

RECORD IMPOUNDED

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3215-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALEJANDRO LONDONO, a/k/a
ALEJANDRO LONDO-PATINO,
ALEJANDRO LONDO,
ALEJANDRO LONDOPATINO,
ALEJANDRO PATINO, and
ALEJANDRO LONDONO-PATINO,

Defendant-Appellant.

Submitted December 14, 2022 – Decided December 29, 2022

Before Judges Mayer and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law
Division, Union County, Indictment No. 18-11-0664.

Joseph E. Krakora, Public Defender, attorney for
appellant (Richard Sparaco, Designated Counsel, on the
brief).

Matthew J. Platkin, Attorney General, attorney for
respondent (Amanda Frankel, Deputy Attorney
General, of counsel and on the brief).

PER CURIAM

Defendant Alejandro Londono appeals from a January 25, 2021 judgment of conviction after a jury found him guilty of first-degree aggravated sexual assault on a victim less than thirteen years old, N.J.S.A. 2C:14-2(a)(1) (count one); second-degree sexual assault on a victim less than thirteen years old where the actor is four or more years older, N.J.S.A. 2C:14-2(b) (count two); and third-degree endangering the welfare of a child – sexual contact by a non-caretaker, N.J.S.A. 2C:24-4(a)(1) (count three). He also appeals from the sentence imposed. We affirm the convictions and the sentence.

We derive the facts based on the trial testimony. The victim, Eleanor,¹ was born in February 2006. Because she returned to work, Eleanor's mother needed a babysitter to care for her one-year-old child. Eleanor's mother hired Lala to babysit for Eleanor. At that time, Lala lived with her daughter, S.P. (Sara), and Sara's two children.² Defendant started dating Sara in 2008 and they

¹ Because this case involves a child sexual assault, we use pseudonyms to protect the identity of the victim. R. 1:38-3(d)(11).

² Defendant lived with Lala, Sara, and Sara's children after he began dating Sara.

later married. Lala's son, E.P. (Eric), lived in a basement apartment in Lala's home.

In addition to watching Eleanor, Lala babysat for several other children. Lala cared for Eleanor from about 2008 until about 2014.

From Tuesday through Sunday, Eleanor's mother worked the early morning shift at a bakery. When Eleanor attended pre-kindergarten, she would arrive at Lala's house at 5:30 a.m. on school days. Eleanor would then remain with Lala until the school bus arrived at 6:30 a.m. After she started kindergarten, Eleanor often stayed with Lala during school recesses and weekends. On the weekends, Eleanor stayed at Lala's house from 5:30 in the morning until 4:00 in the afternoon.

Defendant began sexually assaulting Eleanor when she was five years old. The assaults usually occurred during the morning hours and took place in Lala's living room. Eleanor testified she would be sitting alone on the couch when defendant would enter the room and sexually assault her. Eleanor explained that during the sexual assaults, Sara was at work, and Lala and Sara's children were asleep in their respective bedrooms. According to Eleanor, defendant once took her to Eric's basement apartment and assaulted her there.

In 2014, Eleanor told her mother she no longer wanted to go to Lala's house, and her mother agreed. Eleanor was eight years old at the time. Eleanor did not disclose defendant's sexual abuse until 2018, when she was twelve years old.

The matter was referred to the Special Victim's Unit in the Union County Prosecutor's Office. In June 2018, Detective Annie Coll took statements from Eleanor and Eleanor's mother. As a result of an investigation regarding the sexual assault allegations, the police arrested defendant.

On November 7, 2018, defendant was charged with three counts related to the sexual assault of a child. On December 6, 2019, the trial judge heard argument on defendant's motion to compel discovery, including the production of Eleanor's mental health treatment records. The judge denied defendant's motion.

The trial began on February 12, 2020 and concluded on February 25, 2020. After considering the evidence and the testimony, the jury found defendant guilty on all counts.

Defendant appeared for sentencing on January 21, 2021. On count one, the judge sentenced defendant to sixteen years in prison, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, and a five-year period of parole

supervision. On count two, the judge sentenced defendant to a concurrent prison sentence of eight years, subject to NERA, and a three-year period of parole supervision. On count three, the judge sentenced defendant to a concurrent four-year prison sentence. Additionally, the judge required defendant to register as a sex offender under Megan's Law, imposed the conditions of parole supervision for life, and assessed mandatory fines and penalties.

On appeal, defendant raises the following arguments:

POINT I

THE DEFENDANT WAS DENIED THE RIGHT TO A FAIR TRIAL BECAUSE THE COURT LIMITED HIS CROSS-EXAMINATION OF THE VICTIM BY PRECLUDING THE USE OF HER PRIOR INCONSISTENT STATEMENT.

