State of New York
Court of Appeals

BEFORE: HON. MICHAEL J. GARCIA
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ORDER DENYING LEAVE

TINA L. WAGONER,

Appellant.

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

Dated: September 8, 2021

at Albany, New York

Associate Judge

*Description of Order: Order of the Supreme Court, Appellate Division, Fourth Department, entered June 17, 2021, modifying a judgment of the Cattaraugus County Court, rendered August 3, 2016, and affirming the judgment as modified.

195 A.D.3d 1595
Supreme Court, Appellate Division,
Fourth Department, New York.

The PEOPLE of the State of New York, Respondent,
v.
Tina L. WAGONER, Defendant-Appellant.

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KA 16-02366
|
Entered: June 17, 2021

Synopsis

Background: Defendant was convicted in the County Court, Cattaraugus County, Ronald D. Ploetz, J., of rape in the first degree, attempted rape in the first degree, and promoting prostitution in the second degree, and was sentenced to aggregate prison term of 35 years. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:
[1] three-year delay in indicting defendant did not violate due process;
[2] there was no due process violation stemming from defendant's representation of herself;
[3] sufficient evidence supported defendant's convictions;
[4] convictions for rape in first degree and first count of promoting prostitution in second degree were against weight of evidence;
[5] convictions for attempted rape in first degree and second count of promoting prostitution in second degree were not against weight of evidence; and
[6] determinate prison sentence of 15 years for attempted rape in first degree and promoting prostitution in second degree was unduly harsh.

Affirmed as modified.
Appellate ReviewSentencing or Penalty Phase Motion or Objection

West Headnotes (8)

[1] **Criminal Law**
⇐ In general; balancing test

To determine whether there has been undue delay in prosecution, courts consider (1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay.

[2] **Constitutional Law**
⇐ Time for proceedings in general; limitations

Determination made in good faith to delay prosecution for sufficient reasons will not deprive defendant of due process even though there may be some prejudice to defendant. U.S. Const. Amend. 14.

[3] **Constitutional Law**
⇐ Neglect or delay

Indictments and Charging Instruments
⇐ Investigation; obtaining witnesses or evidence

Indictments and Charging Instruments
⇐ Confinement

Approximate three-year delay in indicting defendant on charges for rape in the first degree, attempted rape in the first degree, and promoting prostitution in the second degree was in good faith and for sufficient reasons, and thus did not violate defendant's due process rights; although charges were serious, defendant was not incarcerated pending trial, and delay was occasioned by circumstances related to vulnerable minor victim, who had significant educational delays and did not initially disclose defendant's involvement offenses. U.S. Const. Amend. 14; N.Y. Penal Law §§ 110.00, 130.35(4), 230.30(2).

[4] **Constitutional Law**
⇐ Waiver of counsel; self-representation

Criminal Law
⇐ Validity and sufficiency, particular cases

Criminal Law
⇐ Waiver of right to counsel

There was no due process violation stemming from defendant's representation of herself during her prosecution for rape in the first degree, attempted rape in the first degree, and promoting prosecution in the second degree; defendant expressed desire to proceed pro se before trial, trial court undertook requisite inquiry into her age, education, and familiarity with legal system before accepting her decision to proceed pro se, defendant was warned of risks of proceeding pro se, and although there were deficiencies in her performance, there was nothing suggesting that proceedings resulted in travesty of justice. U.S. Const. Amend. 14; N.Y. Penal Law §§ 110.00, 130.35(4), 230.30(2).

[5] **Human Trafficking and Slavery**

Promoting prostitution

Infants

Indecent exhibition or use of child; child prostitution

Infants

Carnal knowledge; rape and sodomy

Sex Offenses

Parties to offenses; aiding and abetting

Sufficient evidence supported defendant's convictions for rape in the first degree, attempted rape in the first degree, and promoting prostitution in the second degree, stemming from incident in which she aided and abetted two men in the alleged rape and attempted rape of minor victim in exchange for alcohol in drugs; defendant admitted to "selling" victim to men, who ultimately pleaded guilty to offenses related to their interaction with victim, and victim testified that men committed sex offenses against her inside defendant's home, which was where victim was residing, after men brought defendant alcohol or drugs. N.Y. Penal Law §§ 110.00, 130.35(4), 230.30(2).

