SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1097

KA 18-00305

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON FREY, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered November 8, 2017. The judgment convicted defendant, after a nonjury trial, of assault in the second degree and endangering the welfare of a child (five counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him following a nonjury trial of assault in the second degree (Penal Law § 120.05 [9]) and five counts of endangering the welfare of a child (§ 260.10 [1]), defendant contends that the conviction of assault is not supported by legally sufficient evidence that the five-year-old victim sustained a physical injury within the meaning of Penal Law § 10.00 (9). We reject that contention. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), including the young age of the victim (*see People v Lashway*, 112 AD3d 1222, 1225 [3d Dept 2013]; *see also Matter of Boua TT. v Quamy UU.*, 66 AD3d 1165, 1166 [3d Dept 2009], *lv denied* 14 NY3d 702 [2010]) and photographs of the resulting injuries, we conclude that the evidence is legally sufficient to establish that the victim suffered substantial pain as a result of what the victim's mother testified was a "full-force slap" by defendant to the victim's face (*see People v Chiddick*, 8 NY3d 445, 447 [2007]; *People v Williamson*, 21 AD3d 575, 575-576 [3d Dept 2005], *lv denied* 6 NY3d 761 [2005]; *see also People v Smith*, 45 AD3d 1483, 1483 [4th Dept 2007], *lv denied* 10 NY3d 771 [2008]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). County Court, sitting as the trier of fact, could have reasonably concluded that defendant's striking of the victim with an open hand in such a forceful manner was not a mere " 'petty slap[]' " (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]), and that it caused "more than slight or trivial pain" (*Chiddick*, 8 NY3d at 447).

Furthermore, viewing the evidence in light of the elements of the crime of assault in the second degree in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to that crime is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495). Contrary to defendant's contention, the testimony of the victim's mother that the victim "constantly complained about pain" after the incident and that she gave him over-the-counter pain medication "for quite a few weeks" because "[h]e would cry that his face hurt" was not incredible as a matter of law, i.e., "it was not manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Harris*, 56 AD3d 1267, 1268 [4th Dept 2008], *lv denied* 11 NY3d 925 [2009]; *see People v Johnson*, 153 AD3d 1606, 1607 [4th Dept 2017], *lv denied* 30 NY3d 1020 [2017]).

Finally, we conclude that any error in the court's refusal to suppress defendant's statements is harmless beyond a reasonable doubt (*see generally People v Crimmins*, 36 NY2d 230, 237 [1975]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court