SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5529-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TALBERT D. HINTON, a/k/a YASIN R. BRYANT, TALBRET HINTON, TAV HINTON, HINTON D. TALBERT,

Defendant-Appellant.

Submitted June 1, 2017 – Decided September 11, 2017

Before Judges O'Connor and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 14-01-0098.

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

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

PER CURIAM

In April 2015, a jury acquitted defendant Talbert D. Hinton of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1), but convicted him of second-degree sexual assault, N.J.S.A. 2C:14-2(b), and endangering the welfare of a child, N.J.S.A. 2C:24-4(a). In the aggregate, he was sentenced to an eighteen-year extended term of imprisonment, subject to an eighty-five percent period of parole ineligibility. Defendant appeals from his convictions and sentence. We affirm.

I

The salient evidence was as follows. In December 2012, then five-year old Lisa[1] went to McDonald's with defendant, her mother's friend. Lisa testified after she finished her meal, defendant drove her to his grandmother's home. While she sat on a bed and listened to music, defendant took off his pants but not his underwear. He then took her leggings down to her knees, but left her underwear intact.

Lisa stated defendant then got on top of her, as she lay face down. She felt his chest touch her back and his stomach touch her buttocks. She began to cry, because she believed she would get in trouble with her mother for not returning home as soon as she finished eating at McDonald's. Defendant then got

[1] The child's name is a pseudonym to protect her privacy.

off of her and, after she pulled her leggings up, took her home. Lisa testified the first person she told about the incident was her teacher, because the child found the teacher trustworthy and had a good relationship with her.

During a videotaped interview conducted by a detective of the Monmouth County Prosecutor's Office, which was viewed by the jury, Lisa stated while at his grandmother's home, defendant pulled her pants and underwear down to her knees. As a result, she started to cry and told him to stop. However, he then touched her buttocks with his penis and was moving it "back and up." She described his penis as hard and, at one point, inserted it "inside [my] butt," which hurt "a little bit." He then stopped and, after getting her a "rag" to dry her face, drove her home.

Lisa's teacher testified that, in June 2013, she sat next to Lisa on a bus, which was taking Lisa's entire Kindergarten class on a field trip to a park. Lisa spontaneously said she had gone to a McDonald's with a "mean and nasty" man, who later took her to his grandmother's home, where he pulled down her underwear. The child further stated she started to cry and told him to stop, so he took her home.

After arriving at the park, the teacher approached the teacher assistant for the Kindergarten class and told her to talk to Lisa; the teacher could not recall if she informed the assistant what Lisa had related to her. Finally, the teacher testified that, after the Christmas vacation in 2012, the child was "a little withdrawn" and "not as eager to participate."

The teacher assistant testified she asked Lisa what she had talked about with the teacher. Lisa reported her mother's friend took her to McDonald's and then to his home. While there, he took off his and her clothes, and rubbed his body against hers. The assistant also testified that after the Christmas vacation in 2012, the child had an "attitude" and would get "upset about anything." The teacher and the assistant reported the child's comments to the school principal, who contacted the police.

Lisa was treated by a pediatrician who focuses her practice on children who allegedly have been abused. The pediatrician testified the child told her an adult named "Tal" took her to his grandmother's home and asked her to lie down on her stomach. He then put his penis on top of her buttocks, which "hurt a little."

Lisa also told the pediatrician she was concerned about physical abuse between her mother and stepfather, and further mentioned her mother had hit her with a belt, but stated the belt did not cause any injuries or marks. In fact, Lisa stated she had never been physically abused by an adult in her home. The pediatrician testified she did not have any concern the child was being abused in her home.

The pediatrician further testified that Lisa's mother informed her the child's behavior changed after the time of the subject incident. Lisa's mother related to the pediatrician that Lisa became defiant, continued to do well academically. The doctor commented exposure to domestic violence can cause behavioral changes, including becoming more defiant.

Lisa's mother also testified. She stated around Christmas 2012, she consented to defendant taking Lisa to McDonald's for lunch. The mother recalled they had been gone for a long period of time and she became worried, but Lisa did come home that afternoon and reported she had had fun while she was out.

Months later, the mother received a call from the teacher assistant; following that call, the mother asked Lisa what she had reported to the teacher and the teacher assistant. The child said defendant took her to his mother's house, pulled her

pants and underwear down, made her lie on the bed, laid on top of her, and rubbed his penis on her buttocks.