[6] **Human Trafficking and Slavery**

Promoting prostitution

Infants

Indecent exhibition or use of child; child prostitution

Infants

Carnal knowledge; rape and sodomy

Sex Offenses

Sex offenses against minors in general

Sex Offenses

Parties to offenses; aiding and abetting

Defendant's convictions for rape in the first degree and promoting prostitution in the second degree, stemming from incident in which she allegedly aided and abetted man who allegedly raped minor victim in exchange for alcohol and drugs, were against the weight of evidence; man testified that he did not have sexual contact with victim, that defendant left residence after man provided her with drugs, and that defendant never "sold" victim to him, and victim testified several times that she believed defendant had no knowledge that man would rape her and that man provided defendant with alcohol so that defendant would be unaware while man took advantage of victim. N.Y. Penal Law §§ 130.35(4), 230.30(2).

[7] **Human Trafficking and Slavery**

Promoting prostitution

Infants

Indecent exhibition or use of child; child prostitution

Infants

Carnal knowledge; rape and sodomy

Sex Offenses

Attempt

Sex Offenses

Parties to offenses; aiding and abetting

Defendant's convictions for attempted rape in the first degree and promoting prostitution in the second degree, stemming from incident in which she aided and abetted man in the alleged attempted rape of minor victim in exchange for alcohol and drugs, were not against the weight of evidence; man, due to his own intoxication, was unable to commit actual rape against victim, and victim testified that when man's girlfriend arrived at residence in which man was allegedly attempting to rape victim, defendant answered door and indicated that man was in bedroom with

victim. N.Y. Penal Law §§ 110.00, 130.35(4), 230.30(2).

[8] **Criminal Law**

Sentence or Punishment

Sentencing and Punishment

Total sentence deemed excessive

Determinate prison sentence of 15 years, arising from defendant's convictions for attempted rape in first degree and promoting prostitution in second degree, stemming from incident in which she aided and abetted two men in the alleged rape and attempted rape of minor victim, was unduly harsh and severe, thus warranting reduction to prison sentence of 12 years with five years' post-release supervision, in light of sentences that were imposed upon men who were involved in charged crimes. N.Y. Penal Law §§ 110.00, 130.35(4), 230.30(2).

**853 Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered August 3, 2016. The judgment convicted defendant upon a jury verdict of rape in the first degree, attempted rape in the first degree and promoting prostitution in the second degree (two counts).

Attorneys and Law Firms

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL S. DEAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

TINA L. WAGONER, DEFENDANT-APPELLANT PRO SE.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

MEMORANDUM AND ORDER

*1595 It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts and as a matter of discretion in the interest of justice by reversing those parts convicting defendant of rape in the first degree under count one of the indictment and promoting prostitution in the second degree under count two of the indictment and dismissing those counts of the indictment, and by reducing the sentence imposed for attempted rape in the first degree under count five of the indictment to a determinate term of incarceration of 12 years with a five-year period of postrelease supervision, reducing the *1596 sentence imposed for promoting prostitution in the second degree under count six (mislabeled "second count") of the indictment to an indeterminate term of incarceration **854 of 3 to 12 years, and directing that those sentences run concurrently with one another, and as modified the judgment is affirmed.

