SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1598-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

O.L.,

Defendant-Appellant.

Submitted September 28, 2016 – Decided September 12, 2017

Before Judges Simonelli and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 12-08-1393.

Joseph E. Krakora, Public Defender, attorney for appellant (Alan I. Smith, Designated Counsel, on the brief).

Christopher J. Gramiccioni, Monmouth County Prosecutor, attorney for respondent (Mary R. Juliano, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from his judgment of conviction stemming from engaging in sexual conduct with his girlfriend's fourteen-

year-old sister, C.H. He was charged in an indictment with second-degree sexual assault, N.J.S.A. 2C:14-2(c)(4) (count one);[1] second-degree sexual assault, N.J.S.A. 2C:14-2(c)(1) (count two); and third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a) (count three). A jury trial was conducted from May 6 through 15, 2014, during which, with defendant's consent, count one was amended to fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b). The jury found defendant not guilty on counts one and two, but guilty on count three. He was sentenced to a five-year term of imprisonment and a special sentence of parole supervision for life, N.J.S.A. 2C:43-6.4. All applicable fines and penalties were imposed.

On appeal, defendant argues:

> POINT I - THE TRIAL COURT'S RULING ADMITTING C.H.'S STATEMENT TO DETECTIVE OTLOWSKI AND C.H.'S GRAND JURY TESTIMONY INTO EVIDENCE AS PRIOR CONSISTENT STATEMENTS WAS REVERSIBLE ERROR.
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> POINT II - THE TRIAL COURT'S RULING DENYING DEFENDANT'S MOTION FOR DISCOVERY WAS REVERSIBLE ERROR BECAUSE DEFENDANT ESTABLISHED A LEGITIMATE CONSTITUTIONAL BASIS

[1] Count one of the indictment erroneously indicated that the offense charged was second-degree sexual assault contrary to N.J.S.A. 2C:14-2(b). Prior to trial, the indictment was amended pursuant to Rule 3:7-4 to change the statutory citation to N.J.S.A. 2C:14-2(c)(4) to correspond with the language in the indictment.

TO COMPEL PRODUCTION OF C.H.'S MEDICAL, PSYCHOLOGICAL, DCPP,[2] AND SCHOOL RECORDS.

POINT III — DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE JURY VERDICT ON COUNT THREE, OR ALTERNATIVELY FOR A NEW TRIAL ON COUNT THREE, SHOULD HAVE BEEN GRANTED BECAUSE THERE EXISTED INSUFFICIENT EVIDENCE TO FIND DEFENDANT GUILTY OF ENDANGERING, AND BECAUSE THE VERDICT INCONSISTENCY THAT RESULTED FROM THE TRIAL COURT'S FAULTY JURY INSTRUCTION ON COUNT THREE CONSTITUTED A MANIFEST INJUSTICE UNDER THE LAW.

POINT IV - THE FIVE (5) YEAR BASE TERM IMPOSED ON DEFENDANT'S CONVICTION FOR ENDANGERING THE WELFARE OF A CHILD ON COUNT THREE WAS MANIFESTLY EXCESSIVE.

We reject these arguments and affirm.

I.

We discern the following facts from the record. At trial, C.H. testified that defendant, who was eleven years older, engaged in sexual conduct with her on multiple occasions from July 1, 2011 through April 21, 2012. Initially, the conduct consisted of mutual flirting, texting and exchanging nude photos of each other at defendant's request. C.H. admitted having a crush on defendant, which angered her older sister, S.Q. On one occasion, when C.H. and her younger sister went to visit S.Q., who was then living with defendant in an apartment, defendant touched C.H.'s thigh and vagina over her clothing and told C.H. that he "wanted to f**k"

[2] Referring to the Division of Child Protection and Permanency.

her. S.Q. was not home at the time and defendant stopped when C.H.'s younger sister walked into the room.

The next incident occurred at C.H.'s house. Defendant and C.H. went out to the backyard where defendant apologized to C.H. while they were sitting on the grass. Thereafter, defendant grabbed C.H., told her again that he "wanted to f**k" her, got on top of her, exposed his penis and rubbed it "near [her] vagina." Defendant eventually stopped at C.H.'s request and they went back inside the house. On other occasions, defendant repeatedly touched C.H. inappropriately while they were at her house and continued telling her that he "wanted to f**k" her. C.H. consistently told him "no" because "he was with [her] older sister." However, C.H. did not tell anyone about the incidents because she did not want defendant "to get in trouble."

