SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3459-13T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

A.A.,

Defendant-Appellant.

Submitted June 2, 2016 – Decided April 20, 2017

Before Judges Fuentes and Gilson.

On appeal from Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 06-10-1238.

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

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Robert J. Wisse, Assistant Prosecutor, of counsel and on the brief).

The opinion of the court was delivered by

FUENTES, P.J.A.D.

In October 2006, a Passaic County grand jury indicted defendant A.A. on twenty-seven counts involving sexual offenses against five of his biological daughters. In 2008, the State agreed to sever and separately try the counts related to each victim. Between February 26, 2013, and March 8, 2013, defendant was tried before a jury on counts fifteen through twenty, which involved charges related to his daughter, A.M.

In this portion of the indictment, the grand jury charged defendant with first degree aggravated sexual assault on A.M. when she was under the age of thirteen, N.J.S.A. 2C:14-2a(1) (count fifteen); second degree sexual assault on A.M. when she was under the age of thirteen and defendant was at least four years older, N.J.S.A. 2C:14-2b (count sixteen); first degree aggravated sexual assault on A.M. when she was between thirteen and sixteen years old and related to defendant by blood, N.J.S.A. 2C:14-2a(2)(a) (count seventeen); second degree sexual assault on A.M. when she was between thirteen and sixteen years old and defendant was at least four years older, N.J.S.A. 2C:14-2c(4) (count eighteen); second degree sexual assault on A.M. when she was between sixteen and eighteen years old and she was related to defendant by blood, N.J.S.A. 2C:14-2c(3)(a) (count nineteen); and second degree sexual assault on A.M. through physical force or coercion, N.J.S.A. 2C:14-

2c(1) (count twenty). The jury found defendant guilty on all five counts.

The court sentenced defendant to an aggregate term of fifty years, with an eighty-five percent period of parole ineligibility and five years of parole supervision pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. In this appeal, defendant argues the trial court denied him a fair trial by permitting the State to introduce "detailed and excessive testimony" describing his sexual abuse of his other daughters under N.J.R.E. 404(b). Although defendant did not object to any aspect of the prosecutor's conduct before the trial court, he argues in this appeal that the cumulative effect of the prosecutor's misconduct at trial rises to the level of plain error, thereby warranting the reversal of his conviction. Finally, defendant argues the trial court's instructions to the jury deprived him of due process and violated his right to a fair trial.

After reviewing the record developed before the trial court, we reject these arguments and affirm. The following facts inform our decision.

I

It is undisputed that defendant had a sexual relationship with A.M. over a number of years. The jury was asked to determine two discrete issues: (1) A.M.'s age when defendant began having sex

with her; and (2) whether A.M. was coerced or forced to have sex with defendant after she was old enough to consent. The State called A.M. as its principal witness. A.M. testified that defendant began having sexual intercourse with her when she was eight years old, and the incestuous encounters continued until she was twenty-three years old.

Defendant impregnated A.M. four times. A.M. was fifteen years old at the time defendant first impregnated her. She gave birth to her first child when she was sixteen. A.M. delivered her second child at age nineteen, her third child at age twenty-two, and her fourth child at age twenty-three. A.M. did not go to school during her prepubescent and adolescent years. She gave birth to all four children at home, without prenatal or gynecological care or medical supervision of any kind. The children's births were not registered with civil authorities, and no birth certificates were issued. They were also "home schooled," they did not have any contacts with anyone outside the family.

According to A.M., defendant began the abuse by touching her vagina when she was eight years old. The abuse escalated to digital and penile penetration, fellatio, and other forms of oral sex. As A.M. described it, defendant's depravity reached its zenith when she was between thirteen and sixteen years old.

> Between 13 and 16 I was required to have sex with him at least once a day. It increased to twice a day. There was a period that I had to make sure that I turned him on or [made] him [ejaculate] at least three times a day. And . . . if I didn't do it, then he told me that he would then molest my other sisters.

A.M. testified that after she reached the age of eighteen, defendant would force himself on her sexually by threatening her with physical violence or beating and choking her.

Akua Montano[1] was indicted as a codefendant in this case. She agreed to testify as a witness for the State as part of a negotiated plea agreement in which she pleaded guilty to second degree sexual assault, N.J.S.A. 2C:14-2b. In exchange for her truthful, complete, and accurate testimony, the State agreed to recommend that the court sentence Montano to a term of five years, without any period of parole ineligibility. This five-year term would run consecutive to an unrelated term of imprisonment Montano was serving at the time.

Montano testified that she became defendant's girlfriend in 1984. She was aware defendant was married at the time she joined the family as a de facto second wife. According to Montano,

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[1] We note that Akua Montano's name is spelled in the indictment as "Akua Montana." However, when she was sworn as a witness at trial, she spelled her last name as "Montano."

defendant acted more like the leader of a cult than the head of a family.

> Q. And when you got involved with the family, what role was [defendant] to you in your life besides being your boyfriend?
>
> A. I saw him as my spiritual advisor.
>
> Q. What does that mean?
>
> A. I just looked up to him as someone that would lead me . . . spiritually in everything that I did in terms of morality and what's the right thing to do.
>
> . . . .
>
> Q. And did you become aware at any point that he was having a relationship with his oldest daughter, [A.M.]?
>
> A. Yes.
>
> Q. What year did you become aware of this?
>
> A. Approximately 1988.
>
> Q. And tell us how you became aware of this.
>
> A. By seeing him engaged in a sexual act.
>
> . . . .
>
> Q. [W]hat you're about to describe in 1988, was that the basis of your plea as to what you plead[ed] guilty to?
>
> A. Yes.
>
> Q. Okay. So let's talk about that. Tell us what happened in 1988 that made you guilty of the crime of a sexual assault?

A. I performed cunnilingus on [A.M.].

. . . .

Q. And [defendant] was present in this room when this happened?

A. Yes.

Q. And then you watched this defendant, this man over here, engage in what specifically with her?

A. Sexual intercourse.

Defendant's wife, B.A., also testified as a witness for the State. She testified that in 1987, defendant told her he was having oral sex with A.M. At the time, A.M. was ten years old. B.A. testified that defendant impregnated A.M in 1994, when she was fifteen. B.A. testified that during the summer of 1995, the family moved into the home of "a male friend" for approximately two months. In response to the prosecutor's questions, B.A. told the jury the man was a police officer. This prompted the following colloquy:

Q. So when you moved into this house, at this point [A.M.] has a child with her father; correct?

A. Yes.

Q. All these beatings are going [on], correct, before this moment in time?

A. Yes.

Q. Do you ever tell him what's happening to your family?

A. No. He was [defendant's] friend; he wasn't my friend.

Q. Who cares whose friend [he] is? Why wouldn't you tell him? He's a law enforcement officer. He could help you; right?

A. Yes.

Q. Why didn't you tell him?

A. Because I was afraid. I knew I couldn't tell him. [Defendant] had spoken about all kind[s] of things and namely about the police being on his side.

And [the police officer] being a friend -- when we were living in the house in East Orange, that's when he met [the police officer]. [The police officer] really admired his work, you know, the work he was doing on the house. He thought he had it so together; his family was being home schooled and they were so smart.

And, you know -- but -- and then [defendant] also accused me of flirting with [the police officer], so I limited my communication with him. Any man, he would accuse me of flirting with them or wanting to sleep with them.

It wasn't a friendship that I could go to him. And definitely I -- you know, the thought of anything happening to the family, the family being separated, I was afraid of that. I was afraid of that. [Defendant] had always threatened me if I ever said something to anybody, they're going to take the family away and they're going to put you away.

There was a number of [reasons] I felt justified. I mean, looking back now obviously

> it was stupid. But, you know, my mind frame at this time, I believed everything he told me. I went along with everything -- I did.

The State also presented the results of DNA tests that established defendant was the biological father of A.M.'s four children. The trial court made a number of pre-trial evidential rulings settling the admissibility of N.J.R.E. 404(b) testimony concerning: (1) the children's home-schooling; (2) the family's failure to obtain birth certificates; (3) the family's social isolation; and (4) defendant's use or threatened use of physical force, intimidation, and psychological pressure to maintain a cult-like control over every member of his family.

Against this evidential backdrop, defendant raises the following arguments on appeal:

> POINT I
>
> THE STATE'S INTRODUCTION OF DETAILED AND EXCESSIVE TESTIMONY PERTAINING TO OTHER WRONGS AND CRIMES THAT [DEFENDANT] ALLEGEDLY COMMITTED THROUGHOUT THE YEARS DEPRIVED HIM OF DUE PROCESS AND A FAIR TRIAL.
>
> POINT II
>
> THE PERVASIVE PROSECUTORIAL MISCONDUCT IN THIS CASE NECESSITATES REVERSAL. (Not Raised Below)
>
> > A. The Prosecutor Impermissibly Shifted the Burden of Proof to the Defense and Denigrated Defense Counsel.

B. The State Improperly Appealed to the Jury's Emotions.

C. The Prosecutor Improperly Commented On Facts That Were Not In Evidence.

D. The Cumulative Effect Of The Prosecutorial Misconduct Constitutes Plain Error Warranting Reversal.

POINT III

THE TRIAL COURT'S ISSUANCE OF ERRONEOUS JURY INSTRUCTIONS DEPRIVED [DEFENDANT] OF DUE PROCESS AND A FAIR TRIAL (Not Raised Below).

A. The Co-Defendant Charge Left the Jury With the Erroneous Impression That Akua's Testimony Regarding Conduct That Allegedly Occurred When [A.M.] was Under 13 Years Old Could Serve as a Basis for Convicting [Defendant] of Charges Alleging That He Sexually Abused [A.M.] During Other Age Ranges.

B. The Trial Court Improperly Proscribed the Jury From Automatically Discrediting [A.M.'s] Testimony Based Upon Her Delayed Disclosure.

We reject these arguments and affirm. We first address defendant's challenge to the trial court's decision to admit evidence of his interactions with his family, which defendant claims constituted inadmissible evidence of prior bad acts under N.J.R.E. 404(b). Defendant argues the trial judge erred in allowing A.M. and B.A.'s cumulative testimony concerning his

alleged use of threats and intimidation to keep them from disclosing the horrific details of their existence. Defendant claims the judge allowed the State to permeate the trial "with an exhaustive list of examples" of his supposed proclivity for violence and depravity. As an example, defendant claims the prosecutor presented evidence that "many of [defendant's] children were born at home, without birth certificates[.]" Based on this, defendant allegedly threatened that he could kill the children with impunity because no one knew they existed.

We review a trial court's ruling concerning the admissibility of evidence under an abuse of discretion standard. State v. Rose, 206 N.J. 141, 157 (2011) (citation omitted). An "abuse of discretion only arises on demonstration of 'manifest error or injustice[,]'" Hisenaj v. Kuehner, 194 N.J. 6, 20 (2008) (quoting State v. Torres, 183 N.J. 554, 572 (2005)), and occurs when the trial judge's "decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Milne v. Goldenberg, 428 N.J. Super. 184, 197 (App. Div. 2012) (quoting Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002)).

We conclude the trial judge properly admitted this evidence under N.J.R.E. 404(b) after applying the four-prong test

established by the Supreme Court in State v. Cofield, 127 N.J. 328 (1992):

> (1) The evidence of the other crime must be admissible as relevant to a material issue;
>
> (2) It must be similar in kind and reasonably close in time to the offense charged;
>
> (3) The evidence of the other crime must be clear and convincing; and
>
> (4) The probative value of the evidence must not be outweighed by its apparent prejudice.
>
> [Id. at 338 (citation omitted).]

The judge admitted the testimony of A.M., B.A., and Montano to explain how they "could or would submit to the defendant's alleged sexual assaults or why these assaults were not complained about or reported to the authorities." The judge also found this evidence

> went to [defendant's] motivation. It went to his state of mind. It went to the issue[s] of opportunity, intent, plan, [and] knowledge [--] almost all of the purposes in Evidence Rule 404(b).
>
> But, more importantly, . . . this evidence is the only way for a jury to accept, if they choose to, what might otherwise be the most preposterous story that they will ever hear in their lives [--] a story that is almost totally unbelievable.

We agree with the judge's characterization. The horrific details of the crimes defendant committed against his own child

contravene all of the universally accepted norms of decency, and violate the profound, lifelong trust, devotion, and paternal love every child is entitled to receive from his or her father. The testimonial evidence provided by these three witnesses is an indispensable aspect of the State's case. This testimony provides the means for reasonably prudent jurors to transcend their ordinary life experiences and examine the emotionally oppressive, socially barren, and psychotically toxic environment defendant created to achieve a cult-like control over the female members of his family.

Refocusing our attention to the Cofield factors, there is no question that the testimony was closely related to the prolonged and repeated acts of aggravated sexual assault defendant committed against his daughter. The trial judge found this testimony amounted to clear and convincing evidence. We have no reason to disturb this finding. We are satisfied that the probative value of this evidence far outweighs its prejudicial effect. Finally, the trial judge gave the jury clear and appropriate instructions on how to view and consider this evidence.

Defendant's remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We add only the following brief comments. Defendant's allegations of prosecutorial misconduct and erroneous jury instructions are raised for the first time in this appeal. As such, we are bound

to review these arguments under the plain error doctrine, which provides:

> Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court.
>
> [R. 2:10-2.]

Distilled to its constituent elements, defendant must establish that: "(1) there was error; (2) the error was clear and obvious; and (3) the error affected substantial rights. In other words, the error must have affected the outcome." State v. Blanks, 313 N.J. Super. 55, 64 (App. Div. 1998) (citations omitted).

After examining the prosecutor's opening statement and closing arguments, we discern no basis to conclude the prosecutor's remarks were in any way inappropriate, much less egregious enough to deprive defendant of a fair trial. Contra State v. Nelson, 173 N.J. 417, 463 (2002). We reach the same conclusion with respect to defendant's argument challenging the jury instructions. We emphasize that defense counsel did not express any concern or disagreement with the proposed instructions during the charge conference conducted pursuant to Rule 1:8-7(b).

Affirmed.