POINT II

THE TRIAL COURT ERRED IN FAILING TO CONDUCT AN IN CAMERA REVIEW OF THE RECORDS FROM THE VICTIM'S MEETINGS WITH AN UNLICENSED MENTAL HEALTH TRAINEE.

POINT III

THE SENTENCE OF SIXTEEN YEARS [IN] NEW JERSEY STATE PRISON WAS EXCESSIVE BECAUSE THE COURT ERRONEOUSLY FOUND AGGRAVATING FACTOR TWO APPLIED.

We review a trial court's evidentiary rulings for abuse of discretion. State v. Garcia, 245 N.J. 412, 430 (2021) (citing State v. Nantambu, 221 N.J. 390, 402 (2015)). An abuse of discretion arises where "'relevant evidence offered by the defense and necessary for a fair trial is kept from the jury.'" State v. R.Y., 242 N.J. 48, 65 (2020) (quoting State v. Cope, 224 N.J. 530, 554–55 (2016)). We "will not substitute our judgment unless the evidentiary ruling is 'so wide of the mark' that it constitutes 'a clear error in judgment.'" Garcia, 245 N.J. at 430 (quoting State v. Medina, 242 N.J. 397, 412 (2020)).

Similarly, we review a trial court's ruling on discovery matters for abuse of discretion. State v. Ramirez, 467 N.J. Super. 359, 366 (App. Div. 2021). A trial court's ruling on discovery issues is entitled to our deference. Ibid.

Additionally, we review a sentence imposed by a sentencing court for abuse of discretion. State v. Miller, 237 N.J. 15, 28 (2019). We do "not second-guess the sentencing court" and defer to the sentencing court's factual findings. State v. Case, 220 N.J. 49, 65 (2014). A sentence must be affirmed "unless: (1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not 'based upon competent credible evidence in the record;' or (3) 'the application of the guidelines to the facts' of the case 'shock[s]"

the judicial conscience.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364–65 (1984)).

I.

We first consider defendant's argument that he was denied the right to a fair trial because the trial judge limited his counsel's cross-examination of Eleanor by precluding the use of her prior inconsistent statement to the detective regarding the frequency of defendant's sexual abuse. We disagree.

Eleanor gave a statement to Detective Coll in June 2018. Eleanor told the detective, "Every time I went to the babysitter, this guy would come to me and, like, do—make me do some bad stuff that I really didn't want[] to do."

Defendant contends Eleanor's statement to Detective Coll was inconsistent with her trial testimony because her prior statement implied the sexual assaults occurred "every time" Eleanor was at Lala's house, including weekends and weekdays. Defendant asserts the statement was inconsistent with her trial testimony that the assaults only occurred on weekends and school recesses. Defendant contends the judge's decision to preclude the use of Eleanor's statement to Detective Coll deprived him of the right to a fair trial because his conviction was based "exclusively [on] the victim's testimony at

trial," and, without Eleanor's statement to the detective, he was unable to effectively challenge Eleanor's credibility.

In denying defendant's request to challenge Eleanor's trial testimony with Eleanor's statement to the detective, the trial judge found Eleanor's statement that the assaults occurred "every time" she was at Lala's house was "taken out of context." The judge stated the phrase "every time" "could have meant . . . every time [she] went to the babysitter, during the timeframe when [she] went on the weekends, which is something that the witness did testify to—that there came a point at which she was only going on the weekends." The judge further noted Eleanor testified at trial that the assaults "would happen sometimes, not all the time." Thus, the judge precluded defendant from introducing Eleanor's June 2018 statement to Detective Coll because it was not "a definitively prior inconsistent statement."

Under N.J.R.E. 803(a)(1), a witness's prior inconsistent statement may be admitted as substantive evidence when the witness has testified and is subject to cross-examination. See State v. Caraballo, 330 N.J. Super. 545, 556 (App. Div. 2000). "The prior-inconsistent-statement exception to the hearsay rule allows the jury to determine whether to believe the testimony given on the stand or the

diametrically different version given earlier to the police." State v. Cabbell, 207 N.J. 311, 336 (2011).

Having reviewed the record, we are satisfied the judge did not abuse her discretion in finding Eleanor's statement to the detective was not inconsistent with her trial testimony. Moreover, the judge's preclusion of Eleanor's prior statement did not hinder defense counsel's ability to attack Eleanor's credibility. In fact, defense counsel effectively and extensively cross-examined Eleanor regarding her age during the time period she stayed with Lala, whether she stayed with Lala on weekends, the times of day she would be inside Lala's house, and who else would be in the house.

Defense counsel similarly questioned other witnesses and elicited testimony that conflicted with Eleanor's narrative of the sexual abuse. The jury heard testimony from Lala and her children, Sara and Eric, that differed from Eleanor's recollection of the events.

For example, Eleanor testified either Lala or defendant opened the door when she arrived at Lala's house. Eleanor further stated Lala was asleep in her bedroom at the time of the assaults.

