

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5232-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

M.A.S.,

Defendant-Appellant.

Submitted February 14, 2017 – Decided July 6, 2017

Before Judges Koblitiz, Rothstadt and
Sumners.

On appeal from Superior Court of New Jersey,
Law Division, Gloucester County, Indictment
No. 11-11-1183.

Joseph E. Krakora, Public Defender, attorney
for appellant (Jaime B. Herrera, Assistant
Deputy Public Defender, of counsel and on
the briefs).

Christopher S. Porrino, Attorney General,
attorney for respondent (Jeffrey P.
Mongiello, Deputy Attorney General, of
counsel and on the brief).

PER CURIAM

Defendant M.A.S.¹ appeals from a judgment of conviction entered by the Law Division after a jury convicted him of committing two counts of second-degree of sexual assault upon his sixteen-year-old niece, D.S. The court sentenced him to an aggregate term of eight-years, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, Megan's Law restrictions, N.J.S.A. 2C:7-1 to -23, and parole supervision for life, N.J.S.A. 2C:43-6.4. On appeal, defendant argues that his conviction should be vacated because the trial court improperly permitted a Sexual Assault Nurse Examiner (SANE) to testify to statements made by D.S. during the nurse's examination of the young victim in which D.S. identified defendant as her assailant and provided details of her assault. We agree that portions of the nurse's testimony should not have been admitted, but we affirm, finding the error to be harmless.

In 2011, D.S. disclosed to a guidance counselor at school that defendant had sexually assaulted her. The guidance counselor contacted the police who investigated and arrested defendant. On November 30, 2011, a grand jury returned an indictment charging defendant with second-degree sexual assault of a relative between the ages of sixteen and eighteen, N.J.S.A.

¹ We use initials to preserve the confidentiality of the victim. R. 1:38-3(c)(12).

2C:14-2(c)(3)(a) (count one); second-degree sexual assault by force or coercion without serious injury, N.J.S.A. 2C:14-2(c)(1) (count two); and fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b) (count three).

At defendant's ensuing trial, D.S., her sister, the guidance counselor, and the SANE nurse testified on behalf of the State. Defendant testified on his own behalf.

According to the testimony presented by the State, before disclosing the assault to her guidance counselor, D.S. disclosed defendant's conduct to others. At the time of the assault, D.S. lived with her grandmother, older brother, and three younger sisters, including her sister Da.S., who was two years younger than her. Defendant, who was D.S.'s father's brother, periodically lived in the home as well, at which time he slept in the living room.

According to D.S., on February 10, 2011, defendant assaulted her while her sisters and their grandmother were home. D.S. stated that she went to sleep in her bedroom, where she slept alone, and awoke around midnight to someone touching her. During the course of the attack, D.S. was subject to digital penetration and defendant's unsuccessful attempt to penetrate her with his penis. While the attack was underway, D.S. began "[s]haking in fear," at which point, defendant stopped, "told

[her] not to tell anybody," and left the room. D.S. estimated the incident lasted ten minutes.

At first, D.S. did not know who was attacking her because she was laying on her side, facing a wall, although she assumed it was defendant. She was able to confirm it was defendant when he spoke to her just prior to leaving the room, at which point she recognized his voice.

After defendant left, D.S. went to her sisters' room and woke Da.S. At trial, Da.S. stated D.S. was visibly upset, and D.S. "told [her] about what happened between her and [their] uncle," how "he was inappropriately touching her." In response, Da.S. called a different uncle and aunt to tell them what had occurred. She also crawled out of her bedroom window and went to her parents' house nearby, to inform them of defendant's conduct. Although the grandmother was in the house, D.S. stated she did not wake her regarding the incident because she thought she would "take his side." D.S. ultimately wrote a note explaining what happened, which Da.S. gave to their grandmother the next morning.

The next day at school, D.S. confided in a friend regarding the events of the previous night. The friend told her she should speak to the guidance counselor, which she did. The guidance counselor testified D.S. was "visibly upset, . . .

withdrawn and . . . crying." D.S. eventually disclosed the incident, and the guidance counselor contacted the police, who then came to the school to speak with D.S. After speaking with police, the guidance counselor drove D.S. to the police station, where she was met by her grandmother. After giving a statement to police, the grandmother drove D.S. to the hospital where D.S. was examined by the SANE nurse.

At trial, the nurse explained the purpose of having SANE nurses in the hospital is so "[e]very patient that . . . comes in with sexual assault has the same opportunity to have specialized victim-centered care." She stated that she explains to her patients the purpose of the examination, takes an oral history to determine how best to treat the patient, conducts a "head-to-toe assessment [to] make sure the patient gets treated properly," and then conducts a "detailed genital examination." The nurse testified that her examination of D.S. revealed that "an injury did take place inside the vagina within a recent amount of time."

When the prosecutor began to question the nurse about the oral history provided to her by D.S., defense counsel objected

on hearsay grounds.² The court allowed the testimony, relying upon N.J.R.E. 803(c)(4): "Statements for purposes of medical diagnosis or treatment." The nurse then testified as to D.S.'s description of the incident, including D.S.'s identification of defendant as her assailant, making sure that it was clear that she was quoting D.S.'s statement to her. The nurse's recounting of D.S.'s statement essentially mirrored D.S.'s testimony, except that D.S. indicated to the nurse that defendant asked her if she wanted him to "leave her alone." D.S. nodded her head yes, according to the nurse, and defendant "kissed her thigh and told her . . . not to tell anyone and left the room." Additionally, the nurse testified that D.S. stated that earlier in the night, prior to the incident, defendant asked her if she wanted "something to help her sleep" and that her uncle "kept coming down to her room . . . earlier in the evening." On cross-examination, defense counsel asked if these details were "medically relevant," to which the nurse responded, "[n]ot necessarily."

² It is not clear whether defense counsel even objected. He stated, "Judge, I don't know. I think I might have to object." And, when the prosecutor and judge identified the rule through which the State sought the testimony's admission, defense counsel said "okay." The judge allowed the testimony. For our purposes, we assume an objection was interposed and not withdrawn.

During his closing, defense counsel focused on inconsistencies in D.S.'s testimony and argued D.S. presented a "spotty and frankly inconsistent story," and suffered a "Pinocchio problem." Among the inconsistencies he referred to was a statement made by D.S. to the SANE nurse about whether she was subjected to any type of penetration. Counsel also explained to the jury that the nurse did what she was supposed to do by "accept[ing D.S.'s story] as presented." He also relied upon the nurse's testimony about her attempt to examine D.S. with a speculum that caused D.S. discomfort and pain and asked the jurors to compare that fact with D.S.'s testimony that upon penetration by defendant she did not feel any pain. Counsel also attempted to create an issue as to the assailant's identity by stating that D.S. did not see the perpetrator, but only identified him by the sound of his voice, and noted defendant testified that D.S.'s brother and cousin arrived home at 12:30 a.m., then stating, "I'm not saying the brother did anything. I'm not saying the cousin did anything. I'm saying based on what we know right now, we just don't know."

The prosecutor's closing focused on the nurse's testimony only to the extent that D.S. made statements to her about penetration and the evidence of injury to D.S.'s vagina. The prosecutor explained to the jury that the nurse could not tell

them what happened to D.S., only that the "injury that she discovered . . . is consistent with what D.S. told her." The prosecutor did not mention statements recounted by the nurse that may have been extraneous to evaluation and treatment, including D.S.'s statement about defendant being the perpetrator. Defense counsel did not object to the prosecutor's closing argument at trial.

On appeal, defendant argues:

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE SEXUAL ASSAULT NURSE EXAMINER TO PRESENT DETAILED TESTIMONY REGARDING THE ALLEGED ASSAULT, WHICH WAS HEARSAY UNDER THE MEDICAL EXCEPTION RULE, AND IMPROPERLY IDENTIFIED THE ALLEGED ASSAILANT. THE PREJUDICE TO DEFENDANT WAS COMPOUNDED WHEN THE PROSECUTOR USED THIS TESTIMONY IN SUMMATION AS SUBSTANTIVE EVIDENCE TO ENHANCE D.S.'S CREDIBILITY. (PARTIALLY RAISED BELOW).

Defendant contends that since the nurse's examination was for "evidence-gathering purposes" and "not for the purpose of medical diagnosis or treatment," D.S.'s hearsay statements were not admissible under N.J.R.E. 803(c)(4). He relies upon the fact that the nurse was trained in the process of collecting and maintaining evidence and during her "explanation of the

examination of a patient, care and treatment were not mentioned."

Defendant also avers that "even if this court were to determine that [the nurse] examined D.S. for the purpose of medical diagnosis or treatment, many of the statements by D.S. that were repeated [by the nurse] were inadmissible, and prejudiced defendant." Defendant asserts "[t]his testimony was harmful to defendant due to the lack of other evidence at trial," such as "witnesses to the incident."

"We begin by acknowledging our deferential standard for reviewing a trial court's evidentiary rulings, which should be upheld 'absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment.'" State v. Perry, 225 N.J. 222, 233 (2016) (quoting State v. Brown, 170 N.J. 138, 147 (2001)). An abuse of discretion is "a clear error of judgment" that is "so wide of the mark that a manifest denial of justice resulted." State v. J.A.C., 210 N.J. 281, 295 (2012) (quoting Brown, supra, 170 N.J. at 147). However, appellate review of a trial court's legal conclusions is plenary. State v. Handy, 206 N.J. 39, 45 (2011).

Here, the nurse's testimony regarding what D.S. told her about the attack was hearsay. Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter

asserted." N.J.R.E. 801(c). An exception to the prohibition against hearsay are "[s]tatements made in good faith for purposes of medical diagnosis or treatment which describe medical history" or the cause of the declarant's symptoms "to the extent that the statements are reasonably pertinent to diagnosis or treatment." N.J.R.E. 803(c)(4).

"It has long been the rule in New Jersey that the declarations of a patient as to his condition, symptoms and feelings made to his physician for the purpose of diagnosis and treatment are admissible in evidence as an exception to the hearsay rule." Cestero v. Ferrara, 57 N.J. 497, 501 (1971); see also Prioleau v. Ky. Fried Chicken, Inc., 434 N.J. Super. 558, 586 (App. Div. 2014), aff'd as modified, 223 N.J. 245 (2015). This hearsay exception is premised on the notion that "the declarant is more interested in obtaining a diagnosis and treatment culminating in a medical recovery than [she] is in obtaining a favorable medical opinion culminating in a legal recovery." Biunno, Current N.J. Rules of Evidence, comment on N.J.R.E. 803(c)(4) (2017) (citing, In re Registrant C.A., 146 N.J. 71, 99 (1996)).

For the exception to apply, "the patient must have believed that the statement would enable the doctor to treat," because "[r]eliability is based on the declarant's belief that a doctor

will properly treat him if the doctor is told the truth concerning the ailment." State in the Interest of C.A., 201 N.J. Super. 28, 33-34 (App. Div. 1985). Because N.J.R.E. 803(c)(4) is based upon a presumed "treatment motive," a statement by a declarant who "is unaware that his or her statements will enable a physician to make a diagnosis and administer treatment" lacks the requisite degree of trustworthiness to qualify under this exception. R.S. v. Knighton, 125 N.J. 79, 87-88 (1991). For that reason, hearsay obtained during evidence gathering and medical consultations conducted purely in preparation for litigation remains inadmissible. C.A., supra, 201 N.J. Super. at 33.

Therefore, in order to be admissible, the patient's statements must be "made in good faith for purposes of medical diagnosis or treatment." State v. Pillar, 359 N.J. Super. 249, 289 (App. Div.) (quoting N.J.R.E. 803(c)(4)), certif. denied, 177 N.J. 572 (2003). They must also "describe medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof to the extent that the statements are reasonably pertinent to diagnosis or treatment." Ibid. D.S.'s statements to the nurse identifying defendant or otherwise setting forth the details of her assault that were "not relevant to [D.S.'s]

. . . treatment" were not admissible. State v. McBride, 213 N.J. Super. 255, 273 (App. Div. 1986) (first citing Cestero, supra, 57 N.J. at 501-02; and then citing C.A., supra, 201 N.J. Super. at 33-34).

The trial court's error here, however, was harmless. An error at trial will be considered reversible only if it is "clearly capable of producing an unjust result." R. 2:10-2. "The harmless error standard 'requires that there be some degree of possibility that [the error] led to an unjust result. The possibility must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached.'" State v. Lazo, 209 N.J. 9, 26 (2012) (alterations in original) (quoting State v. R.B., 183 N.J. 308, 330 (2005)).

Applying that standard, we observe that prior to the nurse testifying, D.S. testified about her identification of defendant as her assailant, the details of her assault, and how she shared that information with others before speaking to the nurse. The other individuals included her sister and guidance counselor, who also testified as to what D.S. told them before she spoke to the nurse. Defendant has not established that the nurse's repetition of the same information caused him any prejudice. To the contrary, defense counsel relied on the nurse's testimony

about what D.S. said to argue that D.S. gave several inconsistent statements and thus was not worthy of belief.

Turning next to defendant's contention that he "was deprived of a fair trial by the [State's] improper use of" the nurse's testimony during summation, we note that defendant did not object to the prosecutor's closing statement at trial. Because there was no objection at trial, we review the issue for plain error. R. 2:10-2. We find none. The prosecutor's closing discussed the nurse's testimony only to the extent that it was pertinent to the issue of whether or not there was injury to the vagina indicative of penetration and whether D.S. gave inconsistent statements, as rebuttal to the defense's summation.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION