

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0630-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DANIEL MELENDEZ, a/k/a
DANIEL I. PEREZ-MELENDEZ,

Defendant-Appellant.

Argued January 13, 2022 – Decided May 16, 2022

Before Judges Haas and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 18-12-1658.

Joseph J. Benedict argued the cause for appellant (Benedict and Altman, attorneys; Joseph J. Benedict and Philip Nettl, on the briefs).

David M. Liston, Assistant Prosecutor, argued the cause for respondent (Yolanda Ciccone, Middlesex County Prosecutor, attorney; David M. Liston, of counsel and on the brief).

PER CURIAM

Defendant Daniel Melendez appeals from an October 2, 2020 judgment of conviction after a jury found him guilty, following a five day trial of first-degree sexual assault of A.H.¹ when she was less than thirteen years old, N.J.S.A. 2C:14-2(a)(1), and third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(1). We affirm the conviction but reverse and remand for resentencing on count three.

We discern the following facts from the record. A.H. was born in 2009. A.H. lives with her mother, Evelyn Avalos, and her older sister in Perth Amboy. A.H. has always shared a bedroom with her mother and her sister, each with their own bed. A.H. was two years old when defendant started dating her mother. Defendant would stay at Avalos's residence every two weeks to twenty days. A.H. considered defendant her stepfather. Defendant continued to date Avalos until 2019.

On November 20, 2017, A.H.'s third-grade class had a presentation at school by members of the Middlesex County Child Assault Prevention Project, which was designed to "teach children about their rights to feel safe, strong and

¹ We use initials to protect the privacy of defendant's alleged victim. R. 1:38-3(c)(9), -(12).

free." The children engaged in role playing exercises that addressed bullying, strangers, and "when a trusted adult touches you or wants you to touch them in a way that doesn't make you feel safe." After the presentation, the students were given the opportunity during "review time" to speak privately with a presenter about the workshops, give feedback, and share any experiences of their own.

During review time, A.H. approached Regina Burden, one of the presenters of the program, and disclosed she had been sexually abused by defendant. A.H. disclosed the abuse included sexual penetration. Following A.H.'s disclosure, Burden notified her supervisors, the school counselor, and the Department of Child Protection and Permanency. The police were notified, and after speaking with the school counselor and Burden, Detective Gina Betancourt called the Middlesex County Prosecutor's Office, Special Victim Unit. Detective Michael Connelly of the Middlesex County Prosecutor's Office spoke to Avalos about A.H.'s disclosure and arranged for a forensic interview.

On November 21, 2017, Agent Nicole Ortiz-Franklin conducted a video recorded forensic interview of A.H. During the interview, A.H. described the most recent incident as having occurred in October 2017 when her mother was in Guatemala. A.H. and her sister were staying with their grandmother, but A.H. explained defendant took her and her sister for the day to their apartment and

told A.H.'s grandmother he would return them at nine. A.H. stated defendant was in the same bedroom as A.H. and her sister and when A.H.'s sister went to use the bathroom, defendant pulled A.H.'s pants and underwear down and touched the outside of her vagina, which she called her "private part," with his hand. A.H. then said defendant went on top of her, put his penis, which she called his "private part," in her private part, and began moving. When defendant was done, A.H. stated he told her she could not tell anyone and that it was their secret.

During the interview A.H. also stated defendant had been sexually abusing her since she was six years old. A.H. described how the abuse would often happen when her mom was cooking, and her sister was in the living room or bathroom. A.H. explained defendant would tell her to go into the bedroom. Once inside the bedroom, A.H. stated defendant would put a towel under A.H. A.H. said defendant told her she could not tell anyone because it was their secret. When asked about if A.H. ever saw anything come out of defendant's private part, A.H. said a white liquid would come out after he had his private part inside her private part.

On January 17, 2018, A.H. met with Dr. Gladibel Medina, the Medical Director of the Dorothy B. Hersh Child Protection Center of St. Peter's Hospital

in New Brunswick. At the meeting, Dr. Medina spoke to A.H., gathered A.H.'s medical history, examined A.H., and spoke to Avalos. A.H. told Dr. Medina about how "she was touched in her front genital region inside by the person's penis moving around" and that "white liquid popp[ed] out of the person's penis onto her and a towel[.]" A.H. also mentioned "discomfort inside between her labia" and that she had difficulties peeing immediately after the incidents occurred, which would last for about a day. Dr. Medina described A.H.'s difficulties peeing as dysuria or painful urination. Dr. Medina observed no visible signs of sexual abuse.

On December 20, 2018, a Middlesex County Grand Jury returned a multi-count indictment against defendant, charging him with first-degree sexual assault of a victim who was less than thirteen years old, N.J.S.A. 2C:14-2(a)(1) (count one), second-degree sexual assault, N.J.S.A. 2C:14-2(b) (count two), and second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(1) (count three).

On September 13, 2019, at a pre-trial conference, the State notified the judge that it filed a motion to admit A.H.'s statements to Dr. Medina under N.J.R.E. 803(c)(27). On September 24, 2019, the judge held a N.J.R.E. 104 hearing on Dr. Medina's testimony. At the hearing, the State informed the judge

it intended on eliciting the entirety of Dr. Medina's report and her findings. Accordingly, the judge expanded the hearing to include the admissibility of Dr. Medina's findings and opinions. Dr. Medina testified her diagnosis of child sexual abuse was based on her conversations with A.H. and Avalos and her physical examination of A.H. The judge expressed concern that allowing Dr. Medina to testify about her diagnosis of sexual abuse went to the ultimate issue. The State argued Dr. Medina should be allowed to testify to her opinion because she reached her conclusion "based on the medical history she received as well as the physical examination that she conducted." Defendant argued allowing Dr. Medina to testify that she made a diagnosis of sexual abuse would constitute reversible error and highlighted the importance of leaving the fact-finding to the jury.

At the conclusion of the hearing, the judge decided:

1) Dr. Medina can testify. She can testify to the statements that were made to her by [A.H.], but they can only be testified in the context if those were the statements that she relied upon to provide the jury with her opinion that:

1) The nature and the detail that she -- the nature and the detail of the event that [A.H.] provided to Dr. Medina in light of [A.H.]'s age is an indicator of sexual contact. And that --

[2)] Secondly, [A.H.] expressing irritation when she voided after the alleged sexual contact is, also, an indicator of sexual contact.

Dr. Medina will only be permitted to testify as to those opinions. Would not -- is not permitted to testify as to any opinion as to she has as to whether there was inappropriate sexual contact or not. And that the jury will be given a limiting instruction -- an appropriate limiting instruction advising them that Dr. Medina testifying as to the statements for Ashley are solely for the purposes to educate the jury as to what Dr. Medina relied upon in providing her opinions before the jury. But that her opinions are to be evaluated by the jury to be only as credible as the underlying facts that she relied upon.

Defendant's trial occurred over the course of five days. The State presented testimony from various witnesses including Burden, Detective Betancourt, A.H., Avalos, Sergeant Connelly, Dr. Medina, and Agent Ortiz-Franklin. The State also played the forensic interview. After the State's witnesses, the State moved to amend count three, endangering the welfare of a child, from second-degree to third-degree. Defendant testified on his own behalf.

Directly relevant to this appeal is Dr. Medina's testimony. After being qualified as an expert, Dr. Medina testified about her meeting with A.H., including A.H.'s medical history and A.H.'s physical examination. The State then asked Dr. Medina, "[a]nd, Doctor, did you come to a conclusion or make

findings with respect to your examination of [A.H.]?" Dr. Medina replied, "[s]o the medical history I gathered and her physical examination -- the medical history I gathered from mom and [A.H.] in addition to the physical examination supported her disclosure of being sexually assaulted."

Defendant objected, and the judge held a sidebar. The judge made it clear that Dr. Medina was not to give an opinion as to whether there was sexual abuse. After excusing the jury, the judge explained to Dr. Medina that she "could not give an opinion as to whether or not [she] believed there was sexual abuse here, child sexual abuse[,] " but she "could give [her] opinion as to whether in the course of the interview there were -- there were indicators that are consistent with someone being sexually abused so that [her] opinions [were] not particular as to [A.H.], but in general." The judge went on to state:

And the classic example was you had testified that due to the language that she used in presenting her history, the detail and the choice of words as I understood your testimony that the words that she used were words that were con -- that, in your opinion, were more consistent with someone experiencing an event as opposed to observing an event.

. . . .

And that is something you're looking for in terms of whether there was -- in terms of that is an indicator, then of sexual abuse.

The judge also stated, "if you relate it to this case then you're giving an opinion as to the guilt of the defendant and you want to avoid that."

After Dr. Medina expressed some confusion, the judge clarified that "it being an indicator to [her] of sexual assault . . . would be an opinion that would be permissible as opposed to this is sexual assault." The State argued Dr. Medina's answer was within those parameters. Defendant, however, argued Dr. Medina's response went right to guilt and that failing to strike the answer and provide a curative instruction would be "reversible error, because the bell's been rung, and we can't unring that." Although the judge in hindsight "understood exactly what [Dr. Medina was] saying[,] because the judge thought the response came off as Dr. Medina giving an opinion, the judge decided to strike the last question and answer.

Before the jury came back in, the State clarified that it was going to ask Dr. Medina if there "were any indicators of sexual assault" and "what those indicators were." The judge approved but clarified that "when she's giving these opinions as to indicators it's in general, it's not specific as to this case." The State then questioned how general Dr. Medina's testimony had to be considering "there were specific indicators based on the history that [A.H.] gave in th[e]

examination." The judge then stated, "[w]e have to balance between using the specific history of [A.H.] with her providing general opinion as to indicators."

The judge then instructed the State to preview what Dr. Medina's testimony would be. Upon hearing Dr. Medina repeat everything A.H. told her and relating her statements to indications of sexual assault, defendant protested that he did not want the curative instruction and that the judge should "let it come in because this [was] worse. . . . Because now they[] [were] going to hear a second time again." Defendant objected to the entire line of previewed questioning. The judge did not "find it objectionable to how the State wishe[d] to proceed in this matter." Even though Dr. Medina would be going through the same information as presented earlier in her testimony, the judge found it was not unduly prejudicial and would be "informative to the jury." The judge then brought the jury back and instructed them to ignore the last question and answer.

When asked by the State what indicators of sexual assault were found, Dr. Medina stated "[s]o in [A.H.]'s case it was the sexually explicit details she provided and the physical symptoms [,]" which Dr. Medina clarified was the painful urination. When asked "[a]nd what about that detail is an indictor to you[,]" Dr. Medina stated:

The details that she provided of the person taking her clothes and his clothes off and putting his penis in her

front genital area, moving while that was happening, white liquid popping out into her body and the towel that was placed under her by this person and experiencing discomfort when the inside was touched.

The State then asked, "and what about that was an indicator of sexual assault to you, Doctor?" For both questions, defendant objected, arguing the question was asked and answered. After overruling the first objection, the judge held a sidebar on the second objection. The judge then specifically instructed the State how to phrase the question to Dr. Medina and allowed the testimony to resume.

Cross-examination, re-direct, re-cross and the second re-direct all proceeded without objection as to Dr. Medina's testimony. On the second re-cross, defendant suggested Dr. Medina made a "faulty finding" because she did not include certain details, which came from A.H.'s mother, in her report. Defendant suggested that A.H. "might have observed these . . . certain explicit [experiences]." Finally, on the last re-direct, the State asked, "Dr. Medina, were there additional details that led to your conclusion that [A.H.] had experienced this and not observed it?" Dr. Medina responded, "[n]o, everything is in my report." Defendant did not object to that question, and Dr. Medina's testimony finished.

The jury ultimately found defendant guilty on count one and three.² Defendant was sentenced on September 9, 2020. At sentencing, the judge determined only aggravating factor nine, the need to deter defendant and others from violating the law, applied. Further, the judge found defendant's lack of criminal history was a mitigating factor. On count one, the judge sentenced defendant to the minimum sentence of twenty-five years' imprisonment without eligibility for parole pursuant to the Jessica Lunsford Act, N.J.S.A. 2C:14-2(a). On count three, the judge sentenced defendant to seven years' imprisonment to run concurrently to the sentence imposed on count one. This appeal followed.

On appeal, defendant presents the following arguments for this court's consideration:

POINT I

[DR. MEDINA'S TESTIMONY USURPED THE JURY'S FUNCTION BY EXPRESSING OPINIONS ON THE ULTIMATE ISSUE IN THE CASE.]

A. The trial court committed harmful error by permitting Dr. Medina to express an opinion regarding A.H.'s statements to her.

B. Dr. Medina's violations of the Court's ruling laid waste to any limitations the trial court attempted to place on it.

² The jury never rendered a verdict on count two because the verdict sheet mistakenly treated it as a lesser included offense to count one.

This court reviews the trial court's evidentiary rulings for an abuse of discretion. State v. Scott, 229 N.J. 469, 479 (2017). The ruling "should be upheld 'absent a showing of an abuse of discretion' or 'a clear error of judgment.'" State v. Lora, 465 N.J. Super. 477, 492 (App. Div. 2020) (quoting State v. Perry, 225 N.J. 222, 233 (2016)). This court "will not substitute [its] judgment unless the evidentiary ruling is 'so wide of the mark' that it constitutes 'a clear error in judgment.'" State v. Garcia, 245 N.J. 412, 430 (2021) (quoting State v. Medina, 242 N.J. 397, 412 (2020)).

N.J.R.E. 704 states: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.J.R.E. 704. While an expert can express an opinion that embraces an ultimate issue, "an expert should not express an opinion on matters that fall within the ken of the average juror or offer an opinion about the defendant's guilt." State v. Cain, 224 N.J. 410, 426 (2016). Nor can an expert offer an opinion on a witness's credibility or bolster a fact witness's "testimony about straightforward, but disputed facts." Id. at 427; see also State v. Frisby, 174 N.J. 583, 595 (2002). As a general matter "expert testimony is not necessary to tell the jury the 'obvious.'" Cain, 224 N.J. at 426 (quoting State v. Nesbitt, 185 N.J. 504, 514 (2006)). Rather, an expert's

testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue." N.J.R.E. 702.

Here, Dr. Medina's testimony fell within the boundaries of the rules of evidence. It is not "obvious" to the average juror what may or may not be an indicator of sexual assault. See Nesbitt, 185 N.J. at 514. Dr. Medina did not "offer an opinion about the defendant's guilt." Cain, 224 N.J. at 427. The expert opinion was that A.H.'s factual account "supported [A.H.'s] disclosure of being sexually assaulted." Dr. Medina always referred to "the person" when discussing the details A.H. provided to her. Dr. Medina needed to refer to the specifics of A.H.'s case as the basis for her conclusion that the specificity of A.H.'s account was an indicator that a sexual assault took place. Although Medina opined that A.H. experienced a sexual assault rather than observed it, that was only after defendant on cross implied that Dr. Medina's report was faulty and that A.H. might have observed sexual encounters. Therefore, defendant is erroneously equating testimony that A.H. had experienced a sexual assault with testimony that defendant was guilty. See State v. Baluch, 341 N.J. Super. 141, 185 (App. Div. 2001).

Finally, we reject defendant's argument that Dr. Medina's testimony limited the jury's ability to assess A.H.'s credibility. Defendant's argument is

purely speculative. Dr. Medina stated her report was based on A.H.'s statements. Dr. Medina never expressed an opinion on A.H.'s credibility. The jury could still assess A.H.'s credibility, especially because the judge provided the following jury instruction: "Your acceptance or rejection of the expert opinion will depend, therefore, to some extent on your findings as to the truth of the facts relied upon by the expert."³

Pursuant to Rule 3:21-10(b), the court may correct an illegal sentence at any time. R. 3:21-10(b). Because both parties agree to a remand on the sentencing for count three given that the sentence did not take into account the change from second-degree to third-degree, we reverse and remand for that limited purpose.

Affirmed in part and reversed and remanded in part. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



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³ Defendant's reliance on J.Q. is misplaced, as it involved the admission of Child Sexual Abuse Accommodation Syndrome (CSAAS) testimony, not a factor in this case.