SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1509-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

M.C.-A.,

Defendant-Appellant.

Submitted February 7, 2017 – Decided August 8, 2017

Before Judges Fisher, Ostrer and Leone.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 13-08-1143.

Joseph E. Krakora, Public Defender, attorney for appellant (Joshua D. Sanders, Assistant Deputy Public Defender, of counsel and on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent (Sarah E. Ross, Deputy Attorney General, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant, M.C.-A., was convicted of sexually assaulting his stepdaughter, E.D. (Edith),[1] between 2005 and 2012, when she was ten to sixteen years old. On appeal, he contends the admission of testimony about the Child Sex Abuse Accommodation Syndrome (CSAAS) constituted plain error and his sentence was manifestly excessive. In a pro se brief, defendant also argues his right to cross-examine Edith was infringed and his conviction was against the weight of the evidence. We reject these arguments and affirm.

I.

Defendant lived with Edith; his wife and Edith's biological mother, L.D. (Lucy); and his two biological daughters, K.C. (Kelly) and A.C. (Amy). Edith testified she was five or six years old when defendant first moved in with Lucy. She was "about nine" when defendant began sexually abusing her. She testified that they engaged in countless acts of oral sex before advancing to sexual intercourse when she was thirteen.

Many of the assaults occurred in the family residence when Lucy was out, but Kelly was frequently nearby. Defendant, who was a truck driver, would also regularly take the two girls to his truck, which he kept at a nearby parking lot. Once there, he

[1] We use a pseudonym to protect the child's privacy.

would sexually assault Edith while Kelly waited in the car or in another part of the truck.

Edith stated that defendant did not demand secrecy; he did not say "anything . . . about telling." "[H]e would always tell me, that he loved me as a daughter, and in another way, too." She testified she "thought of him as a father until I figured what he was doing to me wasn't right." At one point she asked him to stop. He responded he would try, but never did. She also once threatened to tell somebody about what he was doing, and he said "to go ahead, that he didn't care."

In January 2012, Edith disclosed the abuse to Lucy, Kelly and a close friend. She testified she delayed because she was scared. Lucy immediately called defendant, who was in Texas at the time, before alerting the authorities. After their conversation, defendant agreed to drive back to New Jersey. Police stopped him soon after he crossed the state border.

During the stop, the investigators conducted a search of defendant's truck, seizing various electronic devices, including two cameras. A subsequent forensic search of one unearthed twenty-two previously deleted images, dated February and August 2010, depicting a woman, some apparently with her face omitted, in sexually provocative poses and engaging in sexual acts. Edith identified herself and defendant's genitalia in the photographs.

She noted she and he were shaven at his request. She also identified furniture in the background from her mother's bedroom.

Kelly testified she had seen defendant and Edith engage in sexual acts through openings in the door of her parents' bedroom. She also described her trips with Edith to defendant's truck, noting that Edith would sometimes return from the truck crying and with "red marks" on her chest. Lucy did not witness any of the alleged assaults, but she was aware that defendant took Edith to his truck. She also identified her husband in the recovered photos. A former co-worker also testified that defendant told him about the allegations shortly after they were made, and insisted that what happened between him and his stepdaughter was "mutual." Edith's friend testified as a fresh complaint witness.

The State also presented testimony about CSAAS from Susan Esquilin, Ph.D., who was admitted as an expert in child sexual assault. The defense did not object to Dr. Esquilin's qualifications or to the reliability of the social science supporting her explanation of CSAAS.

Defendant testified he never had inappropriate sexual contact with Edith. He also denied he was depicted in the photographs. He explained that he never used the seized camera; rather, it was a "family camera" that the children used. He had no idea how it got into his truck.

He contended that all the non-police witnesses were liars. He claimed his wife and daughters were lying to prevent him from moving the family to North Carolina. He suggested his co-worker was jealous of his success and insinuated that he may have had a relationship with his wife. He also described certain behavioral problems Edith had. Specifically, he noted she had a boyfriend without telling her mother, and Kelly sometimes lied to cover for her older sister. The defense also elicited testimony that Edith skipped school and church as a teen.

In addition, the defense highlighted the lack of forensic evidence and inconsistencies between the sisters' recollections. The defense was critical of the State's failure to investigate Edith's boyfriend. The defense also invoked Dr. Esquilin's testimony that abused children commonly disclose assaults in "bits and pieces," noting that Edith disclosed the attacks "all at one time."

The jury convicted defendant of first-degree aggravated sexual assault for sexually penetrating a victim less than thirteen years old, N.J.S.A. 2C:14-2(a)(1); first-degree aggravated sexual assault for sexually penetrating a victim between thirteen and sixteen years old as "a resource family parent, a guardian, or [one who] stands in loco parentis within the household," N.J.S.A. 2C:14-2(a)(2)(c); first-degree endangering the welfare of a child

by a parent or a person charged with the child's care or custody, by causing a child under sixteen years old to engage in a prohibited sexual act knowing or intending that she be photographed, N.J.S.A. 2C:24-4(b)(3);[2] as well as second-degree sexual assault, N.J.S.A. 2C:14-2(b); two counts of second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a) and -4(b)(4); and third-degree aggravated criminal sexual contact, N.J.S.A. 2C:14-3(a).

After the verdict, defendant received a psychological examination administered by Mark Frank, Ph.D. Dr. Frank's report noted that defendant still "denied any wrongdoing whatsoever." The report also recorded that defendant had described himself as "a ladies man," who was "[p]rimarily attracted to younger women, but clarified he meant women older than age 20." He firmly denied being a pedophile.

Dr. Frank concluded that defendant was not eligible for sentencing under the Sex Offender Act, N.J.S.A. 2C:47-1 to -10, due to a "clear absence of a finding of compulsive sexual behavior." He found defendant's actions were "repetitive,"

[2] After the events here, the Legislature modified this section by making it a first-degree offense without regard to whether the actor was a parent or in loco parentis, L. 2013, c. 136, § 1, and raising the age of children protected by the provision, L. 2013, c. 51, § 13.

intentional acts of "exploitative and hedonistic indulgence[,]" rather than "irresistible compulsion."

At sentencing, the trial court found aggravating factors one — "[t]he nature and circumstances of the offense, and the role of the actor therein," N.J.S.A. 2C:44-1(a)(1); three — "[t]he risk that the defendant will commit another offense," N.J.S.A. 2C:44-1(a)(3); four — "[t]he defendant took advantage of a position of trust or confidence to commit the offense," N.J.S.A. 2C:44-1(a)(4); and nine — "[t]he need for deterring the defendant and others," N.J.S.A. 2C:44-1(a)(9). The court was clearly convinced that these factors substantially outweighed the sole mitigating factor, defendant's lack of a prior criminal history, N.J.S.A. 2C:44-1(b)(7).

The court sentenced defendant to an aggregate thirty-four-year term of imprisonment. That term comprised consecutive terms of eighteen years and sixteen years for the two aggravated sexual assault charges and concurrent terms of twelve years on first-degree endangering, seven years on second-degree sexual assault, and six years on one of the second-degree endangering counts. The remaining counts were merged. The sentence was subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, and Megan's Law, N.J.S.A. 2C:7-1 to -23.

II.

On appeal, defendant raises the following points in his counselled brief:

> POINT I
>
> BECAUSE CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME OPINION TESTIMONY IS NOT AT A STATE OF THE ART SUCH THAT AN EXPERT'S TESTIMONY COULD BE SUFFICIENTLY RELIABLE, IT IS INADMISSIBLE UNDER N.J.R.E. 702 AND IT WAS ERROR TO ADMIT SUCH TESTIMONY IN THIS TRIAL. (NOT RAISED BELOW).
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> POINT II
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> THE CSAAS TESTIMONY WAS IMPERMISSIBLE BOTH IN ITS INTRODUCTION AND, SUBSEQUENTLY, SCOPE DURING THE COURSE OF THE TRIAL.
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> POINT III
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> THE SENTENCE IS MANIFESTLY EXCESSIVE BECAUSE, AFTER EXPIRATION OF HIS PRISON TERM, DEFENDANT WILL BE CLOSELY MONITORED FOR THE REST OF HIS LIFE AND WILL BE A LOW RISK TO RE-OFFEND.

Defendant also raises the following arguments in a pro se brief:

> Point I:
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> Defendant's Sixth Amendment Right to Adequately and Fully Cross-Examine the Victim was Violated, Especially when there was no Authenticated Evidence that the Faceless Male Depicted in the Photographs was, in fact, the Defendant and Not the Victim's Boyfriend, therefore, requiring Reversal of Conviction.

Point II:

The State Failed to Meet its Burden of Proof Beyond a Reasonable Doubt that the Defendant Unlawfully Committed these Crimes as Alleged and Charged.

A.

Defendant raises two arguments against the use of CSAAS expert testimony in this case. He broadly challenges our Supreme Court's long acceptance of CSAAS testimony, and he contends that the use of CSAAS testimony here exceeded its permitted scope. As he raised neither argument before the trial court, we apply a plain error standard of review. Defendant must show that any error must be "clearly capable of producing an unjust result." R. 2:10-2. Yet, we discern no error — certainly none "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. Macon, 57 N.J. 325, 336 (1971).

As to defendant's first argument, we are bound by our Supreme Court's precedent. See White v. Twp. of N. Bergen, 77 N.J. 538, 549-50 (1978) (stating that trial and intermediate appellate courts were "bound, under the principle of stare decisis, by formidable precedent" although the Supreme Court reviewed whether the precedent "should stand"). Beginning with State v. J.Q., 130 N.J. 554 (1993), and reaffirmed in the years thereafter, see,

e.g., State v. J.R., 227 N.J. 393, 414 (2017); State v. W.B., 205 N.J. 588, 609-11 (2011); and State v. R.B., 183 N.J. 308, 322-28 (2005), the Court has held that there exists a sufficient scientific basis under N.J.R.E. 702 to admit expert testimony about CSAAS to "identif[y] or describe[] behavioral traits commonly found in child-abuse victims." J.Q., supra, 130 N.J. at 573. The Court believed the testimony offered information beyond the ken of lay persons insofar as it "counter[ed] the mythology that if the abuse had occurred, the children surely would have complained sooner." Id. at 582. As the Court stated in R.B., supra, 183 N.J. at 329, CSAAS testimony should be used only "to explain . . . why it is not uncommon for sexually abused children, without reference to the child victim in that case, to delay reporting their abuse and why many children, again without reference to the child victim in that case, recant allegations of abuse and deny the events at issue."

The Court has recently decided to reexamine the scientific basis of CSAAS. See State v. J.L.G., ___ N.J. ___, ___ (2017) (slip op. at 1-3) (granting certification on the question of "the reliability of CSAAS testimony" and summarily remanding the matter to the trial court for a Rule 104 hearing "to determine whether CSAAS evidence meets the reliability standard of N.J.R.E. 702, in light of recent scientific evidence"). The Court may also decide

to reexamine the factual premise for concluding that such expert testimony is needed, that is, the assumption that the average layperson is unlikely to understand that a victim of child sexual abuse might delay disclosing the assaults. Cf. Boland v. Dolan, 140 N.J. 174, 188 (1995) (expert testimony is barred unless its subject matter is "so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman" (internal quotation marks and citation omitted)).[3] However, it is not for this court to reexamine existing precedent. See In re Educ. Ass'n of Passaic, 117 N.J. Super. 255, 261 (App. Div. 1971) (stating it is not the intermediate appellate court's

[3] In connection with the underlying "myth" CSAAS was designed to counteract, the Court relied on the work of Roland C. Summit, M.D., who observed that "most adults who hear a distraught child accuse a 'respectable' adult of sexual abuse will fault the child." J.Q., supra, 130 N.J. at 566-67 (quoting Roland C. Summit, The Child Sexual Abuse Accommodation Syndrome, 7 Child Abuse and Neglect 177, 178 (1983)); see also Roland C. Summit, Abuse of Child Sexual Abuse Accommodation Syndrome, 1 Journal of Child Sexual Abuse 153, 154 (1992). In recent years, however, the public has been confronted with the reality of delayed disclosure through several high-profile incidents. Accordingly, the fact that children sometimes delay disclosure may no longer be beyond the ken of the average juror (if it ever was). See Jodi A. Quas et al., Do Jurors "Know" What Isn't So About Child Witnesses?, 29 Law and Hum. Behav. 425, 443 (2005) (noting that 84% of participants in the authors' study "knew that children who are sexually abused may not tell someone right away"); Ellen Gray, Unequal Justice: The Prosecution of Child Sexual Abuse 168-69 (1993) (publishing results of a survey in which most participants believed that delayed disclosure of child sexual abuse is "quite common").

"function to alter [a] rule" squarely decided by the Supreme Court), certif. denied, 60 N.J. 198 (1972).

While defendant's first argument questions precedent authorizing CSAAS expert testimony, his second argument seeks to apply it. But we discern no reversible error in Dr. Esquilin's testimony. She was careful to summarize CSAAS without "attempt[ing] to connect the dots between the particular child's behavior and the syndrome, or opine whether the particular child was abused." W.B., supra, 205 N.J. at 611 (internal quotation marks and citation omitted). Indeed, she expressly renounced the use of CSAAS as a diagnostic. She stated, "You can't take the fact that somebody didn't tell and say they were sexually abused. You can't conclude from the delay that somebody was abused." Moreover, the court offered appropriate protective instructions both after Dr. Esquilin testified and during the final jury charge, directing the jury not to "consider Dr. Esquilin's testimony as offering proof that child sexual abuse occurred in this case." See J.R., supra, 227 N.J. at 413-14.

We acknowledge that Dr. Esquilin briefly mentioned the controversy surrounding sexual abuse by priests to describe the syndrome. This reference was likely inappropriate. See id. at 416 ("To avoid confusing a jury, a CSAAS expert should not cite another case — particularly a publicized incident that resulted

in a conviction — in his or her testimony."). But "fleeting" missteps embedded within largely compliant testimony are not reversible, R.B., supra, 183 N.J. at 326-27, particularly when there is overwhelming evidence of guilt and the statements are followed by appropriate limiting instructions, see J.R., supra, 227 N.J. at 417-19.

Finally, whatever the future may hold for CSAAS expert testimony, we are convinced Dr. Esquilin's brief summary of the CSAAS did not affect the outcome of this case in light of the substantial evidence of guilt and the minor role her testimony played in the trial. Cf. W.B., supra, 205 N.J. at 614 ("Convictions after a fair trial, based on strong evidence proving guilt beyond a reasonable doubt, should not be reversed because of a technical or evidentiary error that cannot have truly prejudiced the defendant or affected the end result."); see also J.R., supra, 227 N.J. at 417-18. The evidence against defendant was substantial. The jury heard an extensive account of the abuse from the victim herself, a second eyewitness account of various incidents of abuse from the victim's sister, testimony from the victim's mother and co-worker that corroborated various aspects of victim's testimony, and pictures — downloaded from a camera in defendant's truck — of the victim performing oral sex on a person identified as defendant by the victim and her mother.

Furthermore, Dr. Esquilin's testimony was brief and avoided opining about the ultimate issue. To the extent Dr. Esquilin observed that child sexual abuse victims often delay disclosure, she may have been telling the jury something it already knew. It is not even clear that CSAAS provided much explanatory power over Edith's behavior. Aside from Edith's delay in disclosure, there were few obvious parallels between the facts in this case and the "factors . . . involved in delayed disclosure" that Dr. Esquilin identified and attributed to Dr. Summit. For example, there was no evidence that defendant expressly demanded secrecy, as Dr. Esquilin noted was common. And, as defense counsel pointed out in summation, the way in which Edith disclosed the abuse was atypical of CSAAS as Dr. Esquilin described it. The State did not refer to the testimony at all in summation.

Therefore, we are confident the impact of Dr. Esquilin's testimony was not prejudicial and not clearly capable of producing an unjust result.

B.

Turning to defendant's sentence, "appellate courts are . . . not to substitute their judgment for those of our sentencing courts." State v. Case, 220 N.J. 49, 65 (2014). A sentence will not be reversed without "such a clear error of judgment that it

shocks the judicial conscience." State v. Roth, 95 N.J. 334, 364 (1984).

We discern no error in the court's consideration of defendant's "den[ial of] responsibility for his crimes, despite the overwhelming evidence against him and the convictions" when applying aggravating factor three. Doubts have been expressed about the inference that a failure to confess post-conviction shows a need for longer imprisonment. See State v. Marks, 201 N.J. Super. 514, 539-40 (App. Div. 1985) (noting its "view that a defendant's refusal to acknowledge guilt following a conviction is generally not a germane factor in the sentencing decision"), certif. denied, 102 N.J. 393 (1986); cf. State v. Poteet, 61 N.J. 493, 497-99 (1972) (stating, in pre-Code case, "when the defendant has already been convicted, an admission of guilt is of doubtful value" for rehabilitative purposes, but concluding the trial court appropriately considered young defendant's admission of guilt and break with older co-defendant at sentencing). But the inference has been affirmed in more recent cases. See State v. Carey, 168 N.J. 413, 426-27 (2001) (affirming the trial court's application of factor three when defendant continued to "den[y] responsibility for the crash" in a vehicular homicide case); State v. Rice, 425 N.J. Super. 375, 382-83 (App. Div.) (affirming the trial court's sentence, which considered the fact that the defendant "did not

tell the truth when testifying . . . and took no responsibility for his actions" when applying factor three (internal quotation marks omitted)), certif. denied, 212 N.J. 431 (2012); State v. Rivers, 252 N.J. Super. 142, 153-54 (App. Div. 1991). And it certainly does not "shock the conscience" for the trial court to think that a defendant's utter lack of remorse implies he might commit the wrong again.

In any case, this inference was not the sole basis for the trial court's application of factor three. The court also noted that defendant only stopped his abuse because he was caught. It also relied on Dr. Frank's conclusion that the assaults were repeated, frequent, and rationally-chosen acts of brutality. These considerations provided ample support for the trial court's finding that defendant might re-offend.

We also affirm the court's application of aggravating factor nine. The Court has explicitly noted that sex abuse "[c]rime within the family is one of the most deeply troubling aspects of contemporary life . . . . [that] deeply threatens the fabric of society." State v. Hodges, 95 N.J. 369, 377 (1984). Accordingly, "[t]he sentence for such a crime must reflect primarily the severity of that crime." Ibid.; see also State v. Fuentes, 217 N.J. 57, 79 (2014) (when determining the appropriate sentence, "[d]emands for deterrence are strengthened in direct proportion

to the gravity and harmfulness of the offense" (internal quotation marks and citation omitted)).

The present case concerns the repeated sexual abuse of a young girl by her stepfather over several years, from childhood to adolescence. Defendant's actions were not compelled, but were the result of repeated, intentional decisions to violate and demean his stepchild. The court's conclusion that there was a heightened need to deter both defendant and society at large was not an abuse of discretion.

C.

In his pro se brief, defendant challenges the trial court's decision to preclude defense counsel from asking Edith whether she had a sexual relationship with her boyfriend. We review the trial court's decision for an abuse of discretion, see State v. Perry, 225 N.J. 222, 233 (2016), and we discern none.

Although the right to full cross-examination of an "accusing witness is among the minimal essentials of a fair trial[,]" a court may impose "reasonable limits" on defendant's confrontation rights out of a concern for resulting prejudice. State v. Budis, 125 N.J. 519, 531-32 (1991) (internal quotation marks and citation omitted). As the Court noted, "evidence of a victim's prior sexual activity . . . is prejudice per se." State v. Cuni, 159 N.J. 584, 604 (1999) (internal citation omitted). That prejudice provides

sufficient basis to bar evidence unless it "is relevant to the defense [and] has probative value outweighing its prejudicial effect." State v. Garron, 177 N.J. 147, 172 (2003), cert. denied, 540 U.S. 1160, 124 S. Ct. 1169, 157 L. Ed. 2d 1204 (2004).

Here, the sexual nature of Edith's relationship with her boyfriend was only tangentially relevant to defendant's case. Specifically, defendant asserts it served two purposes: (1) it indirectly supported his argument that Edith wanted to stay in New Jersey and therefore lied about the assaults, and (2) it indirectly supported the suggestion that Edith's boyfriend took and was portrayed in the pictures retrieved from the camera seized from defendant's truck.

We shall not disturb the court's determination that the evidence of any sexual relationship between Edith and her boyfriend was not sufficiently probative of an incentive to fabricate or of a mistaken identification of defendant's genitalia to warrant disclosure at trial. Notably, the court permitted defense counsel both to discuss the intimate nature of Edith's relationship in other terms and, more importantly, to ask Edith directly whether her boyfriend took the photos (but defense counsel declined to pursue that line of questioning). Defendant was therefore not prejudiced by this limitation on his cross-examination. See State v. G.S., 278 N.J. Super. 151, 167-72 (App. Div. 1994) (rejecting

the use of assault victim's sexual relationship with her boyfriend to undermine the victim's credibility where other evidence was available), rev'd on other grounds, 145 N.J. 460 (1996).

To the extent not addressed, defendant's remaining arguments lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

Affirmed.