On April 21, 2012, while the family was celebrating C.H.'s younger sister's first communion at their home, C.H.'s mother asked C.H. to get chairs from the basement. Defendant went with C.H. to assist her. After they finished and were walking up the basement stairs, defendant "grabbed" C.H. from behind and "started to kiss" her "with his tongue in [her] mouth." Defendant also thrust his hand into the leg of C.H.'s shorts and penetrated her vagina with his fingers.

While they were on the stairs, C.H.'s mother called out "who's there" from the bottom of the staircase. Although it was dark, C.H.'s mother could tell that someone was present. At that point, C.H. fled upstairs to her bedroom with her mother following her. Based on C.H.'s reaction and their location on the stairs, C.H.'s mother believed that something sexual had occurred between C.H. and defendant. In the bedroom, C.H.'s mother screamed "[h]ow could you do that to your sister," who was then pregnant with defendant's child. C.H. cried and never responded to her mother. Eventually, C.H. and her mother rejoined the party. C.H.'s mother did not pursue it at that point because she did not want to ruin the celebration.

Two days later, on April 23, 2012, in S.Q.'s presence, C.H.'s parents confronted C.H. about what had transpired at the party. C.H. cried and told them that defendant was kissing her, but did not tell them about the other incidents because she was afraid that her parents would be angry with her. When C.H. explained that she was not the initiator, that defendant had been "chasing after her[,]" and that it had been going on for some time, C.H.'s parents asked if she wanted to go to the police and she agreed. Later that day, accompanied by her parents, C.H. gave a signed written statement to Detective Otlowski disclosing everything that had occurred between her and defendant. Although Detective

Otlowski examined C.H.'s cell phone for any of the photographs referenced in her statement, there were no photos on her phone. C.H. also refused Detective Otlowski's offer to go to the hospital, stating that she was not injured.

After C.H. reported the incidents to the police, her relationship with her sister changed for the worst and it made C.H. "sad." Her sister believed defendant, who had told her that C.H. was the one who was "offering herself to him." As a result, on June 21, 2012, C.H. and her parents went to defense counsel's office and signed waivers of prosecution. Although C.H. and her parents were asked to sign a document admitting that the allegations were false, they refused and instead signed a document they believed meant that they "didn't want to go to court" and they wanted "to drop the charges." C.H. testified that she signed the document because she felt badly about "what [she was] doing to [her] sister" and "want[ed] [defendant and her sister] to be together" with their newborn baby.

However, on July 27, 2012, C.H. testified before the grand jury consistent with her signed statement to Detective Otlowski. When her sister later contacted her and asked her to write a letter recanting her allegations, C.H. agreed. On December 13, 2013, accompanied by her sister, C.H. again went to defense counsel's office and wrote exactly what her sister told her to write in a

signed statement recanting the allegations. Her sister told her not to tell her parents about the recantation statement in case they tried to stop her. In the statement, C.H. wrote: "I, [C.H.], want to be clear that my testimony against [defendant] [was] false. I am sorry for the time wasted in this case. I do not want to say my reasons but I lied and I wish to say no more." After submitting the statement, defense counsel and an investigator interviewed C.H.; she reiterated to them that defendant did not touch her inappropriately.

Before testifying at the trial, C.H. met with members of the Prosecutor's Office on March 21, April 21, and April 23, 2014. At the trial, C.H. testified consistent with her statement to Detective Otlowski and her grand jury testimony, but admitted that she did not want to testify because of her sister and her sister's child. When confronted with her waiver of prosecution and recantation statement, C.H. explained that she felt she had to recant her account for her sister because she "owed her." C.H.'s statement to Detective Otlowski, her grand jury testimony, the waiver of prosecution, and her recantation statement were all admitted into evidence at the trial.

After the State rested, defendant moved for a judgment of acquittal pursuant to Rule 3:18-1, which was denied. Following the jury verdict, defendant moved for a judgment notwithstanding

the verdict (JNOV) or a new trial, both of which were denied on July 11, 2014. On September 26, 2014, defendant was sentenced[3] and this appeal followed.

II.

In Point I of his merits brief, defendant argues that it was reversible error for the trial court to admit the victim's signed statement to Detective Otlowski and her grand jury testimony. We disagree.

"[I]n reviewing a trial court's evidential ruling, an appellate court is limited to examining the decision for abuse of discretion." State v. Kuropchak, 221 N.J. 368, 385 (2015) (citation omitted). Under that standard, "[c]onsiderable latitude is afforded a trial court in determining whether to admit evidence," and "an appellate court should not substitute its own judgment for that of the trial court, unless the trial court's ruling was so wide of the mark that a manifest denial of justice resulted." Id. at 385-86 (citations omitted).

Here, defense counsel objected to the admission of the evidence and argued that the probative value was substantially outweighed by the risk of undue prejudice. The court overruled

[3] At the sentencing hearing, defendant pled guilty to violating his probation on an unrelated charge. The trial court terminated his probation without improvement. Defendant does not appeal the termination.

defense counsel's objection and admitted C.H.'s signed statement to Detective Otlowski and her grand jury testimony to rebut the accusation of recent fabrication. Relying on State v. Johnson, 235 N.J. Super. 547, 555 (App. Div.), certif. denied, 118 N.J. 214 (1989), the court determined that the signed statement and the grand jury testimony both met the requirements of N.J.R.E. 803(a)(2). The court also found that "the probative value outweigh[ed] whatever prejudice there might be."

N.J.R.E. 803(a)(2) provides:

> A statement previously made by a person who is a witness at a trial or hearing [is not excluded by the hearsay rule], provided it would have been admissible if made by the declarant while testifying and the statement . . . is consistent with the witness' testimony and is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive[.]

"A 'charge' of recent fabrication can be effected through implication by the cross-examiner as well as by direct accusation of the witness. In fact[,] that is the usual way in which the charge is made." Johnson, supra, 235 N.J. Super. at 555 (citation omitted).

> [I]t is the impression the cross-examiner makes upon the jury in the heat of the trial rather than what an appellate court would discern from a coldly analytical study of the testimony which must control review of the

> somewhat discretionary exercise of judgment made by the trial judge in the matter.
>
> [Id. at 555-56 (quoting State v. King, 115 N.J. Super. 140, 146-47 (App. Div.), certif. denied, 59 N.J. 268 (1971)).]

Defendant acknowledges that defense counsel "sought to impeach C.H.'s credibility during cross-examination when [C.H.] was confronted with her written recantation made at [defense] counsel's office." Nonetheless, defendant argues that "since C.H.'s direct testimony was consistent with her statement given to Detective Otlowski and with her grand jury testimony, there was no express or implied charge of a recent fabrication to trigger admission of her statement and grand jury testimony into evidence as prior consistent statements." Defendant asserts that the court's ruling was therefore erroneous because "a prior consistent statement may not be offered solely to support a witness' credibility."

"An attack on a party's credibility through prior inconsistent statements does not necessarily give [the party] the right to use a prior consistent statement to buttress the party's credibility." Palmisano v. Pear, 306 N.J. Super. 395, 403 (App. Div. 1997). Here, however, defense counsel admittedly sought to impeach C.H.'s credibility during cross-examination with her recantation statement to imply that C.H.'s recantation was

accurate and that she recently fabricated a different version of events when testifying, or in preparation for testifying, at trial. See Johnson, supra, 235 N.J. Super. at 555 (admitting a witness's prior statement after "defense counsel highlighted several inconsistencies in details between the prior statement and [the witness's] trial testimony, thus creating the inference that [he] had not been truthful at trial").

Such fabrication during trial or in preparation for trial is certainly "recent" in common parlance. See King, supra, 115 N.J. Super. at 146 (admitting a witness's statement to police and grand jury testimony where defense counsel alluded to the witness's threat a week before trial that she would lie at the trial). Moreover, here, C.H.'s prior consistent statement to police and grand jury testimony occurred prior to trial, and prior to trial preparation. "Where the prior consistent statement was made before the motive to fabricate arose, the fabrication is 'recent' enough under N.J.R.E. 803(a)(2)." State v. Moorer, 448 N.J. Super. 94, 110 (App. Div. 2016).

