RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4065-18

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

J.A.G.,[1]

Defendant-Appellant.

Submitted March 31, 2022 – Decided April 11, 2022

Before Judges Haas and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 16-12-1000.

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

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Ali Y. Ozbek, Assistant Prosecutor, of counsel and on the brief).

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

PER CURIAM

Tried before a jury on a twelve-count indictment, defendant was convicted of three counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1) (counts one, four, and seven); three counts of second-degree sexual assault, N.J.S.A. 2C:14-2(b) (counts two, five, and eight); five counts of second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(1) (counts three, six, nine, ten, and eleven); and third-degree terroristic threats, N.J.S.A. 2C:12-3(b) (count twelve). After merging count two into count one, the trial judge sentenced defendant to ten years in prison on count one, subject to an eighty-five percent period of parole ineligibility under the No Early Release Act, N.J.S.A. 2C:43-7.2. The judge merged count five into count four, and sentenced defendant to a consecutive ten-year term on count four, subject to NERA. The judge merged count eight into count seven, and sentenced defendant to a consecutive forty-year prison term on that count pursuant to the Jessica Lunsford Act, N.J.S.A. 2C:14-2. The judge imposed concurrent prison terms on the remaining counts, ordered defendant to comply with the Megan's Law registration requirements, and placed him on parole supervision for life.

On appeal, defendant raises the following contentions:

POINT I

THE JURY INSTRUCTIONS WERE INHERENTLY FLAWED, THUS DEPRIVING [DEFENDANT] OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL. (Not Raised Below).

A. Despite the Multiple Theories of Guilt Presented at Trial, the Court Failed to Provide a Specific Unanimity Instruction.

B. The Court Neglected to Issue a Fresh Complaint Instruction.

POINT II

THE PERVASIVE PROSECUTORIAL MISCONDUCT IN THIS CASE NECESSITATES REVERSAL. (Not Raised Below).

A. The Prosecutor Improperly Appealed to the Jury's Passions and Prejudices by Characterizing J.G. as [Defendant's] "Sexual [Plaything]," "Sexual Object," and "Sexual Prey" that he "Hunted," and By Juxtaposing What a Child of that Age Usually Experiences to That Which Was Alleged in this Case.

B. The Prosecutor Impermissibly Vouched for J.G.'s Credibility When Arguing She Would Not Fabricate the Allegations Because She Had Risked Too Much.

C. The Cumulative Effect of the Prosecutorial Misconduct Warrants Reversal of [Defendant's] Convictions.

POINT III

THE COURT'S JUSTIFICATIONS FOR IMPOSING THE PRESENT SENTENCE WERE INHERENTLY FLAWED AND RESULTED IN A [MANIFESTLY] EXCESSIVE AND UNDULY PUNITIVE SENTENCE.

A. The Court Impermissibly Found Aggravating Factor Two, in Part, Due to the Defendant's Decision to Exercise his Constitutional Right to Stand Trial.

B. The Court Double-Counted Aggravating Factor One, as Applied to Counts One, Two, Four, Five, Seven, and Eight.

C. The Court Abused Its Discretion in Finding and Ascribing Substantial Weight to Aggravating Factor Three.

(i)[.] The Court's Finding of Aggravating Factor Three Was Premised on Statements [Defendant] Purportedly Made for Diagnostic Purposes During an Avenel Evaluation. If Courts Are Permitted to Use These Types of Statements to Penalize Defendants, It Will Create a Chilling Effect on Future Avenel Evaluations.

(ii)[.] Given that [Defendant] Will Be Subject to Rehabilitative Treatment and Stringent Reporting Requirements as a Result of Megan's Law and Parole Supervision for Life, the Court Erred in Finding and Ascribing Substantial Weight to Aggravating Factor Three.

D. The Court Improperly Found and Ascribed Undue Weight to the Need for Deterrence, Based Upon the Degree of Charges for Which [Defendant] was Convicted.

E. The Court Impermissibly Accorded Less Weight to Mitigating Factor Seven Based Upon Incidents that Did Not Result in Conviction.

F. The Court Imposed Consecutive Sentences Without Considering the Overall Fairness of the Aggregate Sentence, Pursuant to State v. Torres.[2]

After reviewing the record in light of the contentions advanced on appeal, we affirm.

I.

The charges against defendant arose from his daughter J.G.'s allegations that he sexually assaulted her on a number of occasions beginning when she was five years old. The State's primary witness was J.G.,[3] who testified she could not remember how many times defendant sexually abused her "[b]ecause it happened a lot." However, J.G. recounted five of the assaults in detail.

[2] State v. Torres, 246 N.J. 246 (2021).

[3] J.G. was thirteen years old at the time of the trial.

J.G. testified that when she was five years old, defendant confronted her in the bathroom and made her perform oral sex on him. Defendant forced J.G.'s head up and down on his penis and then ejaculated into the child's mouth.

When J.G. was six, defendant sodomized her. J.G. screamed for her brother to help, but defendant put his hand over her mouth and told her to be quiet. After he ejaculated, defendant told the child to clean herself up. J.G. realized she was bleeding and defendant returned and took away her underwear.

J.G. stated the third incident occurred when she was seven years old. The child was working on homework in her room. Defendant entered the room and put a laptop on a tray in front of J.G. and made her watch a pornographic animated video. Defendant fondled J.G. while the video played.

About a year later, defendant bound J.G. with a blue and white rope, put her in his bedroom closet, and told her to be quiet. Defendant then had sex with J.G.'s mother in the bedroom. Defendant did not believe her mother knew she was in the closet.

When J.G. was nine, she was using the bathroom in the middle of the night when defendant entered and penetrated her with a dildo. Defendant masturbated and ejaculated on the child.

J.G. also testified that defendant made her smoke marijuana when she was seven or eight years old. She stated defendant kept the marijuana in a jar in the bathroom.

In May 2015, when J.G. was nine years old, she disclosed defendant's abuse to her mother. The next day, J.G. and her mother told J.G.'s school principal, who reported the incidents to the police.

A forensic nurse examined J.G. at the hospital and collected two pairs of underwear from her. A doctor subsequently examined J.G., but the examination "revealed no abnormalities and neither confirmed nor den[ied] the possibility of sexual abuse." The crotch area of one set of underwear tested positive for amylase, an enzyme found in saliva. The DNA profile contained within the saliva did not match defendant. However, a second form of testing, called "Y-STR," showed that the saliva potentially matched defendant, his father, and any of defendant's five sons, or anyone else in his male lineage.

A child interview specialist spoke with J.G. and her account of the abuse was consistent with her trial testimony. The police searched the family's home and found the marijuana and rope that J.G. had described.

J.G. testified that after she disclosed defendant's actions, her mother "stopped believing [her,] and then she started hitting" the child. J.G.'s mother

eventually "sent" the child to a "treatment home." Defendant did not testify, and he presented no witnesses.

II.

In Point I, defendant argues for the first time on appeal that the trial judge failed to properly instruct the jury. Defendant asserts the judge should have given the jury a specific unanimity charge as well as a fresh complaint instruction. We disagree.

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)). If, like here, 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.

Defendant argues that because J.G. testified about five sexual assault incidents that occurred between the time she was five and nine years old, the trial judge should have instructed the jury that there had to be unanimity regarding the underlying events. Defendant participated in a charge conference and did not object to the judge's instructions at trial.

"[I]n cases where there is a danger of a fragmented verdict the trial judge must upon request offer a specific unanimity instruction." State v. Frisby, 174 N.J. 583, 597-98 (2002) (emphasis added) (quoting State v. Parker, 124 N.J. 628, 637 (1991)). "Ordinarily, a general instruction on the requirement of unanimity suffices to instruct the jury that it must be unanimous on whatever specifications it finds to be the predicate of a guilty verdict." Parker, 124 N.J. at 641. "The fundamental issue is whether a more specific instruction [is] required in order to avert the possibility of a fragmented verdict." Frisby, 174 N.J. at 598.

A fragmented verdict typically results when "it appears that a genuine possibility of jury confusion exists or that a conviction may occur as a result of different jurors concluding that a defendant committed conceptually distinct acts." Parker, 124 N.J. at 641. We consider "whether the allegations in the [charge] were contradictory or only marginally related to each other and whether there was any tangible indication of jury confusion." Id. at 639; see also State v. Gandhi, 201 N.J. 161, 193 (2010) (quoting Parker, 124 N.J. at 638) ("[T]he core question is, in light of the allegations made and the statute charged, whether the instructions as a whole [posed] a genuine risk that the jury [would be] confused.").

Here, the judge read the standard model jury charge regarding unanimity. On its face, it is neither ambiguous or contradictory, and its use is in accord with the recommendation that trial judges use model charges as a means of avoiding error. Pressler & Verniero, Current N.J. Court Rules, cmt. 8.1 on R. 1:8-7 (2022) (citing State v. Pleasant, 313 N.J. Super. 325, 333-35 (App. Div. 1998)). Nothing in the record suggests that the jury may have fragmented its verdict, or that different jurors found defendant committed different acts leading to his convictions. For us to hold so on this record would be nothing more than sheer speculation. Because the Parker test is satisfied and the jury instructions were

clear and accurate, a specific unanimity charge was not required. Parker, 124 N.J. at 637.

We also reject defendant's contention that the judge should have provided a fresh complaint instruction the jury concerning J.G.'s testimony that she told her mother what defendant had done to her and they went to the school principal the next day with this information. J.G.'s testimony on this point was not fresh complaint evidence.

"[T]he fresh-complaint doctrine is a common law exception to [the rules barring the admission of hearsay] that 'allows witnesses in a criminal trial to testify to a victim's complaint of sexual assault.'" State v. C.W.H., 465 N.J. Super. 574, 599 (App. Div. 2021) (quoting State v. Hill, 121 N.J. 150, 151 (1990)). "The purpose of the doctrine is to 'allow[] the admission of evidence of a victim's complaint of sexual abuse, otherwise inadmissible as hearsay, to negate the inference that the victim's initial silence or delay indicates that the charge is fabricated.'" Ibid. (quoting State v. R.K., 220 N.J. 444, 455 (2015)). When a witness testifies concerning a victim's fresh complaint of sexual abuse, the trial court should instruct the jury that the complaint is not evidence that the sexual abuse occurred and only dispels any negative inference that might be

made from the victim's silence. See Model Jury Charges (Criminal), "Fresh Complaint" (rev. Feb. 5, 2007).

Here, J.G. testified at trial and was subject to cross-examination concerning her in-court statements[4] that she told her mother and the school principal about defendant's assaults. Because the fresh complaint doctrine was not needed to properly admit J.G.'s testimony in evidence, the judge did not err by failing to give the jury a fresh complaint instruction.

III.

Defendant next contends the prosecutor improperly told the jury that defendant turned J.G.'s childhood into "a nightmare" because he "hunted" the child and treated her as his "sexual plaything," a "sexual object," and "sexual prey." Defendant also asserts the prosecutor "impermissibly vouched" for J.G.'s credibility. He argues the cumulative effect of this "misconduct" warrants reversal. These contentions lack merit.

"[P]rosecutorial misconduct is not grounds for reversal of a criminal conviction unless the conduct was so egregious as to deprive [the] defendant of a fair trial." State v. Timmendequas, 161 N.J. 515, 575 (1999) (citing State v.

[4] "Generally, hearsay is an out-of-court statement admitted 'to prove the truth of the matter asserted, N.J.R.E. 801(c)[.]'" C.W.H., 465 N.J. Super. at 599.

Chew, 150 N.J. 30, 84 (1997)). "To justify reversal, the prosecutor's conduct must have been clearly and unmistakably improper, and must have substantially prejudiced [the] defendant's fundamental right to have a jury fairly evaluate the merits of his [or her] defense." State v. Nelson, 173 N.J. 417, 460 (2002) (alterations in original) (quoting State v. Papasavvas, 163 N.J. 565, 625 (2000)).

"[P]rosecutors are permitted considerable leeway to make forceful, vigorous arguments in summation," but must generally limit their comments to the evidence presented and reasonable inferences therefrom. Id. at 472. On appeal, the court must assess the prosecutor's comments in the context of the entire record. Ibid. "[A] 'fleeting and isolated' remark is not grounds for reversal." State v. Gorthy, 226 N.J. 516, 540 (2016) (quoting State v. Watson, 224 N.J. Super. 354, 362 (App. Div. 1988)).

When counsel fails to object to a prosecutor's remarks, the plain error standard applies, and to warrant reversal, the remarks must be "of such a nature as to have been clearly capable of producing an unjust result." Ibid. (quoting R. 2:10-2). Generally, if there is no objection, the remarks will not be deemed prejudicial. Timmendequas, 161 N.J. at 576. Counsel's failure to object suggests that counsel did not consider the remarks to be prejudicial at the time

they were made. Ibid. Moreover, the failure to raise a timely objection deprives the trial court of the opportunity to address any impropriety. Ibid.

Applying these standards, we are satisfied that the prosecutor's comments did not deprive defendant of a fair trial. J.G. testified that defendant sexually abused her for a period of almost five years. The prosecutor's description of defendant as "preying" upon his five-year-old daughter and treating her as a sexual "plaything" or "object" throughout her early childhood had a clear factual basis in the record. Therefore, these remarks did not prejudice defendant's right to have the jury fairly evaluate the merits of the case.

We are also satisfied that the prosecutor did not improperly vouch for J.G.'s credibility when the prosecutor told the jury:

> I also want to draw your attention to the fact that if this is just a story, I want you to ask yourself, think about all the things that [J.G.] has gone through to make it to this trial to come here to testify before you.
>
> Consider, would the wheels have fallen off somewhere between the sexual assault forensic exam, the two-hour interview with [the child interview specialist], being subjected to a doctor looking at her private parts again, in a separate medical exam, testifying here in court three and a half years later, consider, is that something that a child is willing to go through in order to tell a story? Is losing your family, losing your siblings, losing the people that you care about the most, and wanting, what I would submit no

> child wants to have happen to you, in order to tell a story? I submit it is not.

It is well settled that "a prosecutor may not express a personal belief or opinion as to the truthfulness of his or her witness's testimony." State v. Staples, 263 N.J. Super. 602, 605 (App. Div. 1993). However, a prosecutor may argue that a witness is credible based on evidence adduced at trial. State v. Scherzer, 301 N.J. Super. 363, 445 (App. Div. 1997).

Here, the prosecutor's comments were a direct response to defense counsel's arguments in summation that J.G.'s testimony was "not true" and that the child could not "keep some of [her] stories straight." The prosecutor's statement was also based upon J.G.'s testimony that after she reported defendant's actions, her mother placed her in a treatment facility, and she no longer lived with her family. Thus, we reject defendant's contention on this point.

IV.

Finally, defendant asserts that his sentence was excessive because the trial judge did not correctly apply the aggravating and mitigating factors in determining the range of the sentence and failed to properly consider the appropriate factors in imposing consecutive prison terms. Again, we disagree.

Trial judges have broad sentencing discretion as long as the sentence is based on competent credible evidence and fits within the statutory framework. State v. Dalziel, 182 N.J. 494, 500-01 (2005). Judges must identify and consider "any relevant aggravating and mitigating factors" that "are called to the court's attention[,]" and "explain how they arrived at a particular sentence." State v. Case, 220 N.J. 49, 64-65 (2014) (quoting State v. Blackmon, 202 N.J. 283, 297 (2010)). "Appellate review of sentencing is deferential," and we therefore avoid substituting our judgment for the judgment of the trial court. Id. at 65.

We are satisfied the judge made findings of fact concerning aggravating and mitigating factors that were based on competent and reasonably credible evidence in the record and applied the correct sentencing guidelines enunciated in the Code. The judge's decision to impose consecutive prison terms was also fully supported by the Supreme Court's holdings in Torres and State v. Yarbough, 100 N.J. 627 (1985). Accordingly, we discern no basis to second-guess the sentence.

Affirmed.