[1] [2] Memorandum: Defendant appeals from a judgment convicting her following a jury trial of rape in the first degree (Penal Law § 130.35 [4]), attempted rape in the first degree (§§ 110.00, 130.35 [4]), and two counts of promoting prostitution in the second degree (§ 230.30 [2]) related to allegations that she aided and abetted two men in the rape and attempted rape of a female under the age of 13 in exchange for alcohol and drugs. Although the offenses occurred in 2012 or before, defendant was not indicted until February 2015. Contrary to defendant's contention in her main brief, she was not denied due process by the preindictment delay. To determine whether there has been undue delay in prosecution, courts will consider "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay" (*People v. Taranovich*, 37 N.Y.2d 442, 445, 373 N.Y.S.2d 79, 335 N.E.2d 303 [1975]; *see People v. Decker*, 13 N.Y.3d 12, 15, 884 N.Y.S.2d 662, 912 N.E.2d 1041 [2009]). " '[A] determination made in good faith to delay prosecution for sufficient reasons will not deprive defendant of due process even though there may be some prejudice to defendant' " (*Decker*, 13 N.Y.3d at 14, 884 N.Y.S.2d 662, 912 N.E.2d 1041).

[3] Here, although the charges were serious, defendant was not incarcerated pending trial, and the delay was occasioned by circumstances related to the vulnerable victim. The victim was only 12 years old at the time of the last offense, yet she had never attended school. She had significant educational delays and did not initially disclose defendant's involvement in the underlying sexual offenses (*see People v. McNeill*, 204 A.D.2d 975, 975-976, 613 N.Y.S.2d 302 [4th Dept. 1994], *lv denied* 84 N.Y.2d 829, 617 N.Y.S.2d 149, 641 N.E.2d

170 [1994]). Although defendant points to the death of two material witnesses as a source of prejudice, she did not make that argument before County Court and, as a result, that contention is not preserved for our review (*see People v. Pacheco*, 38 A.D.3d 686, 687, 832 N.Y.S.2d 248 [2d Dept. 2007], *lv denied* 9 N.Y.3d 849, 840 N.Y.S.2d 775, 872 N.E.2d 888 [2007]; *see generally* CPL 470.05 [2]). In any event, the resulting prejudice was minimal and does not outweigh the good-faith determination to delay prosecution (*see People v. Fleming*, 141 A.D.3d 408, 409, 35 N.Y.S.3d 326 [1st Dept. 2016], *lv denied* 28 N.Y.3d 1027, 45 N.Y.S.3d 379, 68 N.E.3d 108 [2016], *reconsideration denied* 28 N.Y.3d 1124, 51 N.Y.S.3d 20, 73 N.E.3d 360 [2016]; ***1597** *People v. Rogers*, 103 A.D.3d 1150, 1151, 958 N.Y.S.2d 835 [4th Dept. 2013], *lv denied* 21 N.Y.3d 946, 968 N.Y.S.2d 8, 990 N.E.2d 142 [2013]; *see generally People v. Johnson*, 134 A.D.3d 1388, 1390, 22 N.Y.S.3d 265 [4th Dept. 2015], *affd* 28 N.Y.3d 1048, 43 N.Y.S.3d 245, 65 N.E.3d 1281 [2016]).

Defendant further contends in her main brief that she was denied due process because she was not present during conferences where CPL article 730 competency proceedings were discussed. We reject that contention inasmuch as such conferences are not material stages of the trial where, as here, the conferences do not "entail a hearing or any significant factual inquiry" (*People v. Kimes*, 37 A.D.3d 1, 31, 831 N.Y.S.2d 1 [1st Dept. 2006], *lv denied* 8 N.Y.3d 881, 832 N.Y.S.2d 494, 864 N.E.2d 624 [2007], *reconsideration denied* 9 N.Y.3d 846, 840 N.Y.S.2d 772, 872 N.E.2d 885 [2007]; *see* ****855** *People v. Chisolm*, 85 N.Y.2d 945, 948, 626 N.Y.S.2d 1002, 650 N.E.2d 849 [1995]). We further conclude, contrary to defendant's contention, that she was not denied due process by the absence of those proceedings from the record. The reports prepared by two psychiatric examiners, which were provided to this Court, conclude that defendant was not incapacitated (*see* CPL 730.30 [2]) and, in light of those reports, the court did not abuse its discretion in failing to order a hearing on its own motion (*see People v. Singleton*, 78 A.D.3d 1490, 1490, 910 N.Y.S.2d 716 [4th Dept. 2010], *lv denied* 16 N.Y.3d 837, 921 N.Y.S.2d 201, 946 N.E.2d 189 [2011]; *People v. Horan*, 290 A.D.2d 880, 882-883, 737 N.Y.S.2d 145 [3d Dept. 2002], *lv denied* 98 N.Y.2d 638, 744 N.Y.S.2d 767, 771 N.E.2d 840 [2002]; *see generally People v. Armlin*, 37 N.Y.2d 167, 171, 371 N.Y.S.2d 691, 332 N.E.2d 870 [1975]). With respect to defendant's final contention related to CPL article 730, we conclude that the psychiatric examiners' reports complied with the statute by including the examiners' opinions that defendant was not an incapacitated person and was able to participate in her defense and by stating the nature and extent of the examination that was conducted (*see* CPL 730.10 [8]; *People v. Vega*, 167 A.D.3d 1468, 1469, 90 N.Y.S.3d 417 [4th Dept. 2018], *lv denied* 33 N.Y.3d 955, 100 N.Y.S.3d 168, 123 N.E.3d 827 [2019]; *cf. People v. Meurer*, 184 A.D.2d 1067, 1068, 584 N.Y.S.2d 370 [4th Dept. 1992], *lv dismissed* 80 N.Y.2d 835, 587 N.Y.S.2d 919, 600 N.E.2d 646 [1992], *lv denied* 80 N.Y.2d 907, 588 N.Y.S.2d 832, 602 N.E.2d 240 [1992]).

[4] Before trial, defendant expressed a desire to represent herself. She now contends in her main brief that her decision to represent herself was not made knowingly, intelligently or voluntarily, and that she was denied due process because her self-representation resulted in a travesty of justice. In her pro se supplemental brief, defendant further contends that she was forced to represent herself due to the court's failure to inquire into her many complaints against defense counsel. We reject those contentions. Addressing first the contentions in her main brief, we conclude that the court "undertook the requisite searching inquiry into defendant's age, education and familiarity with the legal system before accepting defendant's decision ***1598** to proceed pro se[, and] the court and defense counsel warned defendant of the risks associated with proceeding pro se" (*People v. Clark*, 42 A.D.3d 957, 957-958, 838 N.Y.S.2d 760 [4th Dept. 2007], *lv denied* 9 N.Y.3d 960, 848 N.Y.S.2d 29, 878 N.E.2d 613 [2007]; *see People v. Providence*, 2 N.Y.3d 579, 582-583, 780 N.Y.S.2d 552, 813 N.E.2d 632 [2004]). The court thus ensured that defendant's decision was made knowingly, voluntarily and intelligently. Moreover, although there were deficiencies in defendant's performance, we do not believe that "the proceedings resulted in a 'travesty of justice' such that [defendant] was denied [her] right to due process" (*People v. Herman*, 78 A.D.3d 1686, 1687, 910 N.Y.S.2d 833 [4th Dept. 2010], *lv denied* 16 N.Y.3d 831, 921 N.Y.S.2d 195, 946 N.E.2d 183 [2011]; *see generally People v. McIntyre*, 36 N.Y.2d 10, 18, 364 N.Y.S.2d 837, 324 N.E.2d 322 [1974]).

Addressing next the contention raised in the pro se supplemental brief, we conclude that the court did not abuse its discretion in allowing defendant to represent herself despite her issues with defense counsel. Contrary to defendant's contention, the court "afforded defendant the opportunity to express [her] objections concerning defense counsel, and ... thereafter reasonably concluded that defendant's objections were without merit" (*People v. Bethany*, 144 A.D.3d 1666, 1669, 42 N.Y.S.3d 495 [4th Dept. 2016], *lv denied* 29 N.Y.3d 996, 57 N.Y.S.3d 717, 80 N.E.3d 410 [2017], *cert denied* ****856** —— U.S. ——, 138 S. Ct. 1571, 200 L.Ed.2d 760 [2018]; *see People v. Spencer*, 185

A.D.3d 1440, 1441, 127 N.Y.S.3d 670 [4th Dept. 2020]; *see generally People v. Porto*, 16 N.Y.3d 93, 99-100, 917 N.Y.S.2d 74, 942 N.E.2d 283 [2010]).

[5] Defendant contends in her main brief that the evidence is legally insufficient to support the conviction and that the verdict is against the weight of the evidence. Assuming, arguendo, that defendant preserved her challenge to the sufficiency of the evidence (*see generally People v. Gray*, 86 N.Y.2d 10, 19, 629 N.Y.S.2d 173, 652 N.E.2d 919 [1995]), we reject her contention. Defendant admitted "selling [the victim]" to the men named in the indictment, as well as to numerous other people. The victim testified that the two men named in the counts of the indictment of which defendant was convicted committed the alleged sexual offenses against her in defendant's home, where the victim was then residing, after they brought defendant alcohol or drugs. Moreover, both men pleaded guilty to offenses related to their interactions with the victim. We thus conclude, contrary to defendant's contention in her pro se supplemental brief, that her confession was sufficiently corroborated (*see* CPL 60.50; *People v. Daniels*, 37 N.Y.2d 624, 629, 376 N.Y.S.2d 436, 339 N.E.2d 139 [1975]), as was the testimony of the men implicated in the crimes (*see* CPL 60.22 [1]; *People v. Reome*, 15 N.Y.3d 188, 192, 906 N.Y.S.2d 788, 933 N.E.2d 186 [2010]). Upon viewing the evidence in the light most favorable to the People (*see People v. Contes*, 60 N.Y.2d 620, 621, 467 N.Y.S.2d 349, 454 N.E.2d 932 [1983]), we further conclude that the evidence is ***1599** legally sufficient to support the conviction of each offense (*see generally People v. Bleakley*, 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672 [1987]).

[6] We reach a different conclusion on the weight of the evidence insofar as it concerns counts one and two of the indictment, which charged defendant with rape in the first degree and promoting prostitution in the second degree. The man at issue in those counts testified for the prosecution and denied having sexual contact with the victim. He further testified that, on the night of the alleged incident, he provided marihuana to defendant, who then left the residence while he remained there to play video games. Despite any conduct that may have occurred between him and the victim, that man testified on cross-examination that defendant "never sold [the victim] to him." The victim also testified several times that she did not believe that defendant knew what that man was doing to her on the night he raped her.

The victim testified that the man at issue in counts one and two of the indictment gave defendant alcohol, "knowing that she won't [sic] know what's going on, so he could take advantage of me." Although that man was named in defendant's "confession," that confession is of questionable value inasmuch as it also names the female who called the police to report the crimes at issue in counts five and six. Viewing the evidence in light of the elements of count one and count two as charged to the jury (*see People v. Danielson*, 9 N.Y.3d 342, 349, 849 N.Y.S.2d 480, 880 N.E.2d 1 [2007]), we conclude that the verdict with respect to those two counts is against the weight of the evidence (*see generally Bleakley*, 69 N.Y.2d at 495, 515 N.Y.S.2d 761, 508 N.E.2d 672). We therefore modify the judgment by reversing the parts convicting defendant of rape in the first degree under count one of the indictment and promoting prostitution in the second degree under count two of the indictment and dismissing those counts of the indictment.

****857** [7] We reach a different conclusion with respect to counts five and six of the indictment, which charged defendant with attempted rape in the first degree and promoting prostitution in the second degree. In contrast to her testimony related to counts one and two, the victim specifically testified that the man at issue in those counts gave defendant alcohol, in part, "to have sex with [the victim]." Due to his own intoxication, that man was unable to commit the actual rape. In addition, the victim testified that the man's then-girlfriend came to defendant's home on the night in question and, when defendant answered the door, she indicated that the man was in the bedroom with the victim. The girlfriend entered the bedroom and observed the man, naked from the waist down, in bed with ***1600** the victim, who was wearing only a nightgown. That man testified for the defense and, although he denied all of the allegations and contended that he was in the bed sleeping due to his intoxication, he nevertheless admitted that he pleaded guilty to endangering the welfare of a child in relation to the allegations. Viewing the much more damaging evidence related to counts five and six in light of the elements of those two crimes as charged to the jury (*see Danielson*, 9 N.Y.3d at 349, 849 N.Y.S.2d 480, 880 N.E.2d 1), we conclude that the verdict on those two counts is not against the weight of the evidence (*see generally Bleakley*, 69 N.Y.2d at 495, 515 N.Y.S.2d 761, 508 N.E.2d 672).

Defendant's contention in her main brief that she was denied a fair trial due to prosecutorial misconduct on summation is not preserved for our review (*see People v. Green*, 141 A.D.3d 1036, 1042, 36 N.Y.S.3d 312 [3d Dept. 2016], *lv denied* 28 N.Y.3d 1072, 47 N.Y.S.3d 231, 69 N.E.3d 1027 [2016]). In any event, in our view, most of the alleged

instances of misconduct were fair comment on the evidence and fair response to defense counsel's summation (*see People v. Young*, 153 A.D.3d 1618, 1620, 61 N.Y.S.3d 752 [4th Dept. 2017], *lv denied* 30 N.Y.3d 1065, 71 N.Y.S.3d 15, 94 N.E.3d 497 [2017], *reconsideration denied* 31 N.Y.3d 1123, 81 N.Y.S.3d 383, 106 N.E.3d 766 [2018], *cert denied* —— U.S. ——, 139 S. Ct. 84, 202 L.Ed.2d 56 [2018]) and, to the extent that the prosecutor made inappropriate remarks, we conclude that they were "not so pervasive or egregious as to deny defendant a fair trial" (*id.*; *see People v. Fick*, 167 A.D.3d 1484, 1485-1486, 90 N.Y.S.3d 421 [4th Dept. 2018], *lv denied* 33 N.Y.3d 948, 100 N.Y.S.3d 173, 123 N.E.3d 832 [2019]).

[8] Defendant's final contention in her main brief is that the sentence is unduly harsh and severe. Upon her conviction of all four counts, defendant was sentenced to concurrent and consecutive terms of incarceration that aggregated to a determinate term of 35 years. Based on our determination to dismiss counts one and two of the indictment as against the weight of the evidence, the sentence would be reduced to a determinate term of incarceration of 15 years on count five, for attempted rape in the first degree, with a concurrent indeterminate term of incarceration of 5 to 15 years on count six, for promoting prostitution in the second degree. Even as reduced by our determination to modify the judgment by reversing those parts convicting defendant under counts one and two of the indictment, we conclude, after considering the sentences imposed on the men involved in the charged crimes, that the sentence is unduly harsh and severe, and we therefore exercise our discretion to further modify the judgment by reducing the sentence imposed on count five to a determinate term of incarceration of 12 years with five years of postrelease supervision, reducing the sentence imposed on count six to an indeterminate term of incarceration of 3 to 12 years, and directing that those sentences ****858** ***1601** run concurrently with each other (*see generally* CPL 470.15 [6] [b]; *People v. Delgado*, 80 N.Y.2d 780, 783, 587 N.Y.S.2d 271, 599 N.E.2d 675 [1992]).

We have reviewed the remaining contentions in defendant's pro se supplemental brief and conclude that they do not warrant reversal or further modification of the judgment.

All Citations

195 A.D.3d 1595, 150 N.Y.S.3d 851, 2021 N.Y. Slip Op. 03981

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