SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5783-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

R.N.,

Defendant-Appellant.

Submitted June 7, 2017 – Decided December 20, 2017

Before Judges Carroll and Gooden Brown.

On appeal from Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 11-12-1099.

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

Jennifer Webb-McRae, Cumberland County Prosecutor, attorney for respondent (Stephen C. Sayer, Assistant Prosecutor, of counsel and on the brief).

The opinion of the court was delivered by

GOODEN BROWN, J.A.D.

A grand jury indicted defendant for first-degree attempted murder, N.J.S.A. 2C:11-3, N.J.S.A. 2C:5-1 (count one); first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(3) (count two); first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(6) (count three); first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(4) (count four); third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2) (count five); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (count six); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count seven); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (count eight); and third-degree criminal restraint, N.J.S.A. 2C:13-2(a) (count nine).[1] Following a jury trial, defendant was convicted of all counts and sentenced to an aggregate term of thirty-six years' imprisonment, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, and Megan's Law, N.J.S.A. 2C:7-1 to -23, and the special sentence of parole supervision for life, N.J.S.A. 2C:43-6.4.

The charges stemmed from defendant abducting a stranger, P.B., from the street, and brutally raping and stabbing her

[1] The indictment charged defendant with a total of twenty-three counts. The remaining counts consisted of sexual assault and related offenses committed against four other victims. Counts one through nine pertained to a single victim and were severed for purposes of trial. This appeal is limited to those counts.

repeatedly in a stairwell. P.B., who had been convicted for prostitution ten years earlier, admitted to smoking crack cocaine and drinking alcohol earlier that day, and was unable to identify her attacker. However, DNA evidence linked defendant to the crimes. Defendant now appeals from his convictions and sentence, raising the following contentions for our consideration:

> POINT I
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> THE STATE'S COMMENTS DURING ITS SUMMATION, INCLUDING THE USE OF AN UNDULY PREJUDICIAL VISUAL PRESENTATION WHICH EXPRESSED OPINION AS TO DEFENDANT'S GUILT IN AN INFLAMMATORY WAY, DEPRIVED DEFENDANT OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL. (PARTIALLY RAISED BELOW).
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> POINT II
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> THE DOCTOR'S TESTIMONY REGARDING WHETHER P.B.'S INJURIES WERE LIFE-THREATENING EXCEEDED THE BOUNDS OF APPROPRIATE LAY-OPINION TESTIMONY ALLOWED PURSUANT TO [N.J.R.E.] 701.
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> POINT III
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> THE TRIAL COURT ERRONEOUSLY MODIFIED AN ELEMENT OF THE OFFENSE INSTRUCTION FOR COUNT TWO. AS THE EVIDENCE PRESENTED BY THE STATE DID NOT ESTABLISH THAT DEFENDANT COMMITTED THE AGGRAVATED SEXUAL ASSAULT DURING THE COMMISSION, OR ATTEMPTED COMMISSION, OF AN AGGRAVATED ASSAULT ON ANOTHER PERSON, THE TRIAL COURT SHOULD HAVE DISMISSED COUNT TWO COMPLETELY.
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> POINT IV

THE AGGREGATE THIRTY-SIX YEAR SENTENCE WITH EIGHTY-FIVE PERCENT PAROLE INELIGIBILITY IS MANIFESTLY EXCESSIVE AND SHOULD BE REDUCED.

After considering the arguments presented in light of the record and applicable law, we affirm in part and reverse in part.

I.

We recount the pertinent facts from the trial record. At approximately 10:30 p.m. on April 22, 2011, P.B. was walking from her mother's house on Second Street in Millville to a friend's house a short distance away. After turning onto Buck Street, a man grabbed P.B. from behind and "forcibly dragged" her down a nearby stairwell. P.B. did not see the man's face or a weapon, but felt something on her neck.

While in the stairwell, the man forced P.B. to undress and perform oral sex on him "with no condom." P.B. could tell that the man was African-American and believed he was under 5'5" or 5'6" in height. The man then penetrated P.B.'s vagina from behind while P.B. begged him to stop. After the man eventually stopped, he cut P.B.'s throat, beat her, and stabbed her "from all different directions." P.B. attempted to fight back and tried to grab the knife, but the man stabbed her again, cutting her hand and breaking her wrist during the struggle. When P.B. tried to flee by climbing up the stairs, the man "dragged" her by the legs back into the stairwell. P.B. begged for her life, telling the man she had

"children to get home to." As P.B. laid motionless on the ground in the fetal position, the man left, returned briefly, kicked her, and then left again.