During cross-examination, defense counsel broached the subject of domestic violence between the mother and Lisa's step-father. The State objected, and during a sidebar conference defense counsel explained she wanted to "infer possible third-party guilt" by suggesting another in Lisa's home had abused the child. The court sustained the objection, noting there was no evidence the step-father or any third party committed the acts about which Lisa complained.

The defense attorney then advised the court she wished to question the mother about hitting the child with a belt, to suggest the change in the child's demeanor around the time of the subject incident was the result of her mother's abuse. The court sustained the State's objection, noting there was no evidence the mother caused the child to sustain any injury when she hit Lisa with a belt, not to mention there was no evidence a female committed the alleged acts of sexual abuse. The court also expressed concern defense counsel's questions would necessitate the mother asserting her Fifth Amendment[2] rights in the presence of the jury.

[2] U.S. Const. amend. V.

During her summation, defense counsel argued there was insufficient proof defendant committed the alleged offense, and emphasized the inconsistencies among the child's reports of the incident rendered her claim of sexual assault untrustworthy.

II

Defendant asserts the following arguments for our consideration:

> POINT I – THE TRIAL JUDGE IMPROPERLY PERMITTED THE FRESH-COMPLAINT WITNESS TO TESTIFY AS TO THE DETAILS OF THE ALLEGED ASSAULT, PROVIDED THE JURY WITH AN UNNECESSARY AND MISLEADING INSTRUCTION ON THE TENDER-YEARS HEARSAY EXCEPTION, AND PERMITTED THE STATE TO IMPROPERLY BOLSTER [THE CHILD'S] CREDIBILITY BY ALLOWING IT TO PRESENT NEEDLESSLY CUMULATIVE EVIDENCE OF [THE CHILD'S] ALLEGATIONS AGAINST DEFENDANT. THE COMBINATION OF THESE ERRORS DEPRIVED DEFENDANT OF A FAIR TRIAL.
>
> A. The Judge Failed To Limit [The Teacher Assistant] Fresh-Complaint Testimony To General Information About [the Child's] Complaint To Her.
>
> B. The Judge Improperly Issued A Jury Instruction On Tender-Years Testimony That Was Likely To Have Misled And Confused The Jury.
>
> C. In Addition To The Victim's Testimony, The Judge Permitted Three Hearsay Statements Under The Tender-Years Hearsay Exception, One Hearsay Statement Under The Fresh-Complaint Doctrine, And

Testimony About The Reported Incident From The Treating Doctor, Resulting In Cumulative Evidence That Improperly Bolstered The Victim's Testimony and Prejudiced Defendant.

POINT II — THE TRIAL COURT VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE BY PROHIBITING COUNSEL FROM ASKING THE VICTIM'S MOTHER ABOUT VIOLENCE IN THE HOME, WHICH SERVED AS AN ALTERNATIVE EXPLANATION FOR THE VICTIM'S PURPORTED BEHAVIORAL CHANGES AFTER THE INCIDENT.

POINT III — THIS CASE SHOULD BE REMANDED FOR RESENTENCING BECAUSE THE SENTENCING COURT IMPROPERLY WEIGHED THE AGGRAVATING AND MITIGATING FACTORS, RESULTING IN AN EXCESSIVE SENTENCE.

A

We first address defendant's contention the court erred when it failed to limit the teacher assistant's testimony, which both parties regarded as fresh complaint testimony. As stated above, the assistant testified the child informed her that, after her mother's friend took her to McDonald's, he then took her to his home. While there, he took off his and her clothes, and rubbed his body against hers.

The fresh complaint doctrine is one that "allows the admission of evidence of a victim's complaint of sexual abuse, otherwise inadmissible as hearsay, to negate the inference that

the victim's initial silence or delay indicates that the charge is fabricated." State v. R.K., 220 N.J. 444, 455 (2015). However, "[o]nly the facts that are minimally necessary to identify the subject matter of the complaint should be admitted." Id. at 456. When admitting fresh complaint evidence, a trial court should make clear to a jury such evidence should not be considered to "bolster [a] victim's credibility or prove the underlying truth of [] sexual assault charges," but rather used only for the narrow purpose of "dispel[ing] [a negative] inference [from] the victim['s]" silence. State v. Bethune, 121 N.J. 137, 148 (1990).

Defendant contends the teacher assistant's testimony should have been limited to the fact the child complained to her and the "general substance of the complaint – that someone inappropriately touched her." In addition, defendant points out the court failed to give a limiting instruction at the time of the assistant's testimony.

First, the limited details the teacher assistant provided were not more than necessary to identify the subject matter of the child's complaint. Although our courts have disallowed "excessive details," see State v. Bethune, 121 N.J. 137, 147 (1990), "[o]ur courts have been consistent in allowing fresh-

complaint witnesses to provide enough basic information that the jury will have a sense of the complaint's context." State v. R.K., 220 N.J. 444, 459 (2015).

In State v. Balles, 47 N.J. 331 (1966), the victim's mother testified the victim had disclosed to her the defendant "put his hands down her panties and had touched here." Id. at 339. Our Supreme Court determined the mother's testimony was not improper under the fresh complaint doctrine, as she did not "elaborate and could hardly have said less and still identified the nature of [the victim's] complaint." Ibid.

Here, as for the illicit act itself, the assistant merely testified the child said defendant took off her and his clothes, and rubbed his body against hers. These few details were necessary to provide the minimal information necessary to enable the jury to have a "sense of the complaint's context," and were analogous to those provided by the fresh complaint witness and found acceptable by the Court in Balles.

Second, the court did provide the appropriate limiting instruction in its final charge to the jury, thoroughly explaining the limited nature of fresh complaint testimony. There is no requirement such instruction be provided at the time fresh complaint testimony is admitted. See State v. Hummel, 132

N.J. Super. 412, 424 (App. Div. 1975). Accordingly, we conclude there is no merit to defendant's contention the court erred by allowing the admission of the teacher assistant's testimony and by failing to provide a limiting instruction at the time such testimony was provided.

B

Defendant next contends the court issued a jury instruction on tender years testimony that likely misled and confused the jury. Before trial, the court determined the proffered testimony of the mother, teacher and detective was admissible under the tender years exception. Defendant does not challenge this ruling, or that these witnesses' testimony was substantive evidence. The defendant complains the final jury instruction on tender years testimony was given immediately following the instruction on fresh complaint testimony, and thus may have confused the jury on how to use these two different kinds of testimony.

We have examined the jury charge and find no merit to the contention the charge was confusing or could have misdirected the jury on how to consider and apply these two forms of testimony. The court distinguished fresh complaint from tender years testimony and clearly instructed the jury how it was to

consider each kind of testimony. Defendant's remaining arguments pertaining to the court's instructions on fresh complaint and tender years testimony are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

C

In argument Point I(c), defendant maintains the court erred by admitting: (1) the teacher assistant's testimony under the fresh complaint doctrine; (2) the teacher's, detective's, and mother's testimony under the tender years exception; and (3) the testimony from Lisa's treating pediatrician. Defendant does not challenge the fact each witness's testimony was separately admissible under one rule of law or another. The claimed error is the testimony from all of these witnesses improperly bolstered the victim's testimony. That is, collectively, the admission of these witnesses' testimony had the cumulative effect of bolstering the victim's testimony and thus prejudiced him. We disagree.

First, this particular issue was not raised before the trial court. Defendant did move before trial to exclude the testimony of the mother, teacher, and detective under the tender years exception, but he did not seek the exclusion of such

testimony under N.J.R.E. 403. Therefore, our review of defendant's argument is guided by the plain error rule. R. 2:10-2; see also State v. Miraballes, 392 N.J. Super. 342, 360 (App. Div.), certif. denied, 192 N.J. 75 (2007).

Under the plain error rule, any error will be disregarded unless "clearly capable of producing an unjust result." State v. Feaster, 156 N.J. 1, 71 (1998). Reversal based on plain error requires us to find the error is "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. Williams, 168 N.J. 323, 336 (2001) (quoting State v. Macon, 57 N.J. 325, 336 (1971)). We may also infer from the lack of an objection defense counsel recognized the alleged error was of no moment or was a tactical decision to let the error go uncorrected at the trial. Macon, supra, 57 N.J. at 337.

Second, the child's report of what occurred varied from one person to another; thus, collectively, the subject testimony did not bolster the victim's testimony. In fact, defense counsel emphasized the inconsistencies in the child's reports in her cross-examination of some of the witnesses. During counsel's summation, she highlighted the key differences in the child's

reports to each adult, arguing the child's inconsistent reports made her untrustworthy.

Moreover, significantly, while the jury convicted defendant of second-degree sexual assault, N.J.S.A. 2C:14-2(b), specifically, sexual contact, as well as endangering the welfare of a child, N.J.S.A. 2C:24-4(a), the jury acquitted defendant of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1). The State failed to prove beyond a reasonable doubt defendant committed an act of sexual penetration upon the child. Clearly, the jury rejected the child's reports of anal penetration. Given the inconsistencies in the child's reports as provided through the subject witnesses' testimony, which defendant deftly utilized to further his defense — a strategy that succeeded in the acquittal of the most serious charge -, we cannot conclude there was plain error in the admission of the testimony about which defendant complains.

D

Defendant contends the court erred by precluding him from cross-examining the mother on whether the stepfather had been violent toward her, and on the mother's use of a belt to punish Lisa. We reject defendant's argument, substantially for the reasons expressed by the trial court.

"The scope of cross-examination is a matter resting in the broad discretion of the trial court." State v. Martini, 131 N.J. 176, 255 (1993). Accordingly, it is "well settled" that the "scope of cross-examination is a matter for the control of the trial court[,] and an appellate court will not interfere with such control unless clear error and prejudice are shown." Id. at 263-64 (quoting State v. Murray, 240 N.J. Super. 378, 394 (App. Div. 1990)).

As observed by the trial court, there was no evidence the stepfather or any third party committed the acts about which Lisa complained; therefore, evidence of domestic violence between the mother and stepfather was irrelevant. Further, to the extent defendant sought to show witnessing domestic violence can affect a child's behavior and, thus, the observed change in Lisa's behavior may not have been caused by his alleged conduct, defendant effectively cross-examined the pediatrician on the point domestic violence can make a child defiant.

As for the mother's use of a belt to discipline the child, first, there was no evidence the mother committed the acts with which defendant was charged. Second, there was no expert testimony to substantiate the use of the belt caused or could have caused the change in the child's behavior, not to mention

the child herself said she was not injured as a result of her mother's use of a belt. Finally, the pediatrician testified she was not concerned the child was being abused at home.

Accordingly, we are satisfied the trial court's decision to limit defendant's cross-examination on these issues did not prejudice defendant.

E

Finally, defendant argues this matter must be remanded for resentencing because the court improperly weighed the aggravating and mitigating factors, resulting in an excessive sentence. We disagree.

An appellate court reviews a sentence under a deferential standard. State v. Fuentes, 217 N.J. 57, 70 (2014). Our "review of sentencing decisions is relatively narrow and is governed by an abuse of discretion standard." State v. Blackmon, 202 N.J. 283, 297 (2010). "In conducting the review of any sentence, appellate courts always consider whether the trial court has made findings of fact that are grounded in competent, reasonably credible evidence and whether 'the factfinder [has] appl[ied] correct legal principles in exercising its discretion.'" Ibid. (alterations in original) (quoting State v. Roth, 95 N.J. 334, 363 (1984)).

The traditional articulation of this standard limits our review to situations where application of the facts to the law has resulted in a clear error of judgment leading to sentences that "shock the judicial conscience." Roth, supra, 95 N.J. at 364-65. If the sentencing court has not demonstrated a clear error of judgment or the sentence does not shock the judicial conscience, appellate courts are not permitted to substitute their judgment for that of the trial judge. Ibid.

Here, the trial court found aggravating factors three, N.J.S.A. 2C:44-1(a)(3) (the risk of re-offending); six, N.J.S.A. 2C:44-1(a)(6) (the extent and seriousness of defendant's prior record); and nine, N.J.S.A. 2C:44-1(a)(9) (the need to deter defendant and others from violating the law). The trial court noted defendant, only age thirty-five at the time of sentencing, had already been convicted of thirteen indictable and ten Municipal Court offenses.

It is evident from the record defendant has previously had the benefit of probationary sentences, but to no avail. He reoffended and was subsequently imprisoned, only to reoffend again. The three aggravating factors found by the court to exist in this matter are supported by the credible evidence. We

are unpersuaded that it is either necessary or appropriate for us to intervene and adjust this sentence.

To the extent we have not expressly addressed any of defendant's arguments, it is because we concluded they lacked sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.