"The scope of the exception encompasses prior consistent statements made by the witness before the alleged 'improper influence or motive' to demonstrate that the witness did not change his or her story." Neno v. Clinton, 167 N.J. 573, 580 (2001). Thus, in Moorer, supra, we held that "fabrication is 'recent' if

it post-dates a prior consistent statement." 448 N.J. Super. at 110.

> In that situation, the prior consistent statement has clear probative value:
>
> Impeachment by charging that the testimony is a recent fabrication or results from an improper influence or motive is, as a general matter, capable of direct and forceful refutation through introduction of out-of-court consistent statements that predate the alleged fabrication, influence, or motive. A consistent statement that predates the motive is a square rebuttal of the charge that the testimony was contrived as a consequence of that motive.
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> [Id. at 111 (quoting Tome v. U.S., 513 U.S. 150, 158, 115 S. Ct. 696, 701, 130 L. Ed. 2d 574, 582-83 (1995)).]

Accordingly, it was not an abuse of discretion to admit C.H.'s consistent statement to police and grand jury testimony to help refute the allegation of recent fabrication. Moreover, our Supreme Court has declined to adopt as a rigid admissibility requirement that the previous statement was made prior to the motive or influence to lie. State v. Chew, 150 N.J. 30, 81 (1997), cert. denied sub nom., Chew v. New Jersey, 528 U.S. 1052, 120 S. Ct. 593, 145 L. Ed. 2d 493 (1999). Recognizing that "many things were happening as the different stories unfolded[,]" and that "[t]here were shades of difference between the witnesses' motivations at different times[,]" the Court upheld the admission of consistent

statements made after some motive to fabricate arose, but before other motives to fabricate arose. Id. at 80.

Likewise, in State v. Muhammad, 359 N.J. Super. 361, 388-89 (App. Div.), certif. denied, 178 N.J. 36 (2003), we determined that a witness' prior consistent statement was properly admitted, reasoning:

> As in Chew much was happening at the various times [the witness] made statements and testified, and his motivations likely differed at different times. The defense used the taped statement to impeach [the witness] by pointing out inconsistencies with his prior statements and his trial testimony. The statement was not irrelevant to rebut the charge that [the witness'] testimony was the product of an improper influence or motive to lie. As in Chew, it related to differing motives to fabricate and was used for rehabilitative purposes.
>
> [Id. at 389 (citation omitted).]

Here too, much was happening at the various times C.H. made statements and testified and her motivation fluctuated at different times. Her prior consistent statements were therefore relevant to also rebut the charge that her testimony was the product of an improper influence or motive to lie and was properly admitted for rehabilitative purposes. Further, the "probative value" of the evidence was not "substantially outweighed by the risk of . . . undue prejudice" to mandate exclusion. N.J.R.E. 403. "[A] trial court's weighing of probative value against

prejudicial effect 'must stand unless it can be shown that the trial court palpably abused its discretion, that is, that its finding was so wide of the mark that a manifest denial of justice resulted.'" State v. Cole, ____ N.J. ____, ____ (2017), slip op. at 28 (quoting State v. Carter, 91 N.J. 86, 106 (1982)). We discern no abuse of discretion in the court's weighing of the probative value against the prejudicial effect and admitting C.H.'s statement to Detective Otlowski and grand jury testimony.

III.

In Point II, defendant argues that the court erred in denying his motion for the disclosure of the victim's medical, psychological, school and records from the Division of Child Protection and Permanency (DCPP) because "C.H.'s credibility was a critical issue" and "there existed an inference that C.H. had made a prior similar accusation against her father." Pre-trial, defendant moved for disclosure of the records. To establish the basis for the request, defendant relied on the following portion of a recorded jailhouse phone conversation between defendant and S.Q. referenced in a certification submitted by defense counsel:

> [DEFENDANT]: Baby, do you remember that . . . I said I was not going to say anything about what he did . . .
>
> [S.Q.]: Uh hum.
>
> [DEFENDANT]: Your father with your sister?

[S.Q.]: Uh hum.

[DEFENDANT]: I'm not going to say anything. Ok?

[S.Q.]: Ok! Ok baby.

[DEFENDANT]: Because it's your father and I don't want anything to happen to him, but on the same token, I don't want to be here.

In denying the motion, the court explained:

> This is not the situation in which there's a statement by the victim herself that anything happened untoward between the victim and her father. . . . This is the defendant saying that. And so, there's absolutely no factual basis that's been provided . . . that any of these records exist for any reason, anything related to the allegations in this case. . . .
>
> [M]edical records are covered by a statutory privilege . . . . The same is true by statute and . . . evidential rules for the psychological privilege. The school records are covered by statute, as are the . . . DCPP records.
>
> [U]nless there's a compelling need shown there's not even an in camera review. There's no indication that the victim ever reported any of this to a school official that would give rise to a search for anything in the school record. There's no indication in any of the discovery that the . . . victim, as a result of these incidents, has sought or is seeking, or has sought at any time, psychological treatment.
>
> . . . .

> And more importantly, when it comes to the medical, . . . the victim refused medical treatment so, there are no records.
>
> So, it is not appropriate to have the attorney file a statement saying that the victim said that something happened between the victim and her father, and therefore, it must be false. It was the defendant who was saying that, not the victim, nor anyone else. The defendant said that, it's clearly shown on tape.
>
> It's not the basis to engage in a wholesale fishing expedition for records which apparently, on their face, do not exist.

"Appellate review of a trial court's discovery order is governed by the abuse of discretion standard." State in Interest of A.B., 219 N.J. 542, 554 (2014) (citation omitted). "Thus, an appellate court should generally defer to a trial court's resolution of a discovery matter, provided its determination is not so wide of the mark or is not 'based on a mistaken understanding of the applicable law.'" Ibid. (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011)). However, "[i]n construing the meaning of a statute, court rule, or case law, 'our review is de novo,'" and we owe no deference to the trial court's legal conclusions. Id. at 554-55.

"[T]he Confrontation Clause does not require the disclosure of any and all information that might be useful to a defendant." State v. Van Dyke, 361 N.J. Super. 403, 412 (App. Div.), certif.

denied, 178 N.J. 35 (2003). Information that is confidential or subject to a privilege requires courts to balance the defendant's right to confrontation against an individual's right to privacy. Although the standards for piercing various privileges and overcoming confidentiality are worded differently, they share the requirement that the applicant "must advance 'some factual predicate which would make it reasonably likely that the file will bear such fruit and that the quest for its contents is not merely a desperate grasping at a straw.'" State v. Harris, 316 N.J. Super. 384, 398 (App. Div. 1998) (citation omitted). See also Kinsella v. Kinsella, 150 N.J. 276, 306-07 (1997) (holding that courts should not order disclosure of psychological records even for an in camera review absent showing of a legitimate need for the evidence, relevance and materiality to the issue before the court, and unavailability of the information from any less intrusive source); Kinsella v. NYT Television, 382 N.J. Super. 102, 111 (App. Div. 2005) (holding disclosure of privileged medical records required only upon "'compelling' showing of a particularized need for the information"); State v. Krivacska, 341 N.J. Super. 1, 35 (App. Div.), certif. denied, 170 N.J. 206 (2001), cert. denied, 535 U.S. 1012, 122 S.Ct. 1594, 152 L. Ed. 2d 510 (2002) (finding that relevant school records should only be disclosed to a defendant upon a showing of particularized need);

N.J. Div. of Youth & Family Servs. v. N.S., 412 N.J. Super. 593, 637 (App. Div.), certif. denied, 204 N.J. 38 (2010) (holding release of DCPP records may be made only upon demonstration that disclosure is necessary for determination of an issue before the court).

Here, we are satisfied that the court correctly determined that defendant failed to provide the required factual predicate or showing of a particularized need to justify disclosure of the records even for an in camera review. Indeed, given defendant's inability to show that such records even existed, his factual predicate was no more than "a desperate grasping at a straw." Van Dyke, supra, 361 N.J. Super. at 412 (quoting Harris, supra, 316 N.J. Super. at 398).

IV.

In Point III, defendant argues that the court erred in denying his motion for JNOV or a new trial because "the inconsistency in the jury's guilty verdict constitutes a manifest injustice under the law" and "represents [the jury's] failure to rationally apply the reasonable doubt standard[.]" Defendant also asserts that a "flawed jury instruction . . . could have erroneously led the jury to find defendant guilty." Specifically, defendant asserts that the jury charge "erroneously instructed the jury that defendant is guilty of endangering the welfare of a minor if he knew that

his conduct could impair or [debauch] the morals of C.H." We reject defendant's contentions.

In a post-trial motion, defendant moved for JNOV or a new trial. The judge denied the motion, explaining that:

> [A] new trial is not the proper remedy because there is no clear and convincing evidence that the verdict was the result of mistake, partiality, prejudice, or passion. There was no obvious juror error here. Based on the evidence and testimony, the jury could reasonably find defendant guilty beyond a reasonable doubt for the crime of endangering the welfare of a child. There was evidence that [C.H.] was a child of 14 years old when this incident occurred; that defendant engaged in sexual conduct by exchanging text messages and Facebook messages with [C.H.], including messages asking her to send naked pictures of herself, after sending her naked pictures of himself, as well as telling [C.H.] repeatedly he wanted to "[f**k] her;" and that defendant knew this conduct would impair or debauch the morals of [C.H.]. Defendant's conduct of repeatedly sending and receiving sexual messages, including naked picture messages and suggesting that she participate in sexual intercourse with him constitutes sexual conduct.

The court also rejected defendant's argument that the inconsistent verdicts justified granting a new trial, noting that "legally it is of no consequence that the jury acquitted the defendant of crimes which may have been in part an element of the crime for which the defendant was convicted." The court also determined that the single "typographical error" in the written

jury charge did not mandate overturning the guilty verdict or granting defendant a new trial.

The standard to be applied by a trial judge in deciding a motion for an acquittal under Rule 3:18-2 after the jury has been discharged is the same as that which applies when a motion for acquittal is made before the case is submitted to the jury under Rule 3:18-1.

> On a motion for judgment of acquittal, the governing test is: whether the evidence viewed in its entirety, and giving the State the benefit of all of its favorable testimony and all of the favorable inferences which can reasonably be drawn therefrom, is such that a jury could properly find beyond a reasonable doubt that the defendant was guilty of the crime charged.
>
> [State v. D.A., 191 N.J. 158, 163 (2007) (citing State v. Reyes, 50 N.J. 454, 458-59 (1967)).]

We have stated that "the trial judge is not concerned with the worth, nature[,] or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the State." State v. DeRoxtro, 327 N.J. Super. 212, 224 (App. Div. 2000) (citation omitted). Our review of a trial court's denial of a motion for acquittal is "limited and deferential[,]" and is governed by the same standard as the trial court. State v. Reddish, 181 N.J. 553, 620 (2004).

In considering whether a guilty verdict was against the weight of the evidence produced at trial under Rule 3:20-1, "our task is to decide whether 'it clearly appears that there was a miscarriage of justice under the law.'" State v. Smith, 262 N.J. Super. 487, 512 (App. Div.), certif. denied, 134 N.J. 476 (1993) (quoting R. 2:10-1). "We must sift through the evidence 'to determine whether any trier of fact could rationally have found beyond a reasonable doubt that the essential elements of the crime were present.'" Ibid. (quoting State v. Carter, 91 N.J. 86, 96 (1982)). Our "objective is not to second-guess the jury but to correct [an] injustice that would result from an obvious jury error." State v. Saunders, 302 N.J. Super. 509, 524 (App. Div.), certif. denied, 151 N.J. 470 (1997). We do not evaluate the evidence and determine anew how we might have decided the issues.

Applying these standards, we conclude that the State presented sufficient proofs to establish beyond a reasonable doubt that defendant was guilty of third-degree endangering the welfare of a child. Pursuant to N.J.S.A. 2C:24-4(a)(1), "[a]ny person . . . who engages in sexual conduct which would impair or debauch the morals of [a] child is guilty of a crime[.]" While the term "sexual conduct" is not defined in N.J.S.A. 2C:24-4, it is well-recognized that the statute does not require direct sexual contact. See State v. Hackett, 323 N.J. Super. 460, 472 (App. Div. 1999)

(holding that "'sexual conduct' includes showing nude explicit photographs to children"), aff'd as modified, 166 N.J. 66 (2001). Based on the totality of the circumstances, mere sexual conversations or encouragement of sexual conduct may be sufficient for a jury's finding of "sexual conduct." See State v. McInerney, 428 N.J. Super. 432, 438, 450 (App. Div. 2012), certif. denied, 214 N.J. 175 (2013) (holding that defendant's encouragement of sexual conduct was sufficient to satisfy the element); see also State v. Maxwell, 361 N.J. Super. 502, 517-18 (Law Div. 2001) (recognizing that "sexually explicit conversation" may "rise[] to the level of 'sexual conduct'"), aff'd o.b., 361 N.J. Super. 401 (App. Div.), certif. denied, 178 N.J. 34 (2003).

Based on the circumstances of the present case, we agree with the judge that defendant's conduct towards C.H. constituted "sexual conduct" as contemplated by the child-endangerment statute and was sufficient to support a conviction. Giving the State the benefit of all favorable inferences from the testimony it presented, we are satisfied that the verdict was not a miscarriage of justice, was supported by sufficient credible evidence in the record, and the judge properly denied defendant's motion for a judgment of acquittal or for a new trial.

This brings us to defendant's argument regarding inconsistent verdicts. Assuming, for purposes of our analysis, that there was

an inconsistency between the verdicts, inconsistent verdicts are permissible, and "[w]e do not speculate why a jury acquits." State v. Banko, 182 N.J. 44, 54 (2004). An inconsistent verdict may be the product of jury nullification, mistake, compromise, or lenity, and so, is not questioned. Id. at 54-55. Such verdicts will be upheld so long as there is sufficient evidence to support the convictions beyond a reasonable doubt. Ibid. We note, however, that while we need not resolve or explain away inconsistencies in a verdict, we find no inconsistency in this verdict. Because the different counts corresponded to different conduct, it is highly likely that the verdict reflected the jury's acceptance of C.H.'s testimony about the sexual conduct generally but not the specific instance of sexual contact or digital penetration. Accordingly, there is no basis to disturb the verdict based upon any perceived inconsistency in the verdicts.

We also reject defendant's argument that an error in the jury instruction led to the guilty verdict. Because clear and correct jury charges are essential to a fair trial, State v. Adams, 194 N.J. 186, 207 (2008), "erroneous instructions on material points are presumed to possess the capacity to unfairly prejudice the defendant." State v. McKinney, 223 N.J. 475, 495 (2015) (citations omitted). However, an error in the charge that could not have affected the jury's deliberations does not amount to reversible

error. State v. Docaj, 407 N.J. Super. 352, 366 (App. Div.), certif. denied, 213 N.J. 568 (2013). In that regard, "[i]f the defendant does not object to the charge at the time it is given, there is a presumption that the charge was not error and was unlikely to prejudice the defendant's case." State v. Singleton, 211 N.J. 157, 182 (2012).

Here, defendant did not object to the charge. Because defendant did not object at trial, we review the charge for plain error. R. 1:7-2; R. 2:10-2; McKinney, supra, 223 N.J. at 494. Plain error in this context is "[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." Adams, supra, 194 N.J. at 207 (quoting State v. Jordan, 147 N.J. 409, 422 (1997)) (alteration in original). When reviewing a charge for plain error, an appellate court must not examine the "portions of the charge alleged to be erroneous in isolation; rather, 'the charge should be examined as a whole to determine its overall effect[.]'" McKinney, supra, 223 N.J. at 494 (quoting Jordan, supra, 147 N.J. at 422).

Here, in the written instructions given to the jury, on four occasions, the word "would" is used in referring to the "sexual

conduct which would impair or debauch" element of the child-endangerment charge (emphasis added). However, on one occasion, the word "could" mistakenly appears instead of "would." The jury asked no questions that would suggest that it was confused or misled by the error. "This was, then, an error that was isolated rather than pervasive in the charge." Docaj, supra, 407 N.J. Super. at 364.

