*State of New York*
*Supreme Court, Appellate Division*
*Third Judicial Department*

Decided and Entered: June 20, 2019

108910
109624

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THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
v
MEMORANDUM AND ORDER

JEFFREY D. FLOWER,
Appellant.

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Calendar Date: April 30, 2019

Before: Garry, P.J., Clark, Mulvey, Devine and Pritzker, JJ.

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Paul J. Connolly, Delmar, for appellant.

P. David Soares, District Attorney, Albany (Emily Schultz of counsel), for respondent.

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Pritzker, J.

Appeals (1) from a judgment of the County Court of Albany County (Young, J.), rendered October 26, 2016, upon a verdict convicting defendant of the crimes of rape in the first degree (two counts), rape in the third degree and endangering the welfare of a child (two counts), and (2) by permission, from an order of said court, entered July 7, 2017, which denied defendant's motion pursuant to CPL 440.10 to vacate the judgment of conviction, without a hearing.

Defendant was charged by indictment with two counts of rape in the first degree (counts 1 and 3), one count of rape in

the third degree (count 2) and two counts of endangering the welfare of a child (counts 4 and 5). Counts 1 through 4 stemmed from defendant's sexual conduct with victim A, who was the daughter of defendant's long-term girlfriend (hereinafter the mother). Count 5 stemmed from defendant's inappropriate conduct with victim B, who was a friend of victim A. Following a jury trial, defendant was convicted as charged. On the four convictions relating to victim A, defendant was sentenced to four concurrent prison terms, the greatest of which was 25 years, followed by 15 years of postrelease supervision, and, with regard to the endangering the welfare of a child conviction involving victim B, defendant was sentenced to a one-year jail term, with that sentence to run consecutively to the other four sentences. Defendant thereafter moved pursuant to CPL 440.10 to vacate the judgment of conviction on the ground that he received the ineffective assistance of counsel. County Court denied the motion without a hearing. Defendant appeals from the judgment of conviction and, by permission, from the order denying his CPL 440.10 motion.

Defendant argues that his two convictions of rape in the first degree (counts 1 and 3) and his conviction of endangering the welfare of a child as to victim B (count 5) were not supported by legally sufficient evidence and were against the weight of the evidence. "In conducting a legal sufficiency analysis, this Court views the evidence in the light most favorable to the People and evaluates whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial and as a matter of law satisfy the proof and burden requirements for every element of the crime charged" (People v Hartle, 159 AD3d 1149, 1151 [2018] [internal quotation marks and citations omitted], lv denied 31 NY3d 1082 [2018]; see People v Nelligan, 135 AD3d 1075, 1076 [2016], lv denied 27 NY3d 1072 [2016]). "In contrast, a weight of the evidence analysis requires us to first determine, based on all of the credible evidence, whether a different result would have been unreasonable and, if not, weigh the relative probative force of conflicting testimony and the relative strength of

conflicting inferences that may be drawn from the testimony to determine if the verdict is supported by the weight of the evidence" (People v Wilson, 164 AD3d 1012, 1014 [2018] [internal quotation marks and citations omitted]; see People v Perry, 154 AD3d 1168, 1169 [2017]).

We turn first to defendant's contentions regarding his convictions for rape in the first degree. Victim A testified that, in October 2012, when she was 15 years old, both she and defendant were sick and, because of this, the mother had victim A and defendant sleep in the same room in a bed together. Victim A testified that one night, in December 2012, she woke up in bed not wearing any of the clothes that she had on when she fell asleep. She explained that defendant, whose legs were on either side of her body near her thighs, was holding her wrists as he forced his penis into her vagina. She further explained that she tried to move away, but defendant, in response, applied more pressure on her wrists, holding her down tighter. Victim A also testified that she attempted to lift her arms, but that defendant slammed them back down. Victim A explained that, immediately after the incident, defendant told her to be quiet and not to say anything and that, about a week later, defendant began telling her that if she told anyone what had happened, the mother would hate her and that she would not be able to see her brother.

Victim A explained that defendant, during the years that followed, continued to wake her up approximately once per week to engage in sexual conduct. She stated that she eventually did not fight as much because "it was just what [her] life was going to be [like]." According to victim A, she would try not to sleep in the same bed with defendant, but the mother would typically say no. Victim A also testified about two instances — one when she called out for the mother and another when her brother walked into the room when defendant was on top of her. Victim A testified that the last time that defendant had sexual intercourse with her was in March 2015. Victim A explained that she woke up and defendant, who was halfway on the bed, had already put his penis into her vagina. Victim A further

explained that defendant was holding her arms and that, when she tried to pull her arms upwards out of defendant's grip, he held her arms down tighter, placing pressure on her arms, which prevented her from moving. Victim A testified that she moved out shortly after this last incident.

The mother testified that, after victim A recovered from being sick, she never made victim A sleep in the bed with defendant, but that victim A continued to do so for three years. The mother further testified that she suspected something was happening in the room and that she once heard victim A calling her name but, when she entered the bedroom, victim A said that nothing was happening. The mother acknowledged that there came a time when victim A's brother told her that he thought he saw something, but when the mother asked victim A about it, she said nothing. The mother also testified that there came a time when she and defendant told a neighbor, who lived in the apartment below theirs, that defendant and victim A had a relationship when victim A was 17 years old. The neighbor testified that defendant told her that he had been in a relationship with victim A for three years. The neighbor asked defendant to clarify what kind of relationship it was, to which defendant replied that it was a sexual relationship, emphasizing that he waited until victim A was 15 years old before he pursued the relationship because, in his view, that "was more of a legal age."

A friend of victim A testified that, on April 19, 2015, defendant sent her text messages wherein he stated that he had a consensual sexual relationship with victim A that had been ongoing for about one year. This friend further testified that, after informing victim A about those text messages, she and victim A went downstairs to speak to victim A's aunt. The aunt also testified about what occurred on April 19, 2015, explaining that victim A came to her appearing "[v]ery upset and scared" and that, in response to the conversation that they had, she took victim A to the local police department. The aunt added that she received text messages from defendant's cell phone a couple of months later in which he said twice that "you can't

rape the willing." Defendant testified on his own behalf regarding sexual conduct with victim A and stated that he did nothing of a sexual nature while he slept next to her until she was 17 years old. Defendant explained that, one day, victim A approached him and said that she could be his girlfriend and that, after they discussed it, things escalated between them. A couple of weeks later, the relationship became physical and, according to defendant, he and victim A then had a consensual sexual relationship.

In our view, the foregoing evidence, viewed in the light most favorable to the People, provided a valid line of reasoning and permissible inferences from which a rational juror could conclude that defendant committed the crime of rape in the first degree by engaging in sexual intercourse with victim A, without her consent and by forcible compulsion, in December 2012 and March 2015 as charged in the indictment (see Penal Law § 130.35 [1]; People v Wilson, 164 AD3d at 1015). Victim A testified both to her lack of consent during these two incidents, as well as defendant's use of physical force, specifically holding her down so that she could not get away (see Penal Law § 130.00 [8]). Given defendant's testimony that the sexual relationship was consensual and did not begin until victim A was 17, a different verdict would not have been unreasonable. However, "viewing the evidence in a neutral light and deferring to the jury's credibility determinations" (People v Henry, 166 AD3d 1289, 1292 [2018]), we find that the verdict as to defendant's convictions for rape in the first degree was supported by the weight of the credible evidence (see People v Madsen, 168 AD3d 1134, 1137 [2019]; People v Chaneyfield, 157 AD3d 996, 1000 [2018], lv denied 31 NY3d 1012 [2018]).

Regarding defendant's conviction for endangering the welfare of a child as to victim B, victim B testified that, in September 2015, when she was 13 years old, she was at the mother's residence – where she planned to spend the night – after having spent the day at a lake with defendant, the mother, victim A's brother and victim B's brother. After everyone but defendant and victim B left the mother's residence, victim B

went into the bathroom to take a shower. While she was in the shower, defendant came into the bathroom twice. The first time it sounded as if defendant was on the phone and he used the toilet. Shortly thereafter, defendant reentered the bathroom and told victim B that there was a leak in the bathtub, that she needed to immediately turn the shower off and that he either had to hand her a towel or she needed to "trust him" while he checked the sides of the bathtub to ensure there was no leak. Victim B testified that she had defendant hand her a towel, which she placed in front of herself while defendant inspected the tub. Defendant then told victim B that she could quickly finish her shower. Victim B testified that she did not see any leak in the bathroom before or after her shower. Shortly thereafter, victim B put her clothes on and went to the living room where defendant was sitting. Victim B sat on the couch and, after a little while, she noticed that defendant was breathing heavily and appeared red in the face. Victim B repeatedly asked defendant what was wrong, and defendant replied, "You don't want to know." Victim B testified that defendant kept looking at her and that, at one point, he said, "I was trying to look at you." When victim B did not respond, defendant asked, "Are you okay? Are you confused? You must be confused? I'm sorry I feel so guilty," and he also said that "he shouldn't have done this again." Victim B explained that she felt shocked and as if she was "frozen in time."

Victim B testified that her brother returned to the residence soon after and repeatedly asked her if she was okay. Defendant said to victim B's brother, "Your sister hates me, your sister hates me." Victim B also explained that, the week following this incident, defendant texted her saying that he was sorry and that, if she ever wanted to spend time at his residence, he would not be there. Victim B explained that she did not initially tell anyone because, at first, she felt nervous and confused and then felt as though it was her fault. Victim B's brother testified and confirmed victim B's account of what occurred that day. Victim B's brother also testified that, when he and victim A's brother took showers later that same night, no one mentioned a leak, nor did he see any water leaking

out of the bathroom. The neighbor testified that she had never experienced leaking from the area around where the mother's bathroom was located. The neighbor also recalled that defendant had introduced her to victim B at a time when it appeared that they were the only people in the apartment.

Given this testimony, a strong inference may be drawn that defendant's conduct – while victim B was in the shower and when he admittedly attempted to look at her shortly thereafter – was likely to be injurious to the physical, mental or moral welfare of victim B. A strong inference can also be drawn from victim B's testimony regarding defendant's statements following the inappropriate conduct – including his admission that he felt "guilty" – that defendant had knowingly engaged in said conduct (see e.g. People v Salazar, 132 AD3d 418, 419 [2015], lv denied 26 NY3d 1150 [2016]). Therefore, viewing the evidence in the light most favorable to the People, we find that the verdict as to defendant's conviction for endangering the welfare of a child under count 5 was supported by legally sufficient evidence (see People v Bueno, 18 NY3d 160, 169 [2011]; People v Ryder, 146 AD3d 1022, 1023 [2017], lv denied 29 NY3d 1086 [2017]).[1] Although there was not any conflicting evidence presented as to this conviction, the jury could have found victim B and her brother not to be credible, and, as such, a different verdict would not have been unreasonable. However, "viewing the evidence in a neutral light and deferring to the jury's

[1] "Because his convictions are supported by legally sufficient trial evidence, defendant's challenges to the legal sufficiency of the evidence presented to the grand jury and the instructions given during the proceeding are precluded" (People v Medeiros, 116 AD3d 1096, 1099 n [2014] [citations omitted], lv denied 24 NY3d 1045 [2014]; see CPL 210.30 [6]). Our review of the minutes does not reveal any other errors in presenting the case to the grand jury that "impaired the integrity of the proceeding or caused prejudice to defendant so as to warrant the drastic remedy of reversal" (People v Gaston, 147 AD3d 1219, 1220 n 2 [2017] [internal quotation marks, brackets and citation omitted]; see People v Robinson, 156 AD3d 1123, 1128 n 8 [2017], lv denied 30 NY3d 1119 [2018]).

credibility determinations" (People v Henry, 166 AD3d at 1292), we find that the verdict as to this conviction was supported by the weight of the credible evidence (see People v Madsen, 168 AD3d at 1137; People v Chaneyfield, 157 AD3d at 1000).

Defendant also asserts that the two counts of rape in the first degree and the one count of rape in the third degree were duplicitous because these counts charged multiple offenses. As defendant concedes, this issue is unpreserved as there was neither a motion to dismiss these counts prior to trial nor at the time of victim A's testimony (see People v Weber, 25 AD3d 919, 922 [2006], lv denied 6 NY3d 839 [2006]; compare People v Dalton, 27 AD3d 779, 781 [2006], lvs denied 7 NY3d 754, 811 [2006]). Were this issue before us, we would find it to be without merit (see People v Weber, 25 AD3d at 922; compare People v Madsen, 168 AD3d at 1130). Defendant's further contentions that he was deprived of a fair trial due to the improper admission of prior bad acts and the absence of limiting instructions are also unpreserved for our review – as he concedes – given his failure to object to said alleged errors (see People v Cayea, 163 AD3d 1279, 1280 [2018], lv denied 32 NY3d 1109 [2018]). Were these issues before us, we would have found them to be without merit; the testimony regarding defendant's prior bad acts was probative of material issues of fact and its probative value outweighed any undue prejudice (see People v Knox, 167 AD3d 1324, 1326 [2018], 33 NY3d 950 [2019]), and any error by County Court in failing to provide limiting instructions where necessary was harmless given the overwhelming evidence of defendant's guilt (see People v Burnell, 89 AD3d 1118, 1121 [2011], lv denied 18 NY3d 922 [2012]).

Defendant also argues that County Court erred in denying his motion to sever counts 1 through 4 of the indictment, which related to victim A, from count 5 of the indictment, which related to victim B. Although the counts related to different victims, they "were statutorily joinable because they were 'the same or similar in law'" (People v Nickel, 14 AD3d 869, 870 [2005], lv denied 4 NY3d 834 [2005], quoting CPL 200.20 [2] [c]). Inasmuch as the offenses were joined solely for this

reason, whether to sever the counts is a determination that rests within County Court's sound discretion (see CPL 200.20 [3]; People v Johnson, 268 AD2d 891, 893 [2000], lvs denied 94 NY2d 921, 923, 924 [2000]), which we cannot say was abused here. The victims presented proof as to the charges that respectively related to them, and neither victim referenced the conduct underlying the charge or charges that did not relate to them. The two witnesses who provided relevant testimony as to both victims did not conflate the victims, and it was clear as to which victim these witnesses were testifying about. Accordingly, the jury could easily separate the proof on the count or counts involving each victim (see People v Nickel, 14 AD3d at 870). Further, although defendant alleged that it was in his best interest to testify about the incident that occurred with victim B but not as to incidents regarding victim A, this was not sufficiently explained or supported (see CPL 200.20 [3] [b]; People v Young, 48 AD3d 901, 904 [2008]); ultimately, defendant testified as to the counts involving victim A but not victim B. Based on the foregoing, County Court did not abuse its discretion in denying the severance motion (see People v Young, 48 AD3d at 904; People v Nickel, 14 AD3d at 970).

Defendant also contends that reversal is required based upon a curative instruction given to the jury. During the People's direct case, Jeffrey Lockhart, a police detective, twice referenced that he was unable to speak with defendant because defendant had retained an attorney. At the close of the People's direct examination of Lockhart, the People requested a curative instruction regarding defendant's right to counsel, and County Court, the People and defendant's attorney all agreed to a curative instruction. Defendant subsequently moved for a mistrial and objected to the curative instruction. The court denied the motion and provided the curative instruction. It is well settled that a defendant's invocation of his or her right to counsel or right against self-incrimination cannot be used against him or her on the People's direct case (see People v Johnson, 150 AD3d 1390, 1395 [2017], lv denied 29 NY3d 1128 [2017]; People v Capers, 129 AD3d 1313, 1317 [2015], lv denied 27 NY3d 994 [2016]). Although it was error for Lockhart to

reference defendant's invocation of his right to counsel and to remain silent, reversal is not required because this error was harmless beyond a reasonable doubt. Nor do we find that reversal is required because County Court delivered the curative instruction at the request of the People over defendant's objection. Once the error was brought to the court's attention – albeit by the People – the court was able to address the error in a manner that it found appropriate. However, defendant is correct that the instruction was not sufficient to completely cure the error, as it referenced only his right to counsel and not his right to remain silent. Notwithstanding this deficiency, reversal is not required because this error was harmless inasmuch as the proof of defendant's guilt was overwhelming, and there is no reasonable possibility that it might have contributed to defendant's convictions (see People v Johnson, 150 AD3d at 1396; People v Capers, 129 AD3d at 1317-1318).

We are unpersuaded by defendant's argument that County Court abused its discretion in ruling that defendant could not cross-examine victim A with a copy of unauthenticated text messages. Although a defendant has a constitutional right to confront witnesses through cross-examination, that right is not absolute (see People v Fields, 160 AD3d 1116, 1120 [2018], lvs denied 31 NY3d 1116, 1120 [2018]; People v Gooley, 156 AD3d 1231, 1232 [2017], lvs denied 31 NY3d 984, 985 [2018]). Given that these text messages were not produced by defendant until after the People concluded their direct examination of victim A and they were not properly authenticated, it would have been highly prejudicial to the People to allow defendant to cross-examine victim A about them. As such, we discern no abuse of discretion in County Court's ruling (see generally People v Fields, 160 AD3d at 1120; People v Alcarez, 141 AD3d 943, 944 [2016], lv denied 28 NY3d 1025 [2016]).

Both on his direct appeal and his appeal from the denial of his CPL article 440 motion, defendant contends that he was deprived of the effective assistance of counsel. "To establish a claim of ineffective assistance of counsel, defendant is

required to demonstrate that he was not provided meaningful representation and that there is an absence of strategic or other legitimate explanations for counsel's allegedly deficient conduct" (People v Lancaster, 143 AD3d 1046, 1051 [2016] [internal quotation marks and citations omitted], lv denied 28 NY3d 1147 [2017]; see People v Ramos, 133 AD3d 904, 909 [2015], lvs denied 26 NY3d 1143, 1149 [2016]). To the extent that defendant contends that it was error for defense counsel not to move to dismiss counts 1 through 3 of the indictment on the ground that they were duplicitous, said claim is unavailing as any such motion would have had "little or no chance of success" (People v Johnson, 151 AD3d 1462, 1466 [2017] [internal quotation marks and citations omitted], lv denied 30 NY3d 1106 [2018]). Defendant's remaining claims of ineffective assistance due to counsel's failure to make various objections throughout the trial are also without merit for similar reasons, and defendant has failed to establish the absence of strategic or other legitimate explanations for counsel's alleged deficient conduct (see People v Flores, 84 NY2d 184, 187 [1994]; People v Rice, 162 AD3d 1244, 1247 [2018], lv denied 32 NY3d 940 [2018]). After reviewing the record as a whole, we find that, viewed in totality, defense counsel provided meaningful representation (see People v Lancaster, 143 AD3d at 1051; People v Roshia, 133 AD3d 1029, 1031 [2015]).

We also find that County Court was not required to conduct a hearing on defendant's CPL article 440 motion, which claimed that defense counsel failed to impeach victim A by using Facebook and text messages and to do more to retrieve text messages that had been "over written." Initially, defense counsel attempted to cross-examine victim A as to text messages from defendant's phone, but, after objection by the People, County Court did not allow it. Furthermore, although defendant takes issue with defense counsel's attempts to recover text messages from his phone, as he claims that these text messages could have exonerated him, this allegation is conclusory in nature and is, to some extent, contradicted by the record, as defense counsel stated at trial that her investigator was advised by the cell phone provider that these messages could not

be retrieved. Notably, defendant did not take issue with these representations at trial. Accordingly, because defendant did not support his claim of ineffective assistance of counsel with factual allegations that, if established, would entitle him to relief, County Court did not err in denying the motion without a hearing (see People v Carston, 163 AD3d 1166, 1168 [2018], lv denied 32 NY2d 1002 [2018]; People v Pabon, 157 AD3d 1057, 1058-1059 [2018], lv denied 31 NY3d 986 [2018]).

Finally, we find that defendant's sentence was neither harsh nor excessive. "[A] sentence that falls within the permissible statutory ranges will not be disturbed unless it can be shown that the sentencing court abused its discretion or that extraordinary circumstances exist warranting a modification in the interest of justice" (People v Simmons, 122 AD3d 1169, 1169 [2014] [internal quotation marks and citation omitted], lv denied 25 NY3d 1171 [2015]; see People v Malloy, 152 AD3d 968, 971 [2017], lv denied 30 NY3d 981 [2017]). "Further, the mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof positive that [the] defendant was punished for asserting his [or her] right to trial" (People v Malloy, 152 AD3d at 971 [internal quotation marks, brackets and citations omitted]; see People v Peart, 141 AD3d 939, 942 [2016], lv denied 28 NY3d 1074 [2016]). Given the seriousness of the offenses, the predatory nature of defendant's behavior and his refusal to accept responsibility, we discern no basis upon which to disturb the sentence imposed by County Court (see People v Vega, 170 AD3d 1266, 1274 [2019]; People v Malloy, 152 AD3d at 917).

Defendant's remaining contentions have been reviewed and are without merit.

Garry, P.J., Clark, Mulvey and Devine, JJ., concur.

ORDERED that the judgment and order are affirmed.

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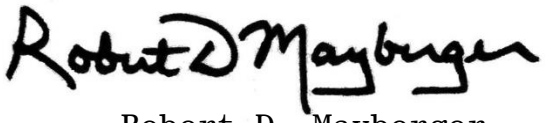

Robert D. Mayberger
Clerk of the Court