SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1846-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

D.R.,

Defendant-Appellant.

Argued October 30, 2017 – Decided March 13, 2018

Before Judges Messano and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 12-03-0235.

Tamar Y. Lerer, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Tamar Y. Lerer, of counsel and on the briefs).

Tom Dominic Osadnik, Assistant Prosecutor, argued the cause for respondent (Camelia M. Valdes, Passaic County Prosecutor, attorney; Tom Dominic Osadnik, of counsel and on the brief).

PER CURIAM

A jury convicted defendant D.R. of second-degree sexual assault, N.J.S.A. 2C:14-2(b), and third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(1).[1] At sentencing, the judge merged the endangering conviction with the sexual assault conviction, and sentenced defendant to an eight-year term of incarceration, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2.

Defendant raises the following issues on appeal:

> POINT I
>
> THE TRIAL COURT ERRED IN NOT SUPPRESSING THE STATEMENT GIVEN BY DEFENDANT FOLLOWING INADEQUATE [MIRANDA] WARNINGS AND AN AT LEAST AMBIGUOUS REQUEST FOR COUNSEL.
>
> A. INTRODUCTION.
>
> B. THE OFFICER NEITHER HONORED DEFENDANT'S INVOCATION OF HIS RIGHT TO COUNSEL NOR PROPERLY EXPLAINED THAT RIGHT. AS A RESULT, DEFENDANT'S SUBSEQUENT STATEMENT WAS INADMISSIBLE.
>
> C. CONCLUSION.
>
> POINT II
>
> THE FAILURE TO PROPERLY INSTRUCT THE JURY AS TO HOW TO CONSIDER THE EVIDENCE PLAYED BACK DURING DELIBERATIONS, AS REQUIRED BY STATE V.

[1] The jury acquitted defendant of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1). The indictment also charged defendant with the same offenses against a second victim. Those counts were severed prior to trial and subsequently dismissed without prejudice at sentencing.

MILLER, NECESSITATES REVERSAL OF DEFENDANT'S CONVICTIONS. (NOT RAISED BELOW)

POINT III

IN SENTENCING DEFENDANT, THE TRIAL COURT IMPROPERLY HELD HIS INTELLECTUAL LIMITATIONS AGAINST HIM, RESULTING IN AN EXCESSIVE SENTENCE.

Having considered these arguments in light of the record and applicable legal standards, we affirm.

I.

L.M. testified that in the morning of June 26, 2011, her eight-year-old granddaughter, A.P.M., said defendant, who was nineteen years of age, had come into her bedroom during the night and touched her buttocks with his "private."[2] Together, they went upstairs and told defendant's mother, R.R., what allegedly had happened. R.R. and L.M. confronted defendant, who denied the accusation. R.R. told her son to leave, and defendant left the house through a window.

R.R. testified that she heard a noise during the night and went to check the bedroom where A.P.M. and her cousin, A.R., were sleeping. R.R. could not enter because the door was locked, but she soon discovered defendant was behind the door trying to keep her from entering. Eventually, R.R. was able to open the door and

[2] L.M.'s testimony regarding A.P.M.'s exact words was confused and inconsistent.

told defendant to go back to his bedroom, which he did. The next morning, L.M. told her of A.P.M.'s accusation, and R.R. confronted her son. He denied any wrongdoing. R.R. told defendant to go to his room; he apparently climbed out a window and left.

A.P.M. testified that defendant first touched her buttocks under her clothing with his hand, and returned later that same night and touched her buttocks with his "private." A.P.M. told her grandmother the next morning.

Investigator Giselle Henriquez recorded a video statement from A.P.M. on June 28, 2011, which was played for the jury. A.P.M. repeated her statement that defendant touched her buttocks with his hand and "private." She told the investigator defendant put his private "in" her "butt."

The State's final witness was Detective Angel Perales. He secured a statement from defendant, also on June 28. Defendant admitted touching A.P.M.'s buttock with his hand and penis. The video recording of the statement was played for the jury with redactions agreed upon by counsel.

II.

Defendant moved pre-trial to suppress the statement he made to Detective Perales. The judge conducted a hearing pursuant to N.J.R.E. 104(c), at which the detective testified and the judge viewed the videotaped interview.

Defendant had been awake for at least seven hours before Perales began interviewing him at approximately 11:22 a.m. Defendant said he was cold and tired. Shortly after entering the interview room, Perales read defendant his Miranda[3] rights from a form. The following dialogue ensued:

> Defendant: You got the air on[?]
>
> Detective: Yeah we can't control the air unfortunately it's one of the most common complaints we got here, but I'll try to when I leave here alright?
>
> Defendant: Alright[.]
>
> Detective: . . . [B]efore I talk to you I gotta advise you Miranda Warnings from our Advisory Form. You could read, write and speak English right?
>
> Defendant: Yeah[.]
>
> Detective: Alright, hold on to that. That's the same copy that I got here. See, it says copy up top. Alright [D.R.] right?
>
> Defendant: Yeah[.]
>
> Detective: Before I remain speaking to you I have to make sure that you understand what your rights are. These are the rights that you have when you speak to me or any of us at any time. I'm going to tell you what your rights are now. One, you have the right to remain silent. Do you understand that?
>
> Defendant: Yes[.]

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

Detective: Two, if you speak to me anything you say can be used against you in court. Do you understand that?

Defendant: No[.]

Detective: You don't understand that?

Defendant: What's . . . what's that mean?

Detective: If you speak to me, so anything you tell me like if you decide to speak to me after we go over this[.]

Defendant: Mm-hmm[.]

Detective: You decide to speak to me; anything you say can be used against you in the court of law down the road[.]

Defendant: Oh[.]

Detective: Do you understand that?

Defendant: Yeah[.]

Detective: Okay, three, you have the right to talk to a lawyer for advice before I begin to speak with you. Do you understand that?

Defendant: Who my lawyer?

Detective: There's no lawyer. . . . [W]hat it says is that you have the right to talk to a lawyer for advice[.]

Defendant: Oh[.]

Detective: So you could talk to a lawyer for advice before I talk to you. Do you understand that?

Defendant: Yeah[.]

Detective: Alright, four, you have the right to have a lawyer with you while I speak to you. Do you understand that?

Defendant: Yeah[.]

Detective: Okay, five, if you want a lawyer but cannot pay for a lawyer one can be appointed to represent you without cost before I speak to you. Do you understand that?

Defendant: Mm-hmm[.]

Detective: Okay, six, if you decide to . . . if you decide to speak with me now without a lawyer present you still have the right to stop speaking with me at any time. Do you understand that?

Defendant: Yes[.]

Detective: Seven, you also have the right to stop speaking with me at any time until you speak to a lawyer. Do you understand that?

Defendant: Yes[.]

Detective: [D.R.] I just told you what your rights are. Do you understand each and every right?

Defendant: Yes[.]

Detective: Understanding these rights, are you willing to give up your rights and speak with me?

Defendant: What you mean?

Detective: Alright. These are all the rights that so you can . . . you have the right to remain silent you don't have to talk to me. You can talk to a lawyer before you speak to me. That . . . this is that part that threshold so if you understand your rights are

> you willing to give up all seven of these rights to talk with me or not?
>
> Defendant: Nah, I'll talk to you[.]
>
> Detective: You are going to talk to me?
>
> Defendant: Yeah[.]
>
> Detective: Okay, have I or anyone else made you any promises or threats to convince you to speak with me?
>
> Defendant: No[.]
>
> Detective: Alright, now I'll just put the time on here. That's it.

The interrogation began and continued for more than one hour.

After reviewing the video recording and hearing the arguments of counsel, in a comprehensive oral opinion, the judge found that defendant "had the necessary understanding of the Miranda rights to give up those Miranda rights," and did so voluntarily. She found defendant was "focused," and was "not threatened or physically menaced by the officer in any way." The judge determined beyond a reasonable doubt that defendant understood and voluntarily waived his Miranda rights and voluntarily made his statement.

