 2012]; People v. Porlier, 55 AD3d 1059 [3d Dept 2008]). As such, this portion of Defendant's motion is denied.

[* 4]

Lastly, Defendant failed to demonstrate that his Endangering the Welfare of a Child convictions are defective. "Endangering the welfare of a child... is a crime that by its nature may be committed either by one act or by multiple acts and readily permits characterization as a continuing offense over a period of time." (People v Keindl, 68 NY2d 410, 421 [1986]). As such, Defendant's duplicity argument fails because "the evidence supporting the endangering count[s] reflects that [these counts charged] continuing crime[s] committed by multiple acts which occurred over a period of time and, thus, [these] count[s were] not subject to the duplicity rules." (People v Kuykendall, 43 AD3d 493, 495 [3d Dept 2007]). Nor was the charge's time period overbroad, as the "usual requirements of specificity with respect to time do not pertain to" these Endangering the Welfare of a Child charges. (People v Burgos, 90 AD3d 1670, 1671 [4th Dept 2011], quoting People v McLoud, 291 AD2d 867 [4th Dept 2002]; People v Dunton, 30 AD3d 828 [3d Dept 2006]). Additionally, Defendant's novel theory that his trial's inclusion of the three counts of Endangering the Welfare of a Child violated *Ventimiglia / Molineux* is supported by neither case law nor statute, and is rejected. (see generally People v Rosica, 171 AD2d 931 [3d Dept 1991]).

Accordingly, Defendant's motion is denied in its entirety.

The original of this Decision and all papers upon which it was decided are filed with the Supreme Court Clerk and a copy of the Decision and Order provided to all counsel.

So Ordered.

Dated: May 22, 2012
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated May 7, 2012; Affirmation of Matthew Hug, dated May 7, 2012, with attached Exhibits A-E; Notice to Attorney General to Intervene, dated May 7, 2012.
2. Affirmation of Chantelle Schember, dated May 16, 2012.