As we stated in Docaj, where the trial court mistakenly used the wrong word once out of four times in its jury charge on passion/provocation manslaughter, the error "was but one iteration imbedded in a charge that contained three entirely correct articulations of the State's burden regarding the third factor[,]" and the "isolated error's capacity to dispel" the effect of the correct portions of the charge "was minimal, at best." Id. at 365. As in Docaj, here, the

> error was one word that was literally buried in a charge that was otherwise correct. The error went unnoticed by the "experienced jurists and lawyers" who "reviewed and refined" the charge . . . as well as the trial court and counsel here. We conclude that the failure to object here reflected the obscure nature of the error and that it is more likely that the jury also depended upon the overall, correct expressions of the controlling legal principles rather than the one erroneous statement here.
>
> [Id. at 370 (citation omitted).]

We note further that in the oral instructions given to the jury, the court used "would" correctly on seven different occasions. Therefore, when reading the charge as a whole, it cannot be said that the typographical error in the written charge was so misleading, confusing, or ambiguous that it was clearly capable of producing an unjust result or that it led the jury to a verdict that it otherwise might not have reached.

V.

Finally, in Point IV, defendant challenges his sentence as excessive and unwarranted given "the crime for which the defendant was found guilty, and the aggravating factors present[.]" Defendant argues that in imposing "the maximum authorized custodial base sentence[,]" the court fell short in its "deliberative process" because "it did not acknowledge that it began its aggravating/mitigating factor analysis at the three (3) year minimum sentencing range for a crime of the third degree." We disagree.

Trial judges have broad sentencing discretion. State v. Dalziel, 182 N.J. 494, 500 (2005). Judges must identify and consider "any relevant aggravating and mitigating factors" that "are called to the court's attention[,]" and "explain how they arrived at a particular sentence." State v. Case, 220 N.J. 49, 64-65 (2014) (quoting State v. Blackmon, 202 N.J. 283, 297 (2010);

State v. Fuentes, 217 N.J. 57, 74 (2014)). "Appellate review of sentencing is deferential," and we therefore avoid substituting our judgment for the judgment of the trial court. Case, supra, 220 N.J. at 65; see State v. O'Donnell, 117 N.J. 210, 215 (1989); State v. Roth, 95 N.J. 334, 365 (1984). We will thus "affirm a sentence under review unless: (1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not [supported by] competent credible evidence in the record; or (3) the application of the guidelines to the facts of the case shock[s] the judicial conscience." State v. Bolvito, 217 N.J. 221, 228 (2014) (citation omitted).

Here, the judge determined that aggravating factors three (risk of re-offense), six (defendant's prior criminal record), and nine (need for deterrence) applied, N.J.S.A. 2C:44-1(a)(3), -1(a)(6), -1(a)(9), and that the aggravating factors substantially outweighed the non-existent mitigating factors. The judge explained that defendant's prior criminal history, which included a prior conviction for criminal sexual contact involving the victim's sister, supported the court's findings. We are satisfied that the judge made findings of fact that were based on competent and reasonably credible evidence in the record and applied the correct sentencing guidelines enunciated in the Code. Further, the sentence does not shock our judicial conscience. Case, supra,

220 N.J. at 65; O'Donnell, supra, 117 N.J. at 215-16. Contrary to defendant's assertion, the court was not required to begin its deliberative process from the bottom of the sentencing range, but rather from the middle "as a logical starting point" with sentencing "toward the higher end of the range" if, as here, "the aggravating factors preponderate[.]" State v. Natale, 184 N.J. 458, 488 (2005). Accordingly, we discern no basis to second-guess the judge.[4]

Affirmed.

[4] While this appeal was pending, over defendant's objection, the State moved before the trial court to amend the judgment of conviction pursuant to Rule 3:21-10(d) to require defendant's compliance with the provisions of Megan's Law, N.J.S.A. 2C:7-1 to -23. Rule 3:21-10(d) expressly excepts applications for sentencing relief pending appeal from the general jurisdictional bar of Rule 2:9-1(a) upon notice to the Appellate Division. After we were duly notified, the motion was granted and the judgment of conviction was amended accordingly.