However, Lala testified she always opened the door for Eleanor and immediately took Eleanor to her bedroom to watch television with the other

children. Lala maintained she never left Eleanor alone in the living room and never slept while the children were under her care. Sara also corroborated Lala's testimony.

Additionally, defense counsel highlighted for the jury another inconsistency related to Eleanor's trial testimony regarding the time defendant sexually assaulted her in Eric's apartment. Eric testified he always kept the door to his apartment locked and the children were not allowed to enter the basement alone. He also never saw defendant with Eleanor in the basement. According to Eric, defendant was not allowed inside his apartment unless Eric was home.

Lala and Sara corroborated Eric's testimony. Lala stated she sometimes took Eleanor to do laundry downstairs or visit Eric's apartment. Lala explained the door to Eric's apartment was normally locked. She also testified defendant was never alone with Eleanor and he never took her to the basement. Sara confirmed Lala would take the children downstairs to the laundry room. According to Sara, Eric's apartment was usually locked and she never saw defendant in the basement with Eleanor.

Defendant's attorney noted an additional inconsistency related to the time period Lala babysat for Eleanor. According to Eleanor, she went to Lala's until

2014. However, Lala testified she only babysat for Eleanor until 2011 or 2012. Sara recalled Eleanor stopped going to Lala's house in July 2012.

Despite the testimony from Eric, Sara, and Lala, which contradicted Eleanor's trial testimony, the jury found defendant guilty. "[T]he jury is charged with making credibility determinations based on ordinary experiences of life and common knowledge about human nature, as well as upon observations of the demeanor and character of the witness." State v. Jamerson, 153 N.J. 318, 341 (1998). A jury is not required to accept the testimony of any witness as true, in whole or in part. State v. Muhammad, 182 N.J. 551, 577 (2005).

Here, the jury accepted Eleanor's account of defendant's sexual abuse over a period of years. Despite defense counsel's attacks on Eleanor's credibility through the testimony of Eric, Sara, and Lala, the jury convicted defendant. Because the jury heard the conflicting testimony challenging Eleanor's version of the events, we are satisfied defendant received a fair trial notwithstanding the judge's preclusion of Eleanor's prior statement to Detective Coll.

II.

We next consider defendant's claim the judge erred in denying his motion to compel production of Eleanor's mental health records after determining the records were privileged under N.J.R.E. 505. Defendant contends Rule 505 did

not apply because the physician, Dr. Catherine Carvalho, was not a licensed psychologist at the time she treated Eleanor. Defendant further asserts that even if the mental health records were privileged, the judge should have reviewed the records in camera under In re Kozlov, 79 N.J. 232 (1979), because there was a legitimate need to disclose the protected information and no less intrusive source existed to obtain the information. We disagree.

The Practicing Psychology Licensing Act (Act) establishes a privilege regarding communications between a psychologist and a patient. See N.J.S.A. 45:14B-28. The Act provides:

The confidential relations and communications between and among a licensed practicing psychologist and individuals, couples, families or groups in the course of the practice of psychology are placed on the same basis as those provided between attorney and client, and nothing in this act shall be construed to require any such privileged communications to be disclosed by any such person.

[Rule 505 (quoting N.J.S.A. 45:14B-28).]

The Act defines a licensed practicing psychologist as "an individual to whom a license has been issued pursuant to the provisions of [the Act], which license is in force and not suspended or revoked as of the particular time in question." N.J.S.A. 45:14B-2(a). The Act does not limit the activities of "unlicensed practicing psychologists" so long as they are performing their duties

as an employee of "an accredited academic institution, a federal, State, county or local governmental institution or agency." N.J.S.A. 45:14B-6(a)(1).

In 2018, at the time she treated Eleanor, Dr. Carvalho held a temporary psychologist license and was working toward her requisite 1,500 hours to become fully and permanently licensed. While treating Eleanor, Dr. Carvalho worked at Trinitas Regional Medical Center under the supervision of two licensed psychologists and had her own trauma-related practice at the hospital.

In her January 9, 2020 written decision denying defendant's motion, the judge noted "[i]t is without doubt that when [Eleanor] came to Trinitas for mental health treatment that she did so with the expectation that her communications would be kept confidential." The judge found the records were privileged as they reflected "the very type of treatment that [Rule] 505 . . . must have intended to protect. Ruling that Dr. Carvalho's treatment records are not covered by [Rule] 505 would contravene the intention of the rule."

The judge further noted even if Rule 505 did not apply to Dr. Carvalho's records, her communications with Eleanor "fell squarely within" N.J.R.E. 534, the mental health service provider-patient privilege. Under Rule 534(b), "[a] patient has a privilege to refuse to disclose in a proceeding, and to prevent any

other person from disclosing confidential communications" made to mental health service providers.

