

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1147-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BRYAN S. CALIMANO-SUAREZ, a/k/a
BRYAN S. CALIMANOSUAREZ, BRYAN
CALIMANO, BRYAN C. SUAREZ, BRYAN
S. SUAREZ, BRYAN S. CALIMANO,

Defendant-Appellant.

Submitted December 19, 2017 — Decided January 26, 2018

Before Judges Gilson and Mayer.

On appeal from Superior Court of New Jersey,
Law Division, Union County, Indictment No.
13-11-0935.

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

Thomas K. Isenhour, Acting Union County
Prosecutor, attorney for respondent (Meredith
L. Balo, Special Deputy Attorney General/
Acting Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

A jury convicted defendant Bryan Calimano-Suarez of third-degree aggravated criminal sexual contact, N.J.S.A. 2C:14-3(a), and fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b). The jury was unable to reach a unanimous verdict on charges of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2a(7), and second-degree sexual assault, N.J.S.A. 2C:14-2c(1). Thereafter, the State dismissed the first-degree and second-degree charges.

The court merged the fourth-degree conviction with the third-degree conviction, and sentenced defendant to time served (746 days) and parole supervision for life. The court also ordered defendant to have no contact with the victim, and to comply with Megan's Law restrictions. Defendant appeals his convictions, arguing that repeated instances of prosecutorial misconduct deprived him of a fair trial. We affirm because the prosecutor's comments during summation do not warrant reversal of defendant's convictions.

I.

In June 2013, the victim, M.A.,¹ lived with her husband, her five children, her sister, her sister's girlfriend, and defendant. Defendant's mother and M.A. were close friends, and M.A. allowed

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

defendant to live with her after he was kicked out of his own home.

On June 27, 2013, M.A. learned that her husband was having an extramarital affair and threw him out of their home. Thereafter, she invited several people over to help console her. During the evening, M.A. consumed one or two shots of rum. Later in the evening, defendant asked if he could watch a movie in M.A.'s bedroom. M.A. agreed, but told defendant that she was going to sleep soon, and that he had to leave her room when his movie finished. Shortly before going to sleep, M.A. took her prescribed anti-depressant medication and changed into sweatpants and a tank top. She then laid down on her bed facing away from defendant, and placed a pillow between her knees for comfort.

After falling asleep, M.A. had a disturbing dream. At trial she explained that she has recurring nightmares about sexual abuse that she endured as a child. Typically, the nightmares did not cause any physical sensations. This time, however, she felt something inside her vagina, which she described as "a scratch" that "woke [her] up out [of her] sleep." When she awoke, she saw defendant laying in front of her with his eyes open, and felt him pull his hand out from between her legs. M.A. also noticed that the drawstrings in her sweatpants were untied, and the pillow that she had placed between her knees was moved.

M.A. pushed defendant away from her and jumped out of bed. She testified that after she confronted defendant, he immediately began apologizing to her. Defendant left M.A.'s home and she reported the incident to the police. M.A. provided a sworn statement to the police, and went to the hospital to see a sexual assault nurse examiner (SANE nurse). At the hospital, the SANE nurse collected swabs from M.A.'s vagina, and conducted a visual examination to look for scratches, cuts, or abrasions. The nurse also used a colposcope to illuminate and magnify the area to search for micro-dermal abrasions. The examination did not reveal any visible marks or injuries to M.A.'s vagina.

On November 1, 2013, a Union County grand jury returned an indictment charging defendant with first-degree aggravated sexual assault, N.J.S.A. 2C:14-2a(7); second-degree sexual assault, N.J.S.A. 2C:14-2c(1); third-degree aggravated criminal sexual contact, N.J.S.A. 2C:14-3(a); and fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b). Thereafter, defendant was tried before a jury.

At trial, defense counsel argued that M.A. was mistaken about the entire situation. Specifically, during closing arguments defense counsel argued that (1) there was no physical evidence that M.A.'s vagina was digitally penetrated, (2) M.A. had a tragic history of sexual assaults and realistic, recurring nightmares

about being sexually assaulted, and (3) M.A. was extremely upset after learning about her husband's extramarital affair on the night of the incident. Thus, defense counsel contended that M.A. was not lying, but that her tragic past experiences with sexual assault, her realistic nightmares, and the stress caused by her marital issues clouded her perception and caused her to misconstrue the situation.

During her summation, the prosecutor contended that (1) the characteristics of vaginal tissue could explain why there were no visible scratches or abrasions, (2) M.A. had lost her friendship with defendant's family after reporting the sexual assault, and (3) M.A. would not have made the allegations against defendant and relived the painful experiences from her past unless she was sure about what happened.

The jury returned a verdict, finding defendant guilty of third-degree aggravated criminal sexual contact, and fourth-degree criminal sexual contact. The jury could not reach a unanimous verdict on the first-degree aggravated sexual assault or the second-degree sexual assault charges.

At defendant's sentencing, the court merged defendant's fourth-degree conviction with his third-degree conviction, and sentenced him to time served (746 days), parole supervision for life, and Megan's Law. In addition, the court ordered defendant

to have no contact with the victim. The court also granted the State's motion to dismiss the first-degree aggravated sexual assault and second-degree sexual assault charges. Defendant now appeals from the judgment of conviction.

II.

On appeal, defendant makes one argument, which he articulates as follows:

POINT I – REPEATED INSTANCES OF PROSECUTORIAL ERROR IN SUMMATION DEPRIVED DEFENDANT OF A FAIR TRIAL AND REQUIRE REVERSAL OF THE CONVICTIONS. (Partially Raised Below).

[A.] Comment on the Nature of Vaginal Tissue.

[B.] Comment on M.A.'s Lost Friendship With Defendant's Family. (Not Raised Below).

[C.] Repeated Vouching for M.A. (Not Raised Below).

Having reviewed defendant's arguments in light of the record and applicable law, we affirm because none of the prosecutor's comments warrant reversal of defendant's convictions.

We begin with the basic principle that prosecutors are afforded wide latitude during summations. State v. R.B., 183 N.J. 308, 330 (2005). Nevertheless, they must "confine their comments to evidence revealed during the trial and reasonable inferences to be drawn from that evidence." State v. Smith, 167 N.J. 158,

178 (2001). When considering claims of prosecutorial misconduct, we first determine whether misconduct occurred and, if so, whether it deprived the defendant of a fair trial. State v. Wakefield, 190 N.J. 397, 446 (2007). Thus, even when a prosecutor's comments constitute misconduct, reversal of a defendant's conviction is not justified unless the comments were "so egregious that [they] deprived the defendant of a fair trial." State v. McGuire, 419 N.J. Super. 88, 139 (App. Div. 2011) (quoting State v. Ramseur, 106 N.J. 123, 322 (1987)).

A. Prosecutor's Comments Regarding Vaginal Tissue

Defendant contends that the prosecutor's comments regarding the nature of vaginal tissue were not supported by the testimony of the SANE nurse, and were not reasonable inferences that could have been drawn from that testimony. Since defense counsel objected to the prosecutor's comments about vaginal tissue, we review the alleged misconduct de novo. State v. Smith, 212 N.J. 365, 387 (2012).

During summation, defense counsel called the allegation of sexual assault into question by emphasizing the lack of physical evidence corroborating M.A.'s claim that defendant digitally penetrated her vagina. In that regard, defense counsel stated that "corroboration is so important . . . because of the notion that sometimes people can be sure, yet so wrong." Defense counsel

also pointed to the SANE nurse's testimony concerning her examination of M.A. and the lack of scratches or abrasions in M.A.'s vagina. Specifically, he stated

[the SANE nurse] . . . was clear, [she] did not observe . . . anything abnormal. There's nothing. [She] looked, [she] magnified it, [she] had light, [she] had this, and there was just nothing there. And when the State even asked her, is there evidence of penetration, the [nurse] said, no.

In response, the prosecutor attempted to explain the lack of scratches or abrasions in M.A.'s vagina during her summation by contending

[s]o a woman's — because that area of our bodies is a little bit more sensitive . . . we're going to have that heightened awareness of it

You know when you have dry skin in the winter and you scratch and you leave like little white lines on your arm, and they go away. That's dried skin in the winter when the heat is blasting and your skin is dry. The vagina is not a dry space. It's very wet. It's dark. It's built to be wet, and not only that, it's built to be very stretchy So the fact that this scratch that she felt, that she was aware of and that woke her up, it's of no moment that there was no evidence of that scratch later on found by the [SANE] nurse.

Defense counsel objected, arguing that it was improper for the State to engage in speculation during summation given the lack of expert testimony regarding vaginal tissue. The court overruled counsel's objection, noting that the prosecutor's summation was

"fair comment from the evidence and from [defense counsel's] summation."

The State did not elicit any testimony regarding the characteristics of vaginal tissue during trial. Given that lack of testimony, the prosecutor's remarks pushed the bounds of fair comment. Nonetheless, having reviewed the prosecutor's comments in the full context of both summations, we find no showing that those comments were so egregious that they deprived defendant of a fair trial. The prosecutor's comments regarding vaginal tissue, when read in context, were made in response to defense counsel's summation. See Smith, 212 N.J. at 403-04 (stating that in determining if a prosecutor engaged in misconduct, "an appellate court will consider whether the offending remarks were prompted by comments in [defense counsel's] summation"). Ultimately, "it was for the jury to decide whether to draw the inferences the prosecutor urged." R.B., 183 N.J. at 330 (quoting State v. Carter, 91 N.J. 86, 125 (1982)).

B. M.A.'s Lost Friendship with Defendant's Family

Defendant also contends that the prosecutor's comments about M.A.'s lost friendship with defendant's family were improper and deprived him of a fair trial. There was no objection to that comment and, therefore, we review that comment for plain error. R. 2:10-2. In other words, the alleged misconduct by the

prosecutor must have been clearly capable of producing an unjust result. State v. Black, 380 N.J. Super. 581, 592 (App. Div. 2005).

Here, the jury heard testimony from M.A. that she and defendant's mother "had" a good relationship, and that they "were" friends. Based upon that testimony, the prosecutor's comment about M.A.'s lost friendship with defendant's family after reporting the sexual assault was a reasonable inference drawn from M.A.'s testimony. Thus, the prosecutor's comments were not "clearly capable of producing an unjust result[.]" Ibid.

C. Vouching for M.A.'s Credibility

Defendant contends that the prosecutor made several inappropriate comments during her summation, which bolstered M.A.'s credibility and deprived him of a fair trial. Again, we review those comments for plain error because there was no objection at the time they were made. R. 2:10-2.

A prosecutor may argue that a witness is credible, "so long as the prosecutor does not personally vouch for the witness or refer to matters outside the record as support for the witness's credibility." State v. Walden, 370 N.J. Super. 549, 560 (App. Div. 2004) (citing State v. Scherzer, 301 N.J. Super 363, 445 (App. Div. 1997)). Furthermore, "[a] prosecutor is not forced to idly sit as a defense attorney attacks the credibility of the State's witness[]; a response is permitted." State v. Hawk, 327

N.J. Super. 276, 284 (App. Div. 2000) (citing State v. C.H., 264 N.J. Super. 112, 135 (App. Div. 1993)).

Although defense counsel did not explicitly contend that M.A. was lying during his summation, he framed his arguments as "misunderstandings" and used M.A.'s (1) tragic history of prior sexual assaults, (2) realistic and recurring nightmares, and (3) emotional distress caused by her husband's extramarital affair, to contend that M.A.'s honest belief that defendant sexually assaulted her was caused by her clouded perception. Essentially, defense counsel's summation challenged M.A.'s credibility not by calling her a liar, but by pointing out the various factors that may have affected her ability to distinguish her nightmare from reality.

Accordingly, the prosecutor responded to defense counsel's attempt to diminish M.A.'s credibility by asking the jury, "[W]hy would she come here, tell you about the abuse she suffered as a child, tell you about what happened that night . . . reliving all of that pain?" and "Why would she lie? Why, if for a second she doubted herself, would she go through all of that?"


While the prosecutor did not personally vouch for M.A.'s credibility, her rhetorical question "Why would she lie?" again skirted the line between fair comment and misconduct. Nonetheless, in the context of both summations, and defense counsel's closing

arguments that opened the door for the prosecutor's comments, we find no showing that defendant was deprived of a fair trial. Moreover, there was no showing of plain error. R. 2:10-2. Indeed, the failure to object suggests that defense counsel did not believe the remarks were prejudicial at the time they were made. See R.B., 183 N.J. at 333 (citing State v. Frost, 158 N.J. 76, 82-84 (1999)).

In summary, we find that none of the prosecutor's remarks were "so egregious that [they] deprived the defendant of a fair trial." McGuire, 419 N.J. Super. at 139.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION