SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4094-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ERIC EPPS, a/k/a CHARLES WATKINS, DWIGHT MITCHELL and COREY GRUBBS,

Defendant-Appellant.

Submitted October 17, 2016 – Decided June 8, 2017

Before Judges Sabatino and Nugent.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 14-02-0397.

Joseph E. Krakora, Public Defender, attorney for appellant (Stefan Van Jura, Deputy Public Defender II, of counsel and on the brief).

Carolyn A. Murray, Acting Essex County Prosecutor, attorney for respondent (Jane Deaterly Plaisted, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Eric Epps appeals from a March 23, 2015 judgment of conviction for sexual assault, endangering the welfare of a child, and lewdness; crimes for which a judge sentenced him to an aggregate seventeen-year prison term. Defendant argues:

POINT I

> THE FAILURE TO GIVE AN N.J.R.E. 404(b) LIMITING INSTRUCTION DENIED DEFENDANT A FAIR TRIAL BECAUSE THE JURY UNDOUBTEDLY CONCLUDED THAT DEFENDANT HAD A PROPENSITY TO MASTURBATE IN FRONT OF CHILDREN, WHICH IS PRECISELY WHAT THE RULE PROSCRIBES (Not Raised Below).
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> A. Introduction.
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> B. Defendant Was Harmed by the Failure of the Court to Limit the Jury's Consideration of Other-Crimes Evidence.
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> C. The Invited Error Doctrine Should Not Bar Relief.
>
> D. Conclusion.

POINT II

> A SEVENTEEN-YEAR [NO EARLY RELEASE ACT] SENTENCE FOR MASTURBATING IN PUBLIC IS UNCONSCIONABLE; IT MUST BE REDUCED.

For the reasons that follow, we affirm.

An Essex County Grand Jury returned an indictment charging defendant with second-degree sexual assault (count one), N.J.S.A. 2C:14-2(b); three counts of third-degree endangering the welfare of a child (counts two through four), N.J.S.A. 2C:24-4(a); and

fourth-degree lewdness (count five), N.J.S.A. 2C:14-4(b)(1). A petit jury acquitted defendant of two endangering offenses (counts three and four) and convicted him of the remaining crimes.

Following defendant's convictions, the State moved to have him sentenced as a persistent offender under N.J.S.A. 2C:44-3(a). The trial court granted the motion and sentenced defendant to a seventeen-year prison term subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2(a), on count one, second-degree sexual assault. The court imposed concurrent prison terms of five years on count two, third-degree endangering the welfare of a child, and eighteen months on count five, fourth-degree lewdness observed by children under age thirteen. The court also ordered defendant to comply with the reporting and registration requirements of Megan's Law, sentenced defendant to parole supervision for life following his release from prison, and imposed appropriate fines and assessments. This appeal followed.

The State presented the following proofs at defendant's trial. On May 2, 2013, at approximately 3:00 p.m., a twelve-year-old girl and her two younger brothers, ages eleven and eight, were walking home from their school bus stop in East Orange when they passed a parked green Jeep with its windows rolled down. Inside the vehicle, they observed a man, who the girl and the older boy identified in court as defendant, masturbating in the driver's

seat. Defendant was not wearing pants but had a towel around his waist. The older boy was shocked, and the younger boy said "that's nasty." Defendant grinned at the children.

At the girl's insistence, the younger boy wrote the Jeep's license plate number on a piece of homework paper. The children walked to a nearby fire station and reported what happened. Defendant drove away from the scene. Fire station personnel contacted the police, who took the children to the police station. There, the children provided the police with defendant's license plate number, which East Orange Detective Phillip Rodriguez determined was registered to defendant.

Five days later, the girl returned to the police station where she identified defendant from a photo array. Detective Rodriguez prepared the photo array, which included defendant's photo and five other photos of physically similar individuals. According to Detective Sharif Greenwood, who displayed the photo array, the girl identified defendant's photograph as the individual she had seen masturbating in the Jeep. She said the photograph "kind of looked like the suspect," though she believed the suspect's skin was "a little darker."

When the girl testified at trial, defense counsel decided to cross-examine her not only about a statement she had given to police, but also about the details of her previous encounters with

a man she thought was defendant. Defense counsel established the girl told police the person she had described in the green Jeep had been following her and her brothers during the year preceding the May 2013 incident. Defense counsel further elicited the girl's acknowledgement she had seen "this person" in 2013 on several occasions before May 2, 2013, at the bus stop and at her grandmother's house in Newark. Lastly, defense counsel had the girl acknowledge telling police the man she described in the green Jeep had also been around her house, driving a red Jeep. On some of the previous occasions, the man was naked and, at times, masturbating. The girl was uncomfortable with these prior encounters, and her parents instructed her to record the Jeep's license plate should she find it again.

The State objected to defense counsel's cross-examination of the specific details of defendant's uncharged conduct. In response, defense counsel argued the girl's previous observations of the man in the red Jeep were relevant because they led to the girl's identification of defendant's photograph.

After completing its case, the State requested a limiting instruction under N.J.R.E. 404(b). Defense counsel objected to the instruction, arguing "it would be unduly prejudicial" in light of defendant's intended testimony and lengthy criminal history. The trial court deferred its decision. During the charge

conference, defense counsel again objected to the court giving a 404(b) charge. The court never gave the charge.

After discussing his prior criminal history on direct examination, defendant testified about the May 2, 2013 incident involving the girl and her brothers. According to defendant, at 7:00 a.m. on the day of the incident, he drove his fiancée to work in West Orange in his green 1996 Ford Explorer. Later, he looked for scrap metals to redeem at a scrapyard. At approximately 3:00 p.m., he began driving back to West Orange to pick up his fiancée. However, he decided to first pick up food at a corner store in East Orange. Defendant parked in the location where the children said they saw him, entered the store, and left shortly after purchasing a few items.

Defendant noticed a few children outside the store, but denied seeing the girl and her brothers. He drove away and picked up his fiancée in West Orange. He denied sitting naked in the driver's seat and masturbating. Defendant also testified he was incarcerated between October 22, 2010 and December 2, 2012. The State stipulated to the date of defendant's release on an unrelated matter.

In summation, defense counsel argued, among other things, defendant was in jail during some of the previous occasions the girl had supposedly seen him. Counsel suggested the children had

not only mistaken defendant for the man in the red Jeep, but also mistook what he was doing when they saw him in the green Jeep.

Following the jury's verdict and defendant's sentencing, defendant filed this appeal.

Defendant argues on appeal the trial court committed reversible error by not giving the N.J.R.E. 404(b) limiting instruction, and that his sentence is excessive. His arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We add only the following comments.

We agree with the State that defendant's argument concerning the 404(b) limiting instruction is precluded by the doctrine of invited error. "Under the invited error doctrine, 'trial errors that were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal.'" State v. Munafo, 222 N.J. 480, 487 (2015) (quoting State v. A.R., 213 N.J. 542, 561 (2013)). As our Supreme Court has explained, the invited error doctrine "gives voice to 'the common-sense notion that a disappointed litigant cannot argue on appeal that a prior ruling was erroneous when that party urged the lower court to adopt the proposition now alleged to be error.'" Ibid. (quoting A.R., supra, 213 N.J. at 561).

This is precisely what happened here. Defendant pursued a defense premised on the proposition the children mistook him for

a predator who pursued them in the past. Defendant objected to the State's proposed 404(b) limiting instruction. Now, disappointed in the trial's outcome, he argues the ruling he sought was erroneous. Defendant invited the ruling. He is now precluded from arguing the ruling was both erroneous and grounds for a new trial. Accordingly, we affirm his convictions.

Defendant also argues his sentence is excessive. He asserts a seventeen-year sentence for masturbating in public is unconscionable. Defendant did not simply masturbate in public; he committed the crimes of sexually assaulting a child and endangering the welfare of children. Moreover, defendant is a persistent offender, a fact he does not dispute. According to the trial court, defendant's "[thirteen] prior indictable convictions" include convictions for endangering the welfare of a child, peering into victims' windows, and violating conditions of a special sentence. The trial court's findings of aggravating and mitigating factors are supported by the record, and the sentence does not "shock the judicial conscience" in light of the particular facts of the case and defendant's extensive criminal history. State v. Roth, 95 N.J. 334, 364-65 (1984). Accordingly, we affirm the sentence.

Affirmed.