

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

Decided and Entered: December 27, 2012

104281

104173

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

SIDNEY JONES,

Appellant.

Calendar Date: November 16, 2012

Before: Mercure, J.P., Spain, Malone Jr., Stein and
McCarthy, JJ.

Justin C. Brusgul, Voorheesville, for appellant, and
appellant pro se.

P. David Soares, District Attorney, Albany (Steven M. Sharp
of counsel), for respondent.

Malone Jr., J.

Appeals (1) from a judgment of the County Court of Albany
County (Herrick, J.), rendered January 13, 2011, upon a verdict
convicting defendant of the crimes of course of sexual conduct
against a child in the first degree, rape in the second degree
(two counts), rape in the third degree (three counts), criminal
sexual act in the third degree and endangering the welfare of a
child (two counts), and (2) by permission, from an order of said
court, entered April 15, 2011, which denied defendant's motion
pursuant to CPL 440.10 to vacate the judgment of conviction,
without a hearing.

Defendant was charged in a nine-count indictment with various sex crimes stemming from sexual contacts that he had with two underage females over a series of years which culminated in one of them becoming pregnant. Following a jury trial, defendant was convicted of the charged crimes and sentenced to an aggregate prison term of 25 years, followed by 20 years of postrelease supervision. Defendant's subsequent motion to vacate the judgment of conviction was denied by County Court without a hearing. Defendant appeals from the judgment of conviction and, by permission, from the order denying his postjudgment motion.

Defendant's contention that the jury's verdict is against the weight of the evidence is unpersuasive. We have reviewed the trial evidence, including the testimony of the victims, their mother, the police investigators, the medical staff at Planned Parenthood and the forensic scientist who conducted DNA analysis of the aborted fetus, which resulted in a 99.99% probability that defendant was the father, and have weighed it against defendant's testimony that he never had sexual contact with the victims. Viewing all of the evidence in a neutral light and according deference to the jury's assessment of witness credibility and resolution of conflicting testimony, the verdict was not against the weight of the evidence (see People v Kruppenbacher, 81 AD3d 1169, 1174 [2011], lv denied 17 NY3d 797 [2011]; People v Stewart, 60 AD3d 1111, 1113 [2009], lv denied 12 NY3d 860 [2009]).

Furthermore, we find no improvident exercise of discretion in County Court's ruling permitting the People to present evidence of prior bad acts allegedly committed by defendant against one of the victims regarding alleged sexual conduct that occurred both prior to and after the period of time charged in count 1 of the indictment. The record establishes that the court properly balanced the probative value of the evidence against its potential prejudice to defendant. The court limited the People's inquiry of defendant's conduct and also gave appropriate limiting instructions to the jury in order to insulate defendant from any prejudicial effect that the evidence may have had (see People v Maggio, 70 AD3d 1258, 1260 [2010], lv denied 14 NY3d 889 [2010]). Moreover, the record demonstrates that the uncharged conduct was

not admitted to establish defendant's propensity to commit the crimes charged, but rather was "admissible to develop the necessary background and complete the victim's narrative" of the nature of the alleged abuse and its escalation (People v Shofkom, 63 AD3d 1286, 1287-1288 [2009], lv denied 13 NY3d 799 [2009], appeal dismissed 13 NY3d 933 [2010]; see People v Maggio, 70 AD3d at 1260).

We also find no abuse of discretion in County Court denying defendant's pro se CPL article 440 motion without a hearing. To the extent that defendant's claims of ineffective assistance of counsel and prosecutorial misconduct are based on information contained in the record, those issues are reviewable on direct appeal rather than on a CPL article 440 motion (see People v Vallee, 97 AD3d 972, 974 [2012]; People v Stevens, 95 AD3d 1451, 1452 [2012], lv denied 19 NY3d 1029 [2012]). Furthermore, notwithstanding defendant's affidavit, his claims pertaining to matters outside the record are unsupported by the requisite sworn allegations of fact (see CPL 440.30 [4] [d]; People v Polanco, 52 AD3d 947, 947 [2008], lv denied 11 NY3d 793 [2008]).

Finally, defendant's contentions on direct appeal challenging aspects of voir dire and the People's summation are unpreserved for our review. Defendant's remaining arguments have been reviewed and found to be without merit.

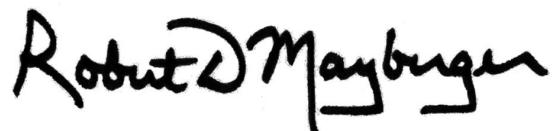
Mercure, J.P., Spain, Stein and McCarthy, JJ., concur.

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ORDERED that the judgment and order are affirmed.

ENTER:

A handwritten signature in black ink, appearing to read "Robert D. Mayberger". The signature is fluid and cursive, with "Robert" and "D." stacked above "Mayberger".

Robert D. Mayberger
Clerk of the Court