We are satisfied the judge did not abuse her discretion in finding Eleanor's mental health records were privileged. The psychologist-patient privilege serves a purpose that is in some respects "even more compelling" than the attorney-client privilege, as it protects "communications that will frequently be even more personal, potentially embarrassing, and more often readily misconstrued than—those between attorney and client." Kinsella v. Kinsella, 150 N.J. 276, 329–30 (1997). The privilege "belongs to the patient, and any waiver of the privilege must be made by the patient." State v. L.J.P., 270 N.J. Super. 429, 438 (App. Div. 1994). The judge correctly concluded the communications between Eleanor and Dr. Carvalho constituted "the very type of treatment" to be protected under Rules 505 and 534.

We also reject defendant's argument that even if the records were privileged, the judge should have compelled production and reviewed the documents in camera. A court should not compel disclosure of privileged records unless the moving party can demonstrate, by a preponderance of the evidence: (1) there exists a legitimate need to disclose the protected information; (2) the information is relevant and material to an issue before the court; and (3)

no less intrusive source exists to obtain the information sought. Kozlov, 79 N.J. at 243–44; see also Kinsella, 150 N.J. at 306–07. A "legitimate need" exists "only in the most narrow of circumstances, such as where a privilege is in conflict with a defendant's right to a constitutionally guaranteed fair trial." State v. Mauti, 208 N.J. 519, 537–38 (2012).

Where a party seeks to compel production of sensitive material, "[t]he evidentiary burden necessarily increases in direct proportion to the nature and extent of the intrusion." State in Interest of A.B., 219 N.J. 542, 556–57 (2014). We have held that "[a] victim's pre-existing mental health records deserve comparable protection" to a compelled psychological examination. State v. Kane, 449 N.J. Super. 119, 133 (App. Div. 2017). In situations seeking to compel the psychological examination of a victim, the defendant must "demonstrate a 'substantial showing of need and justification'" and the "court must balance the possible emotional trauma, embarrassment, and intimidation to the complainant, particularly an extremely young child, against the likelihood that the examination will produce material, as distinguished from speculative, evidence." A.B., 219 N.J. at 557 (quoting State v. R.W., 104 N.J. 14, 21, 28 (1986)).

Here, we are satisfied the judge properly found defendant failed to meet the heavy burden under Kozlov to compel production of Eleanor's privileged records. Defendant argued the records would reveal the perpetrator was Sara's son, not defendant, and Eleanor was confused regarding the details related to the sexual abuse. The judge concluded: (1) defendant proffered no legitimate need for the records; (2) the information in the records was not relevant or material, as Dr. Carvalho confirmed there was no indication Eleanor was confused about the sexual abuse; and (3) less intrusive means existed to verify defendant's claim that he was not the perpetrator of the abuse, such as interviewing Sara's son. On this record, we discern no abuse of discretion in the judge's determination that defendant failed to proffer any legitimate need for a release of the records or explain why an in camera review of the records was required.

III.

We next review defendant's argument that the judge erred in finding aggravating factor two applied when imposing the sentence.³ Again, we disagree.

³ Defendant focuses on a misstatement or typographical error in the sentencing transcript. Defendant asserts the judge found "extreme abuse of the victim" when imposing the sixteen-year sentence. Based on our reading of the entire sentencing transcript, we are satisfied the sentencing judge misspoke and meant

Aggravating factor two, N.J.S.A. 2C:44-1(a)(2), requires the sentencing judge to consider the following:

The gravity and seriousness of harm inflicted on the victim, including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, ill-health, or extreme youth, or was for any other reason substantially incapable of exercising normal physical or mental power of resistance[.]

In imposing a sentence, the court must make individualized assessments based on the facts of each case and the aggravating and mitigating sentencing factors. See State v. Jaffe, 220 N.J. 114, 121–22 (2014). The judge must "state reasons for imposing such sentence including . . . the factual basis supporting a finding of particular aggravating or mitigating factors affecting [the] sentence" R. 3:21-4(h); see also N.J.S.A. 2C:43-2(e) (requiring sentencing court to provide a statement on record of "factual basis supporting its findings of particular aggravating or mitigating factors affecting sentence").

Here, the jury found defendant abused Eleanor based on her credible testimony regarding at least one act of sexual contact and one act of sexual

to say "the extreme youth of the victim" as the judge correctly cited the statute governing aggravating factor two and the legal reasoning in State v. Taylor, 226 N.J. Super. 441 (App. Div. 1998).

penetration over various dates while she was at Lala's house. Contrary to defendant's argument, the Taylor decision does not require a relationship between victim and the defendant to apply aggravating factor two. Rather, Taylor relies on the "extreme youth of the victim" in applying that aggravating factor. 226 N.J. Super. at 453. We are satisfied the judge did not abuse her discretion in applying aggravating factor two and sentencing defendant in the mid-range to a term of sixteen years in prison.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION