

RECORD IMPOUNDED

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3675-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

S.A.H.,¹

Defendant-Appellant.

Submitted May 5, 2022 – Decided May 13, 2022

Before Judges Haas and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 17-03-0277.

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

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (Joie D. Piderit, Assistant Prosecutor, of counsel and on the brief).

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

PER CURIAM

A Middlesex County grand jury charged defendant S.A.H. in a three-count indictment with second-degree attempted aggravated sexual assault, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:14-2(a)(1) (count one); second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a) (count two); and second-degree eluding, N.J.S.A. 2C:29-2(b). The jury convicted defendant under count one of the lesser-included offense of fourth-degree lewdness, N.J.S.A. 2C:14-4(b)(1), and of the lesser-included offense under count two of third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(2). The jury found defendant not guilty of eluding. The trial court later found defendant guilty of several traffic violations.

The trial court sentenced defendant to eighteen months in prison on count one and to a concurrent five-year term on count two. The court also ordered defendant to comply with the Megan's Law registration requirements, placed him on parole supervision for life, and imposed fines and costs for the traffic violations.

On appeal, defendant raises the following contentions:

POINT I

THE IMPROPER ADMISSION OF [THE VICTIM'S]
UNRELIABLE OUT-OF-COURT STATEMENTS

REGARDING SEXUAL ABUSE, PURSUANT TO N.J.R.E. 803[(c)](27), DENIED DEFENDANT HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

POINT II

THE TRIAL COURT'S INSTRUCTION ON ENDANGERING THE WELFARE OF A CHILD IMPROPERLY EXCLUDED THE MENTAL STATE FOR ONE OF THE ELEMENTS OF THE OFFENSE. (Not Raised Below).

POINT III

THE SENTENCING COURT IMPOSED AN ILLEGAL CERTAIN SEXUAL OFFENDERS SURCHARGE PURSUANT TO N.J.S.A. 2C:43-3.7.

POINT IV

THE FINE IMPOSED FOR VIOLATION OF N.J.S.A. 39:4-92, FAILURE TO PULL OVER FOR EMERGENCY VEHICLES, IS ILLEGALLY EXCESSIVE.

After reviewing the record in light of the contentions advanced on appeal, we affirm defendant's convictions and custodial sentence, but remand so that the trial court may correct two mistakes it made concerning the financial penalties it assessed defendant.

I.

The charges against defendant arose from his wife E.L.'s and her eleven-year-old grandson S.F.'s allegations that he attempted to sexually assault S.F. on

September 4, 2016. On that date, S.F. was staying at defendant and E.L.'s home while his mother was away. After watching a movie, the child went to sleep on the pull-out couch in the sunroom.

E.L. had a headache that night and defendant gave her medicine to help her sleep. E.L. testified it was not unusual for her to take Tylenol with codeine and a muscle relaxer when she was ill.

S.F. testified that later that night, defendant woke him up by tapping him on the shoulder. Defendant told S.F., "I want to show you something" and led the child into the guest bathroom. Once there, defendant pressed down on S.F.'s shoulder so he would go into a kneeling position. Defendant then pulled his own pants down and the child could see defendant's exposed penis.

E.L. woke up in her bedroom and noticed defendant was not in bed. She went to look for him and saw the light in the guest bathroom. She walked in and saw S.F. on his knees and defendant walking toward the child. Defendant's penis was erect and was approximately six inches away from S.F.'s face.

E.L. screamed, retrieved her phone, and tried to call 911 using the voice-activated Siri application. Defendant began yelling out random words and numbers to prevent E.L. from completing the call with the application.

However, E.L. was eventually able to contact the police. Defendant then put his pants on, grabbed the keys to his car, left the house, and drove away.

Officer Trevor Robinson responded to the call and saw defendant's car. He activated his emergency lights and followed defendant's car. Robinson turned on the siren, but defendant did not stop.

Defendant continued to drive with Robinson behind him. After driving approximately 2.6 miles, defendant returned to his home where the police arrested him. The State played a videorecording of the pursuit to the jury.

At 4:20 a.m., Detective Michael Connelly conducted a forensic interview with S.F. The State showed this recorded interview to the jury. The statements S.F. made to Connelly during the thirty-one-minute interview were largely consistent with his trial testimony. Defendant did not testify, and he presented no witnesses.

II.

Defendant first contends the trial court erred by admitting S.F.'s forensic interview because the totality of the circumstances, including E.L.'s presence in the waiting room and the prosecutor's alleged use of leading questions, established the child's out-of-court statements were unreliable. We disagree.

We review the trial court's evidentiary ruling for an abuse of discretion. State v. Harris, 209 N.J. 431, 439 (2012). A trial court's discretionary decision to admit or exclude relevant evidence is reversible only if "the trial court palpably abused its discretion, that is, that its finding was so wide of the mark that a manifest denial of justice resulted." State v. Carter, 91 N.J. 86, 106 (1982).

N.J.R.E. 803(c)(27) states:

A statement made by a child under the age of 12 relating to sexual misconduct committed . . . against that child is admissible in a criminal . . . case if (a) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement at such time as to provide the adverse party with a fair opportunity to prepare to meet it; (b) the court finds, in a hearing conducted pursuant to Rule 104(a), that on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy; and (c) . . . the child testifies at the proceeding

In interpreting this evidence rule, our Supreme Court has made clear that

[b]efore admitting a child's out-of-court statement pursuant to N.J.R.E. 803(c)(27), the trial court must make certain findings at a [N.J.R.E.] 104 hearing. The court must determine whether "on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy." N.J.R.E. 803(c)(27). The statement's admissibility is also conditioned on either the child testifying or, if the child is unavailable as a witness, on the presentation of

"admissible evidence corroborating the act of sexual abuse." Ibid. . . . The admissibility of a child's testimonial statement, therefore, will be conditioned on the child taking the stand. State v. P.S., 202 N.J. 232, 249 (2010) (noting that admissibility of child victim's statement is conditioned on not only "judicial finding of trustworthiness," but also "opportunity to cross-examine the child at trial" (quoting State v. R.B., 183 N.J. 308, 318 (2005))); see also State v. D.G., 157 N.J. 112, 124 (1999).

[In re A.R., 234 N.J. 82, 102-03 (2018).]

Thus, the trial court must conduct a N.J.R.E. 104 hearing to evaluate the proposed tender years testimony and if it determines to admit the testimony in evidence, the court must make the required finding that "on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy." N.J.R.E. 803(c)(27).

In reviewing a trial court's determination regarding the admissibility of a child's statement under N.J.R.E. 803(c)(27), "the judge's factual findings are entitled to deference" as long as they are "supported by sufficient credible evidence in the record." P.S., 202 N.J. at 250 (quoting State v. Elders, 192 N.J. 224, 243 (2007)). The "determination of reliability or trustworthiness" should not be disturbed "unless the judge's determination amounted to an abuse of discretion." Ibid.

Here, the trial court conducted a N.J.R.E. 104 hearing prior to the trial, and rendered a comprehensive written decision granting the State's motion to admit the interview in evidence. In its decision, the court made detailed findings concerning its conclusion that the child's statements were trustworthy. Among other things, the court found that S.F. spoke to Connelly on the day the offense happened; "responded to the detective's questions in a straight[-]forward manner and provided a lot of details"; "repeated the major allegation consistently following non-leading questions"; and was not influenced by E.L.

After reviewing the record, we are satisfied the trial court did not abuse its discretion in determining that S.F.'s statements satisfied the requirements of N.J.R.E. 803(c)(27). Therefore, we reject defendant's contention on this point.

III.

For the first time on appeal, defendant argues the trial court failed to properly instruct the jury on the endangering the welfare of a child charge. Defendant asserts the court failed to inform the jury it had to conclude that defendant "knowingly" committed an act of sexual abuse against S.F. This argument lacks merit.

In charging the jury on this offense, the court specifically told the jury that in order to find defendant guilty, the State had to prove four elements

beyond a reasonable doubt. In addressing element two, the court stated the State had to prove "[t]hat the defendant knowingly committed or allowed to be committed an act of sexual abuse against the child[.]" (emphasis added). Two paragraphs later in the charge, the court gave an additional instruction concerning element two and told the jury:

The second element that the State must prove beyond a reasonable doubt is that the defendant committed or allowed to be committed an act of sexual abuse against the child. Sexual abuse of a child may consist of the performing of any indecent, immoral[,] or unlawful act or deed, in the presence of the child, that may tend to debauch or endanger or degrade the morals of the child.

Defendant argues this portion of the court's instruction was faulty because it did not specifically include the word "knowingly" before the word "committed" in the above quote.

It is well settled that "[a]ppropriate and proper charges are essential for a fair trial." State v. Baum, 224 N.J. 147, 158-59 (2016) (alteration in original) (quoting State v. Reddish, 181 N.J. 553, 613 (2004)). Jury instructions must give "a comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find." Id. at 159 (quoting State v. Green, 86 N.J. 281, 287-88 (1981)).

"[I]n reviewing any claim of error relating to a jury charge, the 'charge must be read as a whole in determining whether there was any error" State v. Gonzalez, 444 N.J. Super. 62, 70-71 (App. Div. 2016) (quoting State v. Torres, 183 N.J. 554, 564 (2005)). Where defense counsel did not object to the jury charge at trial, the plain error standard applies. State v. Singleton, 211 N.J. 157, 182-83 (2012). We reverse only if the error was "clearly capable of producing an unjust result," id. at 182 (quoting R. 2:10-2), and consider the totality of the circumstances when making this determination. State v. Marshall, 123 N.J. 1, 145 (1991). Against these standards, we conclude there was no error, let alone plain error.

As noted above, the trial court told the jury that in order to find defendant guilty of endangering the welfare of a child, it had to find the State proved beyond a reasonable doubt that "defendant knowingly committed or allowed to be committed an act of sexual abuse against the child[.]" While it would have been better to have repeated this exact phrase when the court again advised the jury of this element, this omission does not require a reversal. Viewing the instruction as a whole, it adequately advised the jury of the elements of the offense and the State's burden of proof.

IV.

Finally, the trial court made two mistakes in assessing financial penalties at the time of sentencing. First, the court ordered defendant to pay a \$100 Sexual Offenders Surcharge pursuant to N.J.S.A. 2C:43-3.7. Defendant argues he did not commit any of the offenses enumerated in that statute and, therefore, the court should not have imposed this surcharge. The State agrees, as do we. Therefore, we reverse the imposition of the \$100 surcharge and direct the trial court to issue a corrected judgment of conviction.

Defendant also asserts the trial court erred by imposing a \$250 fine² for a violation of N.J.S.A. 39:4-92, failure to pull over for an emergency vehicle. He states that under N.J.S.A. 39:4-203, a court may impose a fine ranging from \$50 to \$200. Therefore, the \$250 fine is excessive.

In response, the State contends the \$250 fine likely covered two separate violations of N.J.S.A. 39:4-92, which the court merged at the time of sentencing.³ Because the court's rationale for imposing this penalty is not clear

² The judgment of conviction states that the penalty was \$256, which included "a \$6 assessment" that is not further explained in the record.

³ The State argues that mandatory financial penalties survive the merger of traffic offenses.

from the record, we reverse the \$250 fine and remand to the trial court so it may reconsider the penalty.

Affirmed in part; reversed in part; and remanded. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION