

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOURTH DEPARTMENT

People v. Ange

37 A.D.3d 1143 (N.Y. App. Div. 4th Dep't 2007) · Decided February 2, 2007

SUMMARY

The New York Appellate Division affirmed a judgment convicting the defendant, after a nonjury trial, of multiple sex offenses involving a child, endangering the welfare of a child, and possessing sexual performances by a child. The court held that several claims were unpreserved, declined discretionary interest-of-justice review of prosecutorial-misconduct claims, and rejected the defendant’s ineffective-assistance and excessive-sentence contentions.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Fourth Department
WRITING FOR THE COURT	Gorski, J.P.; Lunn, J.; Peradotto, J.; Pine, J.
JURISDICTION	New York
DECIDED	February 2, 2007
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendant appealed from a judgment of the Supreme Court, Monroe County, entered after a nonjury trial and convicting him of multiple sex offenses.
STANDARD OF REVIEW	Legal-sufficiency claims are subject to preservation requirements; the verdict is reviewed to determine whether it is against the weight of the evidence, with great deference given to the factfinder's credibility determinations. Unpreserved prosecutorial-misconduct claims may be reviewed in the interest of justice as a matter of discretion.
PRECEDENTIAL VALUE	Published appellate decision
PARTIES	Defendant v. People of the State of New York

TOPICS

- criminal procedure
- appellate procedure
- preservation of error
- prosecutorial misconduct
- ineffective assistance

PRACTICE AREAS

criminal law

criminal procedure

appellate practice

evidence

QUESTIONS PRESENTED

1. Whether the evidence was legally sufficient to support the convictions despite defendant's failure to preserve that claim by specifically directing his motion to dismiss at the asserted ground.
2. Whether the verdict was against the weight of the evidence.
3. Whether defendant preserved and could obtain discretionary interest-of-justice review of his claim that prosecutorial misconduct during summation and sentencing deprived him of a fair trial.
4. Whether defendant was denied effective assistance of counsel.
5. Whether the sentence was unduly harsh or severe.

HOLDINGS

1. Defendant's legal-sufficiency claim was unpreserved because his motion to dismiss was not specifically directed at the ground advanced on appeal.
2. The verdict was not against the weight of the evidence.
3. Defendant failed to preserve his claim that prosecutorial misconduct during summation and sentencing deprived him of a fair trial, and the court declined to review the claim in the interest of justice.
4. Defendant was not denied effective assistance of counsel.
5. The sentence was not unduly harsh or severe.

KEY QUOTATIONS

"We accord great deference to the resolution of credibility issues by the trier of fact "because those who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record"" (1144)

FACTUAL BACKGROUND

Defendant was convicted after a nonjury trial of course of sexual conduct against a child in the first degree and several other sexual offenses, including six counts of possessing a sexual performance by a child. On appeal, he challenged the sufficiency and weight of the evidence, alleged prosecutorial misconduct during summation and sentencing, claimed ineffective assistance of counsel, and argued that his sentence was unduly harsh or severe.

PROCEDURAL HISTORY

The Supreme Court, Monroe County, convicted defendant following a nonjury trial of course of sexual conduct against a child in the first degree, three counts of rape in the second degree, sodomy in the second degree, endangering the welfare of a child, and six counts of possessing a sexual performance by a child. Defendant appealed, raising challenges to the sufficiency and weight of the evidence, prosecutorial misconduct, ineffective assistance of counsel, and the severity of the sentence. The Appellate Division unanimously affirmed.

DISPOSITION

affirmed

CASES CITED

- People v. Gray, 86 N.Y.2d 10, 19 (1995)
- People v. Bleakley, 69 N.Y.2d 490, 495 (1987)
- People v. Lane, 7 N.Y.3d 888, 890 (2006)
- People v. Gainey, 34 A.D.3d 1250 (2006)
- People v. Baldi, 54 N.Y.2d 137, 147 (1981)

OPINION

PER CURIAM.

Appeal from a judgment of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), rendered January 15, 2004. The judgment convicted defendant, after a nonjury trial, of course of sexual conduct against a child in the first degree, rape in the second degree (three counts), sodomy in the second degree, endangering the welfare of a child and possessing a sexual performance by a child (six counts). *1144It is hereby ordered that the judgment so appealed from be and the same hereby is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of, inter alia, course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]) and six counts of possessing a sexual performance by a child (§ 263.16). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction because his motion to dismiss was not specifically directed at the ground advanced on appeal (see People v Gray, 86 NY2d 10, 19 [1995]).

We conclude that the verdict is not against the weight of the evidence (see generally People v Bleakley, 69 NY2d 490, 495 [1987]). We accord great deference to the resolution of credibility issues by the trier of fact “because those who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record” (People v Lane, 7 NY3d 888, 890 [2006]).

Defendant failed to preserve for our review his additional contention that he was deprived of a fair trial by prosecutorial misconduct on summation and at sentencing (see CPL 470.05 [2]; People v Gainey, 34 AD3d 1250 [2006]).

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]). Contrary to the further contentions of defendant, he was not

denied effective assistance of counsel (see generally *People v Baldi*, 54 NY2d 137, 147 [1981]), and the sentence is not unduly harsh or severe. Present—Gorski, J.P., Lunn, Peradotto and Pine, JJ.

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