223 A.D.2d 607, 637 N.Y.S.2d 172
(Cite as: 223 A.D.2d 607, 637 N.Y.S.2d 172)

Supreme Court, Appellate Division, Second Department, New York.
The PEOPLE, etc., Respondent,
v.
Raymond ROSE, Appellant.
Jan. 16, 1996.

Defendant was convicted in the Supreme Court, Queens County, Browne, J., of first-degree sodomy, first-degree sexual abuse, use of child in sexual performance, and endangering welfare of child, and he appealed. The Supreme Court, Appellate Division, held that errors in permitting unsworn testimony of five-year-old complainant without first conducting preliminary examination, in not giving voluntariness charge, and in giving expansive no-adverse-inference charge which implied that defendant's exercise of his right not to testify was tactical decision together deprived defendant of fair trial.

Reversed.

West Headnotes

[1] Criminal Law 110 412(5)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412 In General
110k412(5) k. Particular Prosecutions, Admissibility In. Most Cited Cases
Hearing court properly denied defendant's motion to suppress his oral statements to law enforcement authorities since they were voluntarily made after defendant knowingly and intelligently waived his *Miranda* rights. U.S.C.A. Const.Amend. 5.

[2] Criminal Law 110 1186.1

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1185 Reversal
110k1186.1 k. Grounds in General. Most Cited Cases
Trial court's errors in permitting unsworn testimony of five-year-old complainant without first conducting preliminary examination, in not giving voluntariness charge, and in giving expansive no-adverse-inference charge which implied that defendant's exercise of his right not to testify was tactical decision together deprived defendant of fair trial in prosecution for sex crimes. McKinney's CPL § 470.15, subd. 3(c).

[3] Witnesses 410 77

410 Witnesses
410II Competency
410II(A) Capacity and Qualifications in General
410k77 k. Examination of Witness as to Competency. Most Cited Cases

Witnesses 410 78

410 Witnesses
410II Competency
410II(A) Capacity and Qualifications in General
410k78 k. Evidence as to Competency in General. Most Cited Cases
Trial court improperly permitted unsworn testimony of five-year-old complainant, in sex crimes prosecution, without first conducting preliminary examination to determine whether she understood nature of oath and could, therefore, offer sworn testimony or whether she possessed sufficient intelligence and capacity to justify reception of unsworn testimony. McKinney's CPL § 60.20, subd. 2.

[4] Witnesses 410 77

410 Witnesses
410II Competency

410II(A) Capacity and Qualifications in General
410k77 k. Examination of Witness as to Competency. Most Cited Cases

Witnesses 410 78

410 Witnesses
410II Competency
410II(A) Capacity and Qualifications in General
410k78 k. Evidence as to Competency in General. Most Cited Cases
Witnesses under age of 12 are presumptively incompetent to testify in criminal cases and presumption may only be rebutted by proper preliminary examination of witness.

[5] Criminal Law 110 781(1)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k781 Admissions and Confessions
110k781(1) k. Necessity of Instructions. Most Cited Cases
Failure of court in sex crimes prosecution to give charge on voluntariness of defendant's statement was error since statute permitting charge was mandatory and absence of charge deprived jury of any instructions regarding standards by which to evaluate defendant's claim that statement at issue had been coerced. McKinney's CPL § 710.70, subd. 3.

[6] Criminal Law 110 781(2)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k781 Admissions and Confessions
110k781(2) k. Evidence Justifying or Requiring Instructions. Most Cited Cases

Criminal Law 110 781(5)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k781 Admissions and Confessions
110k781(5) k. Excluding from Consideration If Found Involuntary. Most Cited Cases
Despite adverse ruling at pretrial hearing regarding admissibility of defendant's statement, when evidence sufficient to create factual dispute about voluntariness of statement is adduced at trial, court must submit that issue to jury with instructions to disregard statement upon finding that it was involuntarily made. McKinney's CPL § 710.70, subd. 3.

[7] Criminal Law 110 1173.2(7)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1173 Failure or Refusal to Give Instructions
110k1173.2 Instructions on Particular Points
110k1173.2(7) k. Admissions and Confessions. Most Cited Cases
Trial court's error in not giving voluntariness charge in sex crimes prosecution could not be deemed harmless given that defendant's statement formed integral part of people's case, and it was not clear whether jury would have convicted defendant without it. McKinney's CPL § 710.70, subd. 3.

[8] Criminal Law 110 787(2)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k787 Failure of Accused to Testify, to Testify Fully, or to Make Statement
110k787(2) k. Requisites and Sufficiency of Instructions. Most Cited Cases

Criminal Law 110 1172.2

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1172 Instructions
110k1172.2 k. Instruction as to Evidence. Most Cited Cases
Trial court's expansive no-adverse-inference charge, which improperly implied that defendant's exercise of his right not to testify was tactical decision, was reversible error.

****173** Brenner & Scott, Melville, N.Y. (**Joel A. Brenner** of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (Steven J. Chananie, Wendy G. Brown, and Melissa G. Vaughan of counsel), for respondent.

Before BRACKEN, J.P., and ALTMAN, HART and GOLDSTEIN, JJ.

***607** MEMORANDUM BY THE COURT.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Browne, J.), rendered April 15, 1993, convicting him of sodomy in the first degree, use of a child in a sexual performance, sexual abuse in the first degree, and endangering the welfare of a child, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of the branches of the defendant's omnibus motion which were to suppress, *inter alia*, his oral statements to law enforcement authorities.

ORDERED that the judgment is reversed, on the law and as a matter of discretion in the interest of justice, and a new trial is ordered. The facts have been considered and determined to have been established.

[1] The hearing court properly denied the defendant's motion to suppress his oral statements to law enforcement authorities since they were voluntarily made after the defendant knowingly and intelligently waived his *Miranda* rights (*see*, *People v. Hylton*, 198 A.D.2d 301, 603 N.Y.S.2d 560; *People v. Finn*, 180 A.D.2d 746, 580 N.Y.S.2d 75; *People v. Sohn*, 148 A.D.2d 553, 539 N.Y.S.2d 29; *People v. Woods*, 141 A.D.2d 588, 529 N.Y.S.2d 194). The defendant's remaining contentions regarding the suppression of evidence are unpreserved for appellate review and, in any event, without merit.

Viewing the evidence in the light most favorable to the prosecution (*see*, *People v. Contes*, 60 N.Y.2d 620, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find that it is legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Moreover, upon the exercise of our factual review power, we are satisfied that the verdict of guilt is not against the weight of the evidence (*see*, CPL 470.15[5]).

[2] However, we find that the cumulative effect of several errors committed by the trial court deprived the defendant of a fair trial. Although two of these errors are not preserved for appellate review, we reach them in the exercise of our interest of justice jurisdiction (*see*, CPL 470.15[3][c]).

***608** [3][4] First, it is well established that "[w]itnesses under the age of 12 are presumptively incompetent to testify in criminal cases" (*People v. Ranum*, 122 A.D.2d 959, 960, 506 N.Y.S.2d 105), and the presumption may only be rebutted by a proper preliminary examination of the witness (*see*, *People v. Rowell*, 88 A.D.2d 647, 648, 450 N.Y.S.2d 216, *rev'd on other grounds* 59 N.Y.2d 727, 463 N.Y.S.2d 426, 450 N.E.2d 232; *People v. Kalicki*, 49 A.D.2d 1032, 374 N.Y.S.2d 501; CPL 60.20[2]). It was error for the trial court in this case to permit the unsworn testimony of the five-year-old complainant without first conducting a preliminary examination to determine whether she understood the nature of an oath and could, therefore, offer sworn testimony or whether she possessed sufficient intelligence and capacity to justify the reception of unsworn testimony (*see*, CPL 60.20[2]; *see*, *People v. Rowell, supra; People v. Kalicki, supra*).

[5][6][7] Second, the court also erred by denying

the defendant's request for a voluntariness charge pursuant to CPL 710.70(3). It is well settled that, despite an adverse ruling at ****174** a pretrial hearing regarding the admissibility of a defendant's statement, when evidence sufficient to create a factual dispute about the voluntariness of the statement is adduced at trial, the court must submit that issue to the jury with instructions to disregard the statement upon a finding that it was involuntarily made (*see*, CPL 710.70 [3]; *see*, *People v. Graham*, 55 N.Y.2d 144, 447 N.Y.S.2d 918, 432 N.E.2d 790; *People v. Cefaro*, 23 N.Y.2d 283, 296 N.Y.S.2d 345, 244 N.E.2d 42; *People v. Luis*, 189 A.D.2d 657, 592 N.Y.S.2d 357). The failure of the court in this case to give a voluntariness charge was error since the statute is mandatory and the absence of the charge deprived the jury of any instructions regarding the standards by which to evaluate the defendant's claim that the statement at issue had been coerced (*see*, *People v. Iglesia*, 96 A.D.2d 515, 516, 464 N.Y.S.2d 557; *see also*, *People v. Sutton*, 122 A.D.2d 896, 505 N.Y.S.2d 937). Moreover, this error cannot be deemed harmless given that the defendant's statement formed an integral part of the People's case, and it is not clear whether the jury would have convicted the defendant without it (*see*, *People v. Gibson*, 89 A.D.2d 859, 860, 453 N.Y.S.2d 202; *see also*, *People v. Sutton*, *supra*).

[8] Third, the court's expansive no-adverse-inference charge implied that the defendant's exercise of his right not to testify was a tactical decision (*see*, *People v. King*, 200 A.D.2d 765, 607 N.Y.S.2d 120; *People v. Graham*, 196 A.D.2d 552, 601 N.Y.S.2d 149; *People v. McCain*, 177 A.D.2d 513, 576 N.Y.S.2d 146; *see also*, *People v. Mercado*, 154 A.D.2d 556, 546 N.Y.S.2d 396). Thus, it was reversible error.

The defendant's remaining contentions are either unpreserved for appellate review (*see*, CPL 470.05[2]), without merit, or need not be addressed in light of our determination.

N.Y.A.D. 2 Dept.,1996.
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