Naked and "holding [her] intestines in [her] hand[,]" P.B. walked up the street towards a Chinese restaurant. She attempted to open the door, but it was locked because the restaurant was closed. Hui Wang, a restaurant employee, was still inside. She observed P.B. outside but did not open the door because she believed she was "just a crazy . . . person." However, when Wang noticed something red, which she believed was blood, on the restaurant's "glass panel" door, she called 911.

Multiple police officers, paramedics, an ambulance, and the Millville Rescue Squad responded to the scene. Emergency medical technicians (EMTs) performed first aid on P.B. Although P.B. was in and out of consciousness at the time, she recalled screaming that she had been raped. Ryan Jordan, a paramedic, assisted the EMTs in assessing P.B.'s injuries. According to Jordan, P.B. had "multiple lacerations[,]" including a laceration across her neck, "an evisceration[,]"[2] and a possible "head injury." Jordan also observed "superficial wounds in various places" and detected "the

[2] Jordan explained that an evisceration is a traumatic "abdominal wound . . . generally caused by a knife[,]" which "essentially . . . rips open . . . the internal compartments of the abdomen . . . ."

odor of alcohol" on P.B.'s breath. Because of the extent of P.B.'s injuries, Jordan and his partner determined she required a higher level of care and had her transported by helicopter to Cooper Hospital for treatment at a trauma center.

Millville Police Officer Michael Calchi was the first officer to respond to the scene along with the Millville Rescue Squad. Millville Police Officer Robert Runkel arrived shortly thereafter. P.B. was being treated by emergency medical personnel when they arrived. Calchi and Runkel observed P.B. completely nude and covered in blood with a large laceration on her stomach area. In order to locate the crime scene, they followed blood droplets to a stairwell on Buck Street on the side of the Holly City Family Center. There, Calchi and Runkel observed "blood smeared in the stairwell" and clothing "at the base of the stairwell." Calchi found two men sleeping on the steps of another nearby stairwell, but a subsequent investigation ruled them out as having any involvement in or information about the crimes. Interviews of neighboring tenants also yielded negative results, and there were no surveillance cameras in the area. Calchi and Runkel later turned the investigation over to Millville Detective John Redden.

Redden processed the scene, collected evidence, and took photographs. According to Redden, because there was "a misting-type rain at the time," some of the evidence "had washed away[,]"

but "there was some still visible." As to the stairwell, "[p]art of the overhang of the building . . . kept half of it dry and the other half was being rained on." Redden collected and photographed the bloodstained clothing and "an unwrapped condom" found at the bottom of the stairwell. He also photographed and swabbed the "blood smears and drops in various locations, for potential DNA." Later, Redden interviewed P.B. briefly at the hospital but terminated the interview because of her condition.

When P.B. arrived at the hospital, Dr. Steven Ross, the attending trauma surgeon at Cooper Hospital, evaluated her. According to Dr. Ross, P.B. was resuscitated upon arrival. "She was in shock" and "had to have intravenous fluids" administered. Dr. Ross observed "a number of lacerations or incisions on her neck," "hands[,]" "abdomen," and "chest wall." From "one of the wounds on her abdominal wall, she had bowel protruding." She also had "a collapsed lung," and "a tube" was inserted "between her ribs through a small incision to suck the air out and allow her lung to expand." According to Dr. Ross, P.B.'s injuries "necessitated surgery[,] and [she] received blood transfusions in preparation for surgery."

During the operation, "[t]he wounds of the abdominal wall . . . were repaired[,] and the skin . . . left open with packing in it to help prevent infection." As to the laceration on the

chest wall, "[t]he muscle was repaired[,]" the "bleeding was stopped[,]" and the "wound was also packed open." "[T]he lacerations on her neck and hands were closed" with either sutures or staples. In addition, while operating, another surgeon found injuries to P.B.'s "liver," "gallbladder," "colon," and "large intestine" as well as "a lacerated vessel in the artery in the abdominal wall." Specifically, P.B. had "a cut in the liver[,] which had some active bleeding[,]" a cut in the gallbladder, which required its removal, and a laceration in the colon, which "was repaired."

Following surgery, P.B. was admitted to the intensive care unit and placed on a ventilator. P.B. was discharged from the hospital nine days later. Dr. Ross characterized the severity of P.B. injuries as "life-threatening." In addition, P.B.'s blood work indicated that she had alcohol in her system; however, her blood-alcohol level was well below the legal limit for intoxication.

On April 23, 2011, while P.B. was still at the hospital, a Sexual Assault Nurse Examiner (SANE) conducted a sexual assault examination. During the examination, the SANE nurse detected "a dark mass" in P.B.'s "vaginal vault." Fearing that it was a "blood clot[,]" the SANE "had the physician remove it" and discovered it was a "wadded up paper[,]" which was collected along with the

other items in the sexual assault evidence collection kit. The kit also included a reference sample of P.B.'s DNA.

Following the examination, Detective Keith Kanauss of the Cumberland County Prosecutor's Office collected the kit from the SANE. Kanauss also obtained a buccal swab from defendant. The kit, the wad of paper removed from the victim's genital area, and the condom found at the scene were transported to the New Jersey State Police Lab for processing and testing, along with defendant's buccal swab.

Allison Lane, a forensic scientist with the State Police Office of Forensic Sciences, was qualified as an expert in biological stain identification. She was "able to detect sperm cells" on the vaginal, cervical, and anal swabs, but none "on the rectal or oral swabs" in the kit. The wad of paper and the condom were not analyzed. The swabs that tested positive for sperm cells were submitted to the DNA laboratory for analysis along with the DNA reference swabs for the victim and defendant.

Erol Azanli, a forensic scientist in the State Police DNA Lab, was qualified as an expert in DNA testing and analysis. After examining the vaginal and cervical swabs, Azanli found that P.B. was "a minor component of the sperm cell fraction[,]" which was anticipated because she was the source of the swabbing. However, he identified defendant "as the source of the major DNA profile

obtained" from the vaginal and cervical swabs. In addition, defendant was the "single source" of the DNA profile obtained from the anal swab. No profile of a third person was identified. Although P.B. could not identify her attacker, she denied having consensual sex or any other relationship with defendant.

Following the jury verdict, on March 23, 2015, the trial court denied defendant's motion for a new trial. See R. 3:20-1. On May 8, 2015, defendant was sentenced to eighteen years of imprisonment subject to NERA on count one. On count two, defendant was sentenced to a consecutive eighteen-year term subject to NERA and Megan's Law and to a special sentence of parole supervision for life. Counts three, four, and nine were merged into count two, and counts five, six, seven, and eight were merged into count one. A memorializing judgment of conviction was entered on June 10, 2015, and this appeal followed.

II.

On appeal, defendant argues that the prosecutor's "inappropriate comments" during summation, "including the use of an inflammatory Powerpoint presentation, prevented the jury from making a valid assessment of the evidence and from rendering an impartial verdict[,]" thus depriving defendant of "due process and a fair trial." Specifically, defendant challenges the prosecutor's use of "a Powerpoint presentation that highlighted

graphic pictures of the injuries sustained by P.B.[,]" and included a "final slide . . . that simply said 'GUILTY.'" According to defendant, the prosecutor's misconduct "improperly served to inflame the emotions of the jury, bolster the [credibility of the] State's main witness, P.B., and influence the juror[s'] purview as fact-finders by imposing the prosecutor's personal opinion of defendant's guilt." We disagree.

Defendant partially raised this issue for the first time in his motion for a new trial filed prior to sentencing. In rejecting defendant's argument, the court distinguished State v. Rivera, 437 N.J. Super. 434 (App. Div. 2014). The court found that the prosecuting attorney's "use of the word guilty on the last slide, while . . . saying, 'I'm asking you to return a verdict of guilty,'" was no different from "saying it out loud." The court determined that the manner in which the "guilty slide in the [Powerpoint] was shown" was proper and had no "capacity to divert the minds of the jury," or "be so prejudicial" to defendant to warrant a new trial.

Because defendant did not raise an objection during trial, we review his argument under the plain error standard, which mandates reversal only for errors "of such a nature as to have been clearly capable of producing an unjust result . . . ." R. 2:10-2; State v. Maloney, 216 N.J. 91, 104 (2013). The test is whether the possibility of injustice 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. Macon, 57 N.J. 325, 336 (1971).

"The well-established principles guiding prosecutorial conduct are easily stated and not unique to New Jersey." Rivera, 437 N.J. Super. at 443. "We start with the notion that a prosecutor is afforded considerable leeway to make forceful arguments in summation." State v. Bradshaw, 195 N.J. 493, 510 (2008). However, because "the primary duty of a prosecutor is not to obtain convictions but to see that justice is done[,]" State v. Timmendequas, 161 N.J. 515, 587 (1999), it is "as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." State v. Farrell, 61 N.J. 99, 105 (1972) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

Reversal of a conviction based on the prosecutor's conduct is appropriate only if that conduct was "so egregious that it deprived [the] defendant of a fair trial." State v. DiFrisco, 137 N.J. 434, 474 (1994) (quoting State v. Pennington, 119 N.J. 547, 565 (1990)). Stated differently, reversal is warranted when the prosecutor's conduct "substantially prejudice[s] [the] defendant's

fundamental right to have a jury fairly evaluate the merits of his [or her] defense." State v. Harris, 181 N.J. 391, 495 (2004).

Specific forms of advocacy inconsistent with a prosecutor's duty have been expressly disapproved. As pertinent here, prosecutors generally may not vouch for or bolster a State's witness, State v. Frost, 158 N.J. 76, 87 (1999); "comment on facts not shown or reasonably inferable from the evidence in the case," Farrell, 61 N.J. at 102; or express any personal or official opinion or belief that a jury could understand as based on something other than the evidence, including a belief in the defendant's guilt "unless [the prosecutor] makes it perfectly plain that his [or her] belief is based solely on the evidence that has been introduced at the trial[,]" State v. Thornton, 38 N.J. 380, 398 (1962).

In Rivera, we addressed the propriety of the prosecuting attorney's "use of visual aids" such as Powerpoint presentations during opening and closing statements. 437 N.J. Super. at 451. We recognized that its propriety depended on "the content, not the medium . . . ." Id. at 448. There, we held it was impermissible "for a prosecutor to display a slide containing [the] defendant's picture and text declaring him guilty of the crime charged in an opening statement . . . ." Id. at 451. We determined that the "display and oral declaration of [the] defendant's guilt in an

opening statement [was] an egregious interference with [the] defendant's right to a fair trial." Id. at 452.

Here, we agree with the trial court that Rivera is clearly distinguishable, and we find no error, much less plain error. We are satisfied that the slide containing the word "guilty" was permissible advocacy in the context of the prosecuting attorney's summation, rather than the expression of a personal opinion. Further, the photographs in the Powerpoint presentation were admitted into evidence and relevant to the jury's determination of the severity of the victim's injuries, which was an element of several of the charged offenses. Likewise, the prosecuting attorney's references to the extent of the victim's scars were relevant to the severity of her injuries and proper comment on the evidence adduced at trial.

Additionally, contrary to defendant's assertion, the prosecutor did not vouch for P.B.'s credibility, but essentially commented that her veracity should not be judged by her past transgressions of drug and alcohol use or her prior conviction. Indeed, the prosecuting attorney is entitled to "sum up the State's case graphically and forcefully." State v. Johnson, 31 N.J. 489, 510-11 (1960). "We do not expect the prosecutor to perform this burdensome obligation with the daintiness of a participant in a

minuet." State v. Lockett, 249 N.J. Super. 428, 435-36 (App. Div. 1991).

Next, defendant argues that the attending trauma surgeon's testimony that P.B.'s injuries were "life-threatening . . . exceeded the bounds of appropriate lay-witness testimony permitted under [N.J.R.E.] 701." Defendant argues that "[t]he trial court erred in permitting the offending opinion testimony" because, despite having the requisite credentials, the surgeon "was not presented by the State" as an expert and "was never qualified as an expert at trial." We are unpersuaded by defendant's argument.

Because the admissibility of opinion evidence lies within the discretion of the trial court, State v. LaBrutto, 114 N.J. 187, 197 (1989), we review the admission of this evidence for an abuse of discretion. State v. Feaster, 156 N.J. 1, 82 (1998). As a general rule, the trial court's ruling will not be disturbed "unless there is a clear abuse of discretion." Dinter v. Sears, Roebuck & Co., 252 N.J. Super. 84, 92 (App. Div. 1991). Reversal is only appropriate when the trial judge's ruling was "so wide of the mark that a manifest denial of justice resulted." State v. Carter, 91 N.J. 86, 106 (1982).

In State v. McLean, 205 N.J. 438 (2011), our Supreme Court examined the permissible bounds of both expert and lay opinion testimony. The Court noted that lay opinion testimony is governed

by N.J.R.E. 701, which permits a lay witness's "testimony in the form of opinions or inferences . . . if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness'[s] testimony or in determining a fact in issue." McLean, 205 N.J. at 456 (quoting N.J.R.E. 701). Addressing the first requirement, the McLean Court noted that the witness may offer an opinion that entails some processing of the facts perceived and some reliance upon the witness's own experience and training. Id. at 457-59. As for the second requirement, the Court noted that the opinion must be "limited to testimony that will assist the trier of fact either by helping to explain the witness's testimony or by shedding light on the determination of a disputed factual issue." Id. at 458.

The Court stressed that lay opinions "may not intrude on the province of the jury by offering, in the guise of opinions, views on the meaning of facts that the jury is fully able to sort out without expert assistance . . . [or] to express a view on the ultimate question of guilt or innocence." Id. at 461. Consistent with these principles, although treating doctors are "doubtless 'experts,'" their testimony relating to their diagnosis and treatment of a patient "is factual information, albeit in the form of opinion[,]" and is "more accurately" characterized as lay-

opinion testimony permissible under N.J.R.E. 701. Stigliano by Stigliano v. Connaught Labs., Inc., 140 N.J. 305, 314 (1995).

Guided by these principles, we are satisfied that the admission of the challenged testimony did not constitute an abuse of discretion. To be sure, Dr. Ross' testimony that the victim's injuries were life threatening was permissible lay opinion testimony because it related to his diagnosis and decision to perform an emergency operation. As the court pointed out, Dr. Ross could testify "how he would characterize the injuries themselves based on his assessment[,]" particularly since he was "not providing an opinion on causation."

Next, defendant argues that the court erred in its charge to the jury on one of the elements of count two. Defendant argues that "the court's instruction allowed the jury to find the third element of [N.J.S.A. 2C:14-2(a)(3)] satisfied if it found that the act of penetration committed on P.B. occurred during the commission, or attempted commission, of an aggravated assault on her, and not a third person" in violation of State v. Rangel, 213 N.J. 500 (2013). We agree. Although there was no objection to the jury charge, the error constitutes plain error mandating reversal. R. 2:10-2.

Under N.J.S.A. 2C:14-2(a)(3), when, in addition to sexually penetrating a victim, a defendant engages in "the commission, or

attempted commission, . . . of . . . aggravated assault on another," he or she is guilty of aggravated sexual assault. In Rangel, our Supreme Court interpreted the "'aggravated assault on another' provision of N.J.S.A. 2C:14-2(a)(3)" as "intended to punish the accompanying violence against a third person -- perhaps a relative, friend, or other person -- that is used as a means to render more vulnerable or exert control over the sexual assault victim." Rangel, 213 N.J. at 512 (emphasis omitted). "[N.J.S.A.] 2C:14-2(a)(3) responds to the additional egregious circumstances of an aggravated assault on a third person by elevating the sexual assault to a first-degree crime." Ibid.

When charging the jury on the third element of count two, the court stated:

> The third element that the State must prove beyond a reasonable doubt is that the penetration occurred during the commission or attempted commission, whether alone or with one or other persons, of [a]ggravated [a]ssault on another.
>
> The [i]ndictment has alleged two separate charges of [a]ggravated [a]ssault, one of which involves [a]ssault [w]ith a [d]eadly [w]eapon and the other involves [a]ggravated [a]ssault, causing serious bodily injury.
>
> I'm going to define those elements later in this jury instruction. I'm going to refer you to those instructions.

Because the record does not establish that defendant assaulted a third party during his sexual assault of the victim, the conviction cannot stand.[3] We therefore vacate his conviction on count two. "The State having failed to prove the essential elements of the crime charged, defendant's conviction must be reversed and a judgment of acquittal entered." State v. Anastasia, 356 N.J. Super. 534, 541 (App. Div. 2002). In light of our decision to vacate defendant's conviction on count two, defendant will face re-sentencing on the remaining counts. We therefore need not address his excessive sentence argument.

Judgment of acquittal is entered on count two; we affirm as to the remaining counts but remand those counts for resentencing.

[3] We recognize that, inasmuch as the jury found defendant guilty of attempting to murder the victim, the jury could have convicted defendant of aggravated sexual assault for sexually penetrating the victim "during the commission, or attempted commission . . . [of a] homicide . . . ." N.J.S.A. 2C:14-2(a)(3). However, that was not the form of criminal sexual conduct charged in count two of the indictment.