Citing the dialogue above, in Point I defendant argues the judge erred in denying his motion to suppress, because the detective "neither honored defendant's invocation of his right to counsel nor properly explained that right." We disagree.

Recently, the Court made clear that when reviewing the trial court's findings after an evidentiary hearing on a motion to suppress statements to law enforcement, "[a]n appellate court ordinarily should defer to a trial court's factual findings, even when those findings are based solely on its review of a video recording. Deference, however, is not required when the trial court's factual findings are clearly mistaken." State v. S.S., 229 N.J. 360, 386 (2017). "Because legal issues do not implicate the fact-finding expertise of the trial courts, appellate courts construe the Constitution, statutes, and common law 'de novo -- with fresh eyes -- owing no deference to the interpretive conclusions' of trial courts, 'unless persuaded by their reasoning.'" Id. at 380 (quoting State v. Morrison, 227 N.J. 295, 308 (2016) (citations omitted)).

When a suspect unambiguously asserts his right to remain silent, all questioning must stop. Id. at 382. Our jurisprudence, however, has extended greater protection. "[U]nder our state law privilege against self-incrimination, 'a request, however ambiguous, to terminate questioning . . . must be diligently honored.'" Ibid. (quoting State v. Bey (Bey II), 112 N.J. 123, 142 (1988)). "[I]f the police are uncertain whether a suspect has invoked his right to remain silent, two alternatives are presented: (1) terminate the interrogation or (2) ask only those questions

necessary to clarify whether the defendant intended to invoke his right to silence." Id. at 383 (citation omitted).

Defendant first contends that his question, "Who my lawyer?," was an ambiguous request for counsel. However, in making the threshold determination of whether a suspect has invoked his or her right to counsel, we employ "a totality of the circumstances approach that focuses on the reasonable interpretation of defendant's words and behaviors." State v. Diaz-Bridges, 208 N.J. 544, 564 (2012) (overruled in part on other grounds by S.S., 229 N.J. at 379); see also State v. Roman, 382 N.J. Super. 44, 64 (App. Div. 2005) ("Not merely the words spoken, . . . but the full context in which they were spoken have to be considered in determining whether there has been an invocation of the right to remain silent.").

In this case, defendant never indicated that he wished to stop speaking or speak to counsel. See Roman, 382 N.J. Super. at 65. Immediately before and after the remark, the detective continued to explain defendant's rights and answered defendant's questions. Defendant expressed a clear understanding, as the trial judge found, of his right to have an attorney present before answering any questions, to stop answering questions at any time, and to have a lawyer present before questioning resumed.

Defendant secondarily argues that Detective Perales's answer to his question was improper, and, without being supplied a proper answer, defendant did not knowingly and intelligently waive his Miranda rights. Again, we disagree.

Defendant argues Perales's response, "There's no lawyer," was an "incorrect and misleading" explanation of the Miranda rights. Defendant cites our opinion in State v. Puryear, 441 N.J. Super. 280 (App. Div. 2015), for support. There, in the course of administering the Miranda warnings, the detective told the defendant anything he said could be used against him in court. Id. at 290. The defendant did not understand, asking if that meant he would "have to stand up in . . . court and say this again." Ibid. In response, the detective told the defendant it meant, "if you lie, it can be used against you." Ibid. We affirmed the trial court's suppression of the defendant's statement because "the [detective's] instruction contradicted a key Miranda warning. Moreover, the instruction by the detective was not a permissible interrogation technique." Id. at 298.

Defendant also relies upon our decision in State v. Pillar, 359 N.J. Super. 249 (App. Div. 2003). There, after being administered Miranda rights upon arrest, the defendant indicated a desire to speak to an attorney first. Id. at 262. The defendant asked police if he could "say something 'off-the-record.'" Ibid.

The police agreed to listen, after which the defendant made incriminating admissions, which were admitted at trial after the defendant's motion to suppress was denied. Id. at 262-63.

We reversed defendant's conviction. Id. at 291. We concluded the officers' misrepresentation that the defendant could speak "off-the-record," "renders the resulting statement inadmissible. First, such a misrepresentation directly contradicts and thereby neutralizes the entire purpose of the Miranda warnings. Second, such misrepresentation, may, and in this case did, render the statement involuntary." Id. at 265.

In this case, after responding to defendant's question, "Who my lawyer?," with "There's no lawyer," Perales immediately explained defendant could speak to a lawyer before any further questioning occurred. He thereafter informed defendant that he could speak to a lawyer before answering any questions, that he had the right to have a lawyer appointed without cost before deciding to speak to Perales, and that if defendant decided to speak to Perales, he could stop at any time and speak to a lawyer. The trial judge found defendant unequivocally understood and waived those rights.

Perhaps Perales could have given a more complete response, by indicating there was no lawyer present at that time in the prosecutor's office where the interrogation was taking place.

However, viewed in the context of the entire administration of the Miranda rights, Perales's response did not mislead defendant or otherwise contradict the Miranda warnings defendant received.

III.

The arguments raised in Points III and IV require only brief discussion.

During deliberations, the jury asked to see a short, specific portion of A.P.M.'s video statement and to hear the last four questions the prosecutor posed to A.P.M. during her in-court testimony and her responses. The judge identified the specific portion of the video statement, and without objection, played that for the jury.

The judge also identified the last four questions the prosecutor asked on re-direct. Citing State v. Miller, 205 N.J. 109 (2011), and noting she wanted to be "very, very careful," the judge asked defense counsel if there were any portions of cross-examination that should be played to balance the playback. He responded, "I think we'll just stick with the four questions, Judge." The jury then heard A.P.M.'s testimony.

Defendant argues that the judge's failure to give the jury limiting instructions after playing the video recording was plain error. We disagree.

In Miller, 205 N.J. at 122-24, the Court provided guidance to trial judges in dealing with video playback requests. Among other things, "at the time the testimony is repeated, judges should instruct jurors to consider all of the evidence presented and not give undue weight to the testimony played back." Id. at 123. Undeniably, in this case, the judge did not give such an instruction after a short portion of A.P.M.'s videotaped statement was played for the jury.

However, that omission was not plain error. "Plain error is error that 'is clearly capable of producing an unjust result.'" State v. Weston, 222 N.J. 277, 294 (2015) (quoting State v. Singleton, 211 N.J. 157, 182 (2012) (in turn quoting R. 2:10-2)). "The error must have been of sufficient magnitude to raise a reasonable doubt as to whether it led the jury to a result it would otherwise not have reached." Ibid. (citation omitted).

In this case, the judge provided instructions to the jury during her general jury charge that mirrored the favored language cited by the Court in Miller. The jury deliberated slightly more than one hour before it made its request for the playback. We have no doubt that the failure to provide the same or similar instructions after the jury saw a very limited portion of A.P.M.'s video statement did not bring about an unjust result.

At sentencing, the judge found aggravating factors two, three and nine. N.J.S.A. 2C:44-1(a)(2) (the gravity of harm inflicted on the victim); (a)(3) (the risk of re-offense); and (a)(9) (the need to deter defendant and others). The judge also found mitigating factor seven, N.J.S.A. 2C:44-1(b)(7) (lack of prior criminal history), but rejected defense counsel's argument that mitigating factors eight, nine, ten and twelve applied. N.J.S.A. 2C:44-1(b)(8) (defendant's conduct resulted from circumstance unlikely to re-occur); (b)(9) (defendant's character and attitude make it unlikely he would re-offend); (b)(10) (defendant's amenability to probation); and (b)(12) (willingness to cooperate with law enforcement).

On appeal, defendant argues the judge's finding of aggravating factor three and rejection of mitigating factor eight were premised upon "[her] own musings" that defendant's "intellectual limitations precluded him from benefitting from therapy." We simply do not read the record in such harsh terms. Rather, the judge's sentence reflects a careful, thoughtful consideration of the entire record, and a reasoned, individualized assessment of defendant as a person. We find no reason to disturb the sentence imposed.

Affirmed.